10-4273-cv

United States Court of Appeals for the Second Circuit

ONONDAGA NATION,

Plaintiff-Appellant,

– v. –

THE STATE OF NEW YORK, GEORGE PATAKI, In His Individual Capacity and as Governor of New York State, ONONDAGA COUNTY, CITY OF SYRACUSE, HONEYWELL INTERNATIONAL, INC., TRIGEN SYRACUSE ENERGY CORPORATION, CLARK CONCRETE COMPANY, INC., VALLEY REALTY DEVELOPMENT COMPANY, INC., and HANSON AGGREGATES NORTH AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
Case No. 05-cv-314 - U.S. District Judge Lawrence E. Kahn

JOINT APPENDIX

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TABLE OF CONTENTS

Tab #1	District Court Docket Entries	JA-1
Tab #2	Complaint for Declaratory Judgment filed on March 11, 2005	JA-14
Tab #3	First Amended Complaint for Declaratory Judgment filed on August 1, 2005	JA-30
Tab #4	State Defendants' Notice of Motion to Dismiss filed on August 15, 2006	JA-48
Tab #5	Non-State Defendants' Notice of Motion to Dismiss filed on August 15, 2006	JA-51
Tab #6	Declaration of Robert T. Coulter, Counsel for the Onondaga Nation, In Opposition to Motions to Dismiss filed on November 16, 2006	JA-53
Tab #7	Declaration of Anthony F.C. Wallace in Opposition to Defendants' Motion to Dismiss filed on November 16, 2006	JA-74
Tab #8	Declaration of Robert E. Bieder in Opposition to Defendants' Motions to Dismiss filed on November 16, 2006	JA-103
Tab #9	Declaration of Lindsay G. Robertson in Opposition to Motions to Dismiss filed on November 16, 2006	JA-129
Tab #10	Declaration of Tadodaho Sidney Hill, Onondaga Nation filed on November 16, 2006	JA-152
Tab #11	Declaration of Joseph J. Heath, Esq., General Counsel for the Onondaga Nation in Opposition to Defendants' Motions to Dismiss filed on November 16, 2006	JA-167

Tab #12 Declaration of J. David Lehman in Opposition to Defendants' Motions to Dismiss filed on November 16, 2006 . . . . . JA-189

Tab #13 Transcript of Proceedings held on October 11, 2007 before the Honorable Lawrence E. Kahn JA-228

Tab #14 Memorandum-Decision and Order issued by the Honorable Lawrence E. Kahn on September 22, 2010 . . . . . JA-239

Tab #15 Judgment in a Civil Case filed on September 22, 2010 . . . . . JA-255

Tab #16 Notice of Appeal filed on October 20, 2010 . . . . . JA-256

APPEAL,CLOSED

U.S. District Court
Northern District of New York – Main Office (Syracuse) [LIVE – Version 5.0.3] (Syracuse)
CIVIL DOCKET FOR CASE #: 5:05–cv–00314–LEK–DRH

The Onondaga Nation v. The State of New York et al
Assigned to: Senior Judge Lawrence E. Kahn
Referred to: Magistrate Judge David R. Homer
Case in other court: 2nd Circuit, 05–01763–cv
2nd Circuit, 10–04273–cv
Cause: 28:2201 Declaratory Judgement

Date Filed: 03/11/2005
Date Terminated: 09/22/2010
Jury Demand: None
Nature of Suit: 290 Real Property: Other
Jurisdiction: Federal Question

Plaintiff

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V.

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In His Individual Capacity and as Governor of New York State

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TERMINATED: 10/26/2007

Date Filed	#	Docket Text
03/11/2005	1	COMPLAINT against Hanson Aggregates North America, The State of New York, George Pataki, Onondaga County, The City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. (Filing fee $ 250 receipt number SYR2087) filed by The Onondaga Nation.(alh) (Entered: 03/11/2005)
03/11/2005	2	ORDER REASSIGNING CASE. Case reassigned to Judge Lawrence E. Kahn and David R. Homer for all further proceedings. Judge Gary L. Sharpe, Gustave J. DiBianco no longer assigned to case. Signed by Judge Frederick J. Scullin Jr. on 3/11/05. (alh) (Entered: 03/11/2005)
03/15/2005	3	G.O. 25 FILING ORDER ISSUED Initial Conference set for 7/19/2005 09:00 AM in Albany before Magistrate Judge David R. Homer. Civil Case Management Plan due by 7/11/2005. (alh) (Entered: 03/15/2005)
03/15/2005		Summons Issued as to Hanson Aggregates North America, The State of New York, George Pataki, Onondaga County, The City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. (alh) (Entered: 03/15/2005)
03/23/2005	4	DOCUMENT REJECTION ORDER returning non−parties' submissions. Signed by Judge David R. Homer on 3/23/05. (wjg,) (Entered: 03/24/2005)
03/30/2005	5	NOTICE OF APPEAL from 4 Order by Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh. Filing fee $ 255.00, receipt number ALB000658. (Attachments: # 1 original Document Rejection Order# 2 Cover Letter# 3 "Notice of Jurisdictional Suggestion" [originally rejected document]# 4 Supporting Affidavit [originally rejected document]# 5 Memo of Law [originally rejected document]# 6 Original Cover letter [rejected documents]# 7 Affidavit of Service).(wjg,) (Entered: 04/05/2005)
04/05/2005	6	ELECTRONIC NOTICE sent to US Court of Appeals re 5 Notice of Appeal. (wjg,) (Entered: 04/05/2005)
04/05/2005	7	ELECTRONIC CERTIFICATION to US Court of Appeals of Record on Appeal re 5 Notice of Appeal. (wjg,) (Entered: 04/05/2005)

04/08/2005	8	AFFIDAVIT of Service for Summons and Complaint *Filing Order, etc.* served on Valley Realaty Dev. Co., Inc on March 28, 2005, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 04/08/2005)
04/08/2005	9	AFFIDAVIT of Service for Summons and C omplaint, Filing Order, Etc served on City of Syracuse on March 25, 2005, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 04/08/2005)
04/08/2005	10	AFFIDAVIT of Service for Summons, Complaint, Filing Order, Etc. served on Clark Concrete Co., Inc. on March 28, 2005, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 04/08/2005)
04/08/2005	11	AFFIDAVIT of Service for Summons, Complaint, Filing Order, Etc. served on Onondaga County on March 25, 2005, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 04/08/2005)
04/08/2005	12	AFFIDAVIT of Service for Summons, Complaint, Filing Order, Etc. served on State of New York on March 25, 2005, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 04/08/2005)
04/08/2005	13	AFFIDAVIT of Service for Summons, Complaint, Filing Order, Etc. served on Trigen Syracuse Energy Co. on March 29, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 04/08/2005)
04/12/2005	14	Letter from Nancy J. Larson for The City of Syracuse requesting Approval of Stipulation. (Larson, Nancy) (Entered: 04/12/2005)
04/12/2005	15	STIPULATION re 14 Letter Request *for approval of stipulation extending time to answer or otherwise respond* by The City of Syracuse. (Larson, Nancy) (Entered: 04/12/2005)
04/13/2005	16	STIPULATION &ORDER, Answer due date updated for Onondaga County, answer due 6/17/2005; The State of New York, answer due 6/17/2005; George Pataki, answer due 6/17/2005; The City of Syracuse, answer due 6/17/2005. Signed by Judge David R. Homer on 4/13/05. (wjg,) (Entered: 04/13/2005)
04/13/2005	17	AFFIDAVIT of Service for Summons, Complaint and related documents served on Governor George E. Pataki on April 8, 2005, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 04/13/2005)
04/13/2005	18	Letter from Judith M. Sayles for Hanson Aggregates North America, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. requesting Enlarging Time to Answer. (Attachments: #1 Proposed Order/Judgment Enlarging Time to Answer)(Sayles, Judith) (Entered: 04/13/2005)
04/13/2005	19	NOTICE of Appearance by Christina M. Pezzulo on behalf of Onondaga County (Pezzulo, Christina) (Entered: 04/13/2005)
04/14/2005	20	NOTICE of Appearance by Nancy Jean Larson on behalf of The City of Syracuse (Larson, Nancy) (Entered: 04/14/2005)
04/14/2005	21	STIPULATION &ORDER, Answer due date updated for Hanson Aggregates North America, answer due 6/17/2005; Honeywell International, Inc., answer due 6/17/2005; Trigen Syracuse Energy Corporation, answer due 6/17/2005; Clark Concrete Company, Inc., answer due 6/17/2005; Valley Realty Development Company, Inc., answer due 6/17/2005. Signed by Judge David R. Homer on 4/14/05. (wjg,) (Entered: 04/14/2005)
04/26/2005	22	Summons returned executed served on Honeywell International on April 12, 2005, filed by The Onondaga Nation. Answer due date remanis 6/17/05 (Heath, Joseph) Modified on 4/27/2005 (kcl,). (Entered: 04/26/2005)
05/09/2005	23	AFFIDAVIT of Service for Summons and Complaint *and related documents* served on Hanson Aggregates on April 14, 2005, filed by The Onondaga Nation. (Heath, Joseph) (Entered: 05/09/2005)
06/06/2005	24	NOTICE of Appearance by Gus Coldebella, Mark Puzella on behalf of Hanson Aggregates North America, Onondaga County, City of Syracuse, Honeywell

		International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. (Attachments: #1 Cover letter)(wjg,) (Entered: 06/07/2005)
06/06/2005	25	STIPULATION &PROPOSED ORDER to extend time to answer by Hanson Aggregates North America, Onondaga Nation, State of New York, George Pataki, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. (wjg,) (Entered: 06/07/2005)
06/08/2005	26	STIPULATION &ORDER, answer due date updated for all defendants to 8/16/2005. Signed by Judge David R. Homer on 6/8/05. (wjg,) (Entered: 06/09/2005)
07/14/2005	27	STIPULATION *and proposed order adjourning Rule 16 conference* by State of New York, George Pataki submitted to Judge Homer. (Roberts, David) (Entered: 07/14/2005)
07/19/2005	28	STIPULATION &ORDER Cancelling R16 conference Deadline pending decision on motion to dismiss that is to be filed. Signed by Judge David R. Homer on 7/18/05. (wjg,) (Entered: 07/20/2005)
08/01/2005	29	AMENDED COMPLAINT *for Declaratory Judgment* against all defendants filed by Onondaga Nation.(Coulter, Robert) (Entered: 08/01/2005)
08/01/2005	30	AMENDED DOCUMENT by Onondaga Nation. *Amended Certificate of Service.* (Coulter, Robert) (Entered: 08/01/2005)
08/05/2005	31	STIPULATION *extending time to answer/move regarding recently−filed amended complaint, to 9/15/05* by State of New York, George Pataki submitted to Judge Homer. (Roberts, David) (Entered: 08/05/2005)
08/08/2005	32	STIPULATION &ORDER answer due for defts updated to 9/15/2005. Signed by Judge David R. Homer on 8/8/05. (wjg,) (Entered: 08/08/2005)
09/13/2005	33	STIPULATION *to Extend Defendants' Time to Answer* by Onondaga Nation. (Attachments: #1 Supplement Letter to clerk# 2 Supplement Certificate of Service)(Heath, Joseph) (Entered: 09/13/2005)
09/14/2005	34	STIPULATION &ORDER, Answer due date updated for all defendants to 10/31/2005. Signed by Judge David R. Homer on 9/14/05. (wjg,) (Entered: 09/14/2005)
09/28/2005	35	NOTICE by Hanson Aggregates North America, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. *Withdrawal Of Appearance Of Gus P. Coldebella* (Puzella, Mark) (Entered: 09/28/2005)
09/28/2005	36	NOTICE of Appearance by Anthony M. Feeherry on behalf of Hanson Aggregates North America, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. (Feeherry, Anthony) (Entered: 09/28/2005)
10/25/2005	37	Letter Motion from Robert T. Coulter, Bar No. 101416 for Onondaga Nation requesting Stay submitted to Judge Lawrence Kahn. (Coulter, Robert) (Entered: 10/25/2005)
10/26/2005	38	ORDER STAYING CASE until 60 days after either the denial of certiorari or a decision by the Supreme Court in Cayuga Nation of New York v. Pataki, et al., at which time Defts' responses shall be due. Signed by Judge Lawrence E. Kahn on 10/26/05. (wjg,) (Entered: 10/27/2005)
04/12/2006	39	NOTICE by the Clerk of the Court to Attorney Gus Coldbella: You have (15) fifteen days from the date of this notice to complete all of the necessary steps to register and activate your electronic account. Failure to comply with the Court's requirements within (15) fifteen days, will result in the issuance of an Order to Show Cause, directing you to appear before the assigned Magistrate Judge of the case, to explain why you have failed to comply with the Court's General Order #22

		and why such failure should not result in an order removing you from the bar of the Northern District of New York. (sal,) (Entered: 04/12/2006)
06/28/2006	40	Letter Motion from AAG David Roberts for State of New York, George Pataki requesting joint request regarding motion practice with the lifting of the stay re Cayuga submitted to Judge Lawrence E Kahn. (Roberts, David) (Entered: 06/28/2006)
06/29/2006		USCA Case Number is 05−1763−cv for 5 Notice of Appeal, filed by Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh,. (cbm,) (Entered: 06/29/2006)
06/29/2006	41	ORDER of USCA, dd 7/29/05, dismissing 5 Notice of Appeal filed by Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh, for lack of jurisdiction. USCA Docket No. 05−1763−cv indicates a certified copy of this order disposing of appeal was issued to the district court on 3/29/06. (cbm,) (Entered: 06/29/2006)
07/05/2006	42	ORDER LIFTING STAY &setting motion to dismiss filing/briefing ddls. Signed by Judge Lawrence E. Kahn on 7/5/06. (wjg,) (Entered: 07/05/2006)
08/15/2006	43	MOTION to Dismiss *on behalf of State Defendants*. Motion Hearing set for 11/17/2006 09:30 AM in Albany before Judge Lawrence E. Kahn. Response to Motion due by 10/31/2006 Reply to Response to Motion due by 11/6/2006. by State of New York, George Pataki. (Attachments: #1 Memorandum of Law in Support of State Defendants' Motion to Dismiss#2 Affirmation of AAG David Roberts#3 Exhibit(s) A#4 Affidavit of service)(Roberts, David) (Entered: 08/15/2006)
08/15/2006	44	Letter Motion from AAG David Roberts for State of New York, George Pataki requesting that the clerk adopt the breifing schedule "so ordered" on 7−5−06 submitted to Judge Kahn / Lawrence Baerman. (Roberts, David) (Entered: 08/15/2006)
08/15/2006	45	MOTION to Dismiss *On Behalf of Non−State Defendants* by Hanson Aggregates North America, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc.. (Attachments: #1 Memorandum of Law In Support Of The Non−State Defendants' Motion To Dismiss#2 Bay Mills Indian Community v. Western United Life Assurance Co., 1998 U.S. Dist. LEXIS 20782#3 Delaware Nation v. Pennsylvania, 2004 WL 2755545#4 The Oneida Tribe of Indians of Wisconsin v. AGB Properties, Inc., 2002 WL 31005165#5 Affirmation In Support Of The Non−State Defendants' Motion to Dismiss#6 Exhibit(s) A to the Affirmation In Support Of The Non−State Defendants' Motion To Dismiss)(Puzella, Mark) (Entered: 08/15/2006)
08/16/2006	46	ORDER on 8/15/06 letter request, confirming Motion dates re: 45 MOTION to Dismiss, 43 MOTION to dismiss; Response to Motion due by 10/16/2006. Reply to Response to Motion due by 11/15/2006. Motion Hearings set for 12/1/2006 09:30 AM in Albany before Judge Lawrence E. Kahn. Signed by Judge Lawrence E. Kahn on 8/16/06. (wjg,) (Entered: 08/16/2006)
09/22/2006	47	*Letter motion from Robert T. Coulter for Onondaga Nation requesting enlargement of time to respond to two motions and permission to file a single 50−page brief submitted to Judge Lawrence E. Kahn.* Letter Motion from Robert T. Coulter for Onondaga Nation requesting Enlargement of time to respond submitted to Judge Lawrence E. Kahn. (Coulter, Robert) (Entered: 09/22/2006)
09/28/2006	48	ORDER granting 47 Letter Request for extension of time to response to the pending motions; The 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, and 43 MOTION to Dismiss *on behalf of State Defendants*. are rescheduled for 1/5/2007 at 09:30 AM in Albany before Judge Lawrence E. Kahn. Response to Motion due by 11/16/2006; Reply to Response to Motion due by 12/15/2006. Plaintiff is granted permission to file a 50 page response. Signed by Judge Lawrence E. Kahn on 9/28/06. (amt,) (Entered: 09/28/2006)
10/17/2006	49	MOTION for Discovery Motion Hearing set for 12/15/2006 10:00 AM in Albany before Judge Lawrence E. Kahn. Response to Motion due by 11/28/2006 Reply to Response to Motion due by 12/4/2006. by Onondaga Nation. (Attachments: #1

		Affidavit Of Counsel# 2 Memorandum of Law in support of Motion pusuant to Rule 56(f))(Coulter, Robert) (Entered: 10/17/2006)
10/17/2006	50	AFFIDAVIT re 49 MOTION for Discovery *Certificate of Service* by Onondaga Nation. (Coulter, Robert) (Entered: 10/17/2006)
10/17/2006		Motions No Longer Referred to magistrate judge (administrative entry only to modify judge's report; motion is still pending and will be heard by the assigned district judge): re: 49 MOTION for Discovery (wjg,) (Entered: 02/26/2007)
10/18/2006	51	Letter Motion from AAG David Roberts for State of New York, George Pataki requesting adjustment of briefing schedule regarding plaintiff's Rule 56(f) application submitted to Judge Kahn. (Roberts, David) (Entered: 10/18/2006)
10/18/2006	52	NOTICE by Onondaga Nation *letter stating no objection to letter request by New York State* (Coulter, Robert) (Entered: 10/18/2006)
10/23/2006	53	ORDER resetting Hearing on Motion re: 49 MOTION : Motion Hearing set for 1/5/2007 09:30 AM in Albany before Judge Lawrence E. Kahn (on submit). Response to Motion due by 12/15/2006. Reply to Response to Motion due by 12/29/2006. Signed by Judge Lawrence E. Kahn on 10/23/06. (wjg,) (Entered: 10/23/2006)
11/09/2006	54	NOTICE of Change of Address by Curtis G. Berkey Effective Date 11/09/2006 Old Address: 2000 Center Street, Suite 308 Berkeley, CA 94704 New Address: 2030 Addison Street, Suite 410 Berkeley, CA 94704 (Berkey, Curtis) (Entered: 11/09/2006)
11/16/2006	55	RESPONSE in Opposition re 43 MOTION to Dismiss *on behalf of State Defendants.*, 45 MOTION to Dismiss *On Behalf of Non−State Defendants* filed by Onondaga Nation. (Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	56	AFFIDAVIT in Opposition re 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants. Declaration of Robert T. Coulter* filed by Onondaga Nation. (Attachments: #1 Exhibit(s) Exhibits A−B to Declaration of Robert T. Coulter)(Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	57	AFFIDAVIT in Opposition re 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants. Declaration of Anthony F.C. Wallace* filed by Onondaga Nation. (Attachments: #1 Exhibit(s) Wallace Exhibits A−G# 2 Exhibit(s) Wallace Exhibits H−M# 3 Exhibit(s) Wallace Exhibits N−P)(Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	58	AFFIDAVIT in Opposition re 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants. Declaration or Robert E. Bieder* filed by Onondaga Nation. (Attachments: #1 Exhibit(s) Bieder Exhibits A−L# 2 Exhibit(s) Bieder Exhibits M−W)(Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	59	AFFIDAVIT in Opposition re 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants. Declaration and CV of Lindsay G. Robertson* filed by Onondaga Nation. (Attachments: #1 Exhibit(s) Robertson Exhibits A−C)(Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	60	AFFIDAVIT in Opposition re 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants. Declaration of Tadodaho Sidney Hill* filed by Onondaga Nation. (Attachments: #1 Exhibit(s) Hill Exhibits A−B)(Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	61	AFFIDAVIT in Opposition re 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants. Declaration of Joseph J. Heath* filed by Onondaga Nation. (Attachments: #1 Exhibit(s) Heath Exhibits A−U)(Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	62	AFFIDAVIT in Opposition re 45 MOTION to Dismiss *On Behalf of Non−State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants. Declaration of J. David Lehman* filed by Onondaga Nation. (Attachments: #1 Exhibit(s) Lehman Exhibits A−K# 2 Exhibit(s) Lehman Exhibits L−M# 3 Exhibit(s) Lehman Exhibit

		N# 4 Exhibit(s) Lehman Exhibits O–U# 5 Exhibit(s) Lehman Exhibits V–HH# 6 Exhibit(s) Lehman Exhibits II–JJ)(Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	63	STATEMENT OF MATERIAL FACTS re 43 MOTION to Dismiss *on behalf of State Defendants.*, 45 MOTION to Dismiss *On Behalf of Non–State Defendants Plaintiff's Response to Defendants' Statement of Material Facts* filed by Onondaga Nation. (Berkey, Curtis) (Entered: 11/16/2006)
11/16/2006	64	CERTIFICATE OF SERVICE by Onondaga Nation re 55 Response in Opposition to Motion *Declarations, and Plaintiff's Response to Defendants' Statement of Material Facts* (Berkey, Curtis) (Entered: 11/16/2006)
11/22/2006	65	Letter Motion from AAG David Roberts for State of New York, George Pataki requesting postponement of defendants' reply from 12/15/06 to 1/31/07 submitted to Judge Kahn. (Roberts, David) (Entered: 11/22/2006)
11/28/2006	66	ORDER granting 65 Letter Request and resetting motion reply, hearing ddls. Signed by Judge Lawrence E. Kahn on 11/28/06. (wjg,) (Entered: 11/30/2006)
11/28/2006		Set/Reset Deadlines as to 45 MOTION to Dismiss *On Behalf of Non–State Defendants*, 43 MOTION to Dismiss *on behalf of State Defendants.*. Reply to Response to Motion due by 1/31/2007. Motion Hearing set for 2/2/2007 09:30 AM in Albany before Judge Lawrence E. Kahn. (wjg,) (Entered: 11/30/2006)
01/06/2007	67	Letter Motion from Robert T. Coulter for Onondaga Nation requesting Oral argument submitted to Judge Lawrence E. Kahn. (Coulter, Robert) (Entered: 01/06/2007)
01/19/2007	68	*Letter motion from Robert T. Coulter, Attorney for Onondaga Nation requesting to file supplemental memorandum submitted to Judge Lawrence E. Kahn* Letter Motion from Robert T. Coulter, Attorney for Onondaga Nation for Onondaga Nation requesting To file supplemental memorandum submitted to Judge Lawrence E. Kahn. (Coulter, Robert) (Entered: 01/19/2007)
01/22/2007	69	ORDER granting 68 Letter Request and accepting supplemental memo. Signed by Judge Lawrence E. Kahn on 1/22/07. (wjg,) (Entered: 01/23/2007)
01/23/2007	70	ORDER granting 67 Letter Motion and resetting Hearing on 43 MOTION, 45 MOTION : Motion Hearing (with oral argument) set for 3/28/2007 1:00PM in Albany before Judge Lawrence E. Kahn. Signed by Judge Lawrence E. Kahn on 1/23/07. (wjg,) (Entered: 01/23/2007)
01/26/2007	71	Letter Motion from David Roberts AAG for State of New York, George Pataki requesting seeking leave to file briefs of 22 pages (by NYS defendants) and 15 pages (by other defendants) submitted to Judge Kahn *(briefs in reply to opposition to dismissal motions, and in opposition to Rule 56(f) cross–motion).* (Roberts, David) (Entered: 01/26/2007)
01/29/2007	72	ORDER granting 71 Letter Request to file extended brief. Signed by Judge Lawrence E. Kahn on 1/29/07. (wjg,) (Entered: 01/30/2007)
01/31/2007	73	REPLY to Response to Motion re 43 MOTION to Dismiss *on behalf of State Defendants.*, 49 MOTION for Discovery, 68 *Letter motion from Robert T. Coulter, Attorney for Onondaga Nation requesting to file supplemental memorandum submitted to Judge Lawrence E. Kahn* Letter Motion from Robert T. Coulter, Attorney for Onondaga Nation for Onondaga Nation requesting T, 45 MOTION to Dismiss *On Behalf of Non–State Defendants* filed by State of New York, George Pataki. (Attachments: # 1 Affirmation of David Roberts# 2 Exhibit(s) A – Biomedical Patent Mgmt Corp# 3 Exhibit(s) B – Emereald Casin, Inc.# 4 Exhibit(s) C – Shinnecock Indian Nation# 5 Exhibit(s) D – US petition for writ of cert – Cayuga# 6 Exhibit(s) E – Cayuga / Seneca–Cayuga petition for writ of cert# 7 Exhibit(s) F – Opposition to cert application – Cayuga)(Roberts, David) (Entered: 01/31/2007)
01/31/2007	74	REPLY to Response to Motion re 45 MOTION to Dismiss *On Behalf of Non–State Defendants (Non–State Defendants' Reply Memorandum Of Law In Support Of Their Motion To Dismiss And In Opposition To Plaintiff's Motion Pursuant To Rule 56(f))* filed by Hanson Aggregates North America, Onondaga County, City of

		Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc.. (Puzella, Mark) (Entered: 01/31/2007)
03/15/2007	75	STATUS REPORT *on Federal Government's consideration of litigation request* by Onondaga Nation. (Coulter, Robert) (Entered: 03/15/2007)
03/20/2007	76	ORDER resetting Hearing on 43 MOTION to Dismiss, 45 MOTION to Dismiss : Motion Hearing/Conference reset for 6/19/2007 10:00 AM in Albany before Judge Lawrence E. Kahn. Pltf status report ddl re: Federal Government deliberation set to 60 days from the date of this Order. Signed by Judge Lawrence E. Kahn on 3/20/07. (wjg,) (Entered: 03/21/2007)
03/20/2007		Set Deadlines/Hearings (per 3/20/07 Order of USDJ Kahn): Pltf Status Report due by 5/21/2007. (wjg,) (Entered: 03/21/2007)
05/18/2007	77	STATUS REPORT by Onondaga Nation. (Coulter, Robert) (Entered: 05/18/2007)
05/28/2007	78	Letter Motion from David Roberts AAG for State of New York, George Pataki requesting confirming 6−19−05 conference, not oral argument submitted to Judge Kahn. (Roberts, David) (Entered: 05/28/2007)
05/29/2007	79	ORDER affirming/granting 78 Letter Request. Signed by Judge Lawrence E. Kahn on 5/29/07. (wjg,) (Entered: 05/30/2007)
06/07/2007		RESET Deadlines/Hearings: In Chambers Conference is reset for 6/27/2007 at 01:30 PM in Albany before Judge Lawrence E. Kahn. The conference is being adjourned due to a conflict in the Court's calendar. (sas) (Entered: 06/07/2007)
06/25/2007	80	STATUS REPORT *relating to conference scheduled for 6−27−07 on behalf of defendants* by State of New York, George Pataki. (Roberts, David) (Entered: 06/25/2007)
06/25/2007	81	STATUS REPORT *Relating to Conference Scheduled for 6−27−07 on Behalf of Plaintiff* by Onondaga Nation. (Berkey, Curtis) (Entered: 06/25/2007)
06/27/2007	82	Minute Entry for proceedings held before Judge Lawrence E. Kahn: In Chambers Conference held on 6/27/2007. Reset Deadlines as to 43 &45 MOTIONS to Dismiss. Supplemental Briefs are due: 8/31/2007. Motion Hearing is reset for 10/11/2007 at 10:00 AM in Albany before Judge Lawrence E. Kahn. This motion shall be oral. Appearances: AAG. D. Roberts, Attys J. Heath, R. T. Coulter &M. Puzella. (Court Reporter T. Casal &CRD S. Snyder)(sas) (Entered: 06/27/2007)
07/17/2007	83	*Letter Motion from Robert Coulter for Onondaga Nation requesting deferral of argument and decision on certain issues submitted to Judge Lawrence E. Kahn. (Coulter, Robert)* Letter Motion from Robert Coulter, Onondaga Nation for Onondaga Nation requesting Deferral of argument and decision on certain issues submitted to Judge Lawrence E. Kahn. (Coulter, Robert) (Entered: 07/17/2007)
08/31/2007	84	RESPONSE in Opposition re 43 MOTION to Dismiss *on behalf of State Defendants.*, 45 MOTION to Dismiss *On Behalf of Non−State Defendants − Supplemental* − filed by Onondaga Nation. (Berkey, Curtis) (Entered: 08/31/2007)
08/31/2007	85	LETTER BRIEF *on behalf of all defendants, opposing 7/17/07 request to sever and postpone decision of Eleventh Amendment / Rule 19 bases of motion to dismiss* by State of New York, George Pataki. (Attachments: # 1 Exhibit(s) Attachemnt 1 − 7/5/06 order# 2 Exhibit(s) Attachment 2 − order 1/23/07# 3 Exhibit(s) Attachment 3 − letter 3/15/07# 4 Exhibit(s) Attachment 4 − letter 5/18/07 w/ attachment# 5 Exhibit(s) Attachment 5 − letter 10/25/05)(Roberts, David) (Entered: 08/31/2007)
08/31/2007	86	MEMORANDUM OF LAW re 43 Motion to Dismiss, 45 Motion to Dismiss,,, *Defendants' Joint Supplmental MOL re Oneida decision* filed by State of New York, George Pataki. (Attachments: # 1 Appendix Oneida decision 5/21/07)(Roberts, David) (Entered: 08/31/2007)
08/31/2007	87	AFFIDAVIT in Support re 43 MOTION to Dismiss *on behalf of State Defendants.*, 45 MOTION to Dismiss *On Behalf of Non−State Defendants supporting Defendants' Joint Supplemental MOL re Oneida decision* filed by State of New York, George Pataki. (Attachments: # 1 Exhibit(s) A − Oneida − Declaration

		Pursuant to Rule 56(f)# 2 Exhibit(s) B – Oneida – Statement of Genuine Issues of Material Fact# 3 Exhibit(s) C – Oneida – Declaration identifying exhibits submitted by Oneidas)(Roberts, David) (Entered: 08/31/2007)
08/31/2007	88	CERTIFICATE OF SERVICE by State of New York, George Pataki re 85 LETTER BRIEF, 86 Memorandum of Law, 87 Affidavit in Support of Motion,, (Roberts, David) (Entered: 08/31/2007)
10/11/2007	89	Minute Entry for proceedings held before Judge Lawrence E. Kahn: Motion Hearing held on 10/11/2007 re: 43 MOTION to Dismiss &45 MOTION to Dismiss. Arguments are presented. The Court RESERVES decision. Appearances: Attys. J. Heath, R. T. Coulter, C. Berkey, D. Roberts &M. Puzella; Law Clerks L. Cloutier &S. Koster. (Court Reporter B. B uckley &CRD S. Snyder) (sas) (Entered: 10/12/2007)
10/22/2007	90	TRANSCRIPT REQUEST by Hanson Aggregates North America, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. for proceedings held on 10/11/2007 before Judge Kahn.. (Puzella, Mark) (Entered: 10/22/2007)
10/26/2007	92	NOTICE of Withdrawl of Appearance of Gus P. Coldebella by Hanson Aggregates North America, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc. re 35 Notice (Other), Notice (Other). (ban) (Entered: 10/29/2007)
10/29/2007	91	TRANSCRIPT REQUEST by Onondaga Nation for proceedings held on Oct. 11, 2007 before Judge Lawrence Kahn.. (Heath, Joseph) (Entered: 10/29/2007)
11/20/2007	93	RECORD of Proceedings: motion hearing held on 10/11/07 before Judge Lawrence E. Kahn, Court Reporter: Bonnie J. Buckley. Tape Number: none IMPORTANT NOTICE – REDACTION OF TRANSCRIPTS: In order to remove personal identifier data from the transcript, a party must electronically file a Notice of Intent to Redact with the Clerk's Office within 5 business days of this date. The policy governing the redaction of personal information is located on the court website at www.nynd.uscourts.gov. Read this policy carefully. If no Notice of Intent to Redact is filed within 5 business days of this date, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available on the web 90 days from today's date. Notice of Intent to Redact due by 11/28/2007,Transcript due by 2/19/2008. (bjb,) (Entered: 11/20/2007)
01/07/2009		TRANSCRIPT REQUEST by defendants Hanson Aggregates North America, Honeywell International, Inc. for proceedings held on 10/11/07 before Judge Lawrence E. Kahn.. (bjb,) (Entered: 01/07/2009)
01/29/2009	94	NOTICE of Appearance by Christopher M. Mack on behalf of Onondaga County (Attachments: #1 Certificate of Service)(Mack, Christopher) (Entered: 01/29/2009)
09/21/2009	95	ORDERED, that Plaintiffs Motion seeking a continuance to conduct discovery (Dkt. No. 49) is DENIED. Signed by Senior Judge Lawrence E. Kahn on September 21, 2009. (sas) (Entered: 09/21/2009)
11/03/2009	96	STATUS REPORT by Onondaga Nation. (Coulter, Robert) (Entered: 11/03/2009)
06/18/2010	97	Letter Motion from Robert T. Coulter for Onondaga Nation requesting Leave to withdraw as attorney submitted to Judge Lawrence E. Kahn. (Coulter, Robert) (Entered: 06/18/2010)
06/23/2010	98	ORDER granting 97 Motion to Withdraw as counsel by Robert T. Coulter, Esq. Signed by Senior Judge Lawrence E. Kahn on 6/22/10. (ban) (Entered: 06/23/2010)
08/10/2010	99	NOTICE by George Pataki, State of New York *regarding 2d Cir. Oneida decision* (Attachments: #1 Appendix Oneida decision 8–9–10)(Roberts, David) (Entered: 08/10/2010)

09/22/2010	100	MEMORANDUM–DECISION AND ORDERED, that the State Defendants Motion to dismiss (Dkt. No. 43) is GRANTED, and it is further ORDERED, that the Non–state Defendants Motion to dismiss (Dkt. No. 45) is GRANTED, and it is further ORDERED, that Plaintiff Onondaga Nations Amended Complaint (Dkt. No. 29) is DISMISSED with prejudice. Signed by Senior Judge Lawrence E. Kahn on September 22, 2010. (sas) (Entered: 09/22/2010)
09/22/2010	101	JUDGMENT in favor of Clark Concrete Company, Inc., Hanson Aggregates North America, Honeywell International, Inc., Onondaga County, State of New York, Trigen Syracuse Energy Corporation, Valley Realty Development Company, Inc., City of Syracuse, George Pataki against Onondaga Nation. It is ORDERED and ADJUDGED that in the above entitled action, the case is DISMISSED and judgment is entered in favor of the defendants as against the plaintiff, in accordance with the Memorandum–Decision and Order of the Honorable Lawrence E. Kahn, dated 9/22/10. (ban) (Entered: 09/22/2010)
09/22/2010		Mailed a copy of 101 Judgment to all non–ecf parties. (ban) (Entered: 09/22/2010)
10/20/2010	102	NOTICE OF APPEAL as to 100 Order on Motion to Dismiss,,, by Onondaga Nation. Filing fee $ 455, receipt number 0206–1694164. (Attachments: #1 Declaration of Service)(Berkey, Curtis) (Entered: 10/20/2010)
10/21/2010	103	ELECTRONIC NOTICE AND CERTIFICATION sent to US Court of Appeals re 102 Notice of Appeal. (ban) (Entered: 10/21/2010)
10/21/2010		CLERK'S CORRECTION OF DOCKET ENTRY: Deleted document #104, as it was a duplicate submission of 103 Electronic Certification to Court of Appeals. (ban) (Entered: 10/21/2010)
11/02/2010		USCA Case Number is 10–4273–cv for 102 Notice of Appeal filed by Onondaga Nation. (cbm) (Entered: 11/02/2010)
11/03/2010	104	NOTICE of Appearance by Gordon Cuffy on behalf of Onondaga County (Attachments: #1 Certificate of Service)(Cuffy, Gordon) (Entered: 11/03/2010)

ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5:05-CV-0314

THE ONONDAGA NATION,

LEK/DRH

Plaintiff,

v.

Civil Action No.

THE STATE OF NEW YORK; GEORGE PATAKI, IN HIS INDIVIDUAL CAPACITY AND AS GOVERNOR OF NEW YORK STATE; ONONDAGA COUNTY; THE CITY OF SYRACUSE; HONEYWELL INTERNATIONAL, INC.; TRIGEN SYRACUSE ENERGY CORPORATION; CLARK CONCRETE COMPANY, INC.; VALLEY REALTY DEVELOPMENT COMPANY, INC.; HANSON AGGREGATES NORTH AMERICA,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

I. Nature of the Action

1. The Onondaga people wish to bring about a healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural, and historic

relationship with the land, which is embodied in *Gayanashagowa*, the Great Law of Peace. This relationship goes far beyond federal and state legal concepts of ownership, possession, or other legal rights. The people are one with the land and consider themselves stewards of it. It is the duty of the Nation's leaders to work for a healing of this land, to protect it, and to pass it on to future generations. The Onondaga Nation brings this action on behalf of its people in the hope that it may hasten the process of reconciliation and bring lasting justice, peace, and respect among all who inhabit this area.

2. This is an action to declare that certain lands are the property of the Onondaga Nation and the Haudenosaunee, having been unlawfully acquired by the State of New York in violation of the federal Indian Trade and Intercourse Acts, now codified at 25 U.S.C. §177, and in violation of the United States Constitution, the Treaty of Fort Stanwix of 1784, and the Treaty of Canandaigua of 1794.

II. Jurisdiction and Venue

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1337, 1343 and 1362. Venue lies in this District under 28 U.S.C. §1391(b).

4. Plaintiff's claim for relief arises under federal common law; the United States Constitution; the Indian Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834, now codified at 25 U.S.C. §177; under the Treaty of Fort Stanwix of 1784, 7 Stat. 15; and the Treaty of Canandaigua of 1794, 7 Stat. 44.

III. Parties

5. The plaintiff ONONDAGA NATION is an Indian nation recognized by the United States through the Secretary of the Interior of the United States. It is, and has been at

all relevant times, an "Indian nation" within the meaning of the federal Indian Trade and Intercourse Acts of 1790 and later, now 25 U.S.C. §177. The citizens of the Onondaga Nation reside principally on their territory or "reservation" south of Nedrow, New York. The Nation brings this action by authority of the Onondaga Council of Chiefs, the sole government of the Onondaga Nation. The government of the Onondaga Nation is recognized by the United States through the Secretary of the Interior. The relationship of the Onondaga Nation to the United States has never been terminated.

6. The Onondaga Nation sues on its own behalf and on behalf of and with the authority of the Haudenosaunee. The Haudenosaunee is a confederacy, originally, of five Indian nations: the Onondaga Nation, Mohawk Nation, Oneida Nation, Cayuga Nation, and Seneca Nation. The Tuscarora Nation joined the Haudenosaunee in approximately 1712. It is called, in English, the "Six Nations Iroquois Confederacy." The capital or central Council Fire of the Confederacy is at Onondaga. The Onondagas are the firekeepers of the Haudenosaunee. The Haudenosaunee entered into two treaties recognized as valid by the United States: the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794. This action is brought by authority of the Council of Chiefs of the Haudenosaunee as well as by authority of the Council of Chiefs of the Onondaga Nation. The Haudenosaunee does not object to this case proceeding in its absence.

7. The defendant STATE OF NEW YORK is the purported original purchaser of the land that is the subject of this action, pursuant to transactions described in paragraphs 25 through 38 below. The State continues to claim an interest in and to occupy certain portions of this land. The address of the State of New York is: Attorney General Eliot L. Spitzer, Department of Law, State Capital, Albany, New York 12224-0341.

8. The plaintiff has formally requested the State of New York to waive whatever immunity it may claim to this suit in the interest of fairness toward the other defendants and in the interest of justice.

9. The United States has been requested to file suit against the State of New York asserting a claim identical to that asserted in this complaint. Such a suit by the United States would breach the immunity that New York State may assert. The United States has filed supporting suits or intervened in the Indian Trade and Intercourse Act claims in New York State in behalf of the Senecas, Cayugas, Mohawks, and Oneidas: for example in Seneca Nation, *et al.* v. The State of New York, *et al.* (2nd Cir., No. 02-6185(L)); The Cayuga Indian Nation, *et al.* v. Pataki, *et al.* (2nd Cir., No. 02-6111(L)); Canadian St. Regis Band of Mohawk Indians, *et al.* v. The State of New York, *et al.* (NDNY, 5:82-CV-783); Oneida Indian Nation of New York State, *et al.*, v. The State of New York, *et al.* (NDNY, 74-CV-187).

10. Defendant Governor GEORGE PATAKI is sued here in his official capacity as the Governor of New York and in his individual capacity in that he is acting beyond the scope of his constitutional and other authority in unlawfully claiming an interest in the plaintiff's lands. Governor George Pataki's address is: Executive Chamber, State Capital, Albany, New York 12224.

11. Defendant ONONDAGA COUNTY is a county of New York and occupies or claims an interest in certain portions of the subject land. Onondaga County's address is: Anthony Rivizzigno, Onondaga County Attorney, Civic Center, Syracuse, New York 13202.

12. Defendant CITY OF SYRACUSE is a municipality which occupies or claims an interest in certain portions of the subject land. The address of the City of Syracuse is: Terri Bright, Syracuse Corporation Counsel, City Hall, Syracuse, New York 13202

13. Defendant HONEYWELL INTERNATIONAL, INC. is a corporation which occupies or claims an interest in certain portions of the subject land, in particular several industrial properties along the southwest shore of Onondaga Lake, where, from the 1880s until the 1980s, Honeywell and its predecessor companies operated various chemical plants, which included the Main Plant, the Willis Avenue Plant and the Bridge Street Plant. These industrial operations of Honeywell and its predecessor companies have degraded the land to which the Onondaga Nation holds title under federal law. The address of Honeywell International, Inc., is:101 Columbia Road, PO Box 2105, Morristown, New Jersey 07962.

14. Defendants CLARK CONCRETE COMPANY, INC. and its subsidiary, VALLEY REALTY DEVELOPMENT COMPANY, INC. are corporations which occupy or claim an interest in certain portions of the subject land, in particular the Tully gravel mine, which is located on the north face of the Tully valley moraine and which has negatively impacted some of the head waters of Onondaga Creek. This mining operation has degraded the land to which the Onondaga Nation holds title under federal law. This mining area, near Solvay Road and Tully Valley Road in Tully, New York, also contains areas of extreme archeological and cultural sensitivity for the Onondaga Nation. The address of both Clark Concrete Company, Inc., and Valley Realty Development Company, Inc. is: 434 East Brighton Avenue, Syracuse, New York 13210

15. Defendant HANSON AGGREGATES NORTH AMERICA and its subsidiaries are corporations which occupy or claim an interest in certain portions of the subject land, in particular the property commonly referred to as the "Jamesville quarry", which sprawls across portions of the towns of DeWitt and LaFayette and is one of the largest open pit mines in New York State. Despite the vast areas that have been devastated by this mining operation, there has been little or no reclamation of the land. Further, this mining operation has degraded the land to which the Onondaga Nation holds title under federal law. The address of Hanson Aggregates North America is: 8505 Freeport Parkway, Suite 138, Irving, Texas 75063.

16. Defendant TRIGEN SYRACUSE ENERGY CORPORATION occupies or claims an interest in certain portions of the subject land, in particular an energy "cogeneration" plant in the Town of Geddes. This plant burns a combination of coal and plastic/paper waste, or "fluff", and its emissions include large quantities of hydrochloric acid and quantities of dioxins. Trigen has polluted the air and degraded the land to which the Onondaga Nation holds title under federal law. The address for Trigen Syracuse Energy Corporation is: 56 Industrial Drive, Syracuse, New York 13204-1091.

IV. The Subject Land

17. The land which is the subject of this action is the aboriginal property of the Onondaga Nation. This aboriginal area became part of the entire territory of the Haudenosaunee when the Haudenosaunee was formed.

18. The aboriginal territory of the Onondaga Nation, so far as it lies within what is known as the State of New York, is an area or strip of land running generally north and south and lying between the aboriginal land of the Oneida Nation on the east and the Cayuga

Nation on the west. The strip runs from the St. Lawrence River, along the east side of Lake Ontario and south as far as the Pennsylvania border. The strip varies in width from about 10 miles to more than 40 miles.

19. For identification purposes only, a map showing the general area of land is attached as Exhibit A. The precise locations of the boundaries are indeterminate at this time.

20. The precise areas at issue in this action are those parcels within the aboriginal area above described in which defendants claim an interest.

V. Claim for Relief

21 The preceding paragraphs are hereby incorporated by reference.

22. The land which is the subject of this action has at all times, since time immemorial, been the property of the Onondaga Nation and the Haudenosaunee. It has never been sold, ceded, or given up by any Indian nation or entity.

23. The subject land is not only aboriginal property of the Onondaga Nation and the Haudenosaunee, but it is also land recognized and secured by the Treaty of Fort Stanwix of 1768 between the Haudenosaunee and the British Crown, by the Treaty of Fort Stanwix of 1784 (7 Stat. 15) between the United States and the Six Nations, and by the Treaty of Canandaigua of 1794 (7 Stat. 44) between the United States and the Six Nations.

24. The Onondaga Nation is an Indian nation, and it has continuously existed as an Indian nation since time immemorial.

25. In September, 1788, New York State negotiated a "treaty," so-called, with individuals purporting to represent the Onondaga Nation. In fact neither the Onondaga Nation nor the Haudenosaunee authorized or consented to the "treaty."

26. This "treaty" purported to cede and grant to the State of New York all the lands of the Onondaga Nation, but provided that the Onondagas would hold forever a tract of land described as follows:

> all that tract of land beginning at the southerly end of the Salt Lake at the place where the river or stream on which the Onondagos now have their village empties into the said lake, and runs from the said place of beginning east three miles, thence southerly according to the general course of the said river until it shall intersect a line running east and west at the distance of three miles south from the said village, thence from the said point of intersection west nine miles, thence northerly parallel to the second course above mentioned until an east line will strike the place of beginning, and thence east to the said place of beginning.

27. Pursuant to this purported "treaty," Onondaga Lake and the land one mile around it were to remain for the common benefit of the people of the State of New York and the Onondagas for the sole purpose of making salt.

28. Because of the strong and persistent protests of the Chiefs and others of the Onondaga Nation against the purported treaty of 1788, the State of New York called a meeting in the Spring of 1790 for the purpose of resolving these complaints and ratifying the 1788 "treaty."

29. On June 16, 1790, certain persons purporting to represent the Onondaga Nation signed a so-called "treaty" with the State of New York which purported to "ratify and confirm" the 1788 "treaty".

30. In 1790 Congress passed the Indian Trade and Intercourse Act regulating, among other things, purchases or other dealings in Indian land. Act of July 22, 1790, 1 Stat. 137. This act has been continuously in force since that time and was re-enacted in the Acts of March 1, 1793, 1 Stat, 329; Act of July 22, 1796, 1 Stat. 469, 472; Act of March 3, 1799, 1 Stat. 743,

746; Act of March 30, 1802, 2 Stat. 139, 143; Act of June 30, 1834, 4 Stat. 729, 730; Rev. Stat. §2116. This act in pertinent part provides that:

> No purchase, grant, lease or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or conveyance entered into pursuant to the Constitution.

25 U.S.C. §177.

31. The "treaty" document signed on June 16, 1790 was recorded as required by New York State law on November 25, 1791. However, the "treaty" of June 16, 1790 was ineffective to convey title to any lands, because it could have no legal effect until it was recorded as required by state law, and at the time it was recorded, on November 25, 1791, it was in contravention of the United States Constitution, the Indian Trade and Intercourse Act of 1790, and the Treaty of Fort Stanwix of 1784.

32. Neither the "treaty" of 1788 nor the "treaty" of 1790 was approved by the New York legislature as required by a New York State statute, namely the Act of March 18, 1788, 11th Sess., Chap. 85, and as required by the New York Constitution, Article 37, until passage of the Act of April 10, 1813, 36th Sess., Chap. XCII (R.L.), §VII.

33. The purported conveyance contained in the 1788 "treaty" was a nullity and of no legal effect because of the failure of the legislature to approve the conveyance until the Act of 1813 (cited in paragraph 32 above), long after the entry into effect of the United States Constitution and the first Indian Trade and Intercourse Act.

34. The purported "treaty" signed in 1790 was a nullity and of no legal effect because of the failure of the New York legislature to approve the "treaty" until the Act of 1813

(cited in paragraph 32 above), and because it was in contravention of the United States Constitution, the Treaty of Fort Stanwix of 1784, and the Indian Trade and Intercourse Act of 1790.

35. Despite the passage of the Indian Trade and Intercourse Act three years earlier, the State of New York, in 1793, entered into a "treaty" with persons who the State claimed represented the Onondaga Nation. The transaction purported to release and quit claim to New York two tracts which were part of the area specifically set aside "forever" for the Onondaga Nation in the 1790 "treaty."

A. The first tract is described as follows:

> the first of the said Tracts begins in the East bounds of the said Reservation at a certain bass wood tree marked for seven miles south from the Northeast corner of the said Reservation and runs from the said place of beginning West to the River or Stream commonly called the Onondago Creek, on which the Onondagos now have their Village then Northerly down along the said River or Creek to the Lands appropriated for the common benefit of the people of the State of New York and of the Onondagoes and their posterity for the purpose of making Salt, Then easterly and Northerly along the said last mentioned lands to the line run from the north bounds of the said reservation Then East along the said Line to the northeast corner of the said reservation and then South along the East Bounds of the said Reservation seven miles to the place of Beginning,

B. The second tract is described as follows:

> And the second of the said Tracts begins at a point in the South bounds of the said Reservation Four Miles West from the Southeast corner thereof and runs from the said place of beginning North so far until an East course will strike the aforesaid Basswood tree marked for the seven miles, South from the Northeast corner of the said Reservation; then East to a point half a mile West from the aforesaid Onondago Creek, then northerly along straight lines connecting points successively at intervals of half a mile northing from each other, each of which points shall be half a mile measured West from the said Onondago Creek to the aforesaid Lands appropriated for the common benefit of the People of the State of New York and of the Onondagoes and their posterity for the purpose of making Salt, Then along the same westerly and Northerly to the Line run for the North

> bounds of the said Reservation then along the said line west to the northwest corner of the said reservation, then along the West bounds thereof South to the Southwest corner thereof & then along the South bounds thereof east to the place of beginning.

36. Again, in 1795, the State of New York entered into a "treaty" with persons who the State claimed represented the Onondaga Nation. This transaction purported to convey to New York the Onondaga Nation's rights in Onondaga Lake and the lands one mile around it as well as the strip of land one-half mile wide along the west side of Onondaga Creek between Onondaga Lake and the north boundary of the Onondaga territory as supposedly diminished by the 1793 "treaty." This purported "treaty" also provided for one square mile of land within the diminished territory to be set aside for three individuals. No precise boundaries are stated in the 1795 "treaty." This third "treaty" also was entered into by the State of New York in defiance of Congress's express prohibition set forth in the Indian Trade and Intercourse Act of 1793.

37. In 1817, the State of New York entered into a fourth "treaty" with persons who the State claimed represented the Onondaga Nation. This transaction purported to convey to New York State two additional parcels contained within the area set aside "forever" for the Onondaga Nation in the 1790 "treaty":

A. The first tract is described as follows:

> All that certain Tract of land being part of the Lands reserved to them in former cessions to the said people and known as the Onondaga Residence Reservation and bounded as follows North by the north bounds of said residence Reservation East by the East bounds thereof South by the South bounds thereof and West by a line parallel to the said east bounds and at the distance of one mile and a half westward from the same--

B. The second tract is described as follows:

> Beginning at the south east corner of Lot Number one hundred and fifty eight which is the South West corner of Lot Number one hundred and sixty of the Tract called the Onondago Reservation in the North bounds of said residence Reservation and running thence along the same East twenty five chains, then South Sixty chains then West fifty chains then North sixty chains to said North bounds of said Residence Reservation and then along the same East Twenty five chains to the place of beginning containing Three hundred Acres --

38. Again, more than 30 years after purporting to set aside "forever" an area of land for the Onondaga Nation and more than 30 years after passage of the first Indian Trade and Intercourse Act, in 1822, the State of New York entered into a fifth "treaty" with persons who the State claimed represented the Onondaga Nation. This transaction purported to convey to the State a parcel of land as follows:

> All that certain Tract of land being part of the lands reserved to them in former cessions to the said People and known as the Onondaga residence reservation and bounded as follows to wit Beginning at the South west corner of the said residence reservation and running thence along the south bounds thereof East two miles and a half to the lands sold by the said Indians to the said People in the year One thousand eight hundred and Seventeen then along the same North half a mile then west parallel with the said South bounds two miles and a half then along the same East two miles and a half to the place of beginning containing eight hundred acres:

39. The so-called "treaties" of 1788, 1790, 1793, 1795, 1817 and 1822 were never approved or ratified by the Onondaga Nation or the Haudenosaunee. None of the purported conveyances were made by persons having authority or legal capacity to convey the land.

40. Nor were the so-called "treaties" of 1788, 1790, 1793, 1795, 1817 and 1822 ratified or approved by the United States Senate or Congress. Nor was a United States

Commissioner present at any of the "treaties". No part of the subject land has ever been ceded or given up pursuant to a treaty or conveyance entered into under the Constitution nor pursuant to any act of Congress.

41. The land supposedly ceded in the so-called "treaties" of 1788 and 1790 remained the property of the Onondaga Nation and Haudenosaunee because of the failure of the New York legislature to approve the "treaties" as required by New York's Constitution and the Act of 1788, and also independently because of the failure to record the 1790 treaty until after the effective date of the United States Constitution and the first Indian Trade and Intercourse Act. With enactment by Congress of the first Indian Trade and Intercourse Act in 1790, all of the property of the Onondaga Nation and the Haudenosaunee became subject to the Act's requirements. The said property has never been conveyed in compliance with the Act, and therefore it remains the property of the Onondaga Nation and the Haudenosaunee.

42. Each of the above-mentioned "treaties" between the State of New York and the Onondaga Nation is a nullity and of no legal effect. As a result, the subject land supposedly ceded in the so-called "treaties" of 1788, 1790, 1793, 1795, 1817, and 1822 remained the property of the Onondaga Nation and the Haudenosaunee.

43. The State of New York knew or should have known that its purported purchases of the lands in question, without compliance with the United States Constitution and the federal Indian Trade and Intercourse Acts, without compliance with the Act of 1788, and in contravention of the Treaties of Fort Stanwix of 1784 and Canandaigua of 1794, were void, wrongful, illegal, and of no force or effect.

44. Each of the defendants claims an interest in portions of the lands purportedly conveyed by one or more of the so-called "treaties" of 1788, 1790, 1793, 1795, 1817, and 1822. Because the defendants base their claimed interests in the subject lands on the void "treaties," the defendants have no lawful interest in the subject land.

VI. Prayer for Relief

Wherefore, plaintiff prays for a declaratory judgment pursuant to 28 U.S.C. §2201 declaring:

A. That the purported conveyances of the "treaties" of 1788, 1790, 1793, 1795, 1817, and 1822 were and are null and void;

B. That the subject land remains the property of the Onondaga Nation and the Haudenosaunee, and that the Onondaga Nation and Haudenosaunee continue to hold title to the subject land.

Respectfully submitted,

Robert T. Coulter, Bar No. 101416
Indian Law Resource Center
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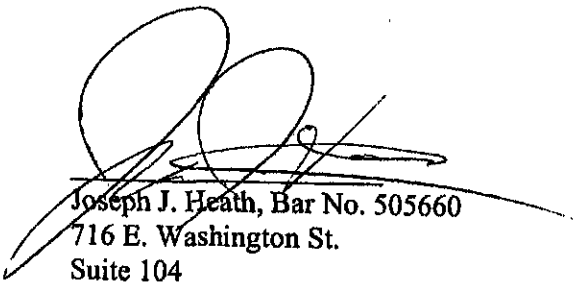

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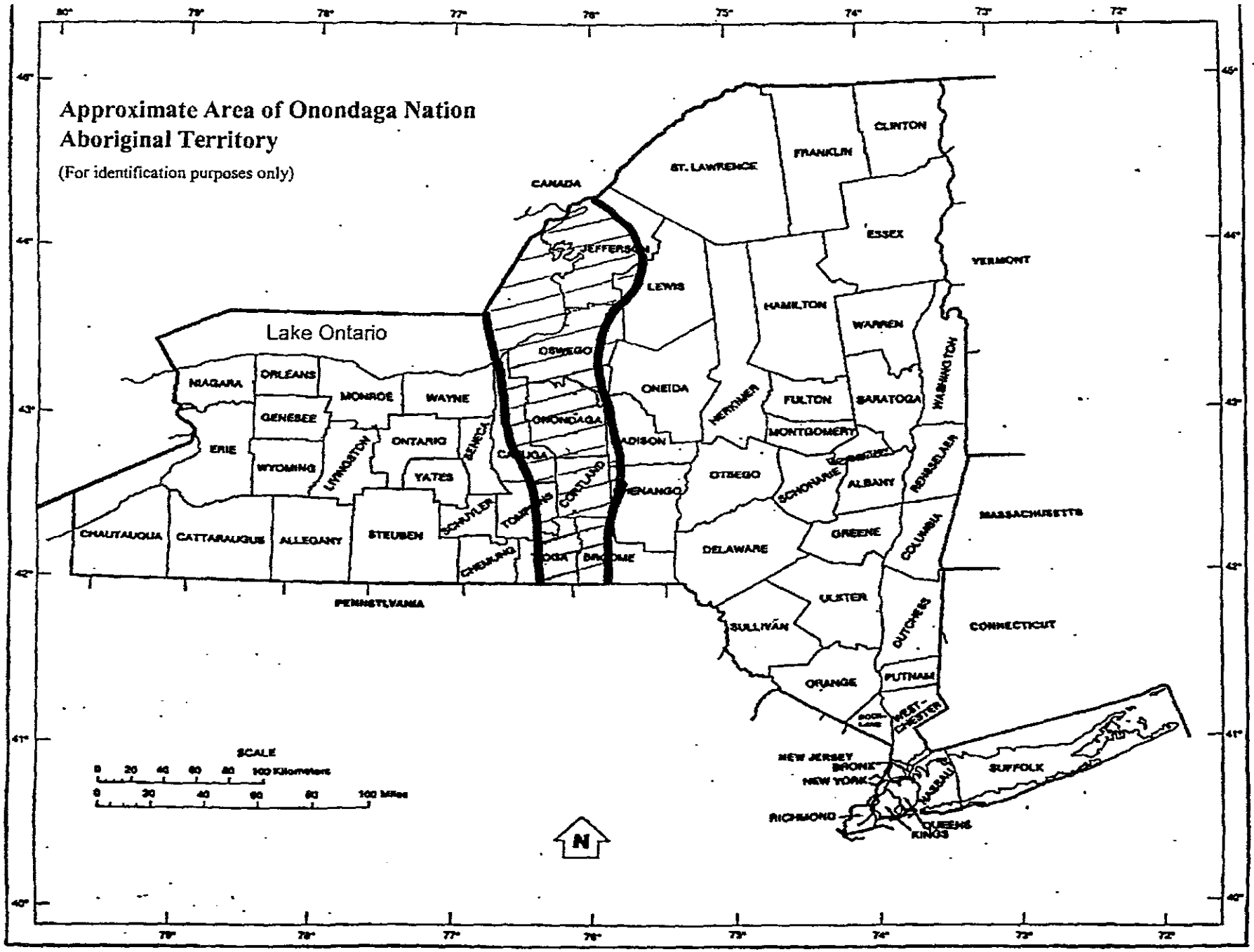

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v.

Civil Action No.

05-CV-314
(LEK/DRH)

THE STATE OF NEW YORK; GEORGE PATAKI, IN HIS INDIVIDUAL CAPACITY AND AS GOVERNOR OF NEW YORK STATE; ONONDAGA COUNTY; THE CITY OF SYRACUSE; HONEYWELL INTERNATIONAL, INC.; TRIGEN SYRACUSE ENERGY CORPORATION; CLARK CONCRETE COMPANY, INC.;VALLEY REALTY DEVELOPMENT COMPANY, INC.; HANSON AGGREGATES NORTH AMERICA,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

I. Nature of the Action

1. The Onondaga people wish to bring about a healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural, and historic

relationship with the land, which is embodied in *Gayanashagowa*, the Great Law of Peace. This relationship goes far beyond federal and state legal concepts of ownership, possession, or other legal rights. The people are one with the land and consider themselves stewards of it. It is the duty of the Nation's leaders to work for a healing of this land, to protect it, and to pass it on to future generations. The Onondaga Nation brings this action on behalf of its people in the hope that it may hasten the process of reconciliation and bring lasting justice, peace, and respect among all who inhabit this area.

2. This is an action to declare that certain lands are the property of the Onondaga Nation and the Haudenosaunee, having been unlawfully acquired by the State of New York in violation of the federal Indian Trade and Intercourse Acts, now codified at 25 U.S.C. §177, and in violation of the United States Constitution, the Treaty of Fort Stanwix of 1784, and the Treaty of Canandaigua of 1794.

II. Jurisdiction and Venue

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1337, 1343 and 1362. Venue lies in this District under 28 U.S.C. §1391(b).

4. Plaintiff's claim for relief arises under federal common law; the United States Constitution; the Indian Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834, now codified at 25 U.S.C. §177; under the Treaty of Fort Stanwix of 1784, 7 Stat. 15; and the Treaty of Canandaigua of 1794, 7 Stat. 44.

III. Parties

5. The plaintiff ONONDAGA NATION is an Indian nation recognized by the United States through the Secretary of the Interior of the United States. It is, and has been at

all relevant times, an "Indian nation" within the meaning of the federal Indian Trade and Intercourse Acts of 1790 and later, now 25 U.S.C. §177. The citizens of the Onondaga Nation reside principally on their territory or "reservation" south of Nedrow, New York. The Nation brings this action by authority of the Onondaga Council of Chiefs, the sole government of the Onondaga Nation. The government of the Onondaga Nation is recognized by the United States through the Secretary of the Interior. The relationship of the Onondaga Nation to the United States has never been terminated.

6. The Onondaga Nation sues on its own behalf and on behalf of and with the authority of the Haudenosaunee. The Haudenosaunee is a confederacy, originally, of five Indian nations: the Onondaga Nation, Mohawk Nation, Oneida Nation, Cayuga Nation, and Seneca Nation. The Tuscarora Nation joined the Haudenosaunee in approximately 1712. It is called, in English, the "Six Nations Iroquois Confederacy." The capital or central Council Fire of the Confederacy is at Onondaga. The Onondagas are the firekeepers of the Haudenosaunee. The Haudenosaunee entered into two treaties recognized as valid by the United States: the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794. This action is brought by authority of the Council of Chiefs of the Haudenosaunee as well as by authority of the Council of Chiefs of the Onondaga Nation. The Haudenosaunee does not object to this case proceeding in its absence.

7. The defendant STATE OF NEW YORK is the purported original purchaser of the land that is the subject of this action, pursuant to transactions described in paragraphs 25 through 38 below. The State continues to claim an interest in and to occupy certain portions of this land. The address of the State of New York is: Attorney General Eliot L. Spitzer, Department of Law, State Capital, Albany, New York 12224-0341.

8. The plaintiff has formally requested the State of New York to waive whatever immunity it may claim to this suit in the interest of fairness toward the other defendants and in the interest of justice.

9. The United States has been requested to file suit against the State of New York asserting a claim identical to that asserted in this complaint. Such a suit by the United States would breach the immunity that New York State may assert. The United States has filed supporting suits or intervened in the Indian Trade and Intercourse Act claims in New York State in behalf of the Senecas, Cayugas, Mohawks, and Oneidas: for example in Seneca Nation, *et al.* v. The State of New York, *et al.* (2nd Cir., No. 02-6185(L)); The Cayuga Indian Nation, *et al.* v. Pataki, *et al.* (2nd Cir., No. 02-6111(L)); Canadian St. Regis Band of Mohawk Indians, *et al.* v. The State of New York, *et al.* (NDNY, 5:82-CV-783); Oneida Indian Nation of New York State, *et al.*, v. The State of New York, *et al.* (NDNY, 74-CV-187).

10. Defendant Governor GEORGE PATAKI is sued here in his official capacity as the Governor of New York and in his individual capacity in that he is acting beyond the scope of his constitutional and other authority in unlawfully claiming an interest in the plaintiff's lands. Governor George Pataki's address is: Executive Chamber, State Capital, Albany, New York 12224.

11. Defendant ONONDAGA COUNTY is a county of New York and occupies or claims an interest in certain portions of the subject land. Onondaga County's address is: Anthony Rivizzigno, Onondaga County Attorney, Civic Center, Syracuse, New York 13202.

12. Defendant CITY OF SYRACUSE is a municipality which occupies or claims an interest in certain portions of the subject land. The address of the City of Syracuse is: Terri Bright, Syracuse Corporation Counsel, City Hall, Syracuse, New York 13202

13. Defendant HONEYWELL INTERNATIONAL, INC. is a corporation which occupies or claims an interest in certain portions of the subject land, in particular several industrial properties along the southwest shore of Onondaga Lake, where, from the 1880s until the 1980s, Honeywell and its predecessor companies operated various chemical plants, which included the Main Plant, the Willis Avenue Plant and the Bridge Street Plant. These industrial operations of Honeywell and its predecessor companies have degraded the land to which the Onondaga Nation holds title under federal law. The address of Honeywell International, Inc., is: 101 Columbia Road, PO Box 2105, Morristown, New Jersey 07962.

14. Defendants CLARK CONCRETE COMPANY, INC. and its subsidiary, VALLEY REALTY DEVELOPMENT COMPANY, INC. are corporations which occupy or claim an interest in certain portions of the subject land, in particular the Tully gravel mine, which is located on the north face of the Tully valley moraine and which has negatively impacted some of the head waters of Onondaga Creek. This mining operation has degraded the land to which the Onondaga Nation holds title under federal law. This mining area, near Solvay Road and Tully Valley Road in Tully, New York, also contains areas of extreme archeological and cultural sensitivity for the Onondaga Nation. The address of both Clark Concrete Company, Inc., and Valley Realty Development Company, Inc. is: 434 East Brighton Avenue, Syracuse, New York 13210

15. Defendant HANSEN AGGREGATES NORTH AMERICA and its subsidiaries are corporations which occupy or claim an interest in certain portions of the subject land, in particular the property commonly referred to as the "Jamesville quarry", which sprawls across portions of the towns of DeWitt and LaFayette and is one of the largest open pit mines in New York State. Despite the vast areas that have been devastated by this mining operation, there has been little or no reclamation of the land. Further, this mining operation has degraded the land to which the Onondaga Nation holds title under federal law. The address of Hanson Aggregates North America is: 8505 Freeport Parkway, Suite 138, Irving, Texas 75063.

16. Defendant TRIGEN SYRACUSE ENERGY CORPORATION occupies or claims an interest in certain portions of the subject land, in particular an energy "cogeneration" plant in the Town of Geddes. This plant burns a combination of coal and plastic/paper waste, or "fluff", and its emissions include large quantities of hydrochloric acid and quantities of dioxins. Trigen has polluted the air and degraded the land to which the Onondaga Nation holds title under federal law. The address for Trigen Syracuse Energy Corporation is: 56 Industrial Drive, Syracuse, New York 13204-1091.

IV. The Subject Land

17. The land which is the subject of this action is the aboriginal property of the Onondaga Nation. This aboriginal area became part of the entire territory of the Haudenosaunee when the Haudenosaunee was formed.

18. The aboriginal territory of the Onondaga Nation, so far as it lies within what is known as the State of New York, is an area or strip of land running generally north and south and lying between the aboriginal land of the Oneida Nation on the east and the Cayuga

Nation on the west. The strip runs from the St. Lawrence River, along the east side of Lake Ontario and south as far as the Pennsylvania border. The strip varies in width from about 10 miles to more than 40 miles.

19. For identification purposes only, a map showing the general area of land is attached as Exhibit A. The precise locations of the boundaries are indeterminate at this time.

20. The precise areas at issue in this action are those parcels within the aboriginal area above described in which defendants claim an interest.

V. Claim for Relief

21 The preceding paragraphs are hereby incorporated by reference.

22. The land which is the subject of this action has at all times, since time immemorial, been the property of the Onondaga Nation and the Haudenosaunee. It has never been sold, ceded, or given up by any Indian nation or entity.

23. The subject land is not only aboriginal property of the Onondaga Nation and the Haudenosaunee, but it is also land recognized and secured by the Treaty of Fort Stanwix of 1768 between the Haudenosaunee and the British Crown, by the Treaty of Fort Stanwix of 1784 (7 Stat. 15) between the United States and the Six Nations, and by the Treaty of Canandaigua of 1794 (7 Stat. 44) between the United States and the Six Nations.

24. The Onondaga Nation is an Indian nation, and it has continuously existed as an Indian nation since time immemorial.

25. In September, 1788, New York State negotiated a "treaty," so-called, with individuals purporting to represent the Onondaga Nation. In fact neither the Onondaga Nation nor the Haudenosaunee authorized or consented to the "treaty."

26. This "treaty" purported to cede and grant to the State of New York all the lands of the Onondaga Nation, but provided that the Onondagas would hold forever a tract of land described as follows:

> all that tract of land beginning at the southerly end of the Salt Lake at the place where the river or stream on which the Onondagos now have their village empties into the said lake, and runs from the said place of beginning east three miles, thence southerly according to the general course of the said river until it shall intersect a line running east and west at the distance of three miles south from the said village, thence from the said point of intersection west nine miles, thence northerly parallel to the second course above mentioned until an east line will strike the place of beginning, and thence east to the said place of beginning.

27. Pursuant to this purported "treaty," Onondaga Lake and the land one mile around it were to remain for the common benefit of the people of the State of New York and the Onondagas for the sole purpose of making salt.

28. Because of the strong and persistent protests of the Chiefs and others of the Onondaga Nation against the purported treaty of 1788, the State of New York called a meeting in the Spring of 1790 for the purpose of resolving these complaints and ratifying the 1788 "treaty."

29. On June 16, 1790, certain persons purporting to represent the Onondaga Nation signed a so-called "treaty" with the State of New York which purported to "ratify and confirm" the 1788 "treaty".

30. In 1790 Congress passed the Indian Trade and Intercourse Act regulating, among other things, purchases or other dealings in Indian land. Act of July 22, 1790, 1 Stat. 137. This act has been continuously in force since that time and was re-enacted in the Acts of March 1, 1793, 1 Stat, 329; Act of July 22, 1796, 1 Stat. 469, 472; Act of March 3, 1799, 1 Stat. 743,

746; Act of March 30, 1802, 2 Stat. 139, 143; Act of June 30, 1834, 4 Stat. 729, 730; Rev. Stat. §2116. This act in pertinent part provides that:

> No purchase, grant, lease or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or conveyance entered into pursuant to the Constitution.

25 U.S.C. §177.

31. The "treaty" document signed on June 16, 1790 was recorded as required by New York State law on November 25, 1791. However, the "treaty" of June 16, 1790 was ineffective to convey title to any lands, because it could have no legal effect until it was recorded as required by state law, and at the time it was recorded, on November 25, 1791, it was in contravention of the United States Constitution, the Indian Trade and Intercourse Act of 1790, and the Treaty of Fort Stanwix of 1784.

32. Neither the "treaty" of 1788 nor the "treaty" of 1790 was approved by the New York legislature as required by a New York State statute, namely the Act of March 18, 1788, 11th Sess., Chap. 85, and as required by the New York Constitution, Article 37, until passage of the Act of April 10, 1813, 36th Sess., Chap. XCII (R.L.), §VII.

33. The purported conveyance contained in the 1788 "treaty" was a nullity and of no legal effect because of the failure of the legislature to approve the conveyance until the Act of 1813 (cited in paragraph 32 above), long after the entry into effect of the United States Constitution and the first Indian Trade and Intercourse Act.

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35. Despite the passage of the Indian Trade and Intercourse Act three years earlier, the State of New York, in 1793, entered into a "treaty" with persons who the State claimed represented the Onondaga Nation. The transaction purported to release and quit claim to New York two tracts which were part of the area specifically set aside "forever" for the Onondaga Nation in the 1790 "treaty."

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> the first of the said Tracts begins in the East bounds of the said Reservation at a certain bass wood tree marked for seven miles south from the Northeast corner of the said Reservation and runs from the said place of beginning West to the River or Stream commonly called the Onondago Creek, on which the Onondagos now have their Village then Northerly down along the said River or Creek to the Lands appropriated for the common benefit of the people of the State of New York and of the Onondagoes and their posterity for the purpose of making Salt, Then easterly and Northerly along the said last mentioned lands to the line run from the north bounds of the said reservation Then East along the said Line to the northeast corner of the said reservation and then South along the East Bounds of the said Reservation seven miles to the place of Beginning,

B. The second tract is described as follows:

> And the second of the said Tracts begins at a point in the South bounds of the said Reservation Four Miles West from the Southeast corner thereof and runs from the said place of beginning North so far until an East course will strike the aforesaid Basswood tree marked for the seven miles, South from the Northeast corner of the said Reservation; then East to a point half a mile West from the aforesaid Onondago Creek, then northerly along straight lines connecting points successively at intervals of half a mile northing from each other, each of which points shall be half a mile measured West from the said Onondago Creek to the aforesaid Lands appropriated for the common benefit of the People of the State of New York and of the Onondagoes and their posterity for the purpose of making Salt, Then along the same westerly and Northerly to the Line run for the North

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36. Again, in 1795, the State of New York entered into a "treaty" with persons who the State claimed represented the Onondaga Nation. This transaction purported to convey to New York the Onondaga Nation's rights in Onondaga Lake and the lands one mile around it as well as the strip of land one-half mile wide along the west side of Onondaga Creek between Onondaga Lake and the north boundary of the Onondaga territory as supposedly diminished by the 1793 "treaty." This purported "treaty" also provided for one square mile of land within the diminished territory to be set aside for three individuals. No precise boundaries are stated in the 1795 "treaty." This third "treaty" also was entered into by the State of New York in defiance of Congress's express prohibition set forth in the Indian Trade and Intercourse Act of 1793.

37. In 1817, the State of New York entered into a fourth "treaty" with persons who the State claimed represented the Onondaga Nation. This transaction purported to convey to New York State two additional parcels contained within the area set aside "forever" for the Onondaga Nation in the 1790 "treaty":

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B. The second tract is described as follows:

> Beginning at the south east corner of Lot Number one hundred and fifty eight which is the South West corner of Lot Number one hundred and sixty of the Tract called the Onondago Reservation in the North bounds of said residence Reservation and running thence along the same East twenty five chains, then South Sixty chains then West fifty chains then North sixty chains to said North bounds of said Residence Reservation and then along the same East Twenty five chains to the place of beginning containing Three hundred Acres --

38. Again, more than 30 years after purporting to set aside "forever" an area of land for the Onondaga Nation and more than 30 years after passage of the first Indian Trade and Intercourse Act, in 1822, the State of New York entered into a fifth "treaty" with persons who the State claimed represented the Onondaga Nation. This transaction purported to convey to the State a parcel of land as follows:

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39. The so-called "treaties" of 1788, 1790, 1793, 1795, 1817 and 1822 were never approved or ratified by the Onondaga Nation or the Haudenosaunee. None of the purported conveyances were made by persons having authority or legal capacity to convey the land.

40. Nor were the so-called "treaties" of 1788, 1790, 1793, 1795, 1817 and 1822 ratified or approved by the United States Senate or Congress. Nor was a United States

Commissioner present at any of the "treaties". No part of the subject land has ever been ceded or given up pursuant to a treaty or conveyance entered into under the Constitution nor pursuant to any act of Congress.

41. The land supposedly ceded in the so-called "treaties" of 1788 and 1790 remained the property of the Onondaga Nation and Haudenosaunee because of the failure of the New York legislature to approve the "treaties" as required by New York's Constitution and the Act of 1788, and also independently because of the failure to record the 1790 treaty until after the effective date of the United States Constitution and the first Indian Trade and Intercourse Act. With enactment by Congress of the first Indian Trade and Intercourse Act in 1790, all of the property of the Onondaga Nation and the Haudenosaunee became subject to the Act's requirements. The said property has never been conveyed in compliance with the Act, and therefore it remains the property of the Onondaga Nation and the Haudenosaunee.

42. Each of the above-mentioned "treaties" between the State of New York and the Onondaga Nation is a nullity and of no legal effect. As a result, the subject land supposedly ceded in the so-called "treaties" of 1788, 1790, 1793, 1795, 1817, and 1822 remained the property of the Onondaga Nation and the Haudenosaunee.

43. The State of New York knew or should have known that its purported purchases of the lands in question, without compliance with the United States Constitution and the federal Indian Trade and Intercourse Acts, without compliance with the Act of 1788, and in contravention of the Treaties of Fort Stanwix of 1784 and Canandaigua of 1794, were void, wrongful, illegal, and of no force or effect.

44. Each of the defendants claims an interest in portions of the lands purportedly conveyed by one or more of the so-called "treaties" of 1788, 1790, 1793, 1795, 1817, and 1822. Because the defendants base their claimed interests in the subject lands on the void "treaties," the defendants have no lawful interest in the subject land.

45. The Onondaga Nation has strongly and persistently protested in various forms and in a wide variety of fora New York State's taking of the Nation's land and exercizing jurisdiction over the Nation's land in violation of the Trade and Intercourse Act, the Treaty of Canandaigua, the Treaty of Fort Stanwix, and the U.S. Constitution.

46. The Onondaga Nation has pursued whatever avenues were open to it to seek redress for the unlawful taking of the subject lands. The Onondaga Nation has sought to overcome legal and political obstacles to the fair and final resolution of the land issues asserted in this action, including without limitation the facts that the federal courts were not open to hear these cases until 1974 at the earliest, and that the prima facie elements of the claims were not upheld until 1985.

47. Until recently, the Onondaga Nation faced serious obstacles to the assertion of the rights that are the subject of this action, including without limitation lack of financial resources, lack of access to attorneys, lack of federal court jurisdiction, and an inability to communicate with and understand the English language adequately.

48. The Onondaga Nation was justified in relying on the promises of the United States Government in treaties and statutes that it would protect the Nation from the unlawful dispossession of their lands. The filing of this lawsuit now does not prejudice any of

the defendants. Under these circumstances, the lapse of time between the illegal transactions and the filing of this lawsuit is not unreasonable.

49. From the time of the illegal transactions, the Onondaga Nation and the Haudenosaunee have continually maintained cultural, spiritual, legal, and political ties to the subject land, which contains particular parcels and resources of significance to the Nation and its citizens. The Nation has taken actions to protect such sites from degradation, impairment or destruction.

50. The subject land became populated and developed by non-Indians over the persistent protests of the Onondaga Nation and the Haudenosaunee. As one example, in 1841, the Onondaga Nation sought the assistance of the United States Government to stop the flood of non-Indian settlers into the Nation's land by enforcing the promises made in the Treaty of Canandaigua. The Onondaga Nation and the Haudenosauee would have maintained even stronger ties to the subject land if not prohibited from doing so by New York State's unlawful conduct in taking and parceling out the Nation's land to non-Indians.

51. Onondaga Nation citizens live in communities throughout the claim area They have never left their aboriginal territory, nor voluntarily relinquished ownership of the subject land, nor broken their historic and contemporary cultural, spiritual, legal, and political ties to the subject land.

52. New York State and the other defendants have at all times known or had reason to know of the Nation's assertions of ownership and the Nation's protests concerning the takings of the Nation's land.

53. New York State acted in bad faith by, among other things, deliberately dealing with individuals who lacked authority to act for the Nation, by deceiving these persons and the Nation about the nature of the transactions, and by ignoring the federal government's explicit warnings not to violate the Trade and Intercourse Act in taking Indian lands that were protected by federal treaties and laws.

VI. Prayer for Relief

Wherefore, plaintiff prays for a declaratory judgment pursuant to 28 U.S.C. §2201 declaring:

A. That the purported conveyances of the "treaties" of 1788, 1790, 1793, 1795, 1817, and 1822 were and are null and void;

B. That the subject land remains the property of the Onondaga Nation and the Haudenosaunee, and that the Onondaga Nation and Haudenosaunee continue to hold title to the subject land.

Respectfully submitted,

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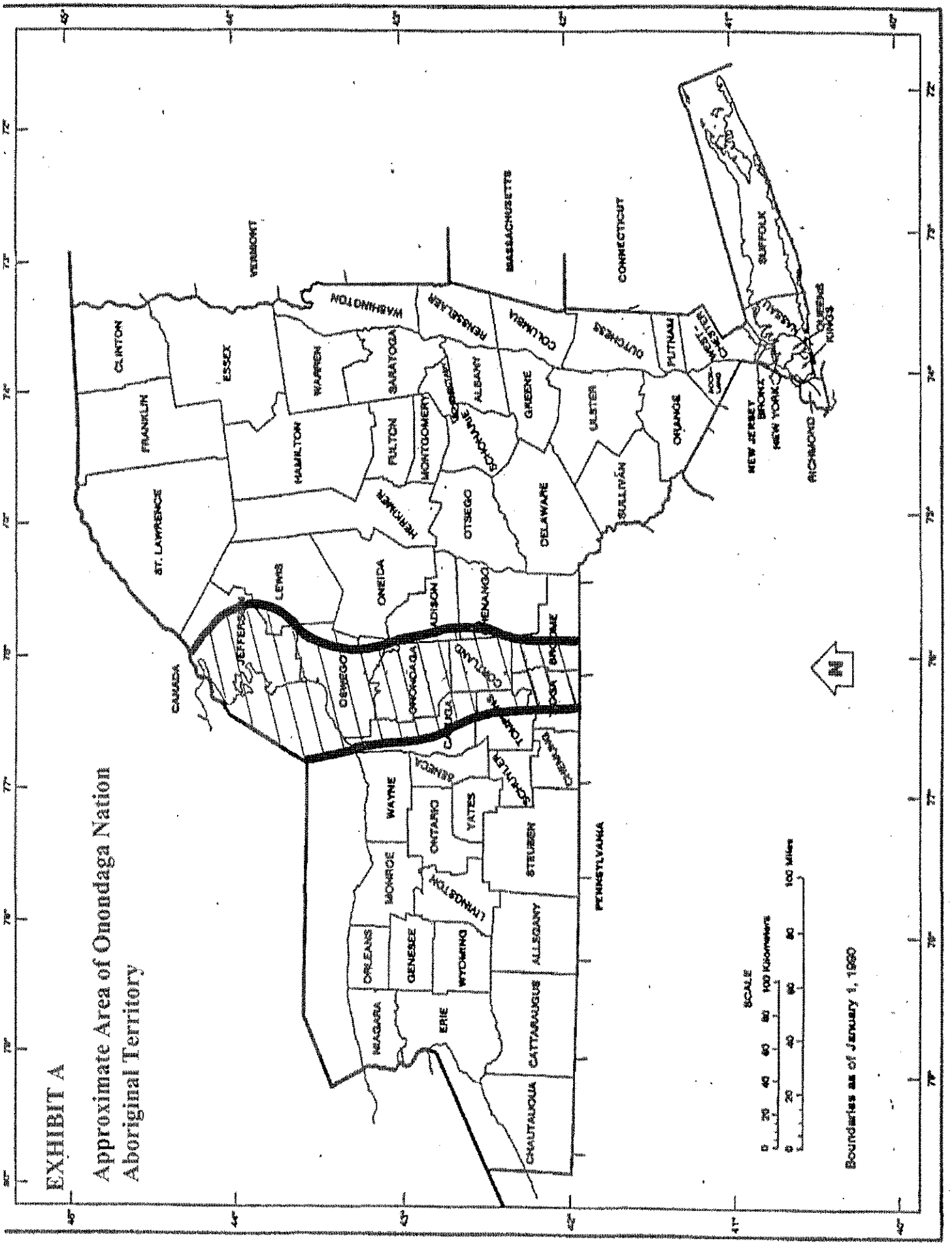
EXHIBIT A
Approximate Area of Onondaga Nation
Aboriginal Territory
VERMONT
MASSACHUSETTS
CONNECTICUT
NEW JERSEY
NEW YORK
PENNSYLVANIA
CANADA
CLINTON
ESSEX
FRANKLIN
ST. LAWRENCE
LEWIS
JEFFERSON
OSWEGO
HAMILTON
FULTON
MONTGOMERY
SCHOHARIE
ALBANY
SARATOGA
WARREN
WASHINGTON
RENSSELAER
COLUMBIA
GREENE
ULSTER
SULLIVAN
DELAWARE
OTSEGO
HERKIMER
ONEIDA
MADISON
CHENANGO
BROOME
TIOGA
CORTLAND
ONONDAGA
CAYUGA
CAYUGA LAKE
SENECA
WAYNE
ONTARIO
YATES
STEUBEN
MONROE
LIVINGSTON
ALLEGANY
ORLEANS
GENESEE
WYOMING
NIAGARA
ERIE
CATTARAUGUS
CHAUTAUQUA
DUTCHESS
PUTNAM
ORANGE
ROCKLAND
WESTCHESTER
BRONX
KINGS
QUEENS
SUFFOLK
RICHMOND
N
SCALE
0 20 40 60 80 100 Kilometers
0 20 40 60 80 100 Miles
Boundaries as of January 1, 1980

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v.

THE STATE OF NEW YORK; GEORGE PATAKI, IN HIS INDIVIDUAL CAPACITY AND AS GOVERNOR OF NEW YORK STATE; ONONDAGA COUNTY; THE CITY OF SYRACUSE; HONEYWELL INTERNATIONAL, INC.; TRIGEN SYRACUSE ENERGY CORPORATION; CLARK CONCRETE COMPANY, INC.; VALLEY REALTY DEVELOPMENT COMPANY, INC.; HANSON AGGREGATES NORTH AMERICA,

Defendants.

STATE DEFENDANTS' NOTICE OF MOTION TO DISMISS

05-CV-314
(LEK/DRH)

PLEASE TAKE NOTICE that, upon the annexed affirmation of David B. Roberts and the exhibit attached thereto, dated August 15, 2006, the accompanying Memorandum of Law In Support Of The New York State Defendants' Motion To Dismiss, and upon the pleadings and all prior papers by and between the parties to this action, the undersigned, pursuant to Northern District Local Rule 7.1(b)(1) and the schedule so-ordered by this Court on July 5, 2006, shall move this Court at a Motion Term on December 1, 2006, before the Honorable Lawrence E. Kahn, United States District Judge, c/o United States District Court, Northern District of New York, at the James T. Foley Federal Courthouse, 445 Broadway, Albany, New York 12207-2924, for an order and judgment pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing Plaintiff's First Amended Complaint in the above action for want of subject matter jurisdiction and for failure to state a claim for which relief can be granted, together with such other and further relief as to the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the schedule so ordered by this Court on July 5, 2006, any papers in opposition to the motion must be served by October 16, 2006, and the motion will be considered on the submission of the motion papers only.

DATED: Albany, New York
August 15, 2006

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Defendants The State of New York and George Pataki, in his Individual Capacity and as Governor of New York State
The Capitol
Albany, NY 12224

s/ David B. Roberts

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Attorneys for Plaintiff The Onondaga Nation

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Attorneys for the Non-State Defendants Onondaga County et al.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONONDAGA NATION, Plaintiff, *vs.* STATE OF NEW YORK, *et al.*, Defendants.	CIVIL ACTION NO. 05-CV-314 (LEK/DRH)

NON-STATE DEFENDANTS' NOTICE OF MOTION TO DISMISS

PLEASE TAKE NOTICE that, upon the annexed affirmation of Mark S. Puzella and the exhibit attached thereto, dated August 15, 2006, the accompanying Memorandum of Law In Support of the Non-State Defendants' Motion to Dismiss, and upon the pleadings and all prior papers by and between the parties to this action, the undersigned, pursuant to District Local Rule 7.1(b)(1) and the schedule so ordered by this Court on July 5, 2006, shall move this Court at a Motion Term on December 1, 2006, before the Honorable Lawrence E. Kahn, United States District Judge, c/o United States District Court, Northern District of New York, at the James T. Foley Federal Courthouse, 445 Broadway, Albany, New York 12207-2924, for an order and judgment pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(7) dismissing Plaintiff's First Amended Complaint.

As set forth more fully in the accompanying Memorandum of Law, the Onondagas' Amended Complaint should be dismissed for two independent and dispositive reasons. First, the Amended Complaint should be dismissed because it is a two hundred year-old possessory land claim and, as such, it is barred by *Cayuga Nation of Indians v. State of New York, et al.*, 413 F.3d 266 (2d Cir. 2005). Second, as set forth in the motion to dismiss filed by the State of New York

(the "State"), the State is immune from suit; once the State is dismissed as party, the Amended Complaint should be dismissed against the Non-State Defendants because the State is a necessary and indispensable party that cannot be joined. *See* Fed. R. Civ. P. 19.

PLEASE TAKE FURTHER NOTICE that, pursuant to the schedule ordered by this Court on July 5, 2006, any papers in opposition to the motion must be served by October 16, 2006, any papers in reply to the opposition must be served by November 15, 2006 and the motion will be considered on the submission of the motion papers only.

Respectfully submitted,

ONONDAGA COUNTY, NY; CITY OF SYRACUSE, NY; HONEYWELL INTERNATIONAL, INC.; TRIGEN SYRACUSE ENERGY CORP.; CLARK CONCRETE CO., INC; VALLEY REALTY DEVELOPMENT CO., INC.; and HANSON AGGREGATES NORTH AMERICA,

By their attorneys,

/s/ Mark S. Puzella
Anthony M. Feeherry (Bar No. 302098)
Mark S. Puzella (Bar No. 106247)
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000

Dated: August 15, 2005

CERTIFICATE OF SERVICE

I certify that this document was filed through the N.D.N.Y. ECF system on August 15, 2006 and, as such, will be sent electronically to the registered participants. I further certify that copies of this document were sent via First Class Mail on August 15, 2006 to the following:

Kanion'ke:haka Kaianereh'ko:wa Kanon'ses:neh
Route 14
P.O. Box 1016
Akwesasne, New York 13655

/s/ Mark S. Puzella
Mark S. Puzella

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF ROBERT T. COULTER, COUNSEL FOR THE ONONDAGA NATION, IN OPPOSITION TO MOTIONS TO DISMISS

ROBERT T. COULTER declares under penalty of perjury as follows:

1. I am an attorney licensed to practice law in the States of New York and Montana and in the District of Columbia. I was admitted to practice in New York in 1970. I am admitted to practice in a number of federal courts, including this Court and the United States Supreme Court.

2. I am lead counsel for the Onondaga Nation in this action, and I make this Declaration in opposition to the Defendants' August 15, 2006, Motions to Dismiss, pursuant to FRCP 12 (b).

3. I am the founder and President of the Indian Law Resource Center, a private, charitable legal organization organized and directed by Indians. The Indian Law Resource Center, since its founding in 1978, has provided legal assistance without fee or charge for Indian and Alaska Native Nations throughout the United States and in Central and South America as well. The Center provides legal assistance to Indian and Alaska Native nations who are working

to protect their land, resources, human rights, environment, and cultural integrity. The Center's principal goal is the preservation and security of Indian and other Native Nations and tribes. The Center is a tax-exempt organization under §501(c)(3) of the Internal Revenue Code. The Center is funded entirely by grants and contributions from individuals, foundations, and Indian nations and accepts no federal or state government support.

4. I began to advise and represent the Onondaga Nation and the Haudenosaunee, or Six Nations Confederacy, in 1975, and I have continuously represented the Nation and the Haudenosaunee since that time, particularly on legal issues relating to lands and land rights. The six member nations of the Haudenosaunee are the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora Nations.

5. This Declaration is made of my personal knowledge about the events, statements, activities, and other matters referred to below, including the factors and considerations that caused or led the Onondaga Nation Chiefs and other leaders to take actions on the Nation's land rights and in some instances to await the results of research or to await clarification or development of the law applicable to Indian land rights.

CHANGES IN FEDERAL LAW OPEN THE COURTS, BUT QUESTIONS REMAIN

6. In 1974 the Supreme Court in *Oneida I*, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), decided for the first time that the federal courts have federal question jurisdiction over Indian suits based upon the violation of the federal Trade and Intercourse Acts, but it remained unclear as a legal matter whether Indian nations had a valid cause of action based upon the Trade and Intercourse Acts, based upon the common law, or based on any other theory.

7. *Oneida I* also left undecided the question whether any statute of limitations or other time bars applied to such actions and the question of the effect of the Trade and Intercourse Acts on the Indian title to the lands in question, among other questions.

8. Most but not all of the above issues were decided in 1985 in *Oneida II, County of Oneida, New York, et al.*, v. *Oneida Indian Nation of New York State*, 470 U.S. 226 (1985).

9. Nevertheless, *Oneida II* left undecided or open to argument a number of remaining issues, particularly the issues of what remedies may be available for violation of the Trade and Intercourse Acts, whether states have immunity from such suits, and whether there is a viable cause of action for the illegal taking of Indian lands prior to the Trade and Intercourse Acts, among others.

10. Thus, in 1975 and later, the Onondaga Nation Chiefs, Clan Mothers, and other leaders did not know and could not know whether any lawsuit regarding their illegally taken lands could possibly be viable, because the law remained uncertain and undecided. The Onondaga Nation, like other Indian nations, had been excluded from the federal and state courts for two centuries, and no lawsuit by any Indian nation under the Trade and Intercourse Acts had ever been successfully concluded on the merits.

11. The Onondaga Nation and other Nations of the Haudenosaunee were very well aware of these issues and legal questions, and they followed very closely the progress of the Oneida lawsuits and other lawsuits. As set out below in further detail, the Onondaga Nation and the Haudenosaunee were parties to some of the lawsuits filed by other Indian nations, and in addition, I served as counsel to one of the Oneida parties in *Oneida II*.

ONONDAGA NATION LAND RIGHTS EFFORTS AFTER *ONEIDA I*

12. In about 1976, the Haudenosaunee, including the Onondaga Nation, created the Haudenosaunee Lands Committee, including representatives of each nation, for the purpose of studying and making recommendations about the land rights of the member nations of the Confederacy. Two of the first recommendations of the Haudenosaunee Lands Committee were that the land claims or land issues should be resolved through negotiations so far as possible and that the nations of the Haudenosaunee should address land issues as a Confederacy.

13. In June and July of 1976, the Haudenosaunee, including the Onondaga Nation, held two meetings with White House counsel, Roberta "Bobbie" Kilberg to discuss the need for a negotiated resolution of the land rights issues of the Haudenosaunee and the Onondaga Nation, particularly the unlawful takings by New York State. One particular issue discussed was the pendency of the Indian Claims Commission case known as Docket 84, an unauthorized claim that threatened to damage or destroy land rights and claims of the nations of the Haudenosaunee, including the Onondaga Nation. This case is discussed further in paragraphs 33 - 34 below.

14. However, despite persistent efforts by the Haudenosaunee Lands Committee and the Onondaga Nation, negotiations were not actually commenced. Nevertheless, the Lands Committee, between 1976 and 1982, continued to meet as often as every two weeks and continued to prepare for the requested negotiations with the United States.

15. Later in 1976, the United States did assist the Onondaga Nation in response to a complaint by the Nation pursuant to Article VII of the Treaty of Canandaigua of 1794. The United States provided legal assistance to the Nation to remove a number of non-Indian intruders on the Onondaga Nation territory south of Syracuse, New York. The issue of the intruders was a

very difficult land rights issue at that time.

16. The Haudenosaunee Lands Committee continued to seek United States involvement in resolving land rights issues, including those of the Onondaga Nation. At last, in 1982, a delegation of the Haudenosaunee, including a number of Onondaga Chiefs and Clan Mothers, met on two occasions with White House Advisor, William P. Barr and again requested negotiations with the United States to resolve the land claim issues involving New York State.

17. As a result of these meetings, the Reagan Administration White House staff eventually agreed to begin negotiations with the Haudenosaunee and so also did the Interior Department. Despite these assurances and despite continued efforts by the Haudenosaunee and the Onondaga Nation, negotiations were never actually begun for reasons unknown to us.

ONONDAGA NATION EFFORTS TO PROTECT RIGHTS TO INDIAN LANDS

18. Another serious legal problem stood in the way of any possible suit in the federal courts to secure Onondaga land rights, the asserted legal power of Congress to "extinguish" Indian land rights without due process of law and without any compensation. This supposed power of Congress had been upheld by the Supreme Court in *Tee-Hit-Ton Indians* v. *the United States*, 348 U.S. 272 (1955). The Onondaga Nation leaders and the Haudenosaunee Lands Committee knew of this asserted legal power by 1975 if not earlier.

19. The Onondaga and Haudenosaunee Chiefs and leaders also knew that the United States Congress claimed "plenary power" to legislate about Indian matters, including Indian lands, Indian land rights, and Indian rights of self-government, practically without any limitation by the United States Constitution and its Bill of Rights.

20. These well-established legal doctrines about the virtually unlimited powers of Congress to extinguish Indian land titles and land rights made it clear to the Onondaga Nation Chiefs, Clan Mothers and other leaders that any suit concerning the Nation's lands could and probably would result in congressional action to extinguish the Nation's asserted land rights and perhaps to take away other rights of the Nation as well. These serious threats discouraged legal action by the Onondaga Nation and the Haudenosaunee with regard to the land rights claims against the State of New York.

21. The Haudenosaunee Lands Committee and the Onondaga Nation concluded that any lawsuit concerning the Nation's lands taken by New York State would likely be futile and possibly counter-productive unless something could be done to change the law or to reduce the likelihood of federal action to extinguish the Nation's rights.

22. Leaders of the Onondaga Nation were present along with me and with Oneida Nation leaders at a meeting in Washington, D.C., with then Interior Department Solicitor Leo Krulitz in about 1978. At this meeting to discuss the Oneida land claims, Krulitz demanded that the Oneidas promptly present final settlement terms for resolving their land claims. He said explicitly that unless the Oneidas did so, the Interior Department would propose legislation to Congress to simply extinguish the claims unilaterally.

23. So great was the concern about the well-known extinguishment power of the federal government, that the Onondaga Nation and the Haudenosaunee took this issue to the United Nations as a human rights issue in1976 and 1977, along with specific proposals to outlaw the discriminatory extinguishment power over Indian lands.

24. Leon Shenandoah, then Tadadaho, the head of the Haudenosaunee and a member of

the Onondaga Nation Council of Chiefs, Chief Oren Lyons (still on the Council), Clan Mother Audrey Shenandoah, and many other Chiefs and leaders of the Haudenosaunee presented their land rights issues to the United Nations in Geneva, Switzerland in September of 1977. They demanded an end to the discriminatory treatment of Indian land rights in the United States and an end to the denial of other human rights. The Declaration of the Rights of Indigenous Peoples, which was first proposed at that conference by the Onondaga Nation and others, is now before the United Nations General Assembly for probable adoption at the current session.

25. Later, in 1980, a formal human rights complaint was lodged against the United States at the United Nations complaining of the discriminatory legal doctrines that permit the United States to take Indian lands at will and without the payment of any compensation. I prepared and filed the complaint on behalf of the Haudenosaunee, including the Onondaga Nation, and on behalf of certain other Indian nations.

26. The fears of extinguishment proved justified in 1982 when the Ancient Indian Land Claims Settlement Act bill was introduced in Congress. The purpose of this bill was to extinguish, unilaterally, the Indian land rights with respect to the lands illegally taken by New York State (and others) and provide a modicum of compensation — far less than fair market value for the land.

27. The Onondaga Nation, represented by Chief Oren Lyons, and the Haudenosaunee as a whole, represented by Chief Corbett Sundown and other Chiefs, testified against this bill and submitted a written statement which specifically referred to the Nation's land rights and claims against New York for the illegal takings their lands. *See*, Statement of Oren Lyons, Onondaga Nation, and Prepared Statement of the Haudenosaunee (Iroquois Confederacy), Submitted by

Oren Lyons, Onondaga Nation, in *Ancient Indian Land Claims*, Hearing before the Select Committee on Indian Affairs, United States Senate, Ninety-seventh Cong., 2d Sess., on S. 2084, pp. 56-65 (June 23, 1982).

28. I also testified against the bill and submitted a written statement, referring to the Haudenosaunee's land claims against the State of New York and the desire to resolve them fairly and reasonably. *Id.* at 65-74.

29. The Onondaga Nation Chiefs, along with me and other members of the Center's legal staff, worked diligently over a period many months to defeat the bill eventually.

THREATS TO ONONDAGA LAND RIGHTS: THE NEED FOR DEFENSIVE ACTION

30. The Onondaga Nation and the Haudenosaunee Lands Committee were faced with constant, serious threats to the land rights of the nations of the Confederacy in many different situations in the period 1974 to the present. These threats, principally in the form of legal actions and lawsuits relating to Haudenosaunee lands, compelled the Onondaga Nation and the Haudenosaunee to respond defensively to protect their land interests. It was clear that these lawsuits relating to Oneida lands, Seneca lands, Mohawk lands, and Cayuga lands (all member nations of the Confederacy) could result in (and some have resulted in) legal rulings and precedents as well as political actions with a profound adverse impact on the land rights of the Onondaga Nation and all the Indian nations in New York.

31. Accordingly, the Onondaga Nation and the Haudenosaunee were faced with the overwhelming necessity of taking defensive legal actions in many lawsuits. This necessity was enormously burdensome to the Onondaga Nation and the Haudenosaunee, as well as to their

counsel, the Indian Law Resource Center.

32. The Onondaga Nation and the Haudenosaunee during this period, particularly during the 1970's and 1980's, did not have the financial resources to hire the attorneys needed for the extensive and specialized litigation work of the Trade and Intercourse Act cases. For this reason, the Indian Law Resource Center provided legal assistance without charge so far as our funding permitted.

33. The first major matter that preoccupied the Onondaga Nation and called for defensive legal action was the case known as Docket 84 in the federal Indian Claims Commission, a claim supposedly in behalf of the "Six Nations". The case had been brought by a group of individuals without any authority to speak for any of the Six Nations, and the claim attorney had agreed to stipulations that could have extinguished the land rights of the Onondaga Nation and the other nations of the Six Nations in regard to the lands that had been illegally taken by New York State.

34. After administrative efforts failed, the Haudenosaunee filed suit in May, 1977 in the federal District Court in Washington, D.C., seeking an injunction against the Secretary of the Interior. *See*, *Six Nations* v. *Andrus*, 610 F.2d 996 (DC Cir. 1979), *cert. denied*, 447 U.S. 922 (1980). Although we did not win the relief we sought, the Haudenosaunee, including the Onondaga witnesses, created a strong evidentiary record that the claim was unauthorized and prosecuted without the knowledge or consent of the Onondaga Nation or the Haudenosaunee. The judgment award in the Indian Claims Commission case has been refused by the Haudenosaunee and has never been paid.

35. Between 1978 and 1982, the Haudenosaunee and the Onondaga Nation were compelled to take legal action to intervene as a party or to participate as *amicus curiae* in three of

the Oneida land claim suits in order to protect the specific interests of the traditional Oneida Nation government in New York as well as the general interest of all Indian nations in New York in the decisional law being developed in those cases. This litigation included many years of motion practice, numerous oral arguments, discovery, evidentiary hearings, and repeated appeals.

36. In 1983, the Oneida of the Thames Band, one of the parties in the Oneida litigation, decided to ally itself with the Haudenosaunee, including the Onondaga Nation. Because of the importance of establishing that there is a valid cause of action for violations of the Trade and Intercourse Act and the importance of winning the Oneida test case in the Court of Appeals and in the United States Supreme Court, the Onondaga Nation and the Haudenosaunee asked me and the attorneys of the Indian Law Resource Center to represent the Oneida of the Thames Band.

37. We represented the Haudenosaunee as *amicus* in the Court of Appeals and the Oneida of the Thames Band in the Supreme Court and helped to win the *Oneida II* decision. The burden on the Haudenosaunee and on the Indian Law Resource Center was enormous.

38. At the same time, between 1982 and 1989, we represented the Thames Band, the Onondaga Nation, and the Haudenosaunee in the Oneida case based on New York's taking of Oneida lands before the Trade and Intercourse Act was adopted in1790. *See, Oneida Indian Nation of New York* v. *State of New York*, 860 F.2d 1145 (2d Cir., 1988), *cert. denied* 493 U.S. 871 (1989). This litigation included an extensive evidentiary hearing on the state of the law during the Articles of Confederation period, two appeals to the Court of Appeals and a petition for review in the U.S. Supreme Court. This too was a test case of enormous importance to the Onondaga Nation to determine whether federal law would recognize a cause of action for such takings. Working for the best possible outcome in that litigation was a strategic priority for

preserving the rights of the Onondaga Nation and the Haudenosaunee. The demands of that litigation, which spanned over six years, made it extremely difficult, if not entirely impossible during that period, for the Onondaga Nation and the Haudenosaunee to bring suit for the taking of Onondaga Nation lands by the State.

39. It was not until the Supreme Court denied certiorari in that case in 1989 (493 U.S. 871) that the federal law on this matter was settled.

40. In 1982, one group of Mohawks from Canada filed a suit in the Northern District of New York seeking the return of Mohawk Nation lands illegally taken by New York in violation of the Trade and Intercourse Acts. The Onondaga Nation along with the Mohawk Nation and the Haudenosaunee responded to this suit in order to prevent the Nation's land interests from being litigated by individuals. The Indian Law Resource Center was called upon to research the Mohawk land claims, advise the Mohawk Chiefs and Clan Mothers, and help to train Mohawk leaders in negotiations and out-of-court dispute resolution skills.

41. That lawsuit by individuals was dismissed. *Canadian St. Regis Band of Mohawk Indians v. State of New York,* 573 F. Supp. 1530 (N.D.N.Y. 1983).

42. The Mohawk Nation claims later became the subject of negotiations with the State and with the federal government until talks broke down in 1988. At that point it was necessary for the Indian Law Resource Center to represent the Mohawk Nation in filing a federal lawsuit asserting the Trade and Intercourse Act claims. A negotiated settlement of the Mohawk claims was reached in 2005, but it has not been implemented, and the litigation continues.

43. In 1986, the land rights of the Tonawanda Senecas, a part of the Haudenosaunee, came into contention in a case against a railroad company. Again, Center attorneys were called

upon to deal with this crisis and help reach a settlement.

44. In 1993, the Seneca Nation of New York (not a member nation of the Haudenosaunee) filed a federal lawsuit claiming Grand Island and a few smaller islands in the Niagara River. The Tonawanda Band of Senecas (a member of the Haudenosaunee) and the Haudenosaunee, including the Onondaga Nation, concluded once again that it was critically important to join that lawsuit in order to protect the interests of the Tonawanda Senecas and to try to avoid any adverse rulings.

45. The Indian Law Resource Center was called upon to represent the Tonawanda Senecas in that action, and we did so until the case was finally concluded in 2006.

46. A further legal case involving Onondaga Nation land rights, which also required Nation time and legal efforts, occurred when a few Onondaga individuals in the Spring of 1997 filed a suit in this Court asserting the land rights of the Nation. *Onondaga Indian Nation, et al., v. State of New York, et al.*, 97-CV-445 NPM-GJD (NDNY 1997).

47. This unauthorized claim was opposed by the Nation as *amicus curiae*, and in due course it was dismissed. Nevertheless, the burden of such legal work slowed the Nation's efforts to find a resolution of its land rights issues concerning the lands illegally taken by New York State.

48. This unauthorized land claim suit nevertheless served the purpose of once again placing New York State on notice that the land rights of the Onondaga Nation in respect to the lands illegally taken by New York State remained unresolved and that the Onondaga Nation government was vigilantly guarding its right to bring such lawsuits in the future.

49. All of the above legal actions (paragraphs 33 through 38) were important measures

that the Onondaga Nation and the Haudenosaunee were compelled to take in order to defend their land rights in cases that they did not initiate. The Nation sought to achieve legal results that would protect Onondaga Nation land rights, sought to defend important legal principles, and sought to determine whether the federal courts and federal law would in fact permit the Nation to bring a successful suit.

ADEQUATE LEGAL RESOURCES WERE NOT AVAILABLE

50. The intense litigation in all of the cases mentioned above meant that the legal resources of the Indian Law Resource Center were exhausted and overtaxed throughout this period. The Center was, for all practical purposes, the only source of legal representation available to the Onondaga Nation and the Haudenosaunee on land rights matters. They could not afford to pay for this legal assistance. Contingent fee arrangements were not trusted and were not feasible in any event because the Onondaga Nation was not primarily interested in money damages.

51. The experience of many Indian claimants in the Indian Claims Commission had made it clear that contingent fee contracts often induced lawyers to seek money damages in preference to other forms of relief. Such arrangements led to improper claims and attorney conflicts of interest, such as occurred in Docket 84 described in paragraphs 33 - 34 above.

52. Before 1995, the Indian Law Resource Center had annual budgets ranging from $167,000 to less than $650,000 to cover all of the Center legal assistance for Indian nations across the United States, including Alaska, and to cover our human rights legal assistance for Indian peoples in Central and South America. Since 1996, the Center's annual budgets have

ranged between $1.1 million and $1.6 million, still a very small amount for a program that provides legal assistance to Indian nations throughout the United States and in many countries of Central and South America as well.

53. The Indian Law Resource Center devoted thousands of attorney hours annually to assisting the Onondaga Nation and the other nations of the Haudenosaunee in their land rights cases, all without charge. We were simply not able to provide the massive amount of attorney assistance that the Onondaga Nation and the Haudenosaunee could well have used since 1974.

54. Nevertheless, I and my colleagues at the Indian Law Resource Center carried out historical and legal research to precisely determine the Onondaga Nation's and the Haudenosaunee's land rights and to document in detail the taking of most of these lands by New York State. This research was undertaken in depth in 1986, soon after the decision in *Oneida II*, and continued for many years.

55. Crucial portions of the historical and legal research concerning the legal validity of the New York State transactions were not completed until 2003 when an expert legal historian was retained to assist in this very specialized and difficult work.

THE ONONDAGA NATION SEEKS ASSISTANCE FROM THE UNITED STATES

56. In May,1989, the Onondaga Council of Chiefs wrote to President George H. W. Bush saying once again that the so-called treaties with New York State were void and in violation of valid treaties with the United States and in violation of federal law. The Chiefs said that they expect to pursue legal remedies but wished to arrange a meeting to discuss these land rights issues.

57. Though no such discussions took place as a result of that request, the Interior Department began in 1992 to consider the possibility of federal legal action on behalf of the Onondaga Nation. Onondaga leaders met with officials of the Eastern Area Office of the Bureau of Indian Affairs and discussed the Bureau's recommendation to sue for title to one area of land taken by the State in violation of the Trade and Intercourse Act. No federal action resulted.

58. At the same time, in 1992, I informed the Onondaga Chiefs that the Indian Law Resource Center did not have the funds to take on any additional litigation, particularly litigation on behalf of the Nation.

59. As a result, the Nation and the Center began a years-long search for capable attorneys and for funding to pay for such legal work. A nation-wide search failed to identify attorneys who could take on the litigation without impossible fees.

60. In order to meet the ballooning needs of the Nation for legal assistance and to move more aggressively in asserting the Onondaga Nation land rights, the Nation and the Indian Law Resource Center began to request assistance from the federal government for the protection of the Nation's land rights.

61. The Onondaga Nation is widely known for its refusal to accept almost all forms of government assistance, but the protection of the Nation's land was a formal treaty obligation of the United States established in the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794.

62. In September, 1995, the Onondaga Council of Chiefs wrote to President Clinton asking explicitly for federal assistance in resolving the Nation's land rights dispute with New York over the illegally taken lands. Funds for attorney fees, litigation assistance and technical

assistance were requested. A copy of that letter is attached as Exhibit A.

63. In December of that year, I requested the Interior Department to initiate litigation on behalf of the Nation against New York State for its violation of the Trade and Intercourse Acts. In early 1996, a formal litigation request was made by the Nation.

64. The Nation in 1996 submitted an application for funding from the Department of Interior for attorney fees and for other expert and technical assistance. No funds or other assistance were made available.

65. In early 1997, the Interior Department sent its litigation request to the Department of Justice, requesting litigation against the State of New York in support of the Onondaga Nation in respect to its lands.

66. From mid-1997 through 2000, the Onondaga Nation Chiefs and I, along with the Nation's General Counsel Joe Heath, made countless contacts with the responsible officials of the Department of Justice and attended countless meetings with these officials in Washington, DC. We requested federal litigation in support of the Nation's planned lawsuit and endlessly explained the need for federal litigation to overcome the State's sovereign immunity defense claims.

67. Over the years, we submitted countless memos to the Department of Justice and answered countless questions from Department lawyers. We were repeatedly assured that a decision would soon be made.

68. During these years, the Nation Chiefs and I, along with Joe Heath, also visited Congressional offices to inform the New York delegation and others in Congress of the Nation's plans to seek justice. We provided detailed information about the Nation's legal plans and about

the Nation's title to the lands taken by New York State.

69. With the repeated assurances of officials in the Justice Department that a decision would soon be made, the Nation waited for the Department of Justice to give its answer.

70. But there was never a decision on the Nation's request, only more meetings and more questions.

71. In January of 2001, all the remaining Justice Department officials we had dealt with departed, and a new administration came in. The Nation renewed its requests.

NEGOTIATIONS WITH NEW YORK STATE ARE FRUITLESS

72. Although New York State was on notice about the Onondaga Nation's claims long before, on December 27, 1988, the Onondaga Nation Council of Chiefs wrote to Governor Mario Cuomo advising him that the Nation regarded the so-called treaties made with the State as void and in violation of United States treaties with the Six Nations and in violation of other federal law. The letter informed that Governor that the Nation expected to take legal action, but wished to discuss these matters nevertheless. A copy of that letter is attached as Exhibit B.

73. It was in 1988 and continuing through 1998 that the Onondaga Nation, the Tuscarora Nation, the Mohawk Nation, and other nations were convulsed with lawlessness and violence on the part of illegal businesses and racketeers attempting to ignore or overthrow the nation governments. The Onondaga Nation was gripped in a serious threat to the rule of law caused by the illegal businesses. The Onondaga Nation had never in the past had need of police or armed law enforcement. During these years of difficulties and confrontation over the illegal businesses, much of the Nation leaders' efforts were devoted to the critical need to bring order to the

community and to bring the businesses under reasonable regulation.

74. More than anything else, this challenge to the rule of law, which the Onondaga Nation successfully resolved, impeded and delayed the Nation in pressing its demands for negotiations with the State.

75. Contacts with the State continued regularly during this period dealing with a variety of matters, especially taxation of sales on the Nation's territory. The Nation suggested talks about the land issues in1996, but without result.

76. Without the benefit of a formal police department, the Nation was able to maintain a peaceful closure of these illegal businesses on its currently recognized territory for a period of more that two years, from 1992 into1994. During this period of time, it became necessary for the Nation leaders and its Clans to work to develop and adopt the Nation's first written laws. This historic and prolonged process resulted in the adoption of the Onondaga Nation Business Rules and Regulations and the Nation's laws regulating outside traders who wished to do business on the Nation's territory.

77. Further, the Nation's leaders and lawyers engaged in an extended period of mediation with the illegal business owners and their attorneys. These mediations were supervised by the United States Department of Justice, Office of Community Relations, but they were not successful, because the illegal business owners eventually broke off the talks.

78. However, negotiations with the State were formally proposed again by the Nation to Governor George Pataki in1997. The Nation offered a preview of the Nation's land rights suit and suggested that it may be possible to resolve the land rights dispute without litigation.

79. A delegation of Onondaga Chiefs, Clan Mothers and other leaders met with

Governor Pataki and members of his staff in Albany on February 25, 1998. Prior to this meeting and also at the meeting, the Governor was given detailed written information about the Nation's legal title to the land illegally taken by the State and about the Nation's plans for litigation in the event that talks failed to resolve the issues. I attended the meeting along with other lawyers for the Nation.

80. On March 26, 1998, a second meeting was held in Albany with Judith Hard, an attorney on the staff of Governor Pataki. Attending the meeting were a number of Onondaga Chiefs and Clan Mothers, General Counsel Joe Heath, and myself, among others. At this meeting, the Nation's planned lawsuit was fully discussed, including the history of the unlawful state treaties, the legal basis of the lawsuit, the value of the land and its resources, and many other issues. The Nation expressed its continuing desire to resolve the land issues out of court if possible.

81. On April 3, 1998, a conference call between myself and Judith Hard discussed plans for further meetings about the Onondaga land issues.

82. On May 22, 1998, a third meeting was held at the Onondaga Longhouse with Judith Hard and other members of the Governor's staff. In addition to Onondaga Chiefs, the meeting was attended by two United States Justice Department attorneys and attorneys for the Nation. The Governor's representative distributed the State's proposed principles for any settlement of the lands issues.

83. Despite further efforts to continue settlement talks with the State, no further meetings were held specifically on land rights issues. The Governor and his staff insisted that the Nation first file its lawsuit before further settlement talks could be held. The Pataki administration told

the Nation that the State could not properly evaluate the strength or complexity of the Nation's land rights claim until formal litigation was actually commenced.

CONGRESS SAYS THERE IS NO TIME LIMIT ON INDIAN SUITS FOR LAND TITLE

84. In 1982, the Haudenosaunee Lands Committee, including the Onondaga Nation, took careful note of the statute of limitation for certain suits by the United States contained in 28 U.S.C. §2415. This limitation was about to expire, and it was widely discussed throughout Indian Country at that time because of its perceived importance to Indian nations. The Haudenosaunee Lands Committee and the Onondaga Nation took note that there were time limits on suits for damages based on contracts or torts, but that there was no time limit for suits for title to Indian lands.

85. The Lands Committee and the Onondaga Nation monitored Congress' consideration of bills to extend the statute of limitations in 28 U.S.C. §2415, as I did myself.

86. Later that year, 1982, the Lands Committee and the Onondaga Nation observed that Congress amended and extended the time limits in §2415 and that Congress left unchanged the provision in §2415(c) which exempted Indian nations' suits for land title or possession from any time limit. This was particularly important to the Onondaga Nation because of the Nation's long-held views about the importance of title as compared to money damages.

COMMUNICATIONS TO THE PUBLIC ABOUT THE NATION'S LAND RIGHTS

87. In 1995, the Onondaga Nation began a deliberate and planned effort to tell the public about the Nation and the Nation's concern about the taking of its lands by New York. The

Nation leaders, including a number of Chiefs, gave attention to communicating with the media and with community groups in the region about the Nation and about land issues.

88. The Nation leaders did as much as they could do to tell the public about the unlawful taking of their lands and about the pollution and environmental degradation that has taken place on much of that land.

89. Since this public education campaign was initiated, hundreds of articles have appeared in the newspapers. Most of these have been in the Syracuse area, but others have appeared in the Rochester and Albany papers and in the *New York Times*.

90. The Nation was particularly concerned that central New Yorkers were simply unaware of the history of how the Haudenosaunee lands were taken by New York State in defiance of the Trade and Intercourse Acts, the United States Constitution, the federal treaties of 1784 and 1794, and in violation of the State's own laws. In order to attempt to fill in this education void, the Nation and its attorneys worked with the *Syracuse Post Standard*, which published an award winning historical series on the Nation and the land takings in August of 2000. This series of six articles, entitled "An Empire Lost", originally appeared on separate days in the Syracuse paper and then was reprinted by the paper in a combined special printing.

91. I declare under penalty of perjury that the foregoing Declaration is true.

November 10, 2006

Date

Robert T. Coulter

ROBERT T. COULTER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF ANTHONY F.C. WALLACE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

ANTHONY F.C. WALLACE, declares under penalty of perjury as follows:

1. I, Anthony F. C. Wallace, am a resident of Parkesburg, Pennsylvania, and am a University Professor of Anthropology, Emeritus, at the University of Pennsylvania. My professional career as anthropologist and historian since the 1940's to the present time has been in considerable part devoted to research and publication on the Indians of the northeastern United States, particularly the Delaware and Iroquois in Pennsylvania and New York. Since 2005 I have served as research consultant to the Indian Law Resource Center in connection with their representation of the Onondaga Nation in its land rights lawsuit against the State of New York. A resume is attached as Exhibit A.

Methodology

2. In preparing this declaration, I have read as an historian several thousand pages of printed documents and transcripts of manuscript sources (much of the latter supplied by previous researchers employed by plaintiffs). I have also as an anthropologist made use of personal

knowledge of Six Nations government and rules of land rights, gained by approximately a year in residence (accumulated over a number of visits) on Six Nations reservations in New York, chiefly at Tuscarora and Allegany, plus brief visits to Grand River in Canada and to Onondaga. I have also published several books and articles in professional journals dealing with Native American subjects (see resume for bibliography) relevant to this period and area.

3. These sources have had to be evaluated for relevance to the issue of laches and further evaluated in accordance with accepted scholarly principles. Principal reliance must be placed on *primary sources*, i.e. documents left by eye-witnesses and participants describing events and customary behavior relevant to the issues. *Secondary works*, i.e. writings by later scholars, may also offer guides to bibliography, the historical context of the primary events, and their interpretation. Primary documents must also be examined for their authenticity, the bias of their authors, the opportunity of the writer to actually observe what he writes about, accuracy of memory, the quality of transcription, and the excellence of the repository. Evidence that does not seem to fit the analyst's own picture of events must also be taken into account. The task ultimately is one of synthesizing information from many sources into a coherent pattern.

Summary of Main Points

4. The Onondaga Nation was actively discouraged from resorting to federal and state courts for settlement of major land issues by actions of the federal and state governments. The right of an Indian nation, apart from the rights of individuals, to bring suit over land issues in federal courts, was uncertain. Actions of both state and federal governments bred a lack of confidence in federal or state legal systems. The State of New York failed to respect native customary law in its several land treaties. And the United States failed to enforce promises it

made in relation to the 1790 Trade and Intercourse Act to ensure fair treatment in land transactions.

5. Ingrained cultural norms among the Onondagas and the Six Nations required, for sale of national territory, the unanimous consent of members of the nation's council of chiefs and the concurrence of clan mothers and warriors. The Iroquois Confederacy (the Six Nations), of which the Onondaga nation was a member, acted as a whole to protect the welfare of each of its member nations, as in disputes over land.

6. The Onondaga Nation has maintained over centuries an acute awareness of the importance of maintaining historical records in a national archive containing the traditional wampum belts representing past agreements and in more recent times written documents.

7. Temporary geographical dispersal caused by the destruction of the Onondaga settlements during the American Revolution made physical assembly and thereby the achievement of consensus more difficult than in normal times.

8. The State of New York, eager to buy land during this dispersal of the Onondagas, failed to secure the agreement of the chiefs' council of the whole nation in its treaties with the Onondagas, and the Onondaga chiefs promptly protested such violations of their customary law. Representatives of the Grand Council of the Confederacy joined in these protests.

9. The traditional means for resolving issues between Indian nations and the English colonies, and later the states and the United States, was by negotiation between sovereign political entities rather than litigation; a system of independent judiciary was not part of native culture and recognizing the authority of federal or state courts would have raised as-yet unresolved issues of sovereignty.

10. The State of New York and the federal government encouraged the continuation of this traditional practice, rather than resort to the unfamiliar system of federal courts (despite occasional federal assertions that the courts were open to Indian plaintiffs).

Onondaga Customary Law Concerning Land Rights and Transfers

11. Onondaga objections to land transactions with New York State from 1788 to 1842 were based on the charge that the State was dealing with persons who had no right to represent the Nation. In order to understand these objections, it is necessary to know something about the Onondagas' customary beliefs and practices regarding land tenure in their own community, and also to grasp the nature of their concepts of national sovereignty, internal governance, and participation in the League of the Iroquois (a confederacy of Indian nations also known as the Haudenosaunee and "Six Nations").

12. From the early years of the colonial period to the present time, the Six Nations of the Iroquois Confederacy resident in what is now New York State -- Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora -- have been recognized as nations exercising a degree of independent sovereignty within their own territories and maintaining law and order according to their own custom by a council of chiefs, whose offices were either hereditary within clans or more recently in some places elected by popular vote. The State still recognizes the council of chiefs of the Onondaga Nation as the authority with whom to do business.

13. The Onondaga Nation's council was then, and still is, composed of chiefs whose titles were hereditary within clans and who were nominated by senior women commonly referred to as "clan mothers." Council decisions and recommendations required unanimity among the chiefs.

14. With respect to the land within the boundaries of the nation, from the colonial period until now, these Indians recognized among themselves two levels of title to the land itself: an underlying title to the entire territory vested in the nation as a whole, and a usufruct title to small portions of land enjoyed by members of the nation and by such others as the council of chiefs might recognize as legitimate residents. Individual families among the Onondagas, for instance, might appropriate to their private use such spaces as a summer fishing camp, like the one visited by General Amherst in July of 1760, where he found an Onondaga family domiciled on the western shore of Oneida Lake. He meticulously counted a man and wife, two children, a dog, a canoe, a gun, and a fishing rod (!), and the resident fisherman was able to indicate the extent of his domain. [A map by a census taker, General Henry B. Carrington, of the land holdings within the Onondaga Reservation as of 1890 is shown facing p. 24 of *The Six Nations of New York: The 1892 United States Extra Census Bulletin*, ed by Robert W. Venables (Ithaca: Cornell University Press, 1995).]

15. Lands unappropriated for agriculture (especially the growing of corn, squash, beans, and tobacco), and for dwellings, orchards, summer fishing camps, and other use by individuals or families were communal or nation lands, such as hunting grounds, streams, and lakes (such as Onondaga Lake). Nation lands could be allocated to individuals or groups as the council saw fit, temporarily or permanently; and abandoned dwelling and farming spaces could revert to the nation. Areas "privately" owned by individuals or family groups could also be transferred to other members of the nation by sharing, sale, lease, or inheritance. [The principle of communal ownership of the nation's territory is attested in William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* (Norman: University of Oklahoma Press, 1998) pp. 7, 113-114. The usufruct ownership of garden plots, houses, and

other property is discussed in Lewis Henry Morgan's classic 1851 ethnography, *The League of the Hodenosaunee or Iroquois* (New York: Dodd, Mead, 1901), Vol. 1, pp. 317-318. My own studies over the course of years at Tuscarora has revealed plainly the principles of underlying ownership by the nation of the entire territory, the existence of "nation land" for public or common use, and the prevalence of private ownership, sale, rental, and inheritance, subject to the underlying national title.]

16. The council fire of the Six Nations Confederacy was, and still is, in the care of the Onondagas. The Confederacy promoted an ethic of mutual inter-tribal peace and tolerance among the member nations that permitted ready travel, marriage, and trade within a wide area.

17. Although each nation claimed a traditional territory as its own, its boundaries were not "lines drawn in the woods" by surveyors but were marked by readily recognizable features such as major rivers, watersheds, and mountain ridges. The combined territory was likened to a Longhouse, the traditional dwelling which housed separate families in separate apartments under one roof. Individual nations could and did appeal to the Grand Council of the Confederacy, composed of 50 chiefs from the several nations, for support when they were threatened or had been injured by another Indian nation or by members of a European colony.

18. By conquest, or by inducing submission from compliant neighboring tribes, the Confederacy established a claim of sovereignty to much of central and western Pennsylvania, western New York, the Ohio Valley as far west as the Mississippi and north to the Great Lakes, and the Virginia Piedmont east of the Appalachians. These conquered nations could not transfer their territory to Europeans without the consent of the League's council at Onondaga and the League could and did transfer its sovereignty over these conquered territories to European or American governments, as at the Treaty of Fort Stanwix in 1784. [Fenton, *The Great Law*, p.

538. There exists a voluminous literature on Iroquois colonial politics. Much of this research has been summarized in Fenton's *Great Law*. Much of my own work has dealt with these issues: see Anthony F. C. Wallace, *King of the Delawares: Teedyuscung, 1700-1763* (Philadelphia: University of Pennsylvania Press, 1949) and *The Death and Rebirth of the Seneca* (New York: Knopf, 1970) See also Paul A. W. Wallace, *Conrad Weiser, 1696-1760: Friend of Colonist and Mohawk* (Philadelphia: University of Pennsylvania Press, 1945) describes the efforts of Pennsylvania's interpreter to mediate among the Six Nations, the refugee communities, conquered tribes, and the province of Pennsylvania.]

19. From post-Revolutionary times, up to the present, one basic rule has governed and still governs the acquisition, use, and transfer of land: the Nation holds an underlying title to all the lands within its boundaries. This title, to all or part, can only be transferred (for instance, to another nation, or to New York State, or to the federal government) by a unanimous decision of the duly appointed Council of Chiefs. If groups within the nation object, however, the chiefs must consult with and gain the agreement of their constituents, the Warriors, the Women, the Clan Mothers (who as we noted earlier, among the Onondagas nominated the chiefs and had the power to impeach them for misconduct), and the clans themselves meeting as independent bodies. In effect, the general populace had to be informed and had to ratify the recommendation of the chiefs in such an important matter as the sale of national land.

Onondaga Historical Consciousness

20. The Iroquois themselves, who in pre-contact times had no written language, were very much concerned with the completeness and accuracy of memory of such historic events as the transfer of nation land. The mnemonic device that was most relied upon to provide cues to important transactions was wampum. Strings and belts of wampum were regularly exchanged by the parties to any formal communication, as a confirmation of the official nature of the statement, and were preserved in a kind of archive, in the care of a formally designated custodian. Some of the belts, six or seven inches wide and up to four feet long, were elaborately woven with figures presenting the different groups and the nature of the agreement that had been reached. [See detailed discussion in Tehanetorens, *Wampum Belts* (Onchiota, N.Y.: Six Nations Indian Museum, 1993).]

21. Lafitau, a French Catholic missionary writing of the Mohawks in his *Moeurs des sauvages Ameriquains*, published in Paris in 1724, concerning belts and strings of wampum, wrote,

> The bank or public treasury consists principally of belts ... which take the place, as I have said, of contracts, public acts, and, in some wise, of records, annals and registers. For, since the Indians have not the use of writing and letters, and are thus given to forgetting the things which take place among them, so to speak, from one minute to the next, they supply this lack by making themselves a local record by the words which they give these belts, each of which stands for a particular affair or the appurtenances of an affair which it represents throughout its existence.... The Agoianders [nobles] and Elders have, besides, the custom of reviewing them often together and dividing among themselves the responsibility of noticing certain ones assigned to them individually so that, in this manner, they forget nothing.

[Fr. Francois F. Lafitau, *Customs of the American Indians...*, 2 vols., trans. W. N. Fenton and Elizabeth Moore (Toronto: The Champlain Society, 1974, 1977), vol. 1 pp.310-311.]

22. Half a century later, the Moravian missionary David Zeisberger in the 1750's was officially made the custodian of the Onondaga archives. He later also described a similar historical repository among the Delawares, who were neighbors and tributaries of the Iroquois: "The chief has the council bag in his possession, as also the treaties that have been made with the governors of the provinces and other documents, although they are not able to read. These constitute the archives, where all messages and reports are kept. With each message or speech there are one or more strings or belts of wampum." [David Zeisberger, *History of the Northern American Indians*, ed. by Archer B. Hubert and William N. Schwarze (Lewisburg, Pa.: Wennawoods Publishing, 1999), pp.3, 93-94.]

23. The Onondaga wampum archive, or at least a major part of it, has been preserved up to the present time. For many years, beginning in the 1890's, it was in the custody of the New York State Museum at Albany; in 1989 the belts were ceremoniously returned to the Onondaga Nation, by whom they are still regarded as a record of past treaty negotiations and agreements. [See Dean R. Snow, *The Iroquois* (Cambridge: Blackwell, 1994), pp. 216-217.] This Onondaga respect for maintaining an accurate history has helped to keep alive their complaints over the loss of their lands.

Temporary Dispersal of the Onondaga Nation

24. During the period from 1779 to about 1850, the Onondaga Nation experienced a series of traumatic events of war, migration, pressure to sell lands, and threats of forced removal from New York to unfamiliar territories in the west. These conditions resulted in the temporary physical dispersal of most of the nation's members from their original settlements near present-day Syracuse. [The general history of the Onondagas is summarized in the two Smithsonian handbooks: J. N. B. Hewitt, "Onondaga," pp.129-135 in Vol.2 of *Handbook of American Indians*

North of Mexico, ed. F. W. Hodge (Washington: Government Printing Office, 1910) and Harold Blau, Jack Campisi, and Elisabeth Tooker, "Onondaga," pp. 491-499 in Vol. 15 of *Handbook of North American Indians: Northeast*, ed. William C. Sturtevant and Bruce Trigger (Washington: Smithsonian Institution, 1978). For the Onondagas' part in the events of the Revolution, see Barbara Graymont, *The Iroquois in the American Revolution* (Syracuse: Syracuse University Press, 1972.]

25. During the American Revolution, in 1779 their main town near Onondaga Lake (present Syracuse, N.Y.) was destroyed by troops operating as part of the famous Sullivan-Clinton campaign to end attacks by pro-British Indians, including individual Onondagas, on the colonial frontier. After the destruction of their main town, along with their gardens and orchards, the majority of the Onondagas fled westward to establish refugee settlements among the Senecas at Buffalo Creek (present Buffalo, N.Y.) and among the Mohawks led by Joseph Brant on the Grand River in Ontario. The Onondaga Chiefs' Council, with the nation's wampum and historical records, was established in a new town with a new council house at Buffalo Creek.

26. After the peace treaty between the Six Nations (including the Onondagas) at Fort Stanwix (Rome, N.Y.) in 1784, a smaller group of Onondagas, presumably including a minority who had remained neutral or favored the Americans in the war, promptly returned to Old Onondaga (near Syracuse). Thus by 1788, when the first of the Onondaga land treaties with New York State was held, the 750 or so Onondagas were divided into four groups, with the council fire of the nation remaining at Buffalo Creek. In 1789 the Reverend Samuel Kirkland, formerly the resident missionary among the Oneidas (whose aboriginal territory adjoined the Onondagas') took a census of the Six Nations in New York and found 301 Onondagas living at Buffalo Creek, 67 at Old Onondaga, and 34 along the Genesee River. ["Kirkland's Census of Iroquois 1789,"

copied from original in Samuel Kirkland Papers, Hamilton College, Clinton, N.Y. A copy is attached as Exhibit B.] A 1785 census at Grand River found 245 Onondagas there. [Cited in Isabel Thompson Kelsay, *Joseph Brant 1743-1807* (Syracuse: Syracuse University Press, 1984), p. 370.]

The Onondaga Land Treaties

27. During the period of dispersal, in the short space of seven years, from 1788 to 1795, the State of New York took control of 99% of the land of the Onondaga Nation. Their land holdings in the center of the state amounted to about 4,000 square miles (about 2,500,000 acres) in a long swath 40 miles wide from the shores of Lake Ontario to the border of Pennsylvania. By four treaties in 1788, 1790, 1793, and 1795, this territory of hunting grounds and villages was reduced to a tiny reservation of about 11 square miles, or about 7100 acres, just south of Onondaga Lake and the site of the present city of Syracuse. Further reductions in the area of their reservation to its present 6,900 acres was accomplished by two later treaties, in 1817 and 1822. At the same time, the State was acquiring the lands of the Onondagas' neighbors on either side, the Oneidas to the east and the Cayugas to the west.

28. Onondaga and other Iroquois land holdings in New York State were further threatened in the infamous treaty of Buffalo Creek in 1838, but a subsequent treaty in 1842 left the Onondaga reservation intact. [Since they were not held under federal authority, the six Onondaga treaties with New York from 1788 to 1822 are not listed in standard compendiums of Indian treaties. They were published however by the New York State Assembly. The treaties of 1788 and 1790 were also printed, along with copious supporting documents, in Franklin B. Hough, ed., *Proceedings of the Commissioners of Indian Affairs, Appointed by Law for the Extinguishment of Indian Titles in the State of New York* (Albany: J. Munsell, 1861), Vol. I pp.

198-203, Vol. II pp. 400-402, and have been made available online by the University of Oklahoma Law Library. Copies are attached as Exhibit C. The treaties of 1838 and 1842 are printed in Charles J. Kappler, *Indian Affairs: Laws and Treaties, Vol. II* (Washington: Government Printing Office, 1904).]

29. After the Revolution, which ended in 1783, the State was eager to obtain the Onondaga Nation lands, in part for a "military tract" for allocation to veterans of the war, and the remainder for sale to speculators and settlers seeking to establish themselves in towns and farms throughout central New York. West of the Cayugas lay the lands of the Senecas, the pre-emption right to buy whose lands had been assigned to Massachusetts, whose colonial charter overlapped New York's. Part of the Seneca lands was acquired by the Massachusetts firm of Phelps and Gorham, also in 1788, and most of the remainder was acquired by their successor, the Holland Land Company, in 1797. In 1788, a rapacious partnership of New York speculators had obtained from the Six Nations a 999-year "lease" to virtually all of their land in New York State, the so-called Livingston Lease," which was disallowed however by a state law that prohibited private purchases of Indian land within the State's pre-emption zone. [Hough, Vol. I, pp. 119-128, attached as Exhibit D.]

30. Thus, in less than ten years, from 1788 to 1797, virtually all of the lands of the Six Nations in the State of New York west of the Line of Property established at the treaty of Fort Stanwix in 1768 and confirmed by New York statute in 1788 had been acquired by the State and by one vast land company, the Holland Land Company, eventually to be known as the Ogden Land Company. The State still asserts the pre-emption right to purchase the Onondaga Reservation and such holdings as the Oneidas still possess, and Ogden still holds the pre-emption right to purchase the remaining Seneca lands. [The text of the treaty of Ft. Stanwix

1784 does not mention the 1768 Line of Property but the Iroquois negotiators demanded that this be retained as the eastern line of Six Nations land holdings. The text of the New York statute of 1788 is published in *Eighteenth Annual Report of the Bureau of American Ethnology* Part 2 (Washington: Government Printing Office, 1899), pp. 585-586. An official map of the line is reproduced in Fenton, *The Great Law*, p. 538.]

Onondaga Protests Against the Land Treaties

31. The Onondaga chiefs' council immediately protested these land treaties. The principal objection was based on the insistence of the State of New York on negotiating almost exclusively with the small band at Old Onondaga, who the census data show constituted only 12% of the Nation's population. The majority resided at Buffalo Creek, where the new chiefs' council house was built, the official council fire was lit, and the Nation's archives were preserved.

32. The 1788 Onondaga treaty was held at Fort Stanwix (now Rome, N.Y.) between Governor Clinton and commissioners of the State of New York and representatives of the small band of pro-American Onondagas still occupying Old Onondaga. Fort Stanwix was a convenient location for the Governor, being only a third of the distance from Albany to Buffalo Creek, and connected to the city of Albany by a wagon road. Also it was closer to Old Onondaga than Buffalo Creek. The chiefs from Buffalo Creek would have to travel, on foot, some 200 miles.

33. In the written text of this treaty, these Onondagas ceded to New York all the Nation's territory, the State retroceding to the Nation a reservation of 100 square miles embracing Onondaga Lake and the Onondaga village. The minutes of the treaty negotiations, however, suggest that the New York commissioners deliberately deceived the Indian representatives into thinking that they were agreeing to a lease, more favorable than the discredited Livingston Lease,

rather than an outright sale. [New York State Archives, A-1823, Legislative Assembly Papers, "Proceedings of the Negotiation between the Onondaga Nation and Commissioners of the State of New York," Vol. 40, folios 140-149. The Legislative Assembly Papers are temporarily unavailable. See attached letter of James D. Folts, New York State Archives, Exhibit E.]

34. When the chiefs at Buffalo Creek learned of this transaction, they at once protested that the treaty was invalid because the Onondaga chiefs' council had not been a party to the negotiations, had not signed the treaty document, and had not received any of the compensation. Those who had "sold" the lands to New York were "young men" or "children" not authorised to sell the Nation's lands. Furthermore, the Confederacy council, which had sovereignty over all of the Six Nations' lands, had not been consulted or given their consent to such a major transfer of land rights by either the Onondagas or the Cayugas and Oneidas. [Hough, *Proceedings*, Vol. I, pp. 331-332. Exhibit F.]

35. By way of contrast, the Confederate council had agreed to the Phelps and Gorham purchase. Death threats were made against the two major figures in the faction at old Onondaga, Black Cap and Kahiktoton. In the following year, the Council of the Six Nations addressed the issue in a formal complaint to President Washington, objecting to the Onondaga sale as invalid and pointing out that they had formally approved the Phelps and Gorham transaction. [State Historical Society of Wisconsin, Draper Collection, Series U, Vol.23, pp. 164-169, copy attached as Exhibit G.]

36. On the same day, July 2, the Six Nations Council addressed a similar complaint to Governor Clinton of New York, denying the 1788 sales by not only the Onondagas but also the Cayugas and Oneidas, and endorsing the Livingston Lease. The New York commissioners had

introduced their proposal as a substitute for the Genesee Company's lease of 999 years, promising better treatment by the state. [Hough, *Proceedings*, Vol. I, pp. 331-332, attached as Exhibit H.]

37. As we noted above, it is by no means certain that the Onondagas present at the treaty of 1788 understood that they were being asked to sell, rather than lease, their lands. Whether based on native memory or on reading of the printed accounts of the treaty, an oral tradition still persists at present-day Onondaga that their forebears had intended to lease not sell their land.

38. These objections were so substantial that the Governor concluded that it would be prudent to take them seriously, and so in 1790 he and the commissioners met again at Fort Stanwix with Onondaga chiefs and warriors, including both signers of and dissenters to the previous treaty and a few chiefs representing others of the Six Nations, including Oneidas and Senecas. As we noted above, the 1790 treaty purported to ratify the 1788 agreement and to provide the Onondagas with additional compensation. It cannot be determined from the list of names whether the any of the signers represented the Onondaga chiefs from Buffalo Creek and the Grand Council of the Confederacy.

39. In 1792 it was rumored in Albany that the Onondagas, Oneidas, and Cayugas at Buffalo Creek were proposing to lease or sell more of their lands; this rumor was attributed to the same Kahiktoton who had taken the lead as a Confederacy sachem in the Old Onondaga band in promoting the 1788 cession. Accordingly, in response to this story, in the spring of 1793 the state legislature passed an act authorizing a purchase of more lands from the three tribes.

40. A meeting was held at Fort Stanwix in November of that year, by which the Onondagas there present (not including others of the Six Nations) quit-claimed about three

quarters of the lands "appropriated by the People of the State of New York to the use of the Onondagoes." The treaty also gave the state the right to lay out and open roads through any part of the remaining reserve and put in trust for the use of Ephraim Webster, the interpreter, a square mile of land, half of which lay in the northern part of the remaining reservation. The Onondagas retained the right to share with the people of New York a strip of land around the lake and along the west bank of Onondaga Creek, which ran northward from the village into the lake. [New York State Archives, Legislative Assembly Papers, Vol. 40, pp. 120-149.]

41. This treaty, by which the state acquired the site of the future city of Syracuse, aroused a storm of protest. What had actually happened was that in the fall of 1792, commissioners had visited Buffalo Creek and attempted to persuade the chiefs there to sell part of the reservation at Old Onondaga. The chiefs put the commissioners off, saying that they were scheduled to begin their winter hunt, but invited the commissioners to return in the spring to discuss the matter. In the spring, the Governor invited the chiefs to meet with him in Albany to treat for lands. The chiefs in response sent a delegation, inviting the Governor to come to the council fire at Buffalo Creek, which was the proper place for the Onondaga Nation to do business, and explaining their system of land rights. Before this delegation could make contact with the New York commissioners, however, these commissioners had held a separate treaty with the faction at Old Onondaga, the treaty of 1793 described above. [NY Archives, Leg. Ass. Pp., A-1823, Vol. 40, pp. 297-298.]

42. Protests against the 1793 treaty were repeated again in the spring of 1794. A delegation of Onondaga Chiefs from Buffalo Creek marched east toward Albany in the spring, meeting with the federal agent Israel Chapin at Onondaga. There on March 4th, the Onondaga

spokesman Clear Sky delivered a blunt message, which was forwarded to the Governor at Albany. The most cogent passage is worth quoting in full:

> ... we wish to see the Governor and reveal our minds to him, as he has not before paid that attention to the principal chiefs which he ought, as he has been trading with but few of the Indians living at Cayuga and Onondago, which we consider as it were but children, with whom he has traded, which was not properly intitled to dispose of the lands, without our consent But has Generally Confirmed his bargains with these few and Neglected the principal Chiefs who are the proper owners of the Land. Brother, You recollect last fall we understood the Governor wished to purchase our Lands, but we declined meeting on account of the Winter Season being so near approaching and would not so well accomodate the business & desired it might be postponed until Spring. And we conceive the Governor has wished to trade with a few who reside on the Lands at Cayuga & Onondago, without consulting the principal Chiefs, or proper owners, and we consider him as one who wishes to defraud us of our Land.

[NY State Archives, Leg. Ass. Pp., vol. 40; original in New York Historical Society, O'Reilly Papers. A copy is attached as Exhibit I.] In the meantime, however, the Governor had been meeting at Albany with the Old Onondaga faction, who reaffirmed their 1793 actions.

43. This practice of treating solely with the eastern faction was followed again in 1795 at the Treaty of Cayuga Ferry where the remaining rights around the lake and along Onondaga Creek were handed over.

44. Some years later, in 1817 and 1822, the state again treated with the local Onondagas for smaller grants of land, including the allotment to Kahiktoton and two other leaders of a mile-square tract [a tract of a square mile] on the remaining reserve, now shrunken to 6100 acres, its present (2006) size. It would appear from his conduct that the Governor was taking the position that he would treat with whomever he was pleased to consider the owners of the reservation.

The Tradition of Resolving Disputes by Negotiation Between Sovereigns Rather than by Litigation

45. It is clear that the responsible Onondaga chiefs were outraged by the failure of the State of New York to recognize that the Six Nations had a well-established system of land rights, and procedures for transfer of land, that had been exercised for more than a hundred years in relations with Dutch and British colonial authorities. The traditional means for resolving such issues between Indian nations and the English colonies, and later the states and the United States, was by negotiation between sovereign political entities rather than litigation; a system of independent courts and resolution of disputes by courts were not part of native culture and recognizing the authority of federal or state courts would have raised as-yet unresolved issues of sovereignty.

46. To cite one example, protests against improper land transfers had been made by the Mohawks since the beginning of the 18th century, and the Onondaga chiefs, as central figures in the Grand Council of the Confederacy, had undoubtedly been aware of these complaints. One case of fraud, the so-called "Kayaderoseras Patent," involving up to hundreds of thousands of acres of prime Mohawk hunting grounds, had so soured relations between the British Government and the Iroquois that there were fears the Six Nations would join the French in war against the Crown colony of New York. The matter was in dispute and subject to negotiations from 1702 until 1768, when the Line of Property was drawn separating Iroquois and British lands in the colonies. [The affair of the Kayaderoseras Patent is discussed at length in Georgiana C. Nammack, *Fraud, Politics, and the Dispossession of the Indians: The Iroquois Land Frontier in the Colonial Period* (Norman: University of Oklahoma Press, 1969.]

47. Iroquois land claims were thus not minor matters to be settled in some lesser civil court but were issues of major political importance, to be settled by negotiation between the legitimate representatives of sovereign nations. Conferences over major issues, such as war and

peace, trade agreements, alliances, and major cessions of land, were properly conducted according to Iroquois custom, and this is clearly revealed in the records of numerous Iroquois treaties throughout the 17th and 18th centuries. They were official events, held in public and not "in the bushes," solemnized by strict native protocol, with formal addresses by skilled speakers instructed by the council, exchanges of wampum, and, at times, the signing of a treaty document, which served as evidence of the agreement just did the wampum belts retained by both sides.

48. With the failure of negotiations with New York State, the Iroquois leaders turned to the United States government for support, trusting in the promises implicitly made in the 1790 Trade and Intercourse Act, which were explained to them repeatedly, that the United States alone had the authority to call and supervise all treaties involving the sale of land, and would ensure fair treatment for the Indians. Yet the Iroquois also counted on the tradition of the Chain of Friendship that had bound them securely to the British interest centered in the authorities at Albany. But this faith in the State and the Federal Government was soon to be replaced by suspicion and distrust. Fair words were not followed by fair actions.

Continuance of the Negotiation Format by New York

49. Despite recommendations by hard-liners that New York discontinue recognizing the Six Nations and its constituent members as sovereign nations, Governor George Clinton and the Committee on Indian Affairs chose to continue, at least in treaty ceremony, the policy of accomodation that had guided their British forerunners in Albany. Specifically, they recognized, as had the Dutch and British before them, the Indian right of soil, and the legal necessity of purchasing the land from the Indians in order to obtain a clear title. (Whatever inflated assertions might be made in the name of the "Right of Discovery," as a practical matter the Indians owned and occupied the land and were prepared to defend what they considered to be their own.)

50. Clinton, who was intent upon maintaining peace on the frontiers while acquiring Iroquois lands to satisfy the demands of prospective settlers from Massachusetts and of the state's own war veterans for their promised reward for military service, saw no advantage in antagonizing the Indian people whose good will was needed to persuade them to sell their aboriginal estates. In opening up communications with the Onondagas and the other nations at Fort Stanwix in the fall of 1784, he and his deputies explicitly declared their intent to treat the Hodenosaunee as "Brethren," addressed the whole body as the "Six Nations," and proposed to polish the old Chain of Friendship binding Albany to Onondaga and to light again the old "Council Fire" at which as of old the State and the Hodenosaunee could resolve any differences between them over such matters as land rights, property lines, and trade. He proposed to follow "the ancient Custom in which Treaties have been conducted between You and Us and our Ancestors." [Hough, *Proceedings*, Vol. I, p. 50, attached as Exhibit J.] They pointedly treated the conference as a meeting between equally sovereign nations.

51. Again, in 1790, during preparations for the treaty of 1790, the Governor explicitly recommended to the Onondagas and Cayugas that any Indian complaints about land or other matters should be settled by negotiation:

> Brothers: It has always been the Custom between your Ancestors and ours, whenever there was any Uneasiness between them, to meet together at a Council Fire, and smoke their Pipes together, and to open their Minds to each other, and so they were always in Peace and Friendship.... This was a good Custom and we hope it will be forever observed, and therefore we wish to meet a convenient Number of you, and who may be authorized to represent and transact Business for the whole of you, at the Council Fire which we propose to kindle at Fort Schuyler on the first Day of June next.

[*Ibid.*, Vol.II, p. 370, attached as Exhibit K.]

52. This, indeed, was the form in which the six treaties of land cession between the State of New York and the Onondaga Nation were conducted in 1788, 1790, 1793, 1795, 1817, and 1822.

What is relevant to the issue of delay in filing a claim in federal court is the fact that New York actively encouraged the Onondagas (as it did other Iroquois nations) to *negotiate* any grievances over land transactions in meetings held in accordance with the traditional forms of treaty protocol.

The Federal Policy of Distancing Itself from New York Indian Affairs

53. The Articles of Confederation, which governed Indian relations until1789, reserved to the federal government the right to treat with Indians "not members of any State." The State of New York considered that the Six Nations in New York *were* members of that State and, as we have seen, promptly proceeded with their plans to acquire Indian lands for their military veterans, for general speculation and settlement, and to satisfy the pre-emption right claimed by Massachusetts.

54. After adoption of the new Constitution and the passage of the Trade and Intercourse Act of 1790, which required federal supervision and sanction, the Senate's approval, and presidential signing, of Indian treaties, including land purchases, the State of New York nevertheless continued a policy of unilateral negotiation with the separate nations of the Hodenosaunee. In 1791, Henry Knox, then Secretary of War, advised Governor Clinton that two grants of land had been made to individual whites by the Cayugas and Senecas contrary to the provisions of the Trade and Intercourse Act. But he explicitly made it clear that he would not object to the transactions if the State of New York "should judge that it would derive any benefit" from them [*American State Papers, Indian Affairs*, Vol. 1, p. 169.] Although the federal

government used military force against individual white residents of Pennsylvania during the Whiskey Rebellion in 1794, it would have been disruptive of the Union to use force against a state in order to enforce the Trade and Intercourse Act.

55. At the beginning, there were efforts by the Six Nations to enlist the federal government in support of its grievances against the State of New York. In December of 1790, Cornplanter led a Seneca delegation to Philadelphia to meet with President Washington, to complain about improper attempts to buy or lease Seneca lands. The President roundly condemned the transactions that occurred before the Trade and Intercourse Acts and assured the Senecas that the federal government would henceforth protect them from unauthorized seizures of their land. Although he denied that the Phelps and Gorham Purchase had defrauded the Indians, his only suggestion for a redress of this and other grievances over land was to file a lawsuit. "If however you should have any just cause of complaint against him [Phelps], and can make satisfactory proof thereof, the Federal Courts will be open to you for redress, as to all other persons." [[2] John C. Fitzpatrick, ed., *The Writings of George Washington* (Washington: Government Printing Office, 1931-44), Dec. 29, 1790.]

56. In the negotiations leading to the Treaty of Canandaigua in 1794, the U. S. Commissioner Timothy Pickering reiterated that under U. S. Law, the 1790 Trade and Intercourse Act, the rights of the Indians to their land would be protected and that the law required that any treaty be approved by the President and the Senate. [Massachusetts Historical Society, Pickering Papers, Vol. 62, folios 217-230. A copy is attached as Exhibit L.]

57. Again in the winter of 1801-1802, a delegation of Senecas and Onondagas visited the seat of government, now in Washington, D.C., to complain about land matters. This party

was led by the Seneca prophet Handsome Lake and his half-brother Cornplanter. The delegation did not negotiate with President Jefferson in person but conducted their business with Secretary of War Henry Dearborn, in whose office Indian affairs were placed. Handsome Lake's complaints dealt primarily with the Treaty of Big Tree in 1797, in which the Senecas sold most of their remaining lands, preserving for the use of themselves and their Indians guests certain reservations, including one of ten miles square for the personal use of Handsome Lake. They condemned their "White Brothers ... who are lost for taking all our Land from us." He wanted copies of deeds or other evidences of their title to "the little land we have left" and Dearborn ordered that such copies be made. [National Archives, Record Group 75, Sec. War Lrs. Sent, Indian Affairs, Vol. A, March 17, 1802. A copy is attached as Exhibit M.]

58. The duplicity behind the fair words of the President and the Secretary of War is also revealed in Dearborn's correspondence. On the 17th of March, 1802, as the Seneca and Onondaga delegations were preparing to leave Washington, Dearborn wrote them a warm letter of assurance that their right to their lands would be guaranteed by the United States "unless they voluntarily relinquish or dispose of the same." [Haverford College Library, Philadelphia Yearly Meeting, Indian Committee, Box 1 (reel 44). A copy of the original in the National Archives is attached as Exhibit N.] On the same date, Dearborn wrote to one John Taylor commissioning him to convene a meeting between the State of New York and the Six Nations for the purpose of arranging New York's purchase of Indian lands. [National Archives, RG 75. Exhibit O.]

59. In due course in June, the state's commissioners proceeded to Buffalo Creek. On the way, they stopped at Onondaga to see if they could pick up some land. But the Indians there "in peremptory terms objected to the sale of any part of their reservation."

60. No sooner had the delegates to Washington returned home than they were greeted by Commissioners from New York asking to purchase more land from the Senecas, Cayugas, and Onondagas. But on this occasion, Handsome Lake was in command. He angrily rejected the proposal to sell more land and his brother Cornplanter covered the fire, ending the proceedings. [New York State Archives, Legislative Assembly Papers, Vol.40, pp. 373-380.]

61. Handsome Lake then wrote a letter to Jefferson, protesting the pressure to sell lands. Jefferson in reply defended the legality of the purchase of the lands which, he said, had been voluntarily sold under federal supervision. Selling land in exchange for the tools of modern husbandry might even be a good thing. He went on to praise the prophet's work in combating the use of alcoholic beverages and his encouragement of white agricultural methods, and endorsed the prophet's leadership of the revitalization movement among the Six Nations. "Go on, then, brother in the great reformation you have undertaken.... You are our brethren in the same land; we wish your prosperity as brethren should do. Farewell!" [Anthony Wallace, *Death and Rebirth of the Seneca,* pp. 271-72.] Jefferson did not reveal in these exchanges that his basic policy was to acquire as much Indian land as possible and even have all eastern Indians re-located west of the Mississippi into the newly acquired Louisiana Purchase. [Anthony Wallace, *Jefferson and the Indians.*]

62. The federal administration in Washington at this time had a general Indian policy that began with the assumption that Indian land had to be acquired to provide for the military security of the country, from threats posed by Spanish, French, and British colonies on her borders and from Indian nations defending their territories and possibly allied with the foreign powers, and to open up land for occupancy and economic development by a population

expanding from natural increase, from European immigration, and from the importation of slaves from Africa. In this large scenario, the Indians of New York and Pennsylvania had to be kept peaceable and discouraged from joining the more militant nations to the west, and at the same time persuaded to part with as much of their own lands as possible as quickly as possible.

63. On the one hand, Washington and his successors in the presidency were quick to assure the Hodenosaunee that the United States guaranteed their right to remain on their land forever, if they so wished; but at the same time, they urged them to sell their land to whites who were willing to buy. In the case of New York, the federal establishment seems to have tacitly accepted the state's claim of the right of pre-emption (i.e., an exclusive option to purchase) derived from its colonial charter. When the state of New York moved to purchase, the federal authorities even under the Trade and Intercourse Act of 1790 seem to have mostly stood aside and turned a blind eye to the infraction of the law.

64. As the years rolled by, the United States assumed an even more aggressive role in promoting the purchase of Indian lands. With the consummation of the Louisiana Purchase in 1803, President Jefferson saw an opportunity to resolve the Indian question by one dramatic stroke. He proposed, without success to be sure, an amendment to the Constitution that would have provided for a major exchange of populations, the Indians of the east being moved west of the Mississippi, and the French and Spanish residents of Louisiana being transported to the east of that river, where they could be assimilated and educated into an Anglo-Saxon cultural milieu. [Anthony Wallace, *Jefferson and the Indians.*]

65. In 1810, the then Secretary of War under President Madison and officers of the Ogden Land Company (successor to the Holland Land Company) engaged in a secret scheme

with U.S. Indian agent Jasper Parrish to persuade the New York Iroquois to sell their reservations in New York to the Ogden company and move west to new land to be provided for them by the U.S. Government west of the Mississippi, in Arkansas. The land company planned to leave the actual negotiation with the Indians "entirely in the hands of the Agents of the General Government," who would "do everything in their power, according to their Instructions from the Government, to induce the Indians to accept of a grant of land in the west." [Huntington Library, HM 8900, Troup to Parrish, Aug. 24, 1810.October 20, 2006; a transcript of the letter, provided by the Huntington Library, is attached as Exhibit P.]

66. The idea of getting rid of the eastern Indians surfaced again in the "colonization" policy of President Monroe, recommended by John Calhoun, and introduced to Congress in 1825. The bill was passed by the Senate but died in the House. Monroe proposed to move the Iroquois to the neighborhood of Green Bay, in Wisconsin, where some of the Oneidas already had a settlement. Other, more numerous tribes might be relocated west of the Mississippi. [Henry R. Schoolcraft, *History of the Indian Tribes of the United States* (Philadelphia: Lippincott, 1857), pp. 406-415, 431.]

67. The Rev. Jedidiah Morse had earlier been dispatched to make a survey of the tribes to be affected; his published report to the Secretary of War, however, suggested that if the goal were to "civilize" the natives, it might be better to effect this program by leaving many of the nations, like the Iroquois, where they were, inasmuch as they had already made much progress. Of the Onondagas, he wrote, "This tribe are unanimously opposed to removal. They must be educated where they are." [Jedidiah Morse, *A Report to the Secretary of War of the United States, on Indian Affairs* (New-Haven: Converse, 1822), pp. 323-324.] The colonization

plan, however, was widely discussed and aroused storms of debate among the Senecas, Onondagas, and others at Buffalo Creek in 1826.

68. Andrew Jackson's own plan for Indian Removal did become law, however, and the 1830's were the decade of the Trail of Tears. The infamous Treaty of Buffalo Creek of 1838, carried out by the aid of bribes and liquor provided under the eyes of the U.S. Commissioners, was intended to accomplish the sale of all of the remaining Hodenosaunee territory in exchange for a new reservation in Kansas. The driving interest in this effort to remove the Six Nations from their land would seem to have been the desire of the land company to profit from the newly completed Erie Canal, whose terminus at Buffalo had made the Buffalo Creek reservation a prime target for land speculators.

69. Although a party of Onondagas and others made an exploratory trip to Kansas, their destined home in the west, there was such a storm of protest from the Iroquois and their white friends, particularly the Quakers, that the discredited treaty was replaced in 1842 by a new document, which preserved the Onondaga Reservation, the Tuscarora Reserve, part of the Tonawanda Seneca Reservation, and the two reserves at Cattaraugus and Allegany. Buffalo Creek, however, was lost, including the Onondaga village there. [Anthony F. C. Wallace, *The Long, Bitter Trail: Andrew Jackson and the Indians* New York: Hill & Wang, 1993).]

70. Given this history of federal failure to enforce the Trade and Intercourse Acts against New York, of conspiring with the Ogden Land Company's schemes to induce the Senecas to sell their reservations, and of the persistent federal efforts to remove the eastern Indians to enclaves in the west, it is not surprising that the Onondagas did not at once turn to the federal court system to gain satisfaction in their efforts to preserve, let alone reclaim, their land base.

(Indeed, it is not certain that the federal courts would have accepted a plea from an Indian tribe wishing to sue a state for satisfaction of a land claim.) The Federal Government could not have been perceived as favoring the giving back of land to the Onondagas.

Looking Ahead to the Years after 1850

71. In the years after 1850, the Onondaga chiefs' council and the council fire remained at Old Onondaga. Given the history of the years before 1850, confidence in the federal court system as a source of support in seeking remedies for long-standing complaints was no doubt lacking, even if Indian nations had standing in the courts, which seems to have been doubtful.

72. Furthermore, circumstances of life on the small reservation at Onondaga, surrounded by white people, exposed to contemptuous attitudes toward their perceived poverty and their limited education in the English language and arithmetic, treated to pejorative evaluations of Indian morality and aptitude by teachers and missionaries, would have made it difficult for Onondagas (like other indigenous peoples, for that matter) to feel confident in bringing their land claims to court. The national political environment might properly have been considered by them to be hostile, in view of the constant pressure to sell whatever lands they had left and move out of the way of "progress," or else be civilized out of existence as Indians, to fulfill the Anglo-Saxon dream of America's "manifest destiny."

73. Only in recent years have more friendly conditions of access to the legal system encouraged Onondaga and other Indian representatives to turn to the courts for a hearing on their long-standing complaints.

I declare under penalty of perjury that the foregoing declaration is true.

Nov. 10, 2006

Date

Anthony F.C. Wallace

Anthony F.C. Wallace

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF ROBERT E. BIEDER IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

ROBERT E. BIEDER, declares under penalty of perjury as follows:

1. I am a resident of Bloomington, Indiana, and a retired Visiting Professor in the Department of History and in the School of Public and Environmental Affairs at Indiana University. My professional career as historian since 1972 to the present time has been devoted to the teaching the history of American Indian cultures, history of American anthropology, and environmental history. My publications include: *Science Encounters the Indian: A Study of the Early Years of American Ethnology, 1820-1880; A Brief Historical Survey of the Expropriation of American Indian Remains; Contemplating Others: Cultural Contacts in Red and White America;* and *Native American Communities in Wisconsin, 1600-1960.* My many articles have appeared in academic journals both here and abroad. I held five Fulbright Lectureships and two postdoctoral grants. I served two years as resident director of the Center for the History of the

American Indian (now the McNickle Center) at The Newberry Library in Chicago. My curriculum vitae is attached as Exhibit A.

2. I have been engaged, since April 6, 2006, by the Onondaga Nation as a consultant for the purpose of carrying out research and preparing findings and conclusions concerning the historical activities and events relating to the Onondaga Nation and its claims or assertions of rights to its lands during the period 1845 to 1974. I have reviewed much of the relevant materials in the National Archives, in the State Archive in Albany, and in other repositories, as well as much of the secondary works covering this period. My examination of the historical record of this period has thus far been only partial, because there has not been adequate time to complete a full review of the available materials and records. Nevertheless, my research has documented a number of pertinent facts, and the documentary record permits a number of conclusions to be reached.

3. In my research and in the preparation of this Declaration, I have employed the standards of research and scholarship usually applied by professional historians in this field. I have relied on research and documentation of the kind normally relied upon by historians and other professionals in this field.

Six Nations' and Onondaga Nation's continuous concern for land and sovereignty

4. Since before the American Revolution, the Six Nations or Haudenosaunee, and particularly the Onondaga Nation, were concerned with land and sovereignty. These were the subjects of treaties with the Dutch, French, British and Americans. Land and sovereignty continued to be a vital element in their dealings with both the American government and the State of New York. As noted by an eminent historian of the Iroquois, "Much of the Iroquois' focus, as individual nations or as a collective body, since the American Revolution has been to

protect their shrinking land base, especially from New York State." (Hauptman, *Formulating American Indian Policy in New York State, 1970-1986*, 1988, p. 20) According to this same historian, "New York State legislators and representatives in Congress, inspired by assimilationist goals, myopic philanthropy, a need for legal order, or less than noble motives of land and resource acquisition, sought increasing control over Indian affairs in the last quarter of the nineteenth century and the mid twentieth century. In 1888, 1906, 1915, and 1930, the Iroquois successfully fought off efforts seeking this change." (Hauptman, *The Iroquois and the New Deal*, 1981, pp. 7-8.)

5. In 1887, the federal government passed the Severalty Act, or Dawes Act, dividing reservations into family land holdings and bestowing citizenship on allotees. Even before 1887, the State of New York saw allotment of the reservations in the state as an opportunity to solve what it considered its "Indian problem." As early as 1849, New York State introduced a law for "'partition of tribal lands' in order to encourage transition from the reservation stage to full assimilation of the Indians." (Henry S. Manley, "Indian Reservation Ownership in New York, *New York State Bar Bulletin*, 30, April 1960, p. 134) Almost all of the Onondagas rejected both allotment and citizenship, as did others of the Six Nations. Allotment threatened their land base and both threatened their national sovereignty and their ability to conduct their national business.

6. A letter of 1853 illustrates the concern of the Onondaga Nation chiefs about the threat to their land based posed by allotment.

> The undersigned Sachem, Chiefs, headmen & warriors, representing the feelings & interests of a great majority of the Onondaga Indians desire to express their gratitude and acknowledgments to you, for the promptness with which the Assembly Bill, for the survey of the Onondaga Indian lands, was repudiated by yourself & Committee. . . . The survey of our lands is strongly opposed by a great

> majority of the Tribe & the measure is only asked for by a few. We believe that this survey is intended to apportion to each individual Indian his or her share of the lands, thereby destroying that bond of common interest which unites & holds Indian communities together.

(April 3, 1853 - Letter from the Onondaga Chiefs to Hon. Nathan Bristol, New York State Senate, Parker Collection, #2576, American Philosophical Society, Philadelphia). Attached as Exhibit B.

The allotment period, roughly 1849 – 1914, a period of grave threats to Indian lands

7. The allotment period stretched from roughly 1849 to 1914 in New York, and this was a period of almost continuous and grave threats to the lands of all Indian nations in the state. The legislative attempts to allot Indian land and the political climate of the period for all practical purposes prevented the Onondaga Nation from taking any realistic action for the recovery of lands or assertion of its rights to the lands taken by New York State.

8. Considering the dominant political attitudes of the day, some of which are illustrated below, and considering that the courts were closed to land claims by Indian nations, as demonstrated by the 1898 case of *Montauk Tribe of Indians v. Long Island R. Co.*, 28 A.D. 470, 51 N.Y.S. 142, it would have been obviously futile for the Onondaga Nation or any Indian Nation in New York to attempt formal legal action to recover lands previously taken from them. The Nation had no legal or political forum in which it could assert its claims to the lands taken by New York State with any reasonable hope.

9. The major threat to Onondaga land came with an assortment of allotment bills proposed over time in the State legislature. These bills were designed to take the remaining Onondaga Nation land, divide it up, and distribute it to Onondaga families.

10. Most Onondagas rejected all the allotment schemes put forth by New York State, because they feared the loss of their Nation's land. Although most of the Iroquois reservations were already allocated among families and individuals through the traditional custom of dividing land, (Manley, "Indian Reservation Ownership," 1960, p. 134) Onondagas, and the Six Nations in general, feared state imposed allotment. Nor did the Iroquois want citizenship, which was promised to them with allotment. They feared that both would subject them to state taxes and might force some Onondagas to sell their land to non-Indians. Bit by bit the reservation would be sold off; the Onondaga people would become landless and possibly without their traditional government, community and identity. As a collapsed community they would no longer be protected by the federal government nor be able to conduct business as a nation.

11. As each allotment or severalty bill came along, the Onondaga Nation leaders were quick to register their resistance.

12. Reacting to a bill proposed by New York State Assemblyman Thomas G. Alvord in 1880 to divide the Onondaga Reservation in severalty, Onondaga representatives protested before the New York Assembly Committee on Indian Affairs, in Albany on March 27, 1880.

> I represent the Onondaga portion of the people opposed to the passage of this bill, should it be reported favorably to the assembly. Since these people are, by their ignorance of your language, unable to say a word on this subject themselves, I stand before you as their spokesman. I understand that the bill is for the purpose of dividing up these lands into severalties among the Onondaga Indians, but, as I learn from the gentleman who introduced it, it is merely to procure a new treaty. . . . According to my reading of the treaties between this state and the Onondaga Indians, I find nowhere any power given to any outside interest to get up such a bill as this. We protest against it. . . .I heard one gentleman remark that these Indians should not be treated as a sovereign people. Who has treated them as a sovereign people heretofore? Your forefathers. That is the reason why treaties have been made with them. If you make treaties[,] you are bound to respect that treaty stipulations. . . .
>
> * * *

> We understand why such a bill as this has been introduced. It is for the purpose of getting our houses and our lands. As I understand it, it is for that purpose; because the lands cannot be got in any other way, a bill must be introduced for their division. What's to be the consequence? You want to destroy their tribal relations in order that you may get hold of their land. That will be the end of it.

(Speech of Parker in *Speeches of Parker, Logan, Tall-Chief and Webster, Indians, before the Assembly Committee on Indian Affairs on the Bill introduced by Mr. Alvord to divide the Onondaga Reservation in several-ties. Interesting protest of Indian chiefs against the project-eloquence of the Red Man-his plea for a memorial of his race,* 1880, pp. 1-2). Exhibit C.

> This proposed act is entirely unconstitutional. The Indians whom I represent have not asked for it from the legislature. . . . As my friend, Mr Parker has stated, the Onondagas are opposed to dividing up their lands.

(Speech of Indian Logan, *Id.*, p. 2.)

> I wish to say a few words by the desire of my friends here, the chiefs of the Onondaga tribe. We understand that there is a bill before this committee. As soon as we had been informed by some of our white friends what this purported to be--immediately after understanding its object--we instituted a canvass of our people of the age of twenty-one years, to ascertain their wishes and feelings in regard to it. The result was seventy-one opposed it and thirty-four were in favor. We do not favor the proposed bill by a majority of seventy-one to thirty-four.

(Speech of Tall Chief, *Id.*, p. 3)

13. Local newspapers generally supported the Onondaga in their resistance to the Alvord bill. The following items are illustrative.

March 2, 1880. *Syracuse Daily Journal,* p. 1, "The Onondaga Reservation."

> Mr. Alvord has introduced a bill in the Assembly, which if it becomes law, will constitute the Governor, Controller and State Engineer and Surveyor a commission to secure the dissolving of the present treaty relation of the State with the Onondaga Indians, to be done by the assent of a majority of the Indians, break up the tribal relations, and apportion the lands of the Onondaga Indians among the members of that nation. . . . The object of this proposed legislation is to destroy the existing Onondaga people, who would share equally in them. This scheme is not a new one. It has been entertained by speculating white men, for many years,

and has in one manner or another been attempted, with some degrees of success in despoiling the Onondagas of their property in years past.

Exhibit D.

March 5, 1880. *Syracuse Daily Journal,* p. 1. "The Onondagas."

Even though the State has had the cause of the Indian wards in its keeping, the lands reserved to them under solemn treaty have gradually been wrested from them by 'legislation,' and in return for their original right to the whole soil of this region of country, all that remains to them is this reserved tract four and a half by two and a half miles in extent, a beggarly money pittance called an 'annuity' and a few bushels of salt. . . . [T]he Onondaga Reservation . . . is a tempting inducement to the instigators of the plan in Mr. Alvord's bill, which he entitled 'An Act to facilitate the spoliation of the Onondaga Indians of their reserved lands, and to hasten their extermination from the face of the earth.'

Exhibit E.

March 16, 1880. *Syracuse Daily Courier,* p. 4. "The Indian Bill."

The Chiefs of the Onondaga Indians, whose interests will go to the wall with the passage of Mr. Alvord's bill, providing for separate ownership of lands in the Reservation and the dissolution of the State's treaty relations, are making all the opposition in their power. . . .

Exhibit F.

14. On March 22, 1882, Onondaga representatives gathered in Albany to protest the Schoonmaker bill, a bill to divide the lands of the Onondaga, Tuscarora, and Seneca Nations into severalty. Jaris Pierce, an Onondaga, presented a letter sent to the Onondaga Chiefs from Benj. G. Casler, U.S. Indian Agent, New York Agency, stating some of the reasons for opposing the bill. The letter was reprinted in the *Syracuse Journal,* March 24, 1882, p. 1.

Gentlemen - The bill introduced into the Assembly at Albany, N.Y., by Mr Schoonmaker, of Cattaraugus, ostensibly to confer citizenship upon the Indians of the six tribes in this State, and to allot their eight reservations in severalty, demands your careful consideration. A bill similar to the above was passed April 18, 1843, for the Oneida Indians. At that time they owned about twelve hundred acres of land, and now they have but 224 acres. In 1793 the Onondaga Indians owned ten square miles, or sixty-four hundred acres of land,

> and now you own but sixty-one hundred acres. I think you ought to do all you can to keep what you have. . . . I think I can safely say if the Shoonmaker bill should become a law that in ten years from that time you would not own more that one-half the land you now own.

Exhibit G.

15. Another story commented on the Onondagas' opposition to allotment on January 23, 1884, in the *Syracuse Standard*, p. 4, "The Indian Treaty".

> Stubborn as the pagan Onondagas are in their resistance to division of their lands into individual properties, they listen more willingly to schemes for the education and moral uplifting of their people.

Exhibit H.

16. The goal of allotment continued to draw support among New York state legislators in 1888 as revealed in *Report of Special Committee to Investigate the Indian Problem of the State of New York, Appointed by the Assembly of 1888,* Albany, 1889, also called the Whipple Report. J. S. Whipple, Chairman of the Special Committee, gathered letters from New Yorkers supporting reservation allotment from New York citizens. Many saw allotment as a lever to lift the Iroquois to "civilization." The following excerpt from one letter is an example.

> Perhaps you will permit me to express my deep conviction that the remedy for these wrongs and immoralities [of the Onondaga] is to be sought in an equitable division of the territory into homesteads, the lifting of the Indians to citizenship and such other changes as would naturally accompany these fundamental measures. . . . About half of the male adults of the nation desire them [division of land and citizenship]. The prejudices of self-interested chiefs and the ignorance of Pagan women, who do not understand the English language, oppose them.

(F.D. Huntington to J.S. Whipple, Chairman, November 20, 1888. *Report of Special Committee to Investigate the Indian Problem of the State of New York, Appointed by the Assembly of 1888,* Albany, 1889, p. 391). Exhibit I.

17. The topic of allotment for New York reservations also proved a popular topic at the annual Mohonk conferences, where many national figures met for several days to discuss Indian affairs. Philip C. Garrett, named by Governor Theodore Roosevelt to investigate the conditions of the Indians of New York, called for an "emancipation proclamation" for the Indian and especially for the New York Indians. The following statement by Dr. Merrill E. Gates, president of the session in which Garrett spoke, echoed the general opinion of conference participants between 1891 and 1910.

> You will find there are many Indians as well qualified to manage their own property as are the members of this Conference. Still they are herded together there as Indians, and paganism is perpetuated in the heart of the Empire State! Let in the law! Establish homesteads and homes! Allot land, and make self-respecting citizens of these people, too long "coddled" by a special system.

(Philip C. Garrett, "The Relations of the New York Indians to the United States," *Proceedings of the Nineteenth Annual Meeting of the Lake Mohonk Conference of Friends of the Indian 1901,* 1902, p. 45.) Exhibit J.

18. The impetus to grab Indian land still prevailed into the twentieth century. In 1914, Congress considered bill H.R. 18735. This bill provided for allotting in severalty Indian land in the State of New York. See "Letter from the Secretary of the Interior Transmitting Reports of the Interior Department and the Department of Justice on a Bill (H.R. 18735) to Settle the Affairs of the Seneca and Other Indians of the Five Nations" in *Report of the Special Committee on the 'Indian Problem' State of New York*, February 12, 1915. Exhibit K.

19. Assistant U.S. Attorney General, Ernest Knaebel saw the bill as a thinly veiled attempt to "get rid of the Indian" rather than serve the Indian. Commenting on the bill in a letter to Hon. John H. Stephens, Chairman, House of Representatives, Committee on Indian Affairs, Knaebel noted:

> Consequently these legislative presumptions of competency [of the Indian] not only fly in the face of well-known facts, but it seems to me (and I make the suggestion with much deference), are indulged in with too much regard for the idea of getting rid of the Indian and developing his property and too little regard for protecting and developing the Indian himself.

(U.S. House of Representatives, *Senecas and Other Indians of the Five Nations of New York.. Letter from the Secretary of the Interior transmitting Reports of the Interior Department and the Department of Justice on Bill (H.R. 18735) to Settle the Affairs of the Seneca and Other Indians of the Five Nations in the State of New York*, 63rd Congress, 3rd Session. 1915, p. 5).

Others letters received by the Interior Department and the Department of Justice, however, were favorable to the allotment of land.

The *Boylan* case creates hope for the Onondaga Nation's land rights

20. As the Onondaga Nation and other nations of the Haudenosaunee were fighting to keep the land they had under the pressure of allotment efforts, the *Boylan* decision in 1919 reinforced the Onondaga Nation's position that the takings of the Nation's lands by New York were invalid because they were in violation of the federal Trade and Intercourse Acts. For the Six Nations and particularly the Onondaga Nation, the *Boylan* decision ushered in a period of renewed protest and fresh efforts to gain back the land lost to New York State. For New York State, the *Boylan* decision created enormous concern and prompted the creation of a legislative commission to investigate Indian land rights in New York.

21. The case of *United States* v. *Boylan*, 265 F. 165 (2d Cir.1920), although concerning Oneida Nation land, had far-reaching ramifications for the Onondaga Nation and the other nations of the Haudenosaunee. In the *Boylan* case, the federal courts ruled for the first time that transfers of Indian nation lands in New York, without compliance with the Trade and Intercourse Acts, were of no legal effect – that the Indian nation continued to own the land.

22. At issue in the *Boylan* case was a small parcel of 32 acres, all that remained of the Oneida Nation reservation in New York State. The land was mortgaged by one Oneida man to secure a loan, and when the mortgage was foreclosed, the land eventually passed into non-Indian hands. The few Oneida residents were ejected from the land and their furniture placed in the road.

22. The United States sued for the return of the land to the Oneida Nation, because the transfer of the land had occurred without federal involvement or approval and in violation of the federal Trade and Intercourse Act. The federal District Court decided in 1919 that the transfer of the land was void and in violation of the federal law and ordered the Oneidas restored to their property. The decision was appealed, and the federal Court of Appeals for the Second Circuit affirmed the District Court decision the following year, 1920. The opinion included the following conclusion:

> We do not think that the state of New York could extinguish the right of occupancy which belongs to the Indians.

United States v. *Boylan*, 265 F. 165 (2d Cir. 1920) p. 174. (The case is discussed in Arlinda F. Locklear, "Oneida Land Claims," *Iroquois Land Claims*, eds. Christopher Vecsey and William A. Starna, 1988.)

24. This decision opened the legal possibility that the lands that New York had purchased illegally from the Six Nations, including the Onondaga Nation lands, were still the property of the Indian nations. The *Boylan* decision also alerted the State of New York once again that the "treaties" it had made, supposedly with various nations, without complying with federal law might be invalid. The State of New York was forced to investigate the status of Indian land rights in New York and relations with the Six Nations in general.

The State's "Everett Commission Investigates Indian Land Rights"

25. The New York State legislature responded immediately to the *Boylan* decision by passing the Act of Legislature of 1919, known as the Machold bill, and later as Chapter 590 of the Laws of New York. The Act created the New York State Indian Commission, the purpose of which was to "examine into the history, the affairs and transactions" that the people of New York had with the state's Indian tribes. ("The Everett Report," p. 2.) The relevant portions of the "Everett Report", including all the of the material quoted below are attached as Exhibit L.

26. There were thirteen members named to the commission, and E. A. Everett served as chair. The commission visited all the New York Indian reservations, holding hearings at each one. A second round of visitations was planned but a lack of funds prevented this.

27. On August 16th and 17th, 1920, members of the commission visited the Onondaga reservation. In the "search for the status of the Iroquois," the committee discovered that the Onondaga leaders still held firmly to the belief that they were under the legal protection of the Federal government and not under the jurisdiction of the State government and that the Treaty of 1794 was still valid. In a signed passage issued by the Chiefs of the Onondaga Nation, George Thomas, Tadadaho, or Head Chief of the Haudenosaunee, emphasized this.

> It is the will of God and the people, we the Chiefs of the Onondaga Nation of New York State and do hereby agree that the Federal Government of Washington, D.C. be the guardian of the Indians of the State of New York and to see that the treaties of 1795 [sic] between the Five Nations of New York State be lived up to by the said government. We firmly believe that the State of New York has no jurisdiction over the Five Nations of New York State.

("The Everett Report," pp. 62-63.)

28. Other Onondagas reiterated this message. Mr. Jarvis Pierce, an Onondaga, said:

> I hope that the state has no jurisdiction and therefore all the lands will have to be thrown up and you will have to clear the city of Syracuse as you said you would

> redeem all lands taken wrongfully. Shall we call for a new treaty or go to the United States and say the State has taken our land wrongfully?

("The Everett Report," p. 64.)

29. A visitor to the conference, Dr. Earl Bates, noted:

> I have that treaty of which Mr. Pierce speaks, between the State and the Onondagas, showing the basis on which the Onondagas sold their interest except the 100 miles square and kept the sixty-one acres they have.

("The Everett Report," pp. 64-65.) Mr. Pierce answered:

> I suggest that my chiefs bring an action to test the legality of the treaty but as long as you are satisfied you [the New York State Commission] have no claim upon it why all right. I think you are right here to place the question up to the Federal Government.

("The Everett Report," p.65.) Later Mr. Pierce added:

> The State has no jurisdiction, whatever, as I understand and they came here for the purpose of solving the problem what the Indians can show and I make a motion that for the present we go away and find a conclusion to give a reasonable answer, then come together again, I am willing to help all we [sic] can, If the United States has the jurisdiction, we want it to be there.

("The Everett Report," p. 94.)

30. On August 17, 1920, the Commission met with the Oneidas who lived on the Onondaga reservation. Many Oneidas lived there, because, except for 32 acres, their reservation had been taken through illegal purchases by New York State. The same issue of state authority versus federal authority that was discussed at Onondaga the day before was put to the Oneidas.

31. Chief Chapman Skenandoah spoke simply: "I cannot say any more than you have heard. But, we do believe in our hearts we are under the protection of the Federal Government." ("The Everett Report," p. 111.)

32. An Onondaga resolution was read that day as follows:

> [T]he Onondagas of the Six Nations of New York do hereby agree that the Federal Government of Washington, D. C., to deal with the Indians of the State of New York and see that the treaties of 1795 [sic] between the Six Nations of New York State be lived up to by the Federal government. We firmly believe the State of New York has no jurisdiction over the Indians of the State of New York.

("The Everett Report," p. 114.)

33. On July 27, 1920, the New York State Indian Commission held a conference with a Federal Indian Commission in Saratoga, New York. After discussing, without reaching agreement, the issues of state authority and federal authority with respect to the Indians in New York, two of the participants noted the central question before them.

34. Hon. George E. Vaux, Chairman of the Federal Indian Commission, said, "The fundamental of this question is to get back to whether the whole of the state of New York belongs to these Indians and if they should have compensation for what they have lost." ("The Everett Report," p. 39.)

35. Senator Loring M. Black, a member of the Everett Commission, commented, "We cannot at this time, admit that we should return the State of New York to the Indians because we bought the land at a low price." ("The Everett Report," p. 45.)

36. It was apparent, that both the New York and the federal commissioners were very aware that the Nations of the Haudenosaunee had serious claims for the lands taken by New York State in violation of federal law.

37. The Commission's report that Everett submitted to the New York legislature, after months of research and collecting oral testimony on the Haudenosaunee reservations, contained his summary, stating his conclusion that the Indian nations still owned much of New York State.

> I maintain that you [the Iroquois] are the owners of all the territory that was ceded to you at the close of the Revolutionary War and unless you disposed of that property by an instrument as legal and binding and necessary as the conditions of that treaty was to place the property in your possession, you are still the owners of it.

("The Everett Report," pp. 319-20.)

38. Newspapers were quick to announce Everett's findings. For example, on February 10, 1922, the *Syracuse Journal* ran a story on page 7, "Says City Land is Owned by Indians - Everett Would Give Them 6,000,000 Acres - Decision Will Be Resisted - all Members of Commission Will Not Sign Report Which Gives Six Nations title to Lands, Part of Which Lies in Syracuse and Buffalo," reporting, in part:

> Findings by Assemblyman Edward A. Everett of St. Lawrence, chairman of the New York State Indian Commission, which holds that the Six Nations of Indians residing within New York state have title to lands estimated at 6,000,000 acres and valued at approximately $2,500,000,000 are being mailed to tribal chiefs throughout the state.

Exhibit M.

39. The Commission's investigations and hearings had provided the Onondaga Nation Chiefs and other leaders of the Six Nations a forum in which to re-state their claims to their homelands, particularly the lands taken by New York. They made their case plainly, and they demonstrated that even after 100 years they had not acquiesced in the takings nor in New York's assertions of power over them.

40. The Report of the Commission was not acted upon by the New York legislature, but the Report was soon followed by a concerted effort by the Onondaga Nation and the entire Six Nations to take legal action on their land rights in the federal court.

The Six Nations, including the Onondaga Nation, File a Test Case in Federal Court

41. The Six Nations, meeting at Onondaga, in the mid-1920's, sought to formulate a unified strategy for the Confederacy for taking their claims to their lands into the federal courts on the strength of the *Boylan* precedent. The Onondaga Chiefs and the Chiefs of the other nations consulted with various attorneys and advisors in order to fashion a strategy. Edward A. Everett was one of those attorneys.

42. Some of the deliberations of the Six Nations leaders were reported in the press. An excerpt from one such story follows:

43. January 30, 1924. *Syracuse Journal*, p. 15, "Opponents of Indian Claims voted traitors - Resolution Passed Condemning Enemies Spreading Propaganda - Differences Settled - Six Nations Make Progress in Creating Closer Relations of Tribes"

> George Thomas has issued a statement in which he said the object of the council was not so much to determine upon action regarding the claim for millions of dollars worth of land which the tribes believe is rightfully theirs under ancient treaties, as to establish closer relations between the tribes which have been somewhat disrupted in late years, and to reaffirm their allegiance to their ancient forms of government, which they claim was used as a foundation for the Constitution of the United states. This, he declared had been attained. E. F. [sic] Everett, former assemblyman, Potsdam, and now attorney for the Six Nations, made a statement regarding the land claims of the Six Nations. Approximately one-half of New York State is their legal property, he said, including all land east [sic] of Utica. Syracuse is really located on land belong to Onondaga reservation, he said.

Exhibit N.

44. For a time, some Onondaga Chiefs resisted the push to press claims against New York State. On July 7, 1924, the *Post-Standard*, p. 7, reported, "Indians Battle today on Suing Government - Paleface legal Talent Will Oppose Redskin Arguments in Council at Long House."

> Onondaga chiefs and tribesmen with the exception of former Head Chief George Thomas and chief Livingston Crouse, are against starting a legal battle against the government, their opposition stimulated because the proposed suit would make a heavy demand upon the financial resources of the tribe.

Exhibit O.

45. The Six Nations Council ultimately decided to press the legal case. The *Syracuse Journal* reported on July 8, 1924, p. 6, "Indians Engage Counsel in Great Suit for Lands."

> Contracts with lawyers to start suit against the State of New York for approximately $500,000,000 were signed Tuesday morning by the chiefs representing the Six Nations of the Iroquois at the Onondaga Reservation and the contract sent to the Department of Indian affairs [sic] at Washington for ratification. . . . The action of the Iroquois was made unanimous Tuesday morning by Sachem Chief Andrew Gibson, of the Onondaga, giving it his approval.

Exhibit P.

46. The *New York Times,* on December 7, 1924, carried a story, "Indians Claim Half of New York":

> The chiefs who compose the Iroquois Congress have met in the Long House, in due form, to discuss the suit which their people have contemplated since 1790 [?], and they have hired the firm of Wise, Whitney & Parker of New York as counsel. The matter is in the hands of Carl E. Whitney and Walter Clark of this firm, and Edward A. Everett of Potsdam is acting as co-counsel.
>
> The Indians contend that they are the rightful owners of lands whose boundary was established first in 1768, in a treaty made between them and Sir William Johnson, representative of the British Government. They contend that possession of their lands was later confirmed to them, as a federation of nations, by the United States: that the United States Government stipulated the Iroquois might sell no land except by treaty, and that any such treaty would need Federal sanction.
>
> No such treaties have been made, yet the Indians do not now hold the land. They believe that all that has happened in the years of frittering away their holdings is without validity. No sale, they say, has met the requirements laid down by the Federal Government. They hold that statutes of limitation have nothing to do with the issue, nor have squatter rights nor any similar qualification of tenure.

ProQuest Historical Newspapers, The New York Times, 1851-2003, pXX4. Exhibit Q.

47. There can be little doubt, because of the rather extensive news reporting about the Six Nations' land claim, that the New York State government and the public at large was familiar with the land rights claims of the Six Nations and the Onondaga Nation.

The Courthouse Door is Closed: The *Deere* test case

48. On October 10, 1927, James Deere, a St. Regis Mohawk, brought on behalf of himself and the Mohawk Nation, an ejectment suit before the Northern District Court of New York. This was to be a test case for the larger Six Nations' land-claim case. At issue was a square mile of land occupied by the St. Lawrence River Power Company and others. This land, according to the Mohawks, was part of the land base retained by them and the Six Nation Iroquois Confederacy under the Treaty of 1784 between the Confederacy and the United States. A subsequent treaty in 1796 further confirmed the land to the Iroquois. Although part of the Mohawk Nation continued to reside on their treaty- designated lands, New York State and the St. Lawrence River Power Company took possession of the one mile square.

49. New York State's dubious claim to the land came about in a treaty negotiated in March of 1824 with some Indians claiming to represent the Mohawk Nation. The treaty was illegal under the Federal Government's Trade and Intercourse Acts of 1790 and later and the Canandaigua Treaty of 1794 between the United States and the Six Nations of Iroquois. Under the illegal 1824 treaty, the one mile square of land was conveyed to New York State. The State then sold the land to the predecessors of the St. Lawrence River Power Company.

50. The court ruled against Deere and the Mohawks on a technicality, declaring that the federal courts have no jurisdiction to hear Indian land cases of this sort. On appeal, the higher court accepted the lower court's decision, thus shutting down future cases of this type.

51. In 1927, the *Herald Sunday Magazine* mentioned that the Iroquois had mounted a test case in pursuit of their land claims.

> A New Six Nations: Laura Cornelius Kellogg Sees the Old Iroquois Confederacy, Re-established On a Modern Business Basis as the First Fulfillment of a Girlhood Vow Pledging Herself to the Welfare of Her Race. A test case has already been filed in the Federal district court at Utica, a suit brought by James Deere, a Mohawk chief of the St. Regis tribe, against the St. Lawrence Power Company and 17 other occupants of a piece of land once the property of the St. Regis tribe.

(*Herald Sunday Magazine*, November 6, 1927, p. 11).

The Onondaga Nation and the Haudenosaunee persist in their land claims

52. Despite the fact that the federal courts were now decidedly closed to the land rights claims of the Onondaga Nation and the Haudenosaunee, the Chiefs of the Haudenosaunee, lead by Tadadaho George Thomas, continued to press their rights to their illegally taken lands. Some of these efforts are documented in congressional hearings in which the Onondaga Nation and the Haudenosaunee sought to bring their land rights issues to the attention of Congress.

53. In these continuing land claim efforts, the Onondaga Chiefs and the Haudenosaunee had the assistance of Laura Kellogg and her lawyer husband, O.J. Kellogg.

54. Laura "Minnie" Cornelius Kellogg, an Oneida from Wisconsin, asserted that the Iroquois had been cheated out of their lands in New York State through fraudulent treaties pushed by the State on the Six Nations. From 1919, she and her lawyer husband worked to empower the Iroquois and improve conditions on reservations. Her plan of setting up industrial states on the reservations was premised on money that the Six Nations would receive from compensation for lost lands. Her plan entailed raising money from the Iroquois in New York, Wisconsin, Oklahoma, and Canada to hire lawyers and to bring the land claims to court. Over time, many Iroquois became suspicious of her, and her plan eventually collapsed. Regardless of

her motives, her speeches and appeals did draw attention to the land claim issue and supported the findings of E. A. Everett. (Laurence M. Hauptman, "Designing Woman: Minnie Kellogg, Iroquois Leader," *Indian Lives: essays on Nineteenth- and Twentieth-Century Native American Leaders*, eds. L.G. Moses and Raymond Wilson, 1985, pp.159-188)

55. In testimony before the Senate Subcommittee of The Committee on Indians Affairs in 1929, Mrs. Kellogg argued, "[T]here is only one relation which we do recognize, and that is that relation between us and the Government of the United States of 1784." (U.S. Congress. Senate. Subcommittee of the Committee on Indian Affairs. Hearings on S. Res. 79: *A Resolution Directing the Committee on Indian Affairs of the United States Senate to Make a General Survey of the Condition of the Indians of the United States,* 79th Congress. 2nd Session; S. Res. 308, 70th Congress. 2nd Session;: S. Res 263, 71st Congress. Washington, D.C., March 1, November 25-26, 1929, January 3, 1930 p. 4860. Hereafter *S. Res 79.*) Exhibit R.

56. Mrs. Kellogg informed the Hearing that the litigation she was pursuing was to recover 18,000,000 acres of land in the States of New York and Pennsylvania. She explained the need for the United States to take legal action in support of the Six Nations' claims, in part to overcome the legal bar imposed by the *Deere* case.

> . . . In going about to do that, the Six Nations started litigation for the recovery of these 18,000,000 acres of land. All trouble immediately started. Just the moment that a telegram was sent by the Assistant Attorney General of the United States to the United States attorney at Syracuse for the northern district of New York, to intervene in behalf of the Six Nations, the assistant attorney general of the State of New York came down here [to Washington] and stopped the Department of Justice from acknowledging that intervention [by the Federal Government] was our due. In one of the letters, of which there are several, written by the Attorney General to attorneys and to friends of ours who had pressed him for his opinion on this matter, he expressed several different opinions. On one occasion it is laches. Now, laches was definitely disposed of by the Boylan case in the appellate court. It was decided the question of laches did not operate against the United States as the guardian of the Six Nations.

(*S. Res. 79*, pp. 4863-64.) Exhibit S.

57. Also testifying before the Senate subcommittee was Mr. O. J. Kellogg, representing the Onondagas at this Hearing. Mr. O. J. Kellogg presented Onondaga Nation and Haudenosaunee grievances going back to the eighteenth-century meetings with Governor Clinton.

58. On behalf of the Onondaga Nation and the Haudenosaunee, Mr. Kellogg submitted an historic Petition from the Haudenosaunee that very clearly states the claims against New York for the taking of Mohawk, Oneida, Onondaga and Cayuga Nation lands in violation of federal laws, the Constitution and United States treaties. That Petition is printed in the published record of the Hearing. (S. Res. 79., pp. 4869 - 4875) Exhibit T.

59. Some of the charges included in the Petition were:

> 1. That Governor Clinton and the delegation from New York did all in their power to keep the [U.S.] Senate from ratifying the treaty of 1784.
>
> 2. That the officials of the State of New York from 1784 through the years willfully defied President Washington and his successors; defied the Congress of the United States, the Supreme Court, and the United States Constitution. . . .
>
> 4. That every foot of the land bought from the Mohawks, Oneidas, Cayugas, and Onondagas was illegally obtained in absolute contravention to the laws of Congress, to the United Constitution and to the treaties.
>
> 5. That President Washington vigorously protested to Governor Clinton that these so-called State treaties were made and the land taken away in utter contempt of Federal authority. . . .
>
> 8. That the State of New York has taken these lands illegally procured from nations of the Six Nations and has issued State patents to its citizens for same.
>
> 9. That the United States Government has issued no patents for any of this land and that the patents issued by the State are null and void and have no force or effect.

10. That a great deal of this land, especially city real estate, has no title but is strictly on lease.

11. That the title of the land along the rivers and streams now controlled by the Power Trust and its connections is vested in the Six Nations and that the Six Nations claim to riparian rights are as well founded as any other peoples'.

12. That the Six Nations Confederacy vigorously protested to the Federal Government through the years so that no statute of limitations can run against them; that the law of laches does not apply to people who have no power to sue.

(*S. Res. 79*, p. 4871) Exhibit T.

60. Mr. Kellogg testified that the decision in the *Boylan* case was proof that the Six Nations' land was protected by the Federal Government and not the State of New York. Several findings in this case shed light on the question of jurisdiction between the Federal and State governments over the Six Nations. The Petition of the Six Nations summarized the principal points of the *Boylan* case, once again plainly asserting the Six Nations' claims of ownership of the lands:

1. The Six Nations Indians consummated a treaty with the United States Government through its regular channels, the same being approved and ratified by Gen. George Washington, at Fort Stanwix in the State of New York in 1784, by which they were ceded certain territory within the State of New York.

2. That the ceding and setting over to the Indians of this territory was in accordance with and at the conclusion of a treaty consummated by the Indians as a nation and by the United States as a nation.

3. That the said Indians of the State of New York as a nation are still the owners of the fee-simple title to the territory ceded to them by the treaty of 1784.

(*S. Res. 79*, pp. 4871-72). Exhibit T.

61. The attempt to construct dams on the Onondaga reservation in 1929 brought forth, in the Hearings of the Senate "Survey of Conditions of the Indians in the United States," more statements by Onondagas claiming that they lived under the protection of the Federal

Government and were not subject to the State of New York. The core legal issue in the Onondaga Nation's claims for the lands that had been taken was the issue of the supremacy of federal law and treaties over state law and state assertions of power over Indian lands.

62. For this reason, the recurring fights over state jurisdiction regarding Indians were in fact fights about the land rights of the Six Nations and the claims of the Six Nations to their lands that had been illegally taken.

63. In a series of hearings conducted in Syracuse, the Senate Subcommittee of The Committee on Indian Affairs took up the issue of the attempt by the City of Syracuse to construct two flood control dams on the Onondaga reservation to prevent flooding in Syracuse. The Onondagas and Oneidas living on the reservation opposed the dams since they would destroy 15 houses in the village and make some of their best farm land useless. As the Onondagas saw the situation, because of treaty rights, neither Syracuse nor the State of New York could take the land if the Onondaga Nation refused. (*S. Res. 79*, pp. 5009-5023. Exhibit U.) (See also, "Both Indian Faction to Fight Dams," *Syracuse Post-Dispatch,* November 16, 1929. pp. 6, 13.)

64. Again in 1930, the Haudenosaunee reiterated their claims to the lands illegally taken by New York State. The Haudenosaunee Petition was again submitted to the Senate Subcommittee on S. Res. 79 by Mr. O.J. Kellogg as attorney for the Six Nations. (*S. Res. 79*, pp. 13620 - 13625) Exhibit V. These repeated assertions of these claims continued to bring the claims to public attention and demonstrated that the Onondaga Nation and the Haudenosaunee had by no means given up.

The Onondaga Nation proclaims its land rights again in 1948

65. The Onondaga Nation yet again declared its rights to the lands illegally taken by New York in the setting of Senate hearings on bills to grant New York State civil and criminal jurisdiction over Indian lands. In these 1948 hearings, the question of state or federal jurisdiction erupted again, and as always the underlying issue was the question of the Six Nations' rights to the lands illegally taken by New York. (U.S. Congress. Senate. Subcommittee of the Committee on Interior and Insular Affairs. Hearings on S. 1683: *A Bill to Confer Jurisdiction on the Courts of the State of New York with Respect to Offences Committed on Indians Reservations Within Such State;* S. 1686: *A Bill to Provide for the Settlement of Certain Obligations of the United States to the Indians of New York;* S. 1687: *A Bill to Confer Jurisdiction on the Courts of the State of New York with Respect to Civil Actions Between Indians or to Which Indians are Parties.* 80th Congress, 2nd Session. Washington, D.C. Hereafter cited as *S. 1683*). Exhibit W.

66. Onondaga Nation Chief, George Thomas, Tadadaho of the Six Nations, testified about the Nation's claims at the hearing. With him at this hearing before the Subcommittee and before a representative of New York State were other chiefs of the Onondaga Nation, David Green and Livingston Crouse. The Onondaga Chiefs believed that the bills being considered would impede them in pursuing a land claim against New York State. Chief Thomas said:

> ... [W]e have unanimously passed this resolution protesting against all these three bills which are now before you, and we feel by this legislation it has no weight whatever, no matter what way you look at it, to solve these Indian problems which are now before us. . . .they [New York] have been reluctant to come to any kind of terms which might, to a certain extent, impair the terms of our treaties. . . . The whole thing in a nutshell is this, and that is what we have been trying to ascertain. *The claims that we have against the State of New York are enormous, probably one of the biggest cases in the whole history Indian relations, and we*

> *have been beating around the bushes so much, I notice, and we all point to this fact that we have this tremendous claim.*

(*S. 1683*, p.163, emphasis added.) Exhibit W.

67. When asked by Senator Ecton how long they had known about these claims, Thomas answered:

> We have a fellow by the name of E. A. Everett in Potsdam, N.Y., who was a member of the assembly at Albany at the time, and he was chairman of the conservation committee at the time. He was appointed to make the investigation to find the legal status of these Indians, the Iroquois Confederacy. . . . That was in the early 1920s. . . . That must have been over 26 years ago. I have been studying these claims all that time, and we have gone so far that we think we have established this claim.

When questioned if the Onondagas had tried to collect on these claims, Thomas answered,

> No we haven't. That is the reason why I say that we would be working backward by trying to pass this legislation, and by doing so the result would be that it would hamper the transactions of the negotiations for a settlement of these claims if we transfer jurisdiction. That would be the most dangerous weapon that they could use against us, and we are not going to allow that to happen if we can help it.

(*S.1683*, p.166.) Exhibit W.

68. When Chief Livingston Crouse testified, he was even more adamant in his statement of rejection and the relation to the Nation's land claims.

> In other words, once the State takes over, that means we are diminished, absolutely ruined. There is no confederacy any longer. ... That is the way to break up the Indians so they won't have to pay any of these tremendous claims that the Indians have.

(*S.1683*, p.168.) Exhibit W.

69. The testimony of Ernest Benedict, a Mohawk from The St. Regis reservation, argued along the same line as Chief Crouse in rejection of the three bills. Like Chief Crouse, he couches the rejection in terms of the Six Nations' claim for land. What is also implied in his statement is that it would more difficult to negotiate with New York State over land claims if they were under

New York State jurisdiction rather than out side of that jurisdiction. Noting that the Indians are "law-abiding" people, he asks,

> why this [S.]1683 has come up at this time when, as you have heard, the Six Nations are just coming alive to their claims, and also have come aware that there has been a United States bill passed whereby they could make some of those claims. Now if New York State gets jurisdiction, of course, the State laws can apply to the reservations. The Indians would be hampered by the state laws in presenting their case.

(*S. 1683*, p.170.) Exhibit W.

70. Other nations also brought attention to the continuing land claims regarding lands taken in illegal treaties with New York. The Oneida Nation submitted a memorandum asserting claims and so also did a speaker from the Seneca Nation. (*S.1683*, pp. 144-145, 164.) Exhibit W.

71. The concluding speaker at the Hearings was Leighton T. Wade, counsel and a member of the Joint Legislative Committee on Indian Affairs for New York State. He sat through the whole Hearing. New York State was clearly and completely aware of the continued vitality of the Onondaga Nation claims and the claims of the other nations of the Haudenosaunee.

I declare under penalty of perjury that the foregoing statement is true.

November 13, 2006
Date

Robert E. Bieder

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF LINDSAY G. ROBERTSON IN OPPOSITION TO MOTIONS TO DISMISS

LINDSAY G. ROBERTSON declares under penalty of perjury as follows:

1. I reside in Norman, Oklahoma, where I am employed as Professor of Law, History and Native American Studies at the University of Oklahoma College of Law. I received an A.B. (American Studies, with Honors) from Davidson College in 1981, an M.A. (History) and J.D. from the University of Virginia in 1986, and a Ph.D. (History) from the University of Virginia in 1997. After teaching for several years as a member of the adjunct faculty of the University of Virginia School of Law and the George Washington National University Law Center, in 1997 I joined the faculty of the University of Oklahoma College of Law as a full-time professor. In 2002, I was named Sam K. Viersen, Jr. Presidential Professor of Law. In 2005, I was named Orpha and Maurice Merrill Professor of Law. I am a member of the affiliate faculty of the University of Oklahoma Departments of History and Native American Studies.

2. I have conducted historical research into the question of the Onondaga Nation's

historical access to state and federal courts to maintain suit to establish title to lands purportedly ceded by the Nation to the State of New York by documents dated 1788, 1790, 1793, 1795, 1817 and 1822. This declaration is based on the results of that research. The methods I used to research and analyze this evidence conform to the standard practices in the legal history profession that are ordinarily and customarily used in the field.

3. My research into the question of the Onondaga Nation's access to state and federal courts to litigate its land claims against the State of New York and others leads to the following conclusion: because of limitations on access to courts, it is not established that, in the absence of specific authorizing legislation, the Onondaga would have capacity to sue in the courts of New York even today. Similarly, the jurisdiction of the federal courts to hear such suits was not established until 1974.

Access to New York State Courts

4. Subject to constitutional constraints, access to the courts of a sovereign is at the discretion of the sovereign. New York State Indian legislation after the Revolution indicates a tentative willingness to permit individual members of certain tribes access to state courts to resolve disputes with non-Indians, at least where those disputes arose from non-Indian interference with Indian possession of recognized reservation lands.

5. On February 21, 1791, the legislature authorized the Indians residing at Brothertown and New Stockbridge to choose three trustees with power to allot reservation lands, each allottee thereafter being empowered "to maintain an action for any trespass which may be committed by any white person or persons on the lands so laid out to him or her for improvement in any court having cognizance of the same. . . ." The trustees were empowered to "bring

actions for any trespass committed by any white person on any of the undivided lands in Brothertown or New Stockbridge . . . not laid out for improvement or leased for the use of a minister and school. . . ." Act for the Relief of the Indians Residing at Brothertown and New Stockbridge, 1791 N.Y. Laws 212.

6. The following year, on April 12, 1792, the legislature repassed these provisions replacing the trustees with "peacemakers" and expanding the range of prospective trespass defendants to include "any white man, Indian, or any other person whomsoever." Act for the Relief of the Indians Residing in New Stockbridge and Brothertown, 1792 N.Y. Laws 379, 380. Within four years, the legislature had rethought this plan. The Brothertown Indians had proven incapable of effectively prosecuting claims.

7. On March 4, 1796, the legislature passed An Act for the Relief of the Indians Who Are Entitled to Lands in Brothertown, repealing the 1791 and 1792 acts as to them. "[T]he said Indians are liable to impositions and losses from the ignorance of the laws of this State and of the proper means of seeking redress for injuries" the act began. "[F]or remedy whereof," the legislature authorized the Governor, with the advice and consent of the Council of Appointment:

> to appoint and commission some proper person learned in the law, to be the attorney of the said Indians during the pleasure of the said council. And the person so appointed shall from time to time advise and direct the said Indians residing in Brothertown in all controversies among themselves, and with any other person, and defend all suits brought against any of them by any white person, and commence and prosecute all such suits and actions for them or any of them as he may find necessary or proper; and in the prosecution and defence of any such suits, he shall observe and pursue such advice and directions, as shall be given him if any by [superintendents also to be appointed by the Governor under the act].

Act for the Relief of the Indians Who Are Entitled to Lands in Brothertown, 1796 N.Y. Laws 655, 657.

8. In particular, the attorney was authorized "to sue and maintain actions of trespass in the name of the Brothertown Indians, for any trespass which has been since the first day of October last or shall be hereafter committed upon any part of the said land so set off for the said Indians and not assigned to any particular Indian or family," and directed to bring trespass actions for persons assigned lands, even if not directed to do so by the person to whom the lands were assigned. Id. at 657, 658.

9. On March 11, 1793, evidently anticipating similar difficulties, the legislature passed An Act Relative to the Lands Appropriated by this State to the Use of the Oneida Onondaga and Cayuga Indians, 1793 N.Y. Laws 454, appointing Israel Chapman, John Cantine and Simeon De Witt agents to negotiate for the sale of tribal lands. By the act, the agents were directed to

> propose to the said Indian nations severally, that the attorney general of this State for the time being, and the clerk and the treasurer for the time being, of the county in which any of the lands, the rights to which the Indians may chuse (sic) to retain shall be situated, and the successors in office of the said officers, shall be vested with the property, the rights whereof the said Indians shall chuse (sic) to retain as trustees for the said Indians, to prevent any encroachments on the said rights and property, and to bring suits for trespasses thereon, and to prosecute the same to effect for the benefit of the said Indians; and in case the said Indian nations, or either of them shall agree to such proposal and shall convey the rights so to be retained for the use of the said Indians to the said officers and their successors, then and from thenceforth the said officers shall be vested with the said property in the manner and for the purposes aforesaid.

Id. at 455. Assuming this proposal was made, the Onondagas evidently declined, as the 1793 treaty executed by the state for the alienation of Onondaga lands includes no such provision. In consequence, the Onondagas were left without a means to prosecute trespass actions.

10. On March 23, 1797, the legislature passed An Act Supplementary to an Act Entitled An Act for the Relief of the Indians Residing in New Stockbridge and Brothertown,

1797 N.Y. Laws 60, which provided that any white person taking timber from or improving any assigned or common land at New Stockbridge without the consent of the peacemakers would be guilty of trespass, "and forfeit and pay the sum of twenty five dollars for each offence; and it shall and may be lawful for the Peace makers to prosecute for and recover such forfeiture with costs of suit in any court having cognizance thereof. . . ." Id. at 61. The New Stockbridge Indians thus continued uniquely authorized to bring actions, but those were confined to trespass actions.

11. More common were legislated appointments of counsel following or anticipating difficulties by tribal members in utilizing the state court system. Of lasting significance were those difficulties experienced by Jacob Dockstedder, an Oneida. Dockstedder's unauthorized venture into state courts proved especially discouraging, and on March 15, 1799, in An Act Relative to the Oneida Indians, 1799 N.Y. Laws 337, the legislature provided that, "whereas Jacob Dockstedder an Oneida Indian by reason of ignorance of the laws of the State, has been subjected to considerable loss in a suit at law with one Benjamin Pierson: And whereas it is highly important to preserve unabated the confidence of the Indian tribes in the justice of our laws," the treasurer would pay Dockstedder fifty dollars to reimburse him for his loss. The Act further provided that:

> it shall be the duty of the assistant attorney general of the district in which the Oneida tribe of Indians reside; to advise and direct the said Indians in all controversies that may arise between the said tribe or any individual thereof, and any other person or persons whatever; and to defend any suit or suits that may be instituted against the said Indian or any of them; and also to institute any suit or suits, he may deem necessary and proper for the said Indians; and in case of trespasses committed on the lands reserved for the use of the said Indians, to bring such action or actions, in the name of the Oneida Indians as may be necessary to recover damages for such trespasses....; provided nevertheless, that in the prosecution or defence of any such suits or actions as aforesaid, the said assistant attorney general shall observe such advice and directions as shall be given him, if any, by the

person administering the government of this State for the time being.

Id. This resolution of the Dockstedder dispute proved the model for subsequent legislation regarding individual Indian and tribal participation in state court proceedings.

12. Increasingly, the legislature provided for the naming of attorneys to make legal decisions for and represent tribes and individual Indians. By 1800 this model would be applied even to the Stockbridge Indians. On April 7, 1800, by An Act for the Relief of the Oneida, Stockbridge, Brothertown and Shinnecock Indians, 1800 N.Y. Laws 573, 574, the legislature directed that "it shall be the duty of the assistant attorney general of the district in which the Stockbridge tribe of Indians reside to do and perform every duty matter and thing, for and on behalf of the said Stockbridge tribe of Indians which by the act entitled 'An act relative to the Oneida Indians' passed the fifteenth day of march one thousand seven hundred and ninety nine he is directed and required to do and perform for and on behalf of" the Oneidas.

13. On April 4, 1801, the legislature created the position of district attorney and assigned to the district attorney of the district in which the Oneida and Stockbridge Indians resided the duties formerly imposed on the assistant attorney general for the district. An Act Relative to District Attornies, 1801 N.Y. Laws 362, 364. The same day, April 4, 1801, in An Act Relative to Indians, 1801 N.Y. Laws 364, the legislature reauthorized the appointment of an attorney for the Brothertown Indians and the bringing of trespass actions by the New Stockbridge peacemakers, simultaneously rendering them and other Indians, including the Onondagas, incapable to make enforceable contracts, by directing "[t]hat no person shall sue or maintain, any action on any bond, bill note, promise or other contract hereafter to be made, against any of the Indians, called the Stockbridge Indians, nor against any Indian residing in Brothertown, or on any

lands reserved to the Oneida, Onondaga or Cayuga Indians and every person, who shall sue or prosecute any such action against any of the said Indians shall be liable to pay treble costs to the party grieved. . . ."

14. Seven years later, the legislature added the St. Regis Indians to those whose legal interests were to be safeguarded by a state appointed attorney. On April 11, 1808, the New York legislature directed that "it shall be the duty of the district attorney, residing in the county of Washington, to . . . commence and prosecute all such actions for [the St. Regis Indians] . . . as he may find proper and necessary." An Act Relative to the Lot of Land Appropriated for the Use of the Missionary to the Oneida Tribe of Indians, and for Other Purposes, 1808 N.Y. Laws 410.

15. The Onondagas were certainly aware of the legislature's moves to provide attorneys who would in theory assist the tribes to find relief for legal wrongs in state courts. In 1806, they petitioned the legislature to appoint an attorney for them. On April 7, 1806, in response, the New York legislature passed an act authorizing the Council of Appointments to appoint and commission an attorney for the Onondaga tribe, to be paid $50 per year. Among other responsibilities, the attorney was to "commence and prosecute all such actions, for them, as he may find necessary and proper. . . . " An Act to Amend an Act, Entitled "An Act Relative to Indians," 1806 N.Y. Laws 601, 604. The same day, the Council of Appointments named Medad Curtis attorney for the Onondagas. New York, Minutes of the Council of Appointment, vol. 8, pages 51, 53 (New York State Archives series A1845), attached as Exhibit A. The appointment of Curtis proved ineffectual, and five years later, complaining to Governor Daniel Tompkins, as Tompkins relayed to the legislature, that "numerous and unprovoked trespasses and injuries which evil-minded white persons commit upon the property and persons of those inoffensive

Indians," the Onondagas requested the appointment of a resident agent. Journal of the Assembly of the State of New York, 1811: 296-97, attached as Exhibit B. The legislature proved willing to comply, and on March 29, 1811, in An Act for the Benefit of the Onondaga Tribe of Indians, and for Other Purposes, 1811 N.Y. Laws 168, the legislature provided that, "Whereas the chiefs of the Onondaga tribe of Indians have represented to his excellency the governor, that the appointment of an attorney for the said Indians has not been found to answer the salutary purposes thereby intended, and have prayed the appointment of an agent resident amongst them," the office of attorney for the Onondagas was abolished, and Ephraim Webster was appointed agent for the Onondagas, he and his successors to "hold that office during the pleasure of the legislature". Id.

16. Webster's duties were materially identical to those of the attorney:

> to advise and direct the said Indians in controversies amongst themselves, and with other persons; and to cause actions brought against any of them with any white person to be defended, and to cause to be commenced and prosecuted all such actions for them, as he may think necessary and proper; and that any suits which may be so commenced for trespasses committed by any white person on the lands called the Onondaga reservation, now possessed by the said Indians, shall and may be prosecuted in the name of the people of this state, and the damages recovered shall be distributed by the said agent among the said Indians as he shall think just.

Id. at 168-69. In the event vacancies in the office occurred while the legislature was out of session, the Governor was authorized to make interim appointments, to be valid until the legislature should act. Id. at 169.

17. Webster proved a major disappointment to the Onondaga Nation. In 1817, he acted as interpreter during negotiations between the Onondagas and New York at Albany that led to the treaty by which the Onondaga Nation allegedly sold the State 4,000 acres for $1,000,

annual payments of $430 and 50 bushels of salt and gave Webster 300 acres he had been leasing from the Onondagas prior to the treaty. In March 1819, 21 Onondagas petitioned Governor DeWitt Clinton to replace Webster as their agent, on grounds of distrust. We "believe that we have been deceived by him, and that he does not attend to our concerns as he ought to do," they complained. "[T]he misunderstanding between us is such that we think he cannot be useful to us as our agent and that we are determined not to have any further dealings with him." Journal of the Assembly of the State of New York 1819: 731, 750, attached as Exhibit C. Governor Clinton relayed these concerns to the legislature, but it failed to replace him.

18. In 1822, during treaty negotiations in New York, Webster again interpreted in the drafting of the treaty by which the Onondagas allegedly sold 800 acres for $1,700. Webster evidently remained the Onondaga agent until his death in 1824.

19. In April 1825, the legislature repealed "so much of" the 1811 act "as relates to the appointment of an agent for the Onondaga Indians," authorizing the Governor to appoint an agent who would hold his office for two years, unless earlier removed. 1825 N.Y. Laws 231. There is no clear indication in the records of the Council of Appointments that anyone was appointed agent for the Onondaga Nation under this statute; these records show no Onondaga agent until the 1840s, when a new act came into play.

20. Regardless of what the law might otherwise have been regarding tribal capacity to sue in state court, it was clear that the appointment of an attorney for a tribe restricted tribal access to suits brought by the attorney. The key case, Jackson ex dem Van Dyke v. Reynolds, was decided by the Supreme Court of New York in 1817. The case was an action on a lease brought against a non-Indian lessee by several individual Oneida Indians. The court relied on

sections 1, 2 and 27 of the 1813 Act Relative to the Different Tribes and Nations of Indians within this State, R.L. 153, 36th sess: ch. XCII (R.L.), which collected earlier statutes by which it was made a public offense to purchase lands of any Indian resident in the state or to make any contract with an Indian for the sale of land, all persons were barred from suing or maintaining an action on contract against any Indian on lands reserved to the Oneida, Onondaga or Cayuga Indians, and the Governor was empowered to appoint an attorney for the Brothertown, Oneida and Stockbridge Indians. The court held:

> we have considered the legislature to have declared those Indians incapable of contracting; and if they cannot make a valid contract for the sale of their individual lands, if they are not amenable to the law upon any of their contracts, and if, upon these hypotheses, the government has taken them under its protection, and authorized the appointment of an attorney to prosecute and defend all actions brought by or against any of them, it cannot be doubted that the only way in which the intention of the legislature can be effectuated, is to construe the statute as confiding to their attorney the exclusive right to prosecute and defend all actions by or against any of the Indians, whose interests are committed to him.
>
> The power of the legislature to restrain these Indians from suing or being defended, except exclusively by the attorney appointed for them, is as unquestionable as is the right to prevent them from alienating their lands, or declaring them disqualified from contracting. . . .
>
> It is desirable, as regards the rest of the community, that the right should be considered exclusive, and it is equally important to the Indians themselves; because, if left at liberty to resort to any attorney they please, they may be involved in ruinous litigation; and they may too carelessly vex those against whom they have resentments. I would not be understood as speaking disparagingly of a profession, not only useful, but learned and upright, but it would be too much to believe, however honorable, in general, it may be, that it contains no unworthy members.

Jackson ex dem Van Dyke v. Reynolds, 14 Johns. 335 (1817).

21. The language construed, as noted in the act itself, appertains as well to the Onondaga attorney and agent. Control over any claim the Onondaga might have had lay in the hands of Medad Curtis and Ephraim Webster. Neither they nor any other tribal agent or attorney

would venture a claim to invalidate state treaties; indeed, Webster himself had acted as interpreter for the treaties of 1817 and 1822.

22. In any event, my research uncovered one reported decision arising from a claim brought by a tribe during this period (the St. Regis Indians, suing by their attorney), and it was a failure. In 1821, in St. Regis Indians v. Drum, 19 Johns. 127 (1821), the Supreme Court of New York affirmed a Justice Court's decision nonsuiting the tribe in an action of assumpsit for use and occupation of its land brought against a non-Indian lessee of the tribe on the ground that such contracts were void under New York law.

23. On May 25, 1841, the legislature formally abolished the office of Onondaga agent. In the event of trespass on lands they possessed -- always the legislature's primary concern – the Onondagas (and other tribes) now were to appeal either to the local district attorney, who, "upon security for the payment of the costs of such suit being given to his satisfaction," was empowered to bring trespass actions in the name of the people of New York, or to the town supervisor or county judge, who was then empowered to authorize three chiefs to bring suit on the tribe's behalf. An Act in Relation to Certain Tribes of Indians, 1841 N.Y. Laws 214, 215. Provision of attorneys to tribes – either generically, as in this statute, or specifically, as above, continued to be the preferred legislative path for decades, with the primary intent clearly to afford tribes a judicial means to evict intruding non-Indians.

24. Two years later, on April 18, 1843, the legislature restored the position of Onondaga agent, but the form of authorization had changed. First, the legislature directed the Governor to appoint an Onondaga agent annually, with the advice and consent of the senate. Second, the agent's duties were changed. The new authorization made no reference to bringing

suit on the tribe's behalf. Instead, the statute provided that it would be the agent's duty "to see that the rights and interests of said tribe are duly protected; and generally to perform such duties in relation to said tribe of Indians as the governor from time to time shall direct." An Act for the Appointment of an Agent of the Onondaga Tribe of Indians, 1843 N.Y. Laws 310. The statute also repealed "all acts and parts of acts inconsistent with the provisions of this act. . . ." Id. It is not clear that having the duty to see that tribal rights and interests were protected gave the agent to power to initiate litigation for the tribe. In any event, the general instruction to obey the Governor effectively obviated the possibility of the agent's initiating an action challenging the validity of New York's purchases of Onondaga lands. Numerous people would hold the position of agent under the 1843 act. None would initiate any litigation to recover Onondaga lands.

25. Tribes without appointed attorneys or agents were completely without even arguable direct recourse to state courts for any purposes. Thus in 1845, when the Seneca of the Cattaraugus and Allegany reservations, who did not have a state-appointed attorney or agent, tried to bring an ejectment action on their own, the New York Chancery Court denied the tribe's capacity to sue, even though, as the court said, its right to possession of the lands at issue was recognized by the state. In the court's words, "No provision has been made at law for the bringing an ejectment to recover the possession of Indian lands in the Cattaraugus reservation. For the right of possession is in several thousand individuals, in their collective capacity; which individuals, as a body, have no corporate name by which they can institute an ejectment suit." Strong v. Waterman, 11 Paige Ch. 607 (1845).

26. The court did, however, suggest two possible avenues around the bar on suits by

tribes. First, the court indicated, the tribe could authorize individuals on behalf of themselves and the other tribal members to sue in equity to enjoin a non-Indian from committing waste or trespass on their recognized lands and from interfering with their possession. Id. The second avenue is discussed in paragraph 29 below.

27. The Strong v. Waterman ruling was evidently based on a misapprehension of New York law. In explaining its view that individuals might bring representative actions, the court cited Jackson v. Goodell, 20 Johns. 188 (1822), for the proposition that individual Indians were state citizens. Apparently unknown to the court, this opinion had been reversed on appeal, Chancellor James Kent stating categorically that individual Indians were not state citizens. Goodell v. Jackson, 20 Johns. 693, 709-18 (1823). Moreover, even to the extent it was well-founded, the right was not unlimited, and the limitation would foreclose action by individual Onondagas. Individual tribal members had capacity to bring injunction claims relative to the "lands of their respective reservations, which have not been by them voluntarily ceded to the people of the state, or granted to individuals with the assent of the state. . . ." Strong v. Waterman, 11 Paige Ch. 607.

28. In other words, from New York's vantage, all Strong v. Waterman recognized was a right to bring an injunctive claim to protect a possessory right to lands within the bounds of state-recognized reservations: in the case of the Onondaga, the 7,300 acres New York recognized as remaining to them in 1845. Consistent with this limitation, a search of the court records of the Onondaga County courts revealed no action filed by the Onondaga tribe or tribal individuals based on Strong v. Waterman.

29. The second avenue suggested by Strong v. Waterman was legislative

authorization. Indeed, two days after the issuance of the Chancery Court's opinion in Strong v. Waterman, the New York legislature passed an act providing:

> the Seneca Indians residing on the Allegany and Cattaraugus reservations in this state, shall be deemed to hold and possess the said reservations as a distinct community, and in and by the name of "The Seneca Nation of Indians" may prosecute and maintain in all courts of law and equity in this state, any action, suit or proceeding which may be necessary or proper to protect the rights and interests of the said Indians and of the said nation , in and to the said reservations, and in and to the reservation called the "oil spring reservation," and every part thereof, and especially may maintain any action of ejectment to recover the possession of any part of the said reservations unlawfully withheld from them, and any action of trespass on the case, for any injury to the soil of the said reservations . . .; and where such injury has been heretofore sustained, or any such injuries have heretofore been suffered by the said Indians in common, or as a nation, actions therefor, and to recover damages for such wrongs may likewise be brought and maintained as herein provided, in the same manner and within the same time, as if brought by citizens of this state, in relation to their private individual property and rights. . . . .

An Act for the Protection and Improvement of the Seneca Indians, Residing on the Cattaraugus and Allegany Reservations in this State, 1845 N.Y. Laws 146.

30. The act also provided for the appointment of an attorney for the Seneca Nation, who was directed "from time to time [to] advise the said Indians respecting controversies between themselves, and between them or any of them, and any other person; he shall prosecute and maintain all such actions, suits or proceedings for them or any of them, as he may find necessary and proper. . . ." The act further imposed a duty on the attorney to prosecute specifically trespass actions upon "the written complaint of a majority of the chiefs of the reservation." Id. at 147.

31. It is difficult to reconcile the authorization of suits by the tribe with the appointment of an attorney who, under existing law, had absolute authority to determine when the Seneca should sue. The state courts wrestled with this in subsequent cases. In his dissenting

opinion in Crouse v. New York, P. & O. R. Co., New York Supreme Court Justice Haight reminded that Jackson v. Goodell held that the appointed attorney "is authorized to prosecute such actions as 'he may find necessary and proper.' He may bring an action without the consent, or even the knowledge, of the Indian . . . ." Crouse v New York, , P. & O. R. Co., 2 N.Y.S. 453, 457 (1888). This raised the possibility of conflict between the individual Indians or the tribe and the attorney, not an issue in Crouse.

32. Such a conflict was an issue in Jemmerson v. Kennedy, 7 N.Y.S. 296 (1889), an assault and battery action involving two members of the Seneca Nation. The plaintiff's attorney was not the appointed attorney for the Seneca Nation, nor is there any indication on the record that he had authorized the suit. The court held that this did not render the plaintiff incapable of proceeding. Legislation subsequent to Strong v. Waterman, the court noted, illustrated that the State wished "to elevate the character and improve the condition of these wards of the state by encouraging in them a spirit of self-reliance, and cultivating habits of industry, thrift, and providence." Id. at 297. In 1843, two years prior to Strong v. Waterman, for example, the legislature had authorized any Indian to own and convey real estate in the state "in the same manner as a citizen," and, once he had "become a freeholder to the value of $100," to contract and be subject to taxation and the civil jurisdiction of state courts. Id., citing 1843 N.Y. Laws, ch. 87, § 4.

33. More importantly, in 1847, two years after Strong v. Waterman, the legislature had authorized any individual Seneca to maintain and prosecute in state court any demand or right of action he may have against any other Indian if the amount in controversy exceeded the amount awardable by the Seneca peacemakers, then $100. Id., citing 1847 N.Y. Laws, ch. 365,

§14. According to the court, "[t]here can, it would seem, be no question of the effect of this provision on the rights of Seneca Indians in the courts of this state. The enactment was subsequent to that which provided for the appointment of an attorney for the nation (act of 1845, supra.) The last-mentioned provision, if not more radically affected, must at least be rendered subordinate and auxiliary, merely, to that quoted from the act of 1847." Id. at 297-98.

34. In 1909, the New York Supreme Court held, on the authority of Jemmerson v. Kennedy, that under the 1845 enabling act, the Seneca Nation itself also could maintain a civil action not brought by their appointed attorney. Seneca Nation of Indians v. Jimeson, 114 N.Y.S. 401 (1909).

35. The 1845 authorizing statute enabled the Seneca to initiate actions in state courts, at least within the limitations set forth in the statute. Thus in Seneca Nation of Indians v. Tyler, 14 How. Pr. 109 (1857), the Supreme Court held that in consequence of the 1845 statute the Seneca had capacity to maintain an action on a promissory note. Similarly, in Seneca Nation v. Christie, 126 N.Y. 122 (1890), the Court of Appeals of New York found that, because of the 1845 enabling statute, the Seneca Nation had capacity to bring an ejectment action, a ruling the Supreme Court of the United States found dispositive in denying a writ of error. Seneca Nation v. Christy, 162 U.S. 283, 16 Sup. Ct. 828 (1896).

36. Key to the success of the Seneca Nation was the 1845 enabling statute. When the Montauk Tribe tried to bring an ejectment action in state court, they were turned away for lack of capacity to sue. Montauk Tribe of Indians v. Long Island R. Co., 51 N.Y.S. 142 (1898). When Eugene A. Johnson, a Montauk tribal member, subsequently brought an ejectment action in reliance on Strong v. Waterman, the Court of Appeals of New York found that he too lacked

capacity. In distinguishing Strong v. Waterman, the Court explained that the earlier court had "held that the two persons named as complainants, having been authorized by the council of chiefs, might file a bill for an injunction . . . to protect their possession. . . . The learned chancellor evidently recognized a broad distinction between the rights of the tribe in defending its possession of lands and bringing ejectment to secure possession." Johnson v. Long Island R. Co., 162 N.Y. 462, 466 (1900).

37. Contemporaneously, the Onondaga Nation and three individual tribal members, together with a Seneca tribal member, a Cayuga tribal member and the University of the State of New York unsuccessfully sued in the Supreme Court of Onondaga County to recover four wampum belts from a non-Indian purchaser. Onondaga Nation v. Thacher, 61 N.Y.S. 1027 (1899). In dismissing the tribe's claim for lack of capacity, the court noted:

> the statutes of the state . . . indicate the intent upon the part of the state to treat the Indians as wards, and, except when otherwise especially provided, to trust the protection of their rights, as tribes or nations, to its agents, rather than to proceedings by themselves. Where it was deemed wise to have tribal action in relation to tribal rights, as in the case of trespasses upon tribal lands, and in the case of certain rights in "oil spring reservations," express authority is given for the prosecution of suits in the name of the "nation" interested. Indian Law, §§ 11, 55. There was, of course, no necessity for this, if the general power was possessed by the different tribes or nations of Indians, as such, to bring suits. In addition to this reasoning, the subject is settled by direct adjudication (citing Strong v. Waterman, Seneca Nation v. Christie, and Montauk Tribe of Indians v. Long Island R. Co.).

Id. at 1030. The Supreme Court was prepared to recognize a right to sue in the individual tribal members, however, but when the case reached the Court of Appeals of New York, that court affirmed the judgment on the ground that "neither the Onondaga Nation nor the individual Indians named as plaintiffs had legal capacity to bring and maintain the action." Onondaga Nation v. Thacher, 169 N.Y. 584 (1901), aff'd Onondaga Nation v. Thacher, 189 U.S. 306, 23

S.Ct. 636 (1903).

38. The New York rule was clear: absent statutory authorization, tribes had no capacity to sue. At best, under Strong v. Waterman, individual tribal members could bring suit for possession of state recognized reservation lands. Indeed, entrusting to tribes the responsibility for initiating actions to oust non-Indian trespassers from such lands appears to have been the legislature's primary motive from the beginning in authorizing those tribes it did to pursue state claims. Even the Seneca were confined in their enabling statute to bringing claims relating to recognized reservation lands. The only party who might have brought a claim in state court to invalidate the treaties at issue in this case was in theory the Onondaga agent, assuming his authority extended to bringing land claims. No Onondaga agent ever brought such a claim.

39. The Onondaga Nation did obtain authority to sue on its own behalf on one occasion. In 1940, the legislature directed that:

> [t]he Onondaga nation of Indians is hereby authorized to commence an action either in the name of the Onondaga nation or in the name of one of its duly constituted chiefs in behalf of said Onondaga nation of Indians against the Tully Pipe Line Company . . . for the recovery of damages for injuries sustained by the Onondaga nation arising out of the damage to the soil, trees, and property in the cemetery owned and controlled by the Onondaga nation in the Onondaga Reservation . . . , such damage alleged to have been caused by salt and salt-brine from a pipe or pipe lines alleged to be owned and controlled by said Tully Pipe Line Company, and said damage alleged to have been sustained during the year nineteen hundred thirty-nine . . . . Such Onondaga nation in any action commenced pursuant to the provisions of this act, may prosecute and enforce any of its rights or causes of action independent of any act conferring jurisdiction upon such person to bring such action.

1940 N.Y. Laws 1889, 1889-90. The Onondaga Nation was given one year to file its claim. No other Onondaga-specific or general authorizing statutes have been found.

40. In the 1950s, in conjunction with the United States Congress, the New York

legislature began amending its Indian laws to provide for greater participation in state institutions by tribes and individual Indians. In 1950, guided by the New York State Legislative Committee on Indian Affairs, the U.S. Congress passed 25 U.S.C. § 233, providing that New York state courts "shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of the state," excepting, however, jurisdiction over "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952," the statute's effective date. 25 U.S.C. § 233, 64 Stat. 845. Congress was evidently motivated by a concern that, absent federal conferral, state courts could not assume jurisdiction over Indians subject to federal authority.

41. In April 1953, New York amended its Indian Law § 5 to provide that "[a]ny action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted in any court of the state to the same extent as provided by law for other actions and special proceedings." 1953 N.Y, Laws 1517. In combination, these statutes effectively eliminated incapacity as a bar to New York court jurisdiction over civil claims involving individual Indians. Not until 1987, however, did a state court suggest that the statutes also accorded state courts jurisdiction over civil actions involving tribes. Oneida Indian Nation of New York v. Burr, 522 N.Y.S.2d 742 (1987). And in 1995, the New York Court of Appeals intimated that this suggestion may be wrong. People v. Anderson, 529 N.Y.S.2d 917 (1998)("Petitioners seek to predicate the jurisdiction of the New York courts on 25 U.S.C. § 233 and New York's Indian Law § 5, which similarly grant our courts jurisdiction in civil actions

'between Indians or between one or more Indians and any other person or persons.' However, those provisions govern private disputes between individual Indians, not disputes between an Indian and a sovereign tribe").

42. Although Burr has not overruled, tribal capacity predicated on Indian Law § 5 appears not entirely settled even today. See Ransom v. St. Regis Mohawk Education and Community Fund, 86 N.Y.2d 553, 560 (1995)(Because the St. Regis Mohawk Education and Community Fund is to be treated as the Tribe itself, it is not "an Indian;" nor is it a "person," within the meaning of New York's Indian Law § 5).

43. On April 7, 1958, the New York legislature added § 11-a to the Indian Law, providing that "[i]n addition to any other remedy provided by this chapter or by any other law, the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band, may maintain any action or proceeding to recover the possession of lands of such nation, tribe or band unlawfully occupied by others and for damages resulting from such occupation." An Act to Amend the Indian Law, in Relation to Actions and Proceedings for Recovery of Reservation Land, 1958 N.Y. Laws 1081. To the extent it purported to empower tribal officers to bring claims for lands lost before September 13, 1952, it conflicts with 25 U.S.C. § 233, and is therefore of questionable validity. Oneida Indian Nation of New York State v. County of Oneida, 464 F.2d 916, 924 (2d Cir. 1972)("[A]lthough § 11-a . . . is broad enough on its face to encompass [a pre-1952 treaty claim], it may not be effective because of the proviso in [§ 233] restricting the grant of jurisdiction to New York courts so as to exclude land claims based on transactions or events antedating September 13, 1952, . . . a matter on which we take no position.")

Access to Federal Court

44. The history of New York Indian nations' opportunity to sue in the federal courts is similar. Two theoretical avenues have been available: suit in the Supreme Court via the Court's original jurisdiction grant and suit in a lower federal court. The first route was attempted by the Cherokee Nation in 1831. The Court held in Cherokee Nation v. Georgia, 30 U.S. 1 (1831), that the Cherokees did not constitute a "foreign state" for purposes of Article III original jurisdiction and could not, therefore, maintain its action. This holding remains the law.

45. Consequently, the only possible federal route was an action commenced in a lower federal court. Allocation of jurisdiction to these courts is a matter entrusted to Congress by Article III. Federal courts were established in New York by the Judiciary Act of 1789. The civil jurisdiction they were authorized to exercise was limited to suits between citizens of different states. For diversity jurisdiction purposes, state citizenship is a matter of federal law. Dred Scott v. Sandford, 60 U.S. 393 (1857). Individual Indians did not become citizens universally until 1924. Act of June 2, 1924, c. 233, 43 Stat. 253. In consequence, absent the acquisition of citizenship by different means (treaty or special statute, neither of which applied in the case of the Onondagas), individual Indians gained access to federal courts via diversity claims only in 1924. The members of the Onondaga Nation had not become citizens before the 1924 Act. Even today, Indian tribes are not clearly entitled to claim citizenship for diversity purposes. Romanella v. Howard, 114 F.3d 15, 16 (2d Cir. 1997).

46. Even were the Onondaga held to be citizens of New York for diversity purposes, the defendants in any claim they might have brought would have been as well, thereby defeating the claim under the rule of complete diversity announced by Chief Justice John Marshall in

Strawbridge v. Curtiss, 7 U.S. 267 (1806), cited in Oneida, 463 F.2d at 953. The claim at issue has thus never been federally justiciable in diversity.

47. In 1875, Congress by statute empowered federal lower courts to hear claims based on federal treaties, statutes, and the Constitution. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)). In 1914, the U.S. Supreme Court foreclosed the use of this new federal question jurisdiction to regain Indian lands allegedly taken in violation of federal law. In Taylor v. Anderson, the Court held nonjusticiable an ejectment action contending that defendants held lands under deeds executed in violation of federal law restricting the alienation of Choctaw and Chickasaw allotments. According to the Court, "it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim. . . unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose. [citations omitted]." 234 U.S. 74, 75-76 (1914).

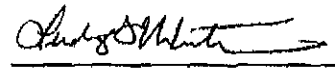
48. The U.S. District Court for the Northern District of New York followed Taylor in 1927 in dismissing an ejectment action challenging the allegedly unlawful taking of St. Regis lands. Deere v. New York, 22 F.2d 851 (N.D.N.Y. 1927), aff'd Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2nd Cir. 1929). Deere remained authority in the Second Circuit through Oneida Indian Nation of New York State v. County of Oneida, 464 F.2d 916 (2nd Cir. 1972). Only in 1974 did the Supreme Court in Oneida Indian Nation of New York State v. County of Oneida, 414 U.S. 661 (1974) hold that an Indian tribal land claim raised a federal question for jurisdictional purposes. Moreover, the Oneida Court distinguished Taylor on the ground that in

the latter, "the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands." Oneida thus did not resolve the question whether individual Indians could bring federal question claims for the recovery of tribal lands in federal court.

49. The only clear avenue for federal judicial relief was thus an action brought by a tribe under federal question jurisdiction. Even assuming tribal capacity, the earliest indication that such was possible was 1974.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 14, 2006



Lindsay G. Robertson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF TADODAHO SIDNEY HILL, ONONDAGA NATION:

TADODAHO SIDNEY HILL, hereby declares the following to be true and correct under penalty of perjury that:

1. I am Tadodaho, one of the leaders of the Haudenosaunee. As such, I am familiar with the facts and circumstances pertaining to the Haudenosaunee's and the Onondaga Nation's spiritual, cultural and historic practices concerning the land, the water and the creatures of the Natural World. I am a member of the Onondaga Nation's Council of Chiefs and have been present for and participated in numerous meetings when the matters of the Nation's land rights have been discussed. Further, I am familiar with the oral traditions of the Onondaga Nation and the Haudenosaunee relative to our lands and how they were lost.

2. The Onondaga Nation is one of the member nations of the Haudenosaunee, also

known as the Six Nations Iroquois Confederacy. The Onondaga Nation is a sovereign nation and has entered into treaties with many other nations. The Onondaga Nation is a distinct political entity with inherent, sovereign rights of self-determination and governance.

3. I make this Declaration in opposition to the two motions to dismiss, one by New York State and the other by the non-state Defendants, which were filed on August 15, 2006 in the Nation's land rights action.

4. The Onondaga Nation is the central fire and the fire keepers of the Haudenosaunee. Onondaga convenes the meetings of the Grand Council, the governing body of the Haudenosaunee. The other Nations of this Confederation are the Mohawk Nation, the Oneida Nation, the Cayuga Nation, the Seneca Nation and the Tuscarora Nation.

5. It remains the tradition and practice of the Haudenosaunee that major decisions about land are made by the entire Haudenosaunee, in the Grand Council. The Onondaga Nation brought this action on its own behalf and on behalf of and with the authority of the Haudenosaunee. (Amended Complain: ¶ 6.)

6. Further, it is the tradition and practice of the Haudenosaunee leaders to make all major decisions about land on behalf of the future generations, those "whose faces are looking up from the earth."

7. We govern ourselves under the Great Law of Peace, a message brought to us by the Peacemaker to end the fighting among the original Five Nations. We buried our weapons of war and came together to form the Haudenosaunee. The Onondaga Nation has maintained

its original form of government despite constant pressure from outside governments to interfere with and replace our original government.

8. The Nation's government functions with a Council of Chiefs, who are nominated by their Clan Mothers. After a careful process which includes consensus at different stages by the Clans, by the Nation and finally by the Haudenosaunee Grand Council, each Chief is then installed by the entire Six Nations of the Confederacy.

9. All decisions by our Council of Chiefs are by consensus. This consensus decision making process is deliberate and it is essential to Haudenosaunee law. This system has preserved our democracy, which dates back to the formation of the Haudenosaunee by the Peacemaker, long before the landfall of the Europeans in the Western hemisphere.

10. The Onondaga Nation continues to reside on a small area of our original land. Our homeland has been reduced from millions of acres to our current homeland of a few thousand acres, which has always been original Onondaga Nation land, under the jurisdiction of our Onondaga Nation government.

11. The Revolutionary War was fought across the Haudenosaunee lands. The Sullivan/Clinton/Van Schaick raids of April, 1779 caused the temporary dispersement of our people. These extreme conditions caused a small number of the Onondaga people to leave this area during the 1780s, 1790s and early 1800s. Land speculators and the attempt to enforce the removal policy of New York State were major threats to our people during this period. However, the great majority of our people currently live here. We have never left

our homelands.

12. The United States government was specific in promising to protect our lands, as shown by the 1790 Trade and Intercourse Act and President Washington's commitment to Haudenosaunee leader, Cornplanter in December of 1790:

> [T]he General Government only has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.
>
> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but will protect you in all your just rights.
>
> Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of fort Stanwix, the 22d of October, 1784, . . . (*American State Papers: Indian Affairs,* vol, 1, p. 142.)

13. President Washington wanted to secure and maintain peace with and the neutrality of the Haudenosaunee in 1790, because he saw these as essential to the fledgling federal government, which at that time was losing the Ohio Indian wars.

14. Our people continue to make use of much of the lands that the Creator had provided for us, for purposes of hunting, fishing, and gathering of plants for medicinal and

cultural uses. We still exercise our original rights to hunt, fish and gather at various places throughout our original lands; not just in our current homeland. We remain deeply concerned about the degraded condition of the land and waters throughout our original land.

15. Our sacred Onondaga Lake is a prime example of this degradation and it is a national disgrace. Our history teaches us that the formation of the Haudenosaunee by the Peacemaker took place on the shores of Onondaga Lake, where our people lived and relied on the natural resources of the Lake and this area. It is for this historic and cultural reason that Onondaga Lake is sacred to the Onondaga Nation and the Haudenosaunee.

16. There are other locations within the original lands of the Onondaga Nation that are sacred to the Nation and the Confederacy. These sacred places include other areas visited and used by the Peacemaker, as well as other locations where we used to live, hunt and fish and where important events in our history took place.

17. One of the mandates that is given to our leaders is that we are the caretakers of the land and waters. It is our duty to protect and preserve the land and waters for the future generations, those yet to come. Our obligation is now focused on restoration of the land and waters to their original conditions, for the benefit of the coming seven generations.

18. Our entire way of life and culture is tied to the land, the water and the natural world of the plants and animals. Our clan system is integral to our culture and government and our Clans are named after creatures of the natural world: the deer, the wolf, the turtle, the heron, the snipe, the eel, the hawk, the beaver and the bear. To this day, whenever one

of our citizens identifies herself, she will say, for instance: "I am from the Turtle Clan of Onondaga Nation."

19. Within the Onondaga Nation's culture, laws and government, the way that we view "land ownership" is fundamentally different from the European system. All land of the Haudenosaunee was, and still is, collectively owned, under what we term the "one bowl" concept of all people sharing the land.

20. We also share the lands and waters with all creatures in the natural world. We do not think of ourselves as separate from or "above" the natural world. We have a saying that: "We are the environment."

21. Historically, we struggled against outside influences to preserve this system of collective, Nation control of all lands. Particularly, we resisted vigorously the attempts by New York State and the United States to allot our lands in the late 1800s.

22. The Onondaga Nation has continued this unique, collective relationship to the lands and waters to this day. We are stewards of the lands and waters, with a duty to preserve them for the future generations.

23. Our relationship to the land, the waters and the entire natural world is spiritual, cultural and fundamental to our way of life and governance. For instance, whenever we gather we always recite "the words that come before all else", which is our way of acknowledging all the gifts of the natural world. In this opening address, we always list and acknowledge all of the plants, animals, waters and other aspects of the natural world which

sustain life.

24. Because our people have been deprived of our access to so much of our former land, water ways and the wildlife, our culture, health and well-being as a people have suffered. The Onondagas see our relationship to the land, the waters and the natural world as mutual, life sustaining and healing.

25. It was this principle of healing that caused our leaders to instruct our attorneys to begin our land rights action with a clear statement that this legal action was not meant to be disruptive to our non-Indian neighbors, but that it was meant to bring about a healing of past wrongs. These historic wrongs include both New York State's illegal taking of our homelands and the horrific and life threatening environmental damage that has occurred on our original lands.

26. For generations, our Nation's leaders have strived to live in harmony with our new neighbors and to welcome them into our land under the spirit of our Great Law of Peace. It was in this spirit that we instructed our attorneys to begin this legal action with the first paragraph of the Complaint, which reads:

> The Onondaga people wish to bring about a healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural, and historic relationship with the land, which is embodied in *Gayanashagowa*, the Great Law of Peace. This relationship goes far beyond federal and state legal concepts of ownership, possession, or other legal rights. The people are one with the land and

> consider themselves stewards of it. It is the duty of the Nation's leaders to work for a healing of this land, to protect it, and to pass it on to future generations. The Onondaga Nation brings this action on behalf of its people in the hope that it may hasten the process of reconciliation and bring lasting justice, peace, and respect among all who inhabit this area.

27. Our instructions to begin this legal action in this healing, non-disruptive manner were given well before either the *Sherrill* decision by the Supreme Court, or the dismissal of the Cayuga Nation's land claim by the Second Circuit.

28. It was in this spirit of working with our non-Native neighbors in Central New York that we also instructed our attorneys not to name any individual land owners as defendants in this land rights action, to never seek any evictions of the current land owners, and to never seek any money damages against any individuals.

29. Since I was a child, I have always heard our elders talk about the illegal taking of our lands and how, one day, we hoped to address this wrong. Further, our elders always discussed that our Nation lands had been merely leased, not sold to New York State. Our decision about how to attempt to correct the illegal taking of our original lands and the subsequent environmental destruction of those lands has been discussed by our Council of Chiefs in our Nation's Longhouse. Further, from talking with our elders, I have learned that the Onondaga leaders have always talked about how these historic injustices could be addressed. This has not been an easy or quick decision making process for our leaders or our people; we have struggled with it for generations.

30. For generations, our leaders attempted to exercise our rights, as preserved in our federal treaties, to resolve any differences that would come between our peoples. It was only after we concluded that our rights were being ignored and that the natural world was being further and further desecrated that we reluctantly decided that we had no alternative other that to file this land rights action.

31. One of the aspects of our long discussion and decision making has been that we are a sovereign Nation, with treaties with the United States in 1784, 1789 and 1794. As a sovereign Nation, until now we have generally felt that it was not proper for our Nation to go into the federal or state courts, because these are institutions of separate governments.

32. Since our first encounter with Europeans, we have always maintained government-to-government, diplomatic relationships with successive colonial governments. Our first treaty, with the Dutch in the early 1600s, was the "Two Row Wampum". It was our practice to record our historic treaties with successive European governments in wampum belts. The Two Row has a background of white wampum beads, with two, separate and parallel rows of purple wampum. These two separate rows symbolize the distinct governments, one the Haudenosaunee and the other the Europeans, traveling down the river of life together, side-by-side and agreeing never to interfere with the other by passing laws that would attempt to govern the other. We still conduct ourselves in accordance with the Two Row.

33. This spirit of separate and distinct sovereigns is still very much a part of the

current Haudenosaunee and Onondaga systems. We still believe that diplomatic interactions are the best way to resolve any differences with either the federal government or New York State. Our elders always told us that we are to use direct, government-to-government interactions, rather than going into the courts of another government.

34. This traditional commitment to diplomacy is also completely supported in our treaties. For instance, in the 1794 Treaty of Canandaigua with the United States, Article VII sets forth the proper method of resolving differences with the United States:

> Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United State and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States. . . ."

35. The leaders of the Onondaga Nation have always used this diplomatic vehicle of direct contact with the President, or his designee, to resolve differences, and we continue to use Article VII to this day. We have repeatedly gone to the President with our concerns that New York State took our lands illegally, and the Canandaigua Treaty tell us that this is the correct way to address this problem.

36. Article VII of the Canandaigua Treaty was invoked by the United States government in 1974, when they sent a letter to the Haudenosaunee, asking for our assistance in resolving a conflict in the Adirondack Mountains. A copy of this November 22, 1974

letter from the Bureau of Indian Affairs to the former Tadodaho, Leon Shenandoah, is attached to this Declaration, as Exhibit "A". This letter clearly invokes and makes reference to Article VII, so that "our peace and friendship [shall be] unbroken." *Id.*

37. This strong traditional preference for diplomacy also caused us to meet repeatedly with the New York State Governor's office and the State's lawyers, at least since the mid-1980s, to discuss how these historic takings of our lands could be resolved. Eventually, in the late 1990s, one of Governor Pataki's lawyers and the Governor himself informed us that we could not continue to meet to discuss a possible resolution of our land rights and that we would have to take the state to court.

38. Throughout this same period, we have repeatedly requested the United States to file suit in support of the Nation's land rights action. We have had innumerable meetings with representatives of the federal government, particularly high ranking officials in the Departments of Interior and Justice, to discuss our requests. These meetings have been to request specific litigation assistance, such as funds to pay for experts or the provision of separate, federal experts, for this legal action. Many other meetings were held to repeatedly remind the federal government of its obligation to join with us in suing New York State for its violations of the United States Constitution, the treaties and the Trade and Intercourse Acts. Despite dozens of such meetings in Washington, DC, we still are waiting for a favorable response from the federal government to our litigation request.

39. We have also had scores of meetings with the Nation's lawyers, to discuss

whether or not to file a land rights action, and if so, what form it should take. Over the past several decades, the Nation was carefully assessing whether such law suits were legally viable, and for this purpose we have monitored the progress, or lack thereof, of other Nations' suits. We were aware that these suits had not yet been successful and had not been finally legally validated by the federal courts. Until the *Oneida* Supreme Court decisions, it was not possible to go to court.

40. We were also very concerned when the court ruled that money damages were the only form of relief available to other Nations for the historic illegal takings of their lands. The Onondaga Nation has been primarily concerned with protecting the lands and seeking justice. Seeking money damages has never been a priority. Our decision to come to federal court to attempt to find justice for the State's illegal taking of our land was made more difficult and was delayed because of the court's decision to give money damages as the exclusive remedy.

41. Another hurdle for our leaders in reaching any consensus decision about going into federal court was our Nation's oral history that the Nation's lands were merely leased to New York State, not sold. This is particularly true of the area that is now the City of Syracuse and the immediate area around Onondaga Lake.

42. The Nation has historically been resistant to contingent fee contracts with attorneys, relative to land rights issues, because such contracts reinforced the tendency on the part of attorneys to seek money damages rather than settlements that more fairly

addressed the need for justice for New York State's historic and current wrong-doings. It was not until recently that we identified attorneys who would represent us on a non-contingent bases; who were knowledgeable about our history, culture and legal rights; and who were also capable of carrying out the needed research and advising our Council of Chiefs.

43. As we observed the suits by the Oneidas and Cayugas over the years, we decided that, in order to minimize the possible impact on our neighbors, we should embark on a communications campaign to increase public understanding about the Nation and its land rights. As part of this campaign, our leaders have gone out into the neighboring communities to speak to civic groups and at public meetings to explain the Nation's interests in its lost lands and why the Nation would be filing this land rights action. Our leaders have spoken at hundreds of such meetings and to the media, and the results have been very positive, with each side learning from the other. We have observed an almost complete absence of the severe tension that has occurred elsewhere in the state in reaction to the other Nations' suits.

44. From these meetings, we have learned that our neighbors recognize that this area was the original land of the Onondaga Nation; that this realization is not necessarily threatening to our neighbors; and that most of our neighbors welcome and share our concerns about the environmental destruction that has taken place. They welcome our assistance in working to heal the land, the waters and the difficulties caused by New York's illegal takings of our original land.

45. Our ancestors are buried, in unmarked graves, throughout our original lands. It is the duty of our current Nation leaders to protect these numerous resting places from being disturbed. Our ancestors' graves deserve to be protected and that they should remain undisturbed. The Nation has attempted to work with outside governmental agencies to protect these graves. However, this preservation has not always occurred and our concerns over this problem has been another motivating factor in seeking to exercise our rights throughout our original land.

46. In the 1700s our ancestors worked cooperatively with the leaders of first the colonies, and then the emerging federal government. In 1754, the Albany Plan of Union was the result of Benjamin Franklin and others having met with our leaders. The Haudenosaunee leaders shared the lessons of the structure and balance of our democracy.

47. After 200 years, in 1988, the United States Congress recognized the important contributions of the Haudenosaunee to the foundation of the American democratic system. Attached hereto, as Exhibit "B", is a copy of the House of Representatives Concurrent Resolution, 331, which was passed on October 3, 1988 and which states, in part:

> To acknowledge the contribution of the Iroquois Confederacy of Nation to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.
>
> Whereas the original framers of the Constitution, including, most notably, George Washington and Benjamin Franklin, as known to have

greatly admired the concepts of the Six Nation of the Iroquois Confederacy;

Whereas the confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself;

48. When our European visitors first came into our lands, we were generous and hospitable. Now, simple justice should prevail, Washington's promises should be kept, and our federal treaties should be honored.

I have read this statement and hereby declare that all of the statements contained above are the truth, to the best of my knowledge.

Dated: November 15, 2006.

Tadodaho Sidney Hill

TADODAHO SIDNEY HILL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v. Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF JOSEPH J. HEATH, ESQ., GENERAL COUNSEL FOR THE ONONDAGA NATION IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

JOSEPH J. HEATH, hereby declares the following to be true and correct under penalty of perjury that:

1. I am the General Counsel for the Onondaga Nation and one of their attorneys in this action. I have been General Counsel for the Nation since 1983 and my responsibilities in this capacity have been to be primarily responsible for their legal matters, other than the land rights, and to work with other counsel on this land rights preparation.

2. I make this Declaration in opposition to the two motions to dismiss, one by New York State and the other by the non-state defendants, which were filed on August 15, 2006 in this matter.

3. The statements contained in this Declaration are based upon my personal knowledge, founded upon my work for the Nation and upon my having lived in Central New York for almost all of my 60 years.

4. I was born in Watertown, New York, in Jefferson County, in 1946. I lived the first 18 years of my life in northern Oswego County, before attending Syracuse University from 1964 to 1968. Following two years in the Navy, I returned to Central New York to teach school in Ithaca for a year, before attending law school in Buffalo, where I lived from 1971 to 1975. I then moved back to Syracuse and lived in the City of Syracuse until 2000, when I moved to my current home in northern Cortland County.

5. As general counsel for the Onondaga Nation, I have supervised the Nation's environmental and archeological efforts throughout its aboriginal territory. Further, since the early 1980s, I have assisted them in their communications and political outreach work and in their efforts to talk with and work with their neighbors by taking part in public speaking, meeting with reporters, editorial boards and concerned citizens groups from all corners of the Nation's aboriginal territory.

6. This Declaration addresses the following factual matters relevant to the pending motions to dismiss: (a) that the filing of the Nation's land rights action has, in fact, **not** been disruptive to the citizens, media or governments of Central New York; (b) that the Onondaga Nation's continued presence in their aboriginal territory is still recognized and welcomed by their non-Indian neighbors and the local governments; (c) an Indian Nation's retention of its recognized title to land is not necessarily disruptive as shown by the City of Salamanca, New York and (d) that the development of the area by non-Indians has not been positive, but in fact it has been distinctly and environmentally negative.

The Filing of the Nation's Land Rights Action Has, in Fact, Not Been Disruptive

7. The Defendants, without citing any facts in support thereof, have made the blanket assertions that this case is "inherently disruptive". However, the reality on the ground in Central New York is just the opposite: it has **not** been disruptive at all. The media coverage of the land

rights action and the Nation, since the filing of the original Complaint on March 11, 2005 has been overwhelmingly positive and supportive of the Nation and its efforts to achieve justice.

8. My office has reviewed our media files in which we have compiled copies of the media coverage of the Nation and its land rights actions since March 11, 2005. We have determined that at least 175 articles, or instances of electronic news coverage, have appeared in the media and that almost universally, they have been supportive of the Nation, its call for healing as contained in the first paragraph of the Complaint and the Amended Complaint. For instance, on March 20, 2005 the editorial in the *Syracuse Post Standard* was entitled: " Elements of the Claim, Onondagas' carefully targeted strategy avoids panic". (See: Exhibit "A".) The text of this editorial reads:

> Like a gentle but persistent breeze, the Onondagas have carefully laid out their case for legal ownership of land in New York. . . .
>
> The Onondagas' announcement caused little stir in the area, a testament to the nation's handling of the claim. The Onondagas have been true to their culture–which does not recognize that anyone has the right to truly "own" land that belongs to the Creator.
>
> The water. The Onondagas say they are stewards of the land and water, and as such have included environmental cleanup of Onondaga Lake and other site as integral parts of their lawsuits. . . .
>
> The air. The Onondagas are considered the most traditional of the members of the Iroquois Confederacy. As such, they would like Onondaga Lake and the surrounding areas returned to their original state–with fishable waters, huntable lands and pollution-free air. It is not clear whether this will happen in this generation, but it definitely will not every happen unless high goals are set. . . .
>
> The people. It is not clear what will happen next in court or how long it will take to settle the claim. Thankfully, the Onondagas are opposed to gambling casinos, with is Gov. George Pataki's solution for righting historic wrongs. What is encouraging and perhaps even humbling is how Sid Hill, tadodaho or spiritual leader of the Onondagas, views the Onondagas' action:
>
> "We're trying to do a different land-rights action here. Our concern is for the environment and how we as two peoples can live in the area that was our ancestors'."

This editorial also labels this land rights action as an: "arguably justifiable claim."

9. In addition to this positive local media coverage, the statewide and national media have also contained numerous and positive articles, which have emphasized, *inter alia*, that the Nation's land rights action is very different in nature from the land claims which have sought evictions and possession. For instance, on March 31, 2005 the *New York Times* contained a large article, with photographs, entitled: "Challenging History and Pollution", A copy of this article is attached hereto as Exhibit "B". The article reads in part:

> The Nation's leaders have said that they do not intend to forcibly take away anyone's land in the disputed territory, which is now home to hundreds of thousands of people. They also said that unlike other Indian tribes pursuing land claims against the state, they are not interested in compensation involving money and casinos.
>
> What they want is influence in major policy discussions affecting the ecosystem in their ancestral lands. The also hope to use a favorable judgment to buy land to increase agricultural and housing opportunities, protect ancestors' gravesites and safeguard the environment.
>
> "We came to this point without avarice or any kind of greedy expectations," Audrey Shenandoah, 78, one of the community's clan mothers said in an interview in the Onondaga Nation Territory. . . .
>
> The public response to the lawsuit has been surprisingly subdued. Onondaga Nation officials were bracing for negative reactions from homeowners throughout the claim area, but so far, none have emerged. Mr. Pirro [Onondaga County Executive] said his office had not received a single call from a constituent seeking information about the lawsuit. . . .
>
> Onondaga representatives have started to make the rounds of public forums and newspaper editorial boards to respond to questions and solicit support for their cause. They speak of reconciliation and healing between them and the other residents of central New York, and steer the conservation towards discussions about the environment.

10. This positive media and editorial coverage has continued even after the Defendants filed their motions to dismiss on August 15, 2006. Defendants' claims to the contrary, the letters to the editor continue to express strong support for the Nation, its presence throughout the aboriginal

territory, and the benefits to all of Central New York that can result from the filing and resolution of this land rights action. For instance, on Sunday, October 22, 2006, the "Readers Page" of the Post Standard featured a letter from Syracuse University Associate Professor of Religion, Philip P. Arnold, with a large display and color photo, captioned with the headline : "Onondaga–Our Lake, Learn to think of it in a new way." A copy of this letter to the editor is attached hereto, as Exhibit "C".

11. Prof. Arnold began this letter with: "It wasn't until the Onondaga Nation files its 'land rights action' in U.S. Federal Court March 11, 2005, that I became fully aware of my living in a toxic soup." The letter continues and recognizes the continued and sacred relationship that the Onondaga Nation maintains with Onondaga Lake:

> Onondaga Lake is a sacred place for the "People of the Longhouse" (also known as the Haudenosaunee.) It is where the first Tadadaho, the Peacemaker and Hiawatha came together over 1,000 years ago to form the Great Law of Peace–the process by which the Onondaga Nation has governed itself continuously since that time. . . .
>
> We people who are immigrants in Upstate New York, whether we have been here for generations or since last week, need to foster a better indigenous sense of the sacred–for practical reasons of our own survival.

12. In addition to the positive coverage in the news articles and editorials, perhaps the best measure of the lack of disruptiveness can be found in the dozens of letters to the editor that have appeared in the *Syracuse Post Standard*, since March 11, 2005. My office has counted twenty-seven such letters to the editor and only two of those have been negative in nature. The remaining twenty-five (including Prof. Arnold's letter referred to above) have been very supportive of the Nation and this land rights action. For instance, on April 3, 2006, in a letter to the editor, entitled: "Onondaga's Vision for Healing Worth Supporting", Tully, New York resident Dan Gefell wrote: "Chief Sid Hill, tadodaho, has invited us all to join the Onondagas in healing our environment and relationships

between our peoples. The approach is visionary and a source of hope. As chief Hill pointed out, the first step in healing is to acknowledge the wounds–both environmental and between people. . . . Support the Onondagas' vision for healing and accept Chief Hill's invitation to apply it in your own life. ". (See: Exhibit "D".)

13. Another measure of the positive relationship between the Onondaga Nation and its Central New York neighbors is shown by the speakers series that has been running since February of 2006, which is entitled "*Onondaga Land Rights & Our Common Future, A Collaborative Educational Series, Bringing Together the Central New York Community, Syracuse University and SUNY ESF*". This series was announced in the *Syracuse Post Standard* in an article on February 24, 2006, (attached, as Exhibit "E") which *inter alia*, reads:

> Local colleges and several local organization have teamed up with the Onondaga Nation to present a yearlong educational series on the nation and its land rights action. . . .
>
> "We all know what condition this world is in, but we can set a precedent right here in our own community," said Onondaga Chief Jake Edwards.
>
> The series will focus on educating the Central New York community on the history of the Onondaga Nation and the importance of the land rights action the nation filed last spring. . . .
>
> "The land rights action brings about healing from centuries of injustices that has occurred here." [Jack] Manno [executive director of the Great Lakes Research Consortium at SUNY ESF] said. "We need to begin to learn about our own history, so that we can find ways to heal our relationship with the land and the waters." . . .
>
> Edwards said the series will offer a way to learn how to care for the environment.
>
> "We all need the same things, clean air and clean water," Edwards said. "We have a lot of work to do, but if we can combine our strengths, we can fight for what's right."

14. This educational speaking series has been held in the theater at Syracuse Stage and each of its monthly speeches have been attended by hundreds of non-Indians. I have attended each session. Each session has concluded with a prolonged period of questions from the audience and not one of these questions has been negative in nature or antagonistic to the Nation or to the speakers. Copies of the Programs for most of these events are contained in Exhibit "F".)

15. Many of these audience comments and questions have included statements in support of the Nation and of this case, particularly the spirit of healing that is contained in the first paragraph of both the original Complaint and the Amended Complaint. Many of the audience comments have been to express their gratitude to the Nation leaders, either on the stage or in the audience, for the positive leadership shown by the filing of this case, with its positive and healing message.

16. Every one of these speaking events has been very positive in nature, well attended, very well received by the audiences, and very well received by the media. For instance, on April 12, 2006, an article appeared in the *Syracuse Post Standard* under the headline: "Chief Traces History of Hurt; Irving Powless' talk on Onondagas and European Settlers Has Wit and Sting". A copy of this article is attached hereto as Exhibit "G".

17. Additionally, on October 17, 2006, a full day teach-in was conducted at the State University of New York's College of Environmental Science and Forestry, which was entitled: "*Environmental Stewardship: Finding Common Ground*". I attended this event. Hundreds of native and non-Indian participants attending this series of workshops and speeches in a very positive atmosphere of sharing and cooperation. A copy of the program for this day long event is attached as Exhibit "G".

18. During the lunch speeches on October 17, 2006, the President of the College announced the establishment of the "Center for Native Peoples and the Environment", that will focus

on developing connections between traditional ecological knowledge and western scientific knowledge. A copy of the college's press release announcing the establishment of this Center and the October 18, 2006 *Post Standard* article covering it are attached as Exhibit "H ". SUNY ESF's press release talk positively about: "developing connections between traditional ecological knowledge (TEK) and western scientific approaches."

19. This establishment of the Center received a very positive editorial endorsement in the *Post Standard* on October 19, 2006, which praised the College for this decision and concluded by saying: "Considering this area's vast Native American history, it makes all the sense in the world." A copy of this editorial is attached as Exhibit "I".

20. Unlike many universities around the country that have strained relationships with their local Natives, due to offensive mascots and other issues, the relationship between the Onondaga Nation and Syracuse University remains very positive and has actually grown stronger since the filing of this land rights action.

21. Other cooperative efforts with Syracuse University include a new program of offering full scholarships which will cover tuition, room, board and fees, for any qualified Onondaga and Haudenosaunee high school graduate who qualifies for admission. This positive, new, cooperative program was established **after** the filing of this action in March of 2005.

22. This full scholarship program was announced by Syracuse University's Chancellor, Nancy Cantor on August 19, 2005, as reflected in an article in the *Syracuse Post Standard*, entitled "SU Offers Haudenosaunees Full Scholarships". During this historic announcement, Syracuse University officials stressed that they "have been working to establish closer ties with the Haudenosaunee and Native American people." A copy of this article is attached hereto, as Exhibit "J".

23. The success of this scholarship program was reported just a few weeks ago, when, on September 20, 2006 the *Post Standard* ran another article, entitled: "SU Sees A Jump in Indian Students". This article reported that the scholarship program has resulted in 27 new Haudenosaunee students attending the University. A copy of this article is attached hereto, as Exhibit "L". This article reaffirms Syracuse University Chancellor Nancy Cantor's announcement of the scholarship program as an "express[ion of] SU's respect for the Haudenosaunee and to instill a better relationship between the university and the Haudenosaunee. . . ."

24. Another measure of the non-disruptive nature of the atmosphere in Central New York between the Onondaga Nation and its non-Indian neighbors, since the filing of this land rights action, is the existence of the non-Indian support group: "Neighbors of the Onondaga Nation (NOON). NOON maintains a website at: www.peacecouncil.net/noon, where it states that "NOON is a grassroots organization of Central New Yorkers which recognizes and supports the sovereignty of the traditional government of the Onondaga Nation . . . and advocates for the fair settlement of any claims that are filed."

25. NOON's web site lists the goals of NOON as: (a) "To promote understanding of and respect for the Onondaga people and culture within the broader Central New York community;" (b) "To educate ourselves and others about the history of the relations between the United States and the Onondaga Nation;" (c) "To challenge racism towards native peoples; and (d) "To work with the Onondaga Nation on matters of mutual concern."

26. NOON's open and public continued existence are further evidence that the filing of this action has not been disruptive within the "broader Central New York community."

27. Another indication of the lack of disruptiveness of this land rights action is found in its lack of impact on the real estate market. On the same day that the Nation filed its original

Complaint in this matter, March 11, 2005, the Post Standard published an article, with the title: "Will this hurt house, land sales?", with the "this" referring to the Nation's filing of this case. A copy of this article is attached hereto, as Exhibit "M". The answer to this question was clearly: "No", with the article's opening sentence reading: "Native American land claims in Central New York have not hurt residential real estate sales, said two professionals in land transactions in other land claim areas."

28. After quoting both a vice president of a title insurance company and a real estate attorney in Oneida, New York as both verifying that: "the land claims should not hurt sales.", the article went on to quote the real estate attorney, Richard Vindigni, as saying: "People have gotten used to the Indian land claim." The article also reported that title insurance has been routinely written in Central New York covering land rights actions for thirty five years and it concluded by reporting that: "A land claim does not lead to higher rates [for the title insurance]."

29. In addition to Ticor Title Insurance Company's history of writing title policies in the other claims areas, as reflected in Exhibit "M", at least one title insurance company has, since July of 2005, been writing title polices to cover the Onondaga Nation's action. This is verified on the Washington Title Insurance Company's web site: www.washtitle.com

30. Another measure of the lack of disruption is shown by the cooperative interaction between the Nation and many of the local governments. The best example of this continued cooperation is with the City of Syracuse, which is a named defendant in this action. The Nation's leaders have met with the Mayor of Syracuse twice since the March 15, 2006 filing and both meetings, which I attended as the Nation's counsel, have been very positive and cordial. The Nation continues to maintain a constructive dialog and interaction with the City's Common Council and with individual Councilors. Further, the Nation continues to work cooperatively with the City on

environmental issues of mutual concern, particularly the efforts to restore and clean up Onondaga Creek.

31. The Nation has also worked positively and cooperatively with other local governments. For instance, officials from the Town of Clay, in northern Onondaga County, have recently approached the Nation to begin a dialog about the Nation's and the Confederacy's historic interests in the Three Rivers area. The town's leaders have offered to work cooperatively with the Nation towards the creation of an accurate historic sign that would properly reflect the spiritual, historical and archeological interests of the Haudenosaunee and Onondagas in the Three Rivers area.

32. On August 29, 2006, the town leaders hosted a meeting of Nation leaders to discuss this cooperative effort and then undertook a tour of the area to show us their environmental restorative efforts in this important and historic area.

33. Another recent example of the continued recognition of the Onondaga Nation's historic presence and continued acceptance of the Nation's continued presence and contributions to Central New York is found in the August 2006 brochure, entitled: "*Welcome to The Valley*", published by the City of Syracuse's Department of Community Development. A copy of the front and back of this brochure are attached as Exhibit ""N. The text on the back of this Valley brochure reads:

> The land had previously been settled by the Onondagas, Keepers of the Central Fire of the Haudenosaunee ("Iroquois Confederacy"), **still good neighbors of the Onondaga Nation today.**
>
> We have learned much from them and enjoy many of their contributions to our culture. We join in their appreciation and care for this part of "Mother Earth" which we share. (Emphasis added.)

34. The Nation also has a close and mutually respectful working relationship with the Town of LaFayette, which actively seeks consultation with the Nation on environmental and

archeological matters. This spirit of consultation is based on this town's leaders recognition of the importance to the Nation of its numerous historic and archeological sites within the Town.

The "Character of the Area" Has Not Become Distinctly Non-Indian:

35. As reflected in some of the articles and cooperative efforts listed above, scholars, governmental officials and citizens in Central New York continue to be aware of and embrace the ties of the Onondaga Nation to this area. It remains widely accepted that this area was the center of the great Iroquois (Haudenosaunee) Confederacy and that the Onondagas, therefore have a continued right to be involved with decisions that are being made about the land and the waters.

36. As noted in ¶¶ 30 through 33 above, local governments recognize the continuing Onondaga presence. In addition, many state and federal agencies maintain a positive and cooperative interaction with the Nation, based upon these agencies' recognition of the Nation's continued presence in and interests in the land and the waters.

37. The Onondaga Nation's Historic Preservation Office responds to a wide variety of requests for consultation from federal, state and local governments throughout the Onondaga Nation's aboriginal territory. The majority of requests from federal agencies are pursuant to §106 of the National Historic Preservation Act; a small number are pursuant to the Native American Grave Protection and Repatriation Act (25 USC §§ 3001 *et seq.*). The following is a partial list of recent consultation projects within the claim area in connection with federal agencies:

a. United States Department of Defense, Department of the Army: Fort Drum, New York (near Watertown, in northern Jefferson County): NAGPRA and §106 consultation concerning excavation of longhouse site; disposition of artifacts and remains;

b. United States Department of Agriculture, Natural Resource Conservation Service:

i. Negotiation of Consultation Agreement underway;

ii. Starmer Project, Pompey, New York: §106 Consultation;

iii. Henderson Project, LaFayette, New York: §106 Consultation;

iv. Mras Project, Lisle, New York: §106 Consultation; and

v. Livingston Project, Lisle, New York: §106 Consultation;

c. United States Department of Agriculture, Office of Rural Development:

i. Orleans and Alexandria, New York: §106 Consultation re: Sewer District Extension;

ii. LaFayette, New York: §106 Consultation re: Smokey Hollow Water District;

iii. Binghamton, New York: §106 Consultation re: Lillian Drive Water District Extension;

iv. Owego, New York: §106 Consultation re: Owego Water System Improvement Project;

v. Dryden, New York: §106 Consultation re: RPM Ecosystems Tree Nursery Project;

vi. Homer, New York : §106 Consultation re: Homer Senior Apartments;

d. Federal Communications Commission:

i. Consultation with the Nation for any FCC project in: Broome, Cayuga, Chenango, Cortland, Erie, Jefferson, Lewis, Madison, Onondaga, Oswego, Tioga, Tompkins, and St. Lawrence Counties, New York;

ii. §106 Consultation re: Wireless Communications Tower Siting: The Onondaga Nation receives bi-weekly notices containing between five and thirty towers, with the Nation responding to any that involve ground disturbance and requests notification in the event cultural resources are discovered during construction. For projects known to be in archeologically sensitive areas, the Nation requests cultural resource surveys be performed prior to construction.

iii. CRAM Communications, AM Tower, LaFayette, New York: §106 Consultation. FCC required project applicant to consult with Onondaga Nation and perform cultural resource survey of this project adjacent to currently recognized territory.

e. Federal Energy Regulatory Commission: Oswego River Project, Brascan Power: §106 Consultation.

38. The Nation also received consultation requests from various New York State agencies. In the past few years, we have developed a close and cooperative working relationship with the State Office of Historic Preservation. Additionally, the following is a partial list of recent consultation projects in connection with federal agencies:

a. New York State Department of Transportation: Consultation requested under §106 on a variety of projects within Onondaga, Oswego, Cayuga, and Cortland Counties:

i. Plainville, New York: §106 Consultation regarding bridge reconstruction;

ii. Cicero, New York: §106 Consultation re: Bartell Road Bridge;

iii. Liverpool, New York: §106 Consultation re: bridge reconstruction;

iv. Pompey, New York: §106 Consultation re: bridge over Limestone Creek.

b. State University of New York:

i. Oswego, New York: NAGPRA and §106 consultation re: disposition of human remains:

ii. Binghamton, New York: NAGPRA and §106 Consultation re: disposition of artifacts recovered during construction of Student Center.

39. The Nation also received consultation requests from various Central New York town governments. The following is a partial list of recent consultation projects in connection with various towns:

a. Onondaga County:

i. Clay, New York: Three Rivers Point, SEQRA and §106 Consultation;

ii. Elbridge, New York: Elbridge Water District, SEQRA and §106 Consultation;

iii. LaFayette, New York: Jamesville Grove, SEQRA;

iv. Lysander, New York: Highland Meadows, SEQRA and §106 Consultation; and

v. Lysander, New York: River Road Golf and Development Project, SEQRA.

A Recent Book about Central New York Reflect the Continued Recognition of the Presence of the Onondaga Nation

40. This year, the Onondaga Historical Association published a new book: *Crossroads in Time, An Illustrated History of Syracuse.*[1] In its Preface, this book acknowledges both the

[1] By Dennis J. Connors, Curator of History, Onondaga Historical Association, First Edition, Syracuse University Press, 2006. This book was just released, in August of 2006; it was published **after** the March 2005 filing of this action.

historic importance of the Onondaga Nation and the continuing presence and importance to the area and the county:

> It is common to begin histories of American communities by relating the presence f Native Americans. To 17th and 18th century European powers and colonial authorities, our hills and valleys were a remote wilderness. But this land was the traditional meeting place of the Iroquois Confederacy. Members of the Onondaga Nation, central Keepers of the Council Fire, and their ancestors had resided here for centuries. As the Iroquois acted to maintain their own prerogatives and independence as a people, they exerted considerable influence on the affairs of European and colonial interests for more than two centuries. That made Onondaga a place of international notoriety. It was the locale for engaging lessons of cultural interaction as the two worlds maneuvered to both understand and influence each other.
>
> And yet, when considering Native Americans in the eastern United States, it is too often only the adventures of colonial encounters that intrigue historians. **But the Onondaga People still live here.** The experiences, philosophies and struggles of that nation for the last two centuries to confront assimilation and endure as a distinct culture are also dramatic and notable topics for examination. The territory they occupy today, just south of Syracuse, has always been native land, well before Columbus stumbled into our hemisphere on his way to the Far East. The limitations of this publication, however, will not allow us to venture into their rich culture this time. (*Crossroads in Time*, p. 9, Emphasis added.)

41. The presence and importance of the Onondaga Nation to Central New York was likewise acknowledged in the 2002 book, by local historian, Donald H. Thompson, entitled: *The Golden Age of Onondaga Lake Resorts*.[2] This book devotes several pages to the history of the Nation around the lake and to the Nation's interaction with first the French, then the English and finally the State of New York. The book notes that, in 1933, Onondaga County built a replica of the first French fort: St. Marie Mission to the Iroquois to commemorate the first, sustained European interaction with the Onondagas. This first replica was subsequently replaced by the County in 1975. (*Id.* p. 14).

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[2] First Edition, Purple Mountain Press, 2002.

The Haudenosaunee Flag Flies in Downtown Syracuse and at LaFayette, New York High School, in Recognition of the Onondagas' Continued Presence

42. In November of 2003, the LaFayette, New York high school began flying the Haudenosaunee flag outside the school, along with the American flag. Attached hereto, as Exhibit "O", is a photograph that I took on October 24, 2006 of the flags outside the school.

43. The flag was raised at a ceremony, which I attended, outside the school on November 12, 2003, when an Onondaga young man, Steven Thomas, and a non-Native young women, Sarah Walsh, joined together to raise the flag, as documented in the November 13, 2003 article from the *Post Standard*, which is attached as Exhibit "P". Mr. Thomas, who is Onondaga and was a junior, stated that: "the raising of this flag today will not further divide us but [will] unite us as a community." Ms. Walsh, also a junior, but not an Onondaga, said: "I think it's a great thing."

I attended this November 12, 2003 flag raising event at the LaFayette high school.

44. Attached as Exhibit "Q" is another news article which covered this flag raising ceremony at the high school; it is from the Associated Press. The headline to this AP piece reads: "Flag raising does what it was supposed to--unites community." and the article reads in part:

> Intended to help unite a community, the flag of the Iroquois Confederacy was raised next to the American Flag at the local high school Wednesday, bringing together nearly 1,000 students, teachers and residents.
>
> Although the flag-raising created a stir over the proper flag etiquette and drew mild protests from some in the community, the event at LaFayette Junior-Senior High School proved itself, said Superintendent Mark Mondanaro.
>
> "We wanted to bring people together. Looking around, that's exactly what we accomplished," Mondanaro said.
>
> "This action recognizes and celebrates two communities that come together as one in our schools," school board President James Wolf told the crowd during the 30-minute ceremony. ". . . it will lead to improvement on how we treat each other and how we live together."

45. The Haudenosaunee flag also flies in Clinton Square in downtown Syracuse, as shown in the photograph that I took on October 24, 2006, which is attached hereto as Exhibit "R". This photograph shows the James M. Hanley federal court and office building in the background and the Soldiers and Sailors monument next to the flag, which flies along side the American and New York State flags.

46. The Haudenosaunee flag was first raised in Clinton Square, on August 3, 2002, during a ceremony which involved Syracuse Mayor Matthew Driscoll and Tadodaho Sidney Hill, as shown in the *Post Standard* article of August 4, 2002, which is attached as Exhibit "S", and which concludes: "And in a ceremony attended by local politicians and Tadadsho Sid Hill, the spiritual leader of the six Iroquois nations that make up the Haudenosaunee, the Haudenosaunee flag was raised in Clinton Square–for the first time in history."

I attended this August 3, 2002 flag raising event in Clinton Square

An Indian Nation's Retention of its Recognized Title to Land is Not Necessarily Disruptive As Shown by the City of Salamanca, New York

47. The Seneca Nation has retained title to the land in the city of Salamanca, New York and this situation is an excellent example that such retention of title by an Iroquois Nation is not necessarily disruptive. That nation's recognized title retention has not disrupted either the local, non-Indian government nor the real estate market.

48. The City of Salamanca's municipal web site clearly acknowledges that: "Salamanca is the only city in the United States that lies almost completely on an Indian Reservation." (See: www.salmun.com/about.htm.) The retention of the recognized title by the Senecas has been clearly acknowledge at least twice by the 2nd Circuit in: *US v. Forness*, 125 F. 2d 928, 930 (1942); and *Fluent v. Salamanca Indian Lease Authority*, 928 F. 2d 542, 544 (1991).

49. Rather than cause disruption, the acknowledgment of the Seneca Nation's recognized title was an important step towards the passage of the Salamanca Settlement Act, as part of the "truth and reconciliation" process that has been beneficial to all parties around Salamanca. This is shown when we examine the purposes of the Act, as set forth in 25 USC § 1774 (b): "It is the purpose of this subchapter to effectuate and support the Agreement between the city [of Salamanca] and the Seneca Nation; . . . to assist in resolving the past inequities; . . . to provide stability and security to the city and the congressional villages, their residents, and businesses; to promote the economic growth of the city and the congressional villages; . . . [and] to promote cooperative economic and community development efforts on the part of the Seneca Nation and the city." (25 USC § 1774 (b) (1), (2), (4), (5), and (7).)

50. The non-native government of the City of Salamanca has not been disrupted and continues to operate in a routine manner, as can be seen by only a cursory check of the web editions of the two local newspapers, the Salamanca Press (www.salamancapress.com); and the Olean Times Herald (www.oleantimesherald.com). Additionally, the real estate market in the City of Salamanca appears to be unaffected by the Seneca's recognized title and mortgages are still being written. (See: www.city-data-com/housing-Salamanca-New-York.html).

The "Development" of the Land and Water by the Non- State Defendants Has Not Been Positive, But in Fact, Has Been Distinctly and Environmentally Negative

51. One of my primary responsibilities as General Counsel for the Nation has been to oversee their environmental work, with a particular focus and concern of the Nation being the environmental problems in and around Onondaga Lake and in Onondaga Creek. In this capacity, I have supervised other attorneys and environmental consultants who have worked for the Nation. I have also personally attended dozens of meetings at the State Department of Environmental Conservation which have reviewed various aspects of the remediation plans for Onondaga Lake and

Onondaga Creek. I have also personally reviewed scores of engineering studies, Risk Assessments, Proposed Remediation Plans, Records of Decisions and other documents that have been prepared for this remediation work. I have also personally toured many, if not all, of the Superfund sites that surround the Lake.

52. Defendant Honeywell International, Inc. is the owner of industrial properties along the southwest shore of Onondaga Lake, where, from 1881 until 1986 Honeywell and its predecessor companies: General Chemical Company, National Aniline and Dye Company, Solvay Process Company, Semet Solvay Company, Allied Chemical and Dye Corporation, Allied Chemical Corporation, and Allied Signal, Inc., operated three chemical plants, the Main Plant, the Willis Avenue Plant and the Bridge Street Plant.

53. During these 105 years of industrial chemical manufacturing, Honeywell and its predecessors used the Lake itself and its southwest shore as their private chemical waste dump. They disposed of hundreds of thousands of tons of toxic chemical wastes either directly into the Lake or into unlined dumps along its shore. These wastes included: mercury, lead, asbestos, tri- and tetrachlorobenzenes, toluene, ethylbenzene, xylene, polychlorinated biphenyls (PCBs), cadmium, chromium, cobalt, pesticides, creosote, chlorinated benzene, polycyclic hydrocarbons (PAHs), and volatile organic compounds (VOCs), among other heavy metal, chemical, and toxic discharges.

54. Additionally, the former Honeywell manufacturing and upland waste disposal sites are still actively contributing toxic and hazardous leachate to the Lake. Further, Honeywell's 100+ years of dumping toxic chemical wastes directly into the Lake has resulted in an estimated 20 to 40 percent of the bottom sink of the Lake being filled in with "Solvay Process wastes."

55. Attached hereto as Exhibit "T", is a copy of the July 30, 2004 article for the *Post Standard*, entitled: "How to Clean the Lake: Plan Could Cost $2.3 Billion]", and it begins:

"Onondaga Lake's biggest industrial polluter may have to spend up to $2.3 billion over 17 years to clean a century's worth of waste it dumped into the lake, state officials say in a report to be released today." The description of the destruction caused by Honeywell and its predecessors continues later in this article:

> The state sued Allied in 1989, claiming the chemical company was responsible for dumping 165,000 pounds of mercury into Onondaga Lake from 1946 to 1970. . . .
>
> The mercury contaminated the lake's fish and led to a fishing ban. Mercury also contaminates 7 million cubic yards of sediment on the lake bottom. It is the reason Onondaga Lake is on the federal Superfund list of toxic waste sites.

56. Defendant Clark Concrete Company, Inc. and its subsidiary, Valley Realty Development Company, Inc., are the owners of the Tully gravel mine, which is located on the north face of the Tully valley moraine and which has negatively impacted some of the head waters of Onondaga Creek. This mining area, near Solvay Road and Tully Valley Road in Tully, New York, also contains areas of extremely archeological sensitivity for the Onondaga Nation.

57. In addition to the routine deforestation and digging up of vast areas that are associated with such a gravel mining operation, without any reclamation, in early April of 2002, Clark caused severe damage to one of the streams that form the head waters of Onondaga Creek, when, in the course of attempting to dredge the clay sediments from the bottom of one of its wash ponds at the mine, the clay lining at the bottom of the pond was punctured. This caused the water in the pond to leak out of the bottom of the pond, through a gravel vein and down the side of the north face of the moraine. This unchecked discharge of water was of such high volume that it, along with the mud and gravel it contained, caused:

a. Serious bed and bank damage to the stream;

b. Destruction of all trout fry present in the stream at the time;

c. A substantial amount of scouring of the stream bed, removing the small pebbles and gravel used for trout spawning; and

d. Sediment deposits and turbidity downstream.

(See: April 10, 2002 New York State DEC Region 7 Memo, attached hereto, as Exhibit "U".)

58. Defendant Hansen Aggregates North America and its subsidiaries are the owners of what is commonly referred to as the "Jamesville quarry", which sprawls across portions of the towns of DeWitt and LaFayette and is the largest open pit mine in New York State. Despite the vast areas, of 1000s of acres, that have been devastated by this mining operation, there has been little or no reclamation of the land. Further, this mining operation has had a very negative impact on the ground water in the area.

I have read this statement and hereby declare that all of the statements contained above are the truth, to the best of my knowledge.

Dated: November 10, 2006

Joseph J. Heath

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION,

Plaintiff,

v.

Civil Action No. 05-CV-314 (LEK/DRH)

THE STATE OF NEW YORK, *et al.*,

Defendants.

DECLARATION OF J. DAVID LEHMAN IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

J. DAVID LEHMAN, declares under penalty of perjury as follows:

1. I reside in Los Angeles, California where I am employed as an Associate Professor of History at Long Beach City College, teaching courses in Early American history. I am a professional historian, having received my historical training at the University of California, Los Angeles (UCLA), where I earned a Ph. D. in History in 1992.

2. I have engaged in historical research and writing relating to the history of the Six Nations Confederacy in the Revolutionary and Early National periods since 1978. I was employed by the Indian Law Resource Center in Washington, D.C. as a researcher from 1978 to 1981. Since 2005 I have served as a research consultant to the Indian Law Resource Center in connection to their representation of the Onondaga Nation in its land rights lawsuit against the State of New York. Although my fields of study and research are not confined to Native American history, I have acquired a personal knowledge of, and familiarity with the historical primary sources and scholarly literature relating to the Six Nations Confederacy in the late 18th and early 19th centuries, particularly in regard to the land cession treaties with the State of New

York. My research has been published in a peer-reviewed scholarly journal and has been cited by other scholars in the field.

3. I make the following declaration based on historical research that I have personally conducted in libraries and archives located throughout the nation. The methods I have used to compile this statement conform to the historical practices that are ordinarily and customarily used by scholars in the field.

Introduction

4. In a span of seven years between 1788 and 1795, the State of New York took control of the vast majority the lands of the Onondaga Nation in a series of land cession treaties. None of these treaties was ever ratified or approved by the Onondaga Nation itself, by the Grand Council of the Six Nations, or by the United States government. These treaties reveal a pattern of fraud and deception on the part of New York State. Not only were Indian participants in the treaties repeatedly misled during negotiations, but also the majority of the Onondaga Nation denied that those participants had any authority to sell Onondaga lands. By 1795 the traditional homeland of the Onondagas had been reduced from an estimated 2,500,000 acres to a tiny reservation of only 7,100 acres. The area of this reservation was further reduced to its present 6,900 acres in two subsequent treaties in 1817 and 1822. In return for the lands "sold" at these treaties between 1788 and 1822, the Onondagas received $33,380 in cash, $1,000 in clothing, and an annuity of $2,430 and 150 bushels of salt. [The New York State land treaties with the Onondagas are compiled in New York State Assembly, *Report of the Special Committee Appointed by the Assembly of 1888 to Investigate the "Indian Problem" of the State*, (Albany, 1889), vol. 1, pp. 190-211.]

The Six Nations and the Onondaga Nation repeatedly denied the validity of the Treaty of Fort Schuyler, 1788 to both United States and New York State officials

5. On September 12, 1788, officials of New York State and various Onondaga Indians signed the so-called Treaty of Fort Schuyler. By this treaty, the Onondaga Nation

purportedly ceded all of its lands to the State, retaining only a reservation of 100 square miles around Onondaga Lake. From the time that this treaty first became known, its validity was denied by the Grand Council of the Six Nations Confederacy and by the Onondaga Nation. Even prior to the treaty council at Fort Schuyler, New York officials had been notified that the proper chiefs would not be in attendance and that the chiefs had promised federal officials that they would attend congressionally-sanctioned councils. In the following document, dated May 14, 1788, the Six Nations chiefs refer to the deception practiced on them by the infamous "Livingston Lease" of 1787 and the Grand Council's resolve to attend only those meetings authorized by Congress:

> They [the representatives of the New York Genesee Company] told us they were sent by the Congress, otherwise we should not have taken the least Notice of their Message, as we had already promised Congress not to attend any Council but what should be called by their Authority.
>
> Source: Message from the Six Nations Council to Governor George Clinton, May 14, 1788, from Franklin B. Hough, *Proceedings of the Commissioners of Indian Affairs . . .*, Albany: Joel Munsell, 1861, 2 volumes, p. 148. (Exhibit A)

6. In a message dated July 9, 1788, the Six Nations chiefs informed Governor Clinton that they would not attend the state treaty at Fort Schuyler because the Continental Congress had requested them to attend a federal treaty in the Ohio country.

> Brother: You sent us an Invitation to meet you at Fort Schuyler, which Belt we return. We are unable to meet you at the Place you propose this Year as Business of the utmost Importance to the Indian Nations calls our immediate Attendance on the Treaty now held on the Ohio River, for which Place we are now setting out. Brother, this is all we have to say.
>
> Source: Message from the Six Nations Council to Governor George Clinton, July 9, 1788, from Hough, *Proceedings of the Commissioners*, pp. 166-167. (Exhibit B)

7. June 2, 1789—In their first official response to news that the state had negotiated separate land cession treaties with the Onondagas, Oneidas, and Cayugas, the Six Nations chiefs denied their validity in a message to Governor Clinton, asserting that the State of New York conducted the negotiations with unauthorized individuals, at an improper location, and without the consent or knowledge of the chiefs. They further declared that only the Six Nations Grand Council, meeting at the Council Fire of the Confederacy at Buffalo Creek, could dispose of Six Nations lands.

> Brothers: We have been informed of the Purchases you made of some of our young Men, both of the Onondaga and Kayuga Country, and we have considered long and seriously on the Consequences that may arise from suffering Individuals (without Authority) to dispose of Property that was given by the Great Spirit to our Forefathers and handed down by them to their Children the Five Nations in general. We have not been hard with the white People who has made an open and fair Application for Lands at our Council Fire; but we have accommodated them, and we hold the Sales sacred, because it was done in full Council and at a proper Place; but what is partially purchased from Individuals, at improper Places, we are bound by the ancient Customs of our Forefathers to disapprove of.
>
> Brothers: We did not expect you, after advising us to shun private Treaties with Individuals and avoid selling our Lands to your disobedient Children, that you would yourself purchase Lands from a few of our wrong headed young Men, without the Consent or even the Knowledge of the Chiefs; therefore we have at present only to communicate our Disapprobation of those Sales . . .
>
> Buffaloe Creek, 2nd June, 1789
>
> Sharongyowanon
> Kakondenayen, in Behalf of the Onondaga Nation
> Ojageghte
> Oghniokwenton, in Behalf of the Cayuga Nation
> Oghnenrayewaghs
> Skentyoghkevadogh, in Behalf of the Seneca Nation
> Jos: Brant or Tekenaweter, in Behalf of the Mohawks &c.

Source: Message from Six Nations Council to Governor George Clinton, June 2, 1789, Hough, ed., *Proceedings of the Commissioners*, pp. 331-332. (Exhibit C)

8. At the time of the making of the Treaty of Fort Schuyler, of those Onondaga Indians living within the boundaries of the United States, a substantial majority lived in western New York, either at the Onondaga village at Buffalo Creek or along the Genesee River. Most Onondagas had fled their homes during the Revolutionary War, especially after the destruction of their village along Onondaga Creek by American forces in 1779. The Onondaga Chiefs' Council, with the nation's wampum and historical records, was established at a new council house in the new village at Buffalo Creek. As of 1788 only a small portion had returned to their traditional homeland at Old Onondaga. It was members of this latter group that signed the New York State treaty at Fort Schuyler. The missionary Samuel Kirkland, who traveled from one end of Six Nations territory to the other in 1788-1789, compiled a census of the Six Nations for the year 1789. He recorded 339 Onondagas living at Buffalo Creek, 34 at Genesee, and 68 at Old Onondaga. Source: Kirkland Census of the Six Nations, Samuel Kirkland Papers, Hamilton College, Hamilton, N.Y. A transcript of this census is located in the collections of the American Philosophical Society, Philadelphia. (Exhibit D)

9. On June 2, 1789, the same date of the previous message to Governor Clinton, the Six Nations Council officially informed the new federal government of this threat to its land rights. In a message addressed to President George Washington, the Six Nations protested the state treaty and denied its validity. The Six Nations Council insisted that the Council fire at Buffalo Creek (at the Onondaga village) was the only legitimate place at which to conclude a land cession treaty. Although the chiefs appear to act on their understanding that the national government had an obligation to assist them, there does not appear to have been a response to this message from either President Washington or Secretary of War Henry Knox.

> We feel ourselves injured by the Number of Council Fires which your people have kindled at Different places to do Business with us, it has always been the

Custom with our Forefathers to have one Great Council fire kept Burning and there to do all public Business which respected the five Nations in General [.] The King our father had also one Great Council fire to which we resorted when we had any important Matter to Communicate. [A]t Buffalo Creek ours has long been Established, & still Continues, and there we hold and mean to hold all Treaties in which the General Consultation of the Five Nations is required and what is done there in public council we hold Sacred and shall always adhere to Strictly.

The Governor of New York addressed us in a speech dated the 18th of May, 1788, inviting us to attend at Fort Schuyler, on the 10th Day of July on Business of importance to our Mutual Happiness at the same time warned us against holding private Treaties with the Disobedient Children of the States, Contrary to the Good old rule and customs which had always been observed between Your Forefathers and ours, and advised us not to let them Settle on the Land which they had obtained a Lease of the fall before, from [some?] of our Chiefs only.

Prior to the receipt of the Governors letter we received a Letter from Your Commissioners to attend a Treaty to be held at Tuskarowas where we were then preparing to go. Soon after our Departure from Home another Message arrived in our Villages informing that the Treaty was to be held in the fall at Fort Schuyler and requesting our Chiefs to attend. The Governor was then informed that our Chiefs were gone to the Southward on Public Business and could not attend till their Return. Notwithstanding which the Governor contrary to the principles of his advice to us (at the instigation of a Couple of Traders residing in our Villages) assembled two Sachems one Chief Warrior, and a few Young men & women & made a partial purchase of the whole of the Onondaga Country. . . . This we looked upon as Fraudulent means of possessing our Country, without paying the Value or any part thereof, for the good of the Nations in General to whom the Lands belong. . . .

[W]hat has been sold since to the Governor by our Young men and wrong headed people contrary to our ancient customs and in direct Contradiction to the Governor's own Language to us and not confirmed at our Great Council fire at Buffalo Creek, we can not confirm and we are convinced you will see the impropriety of his pretensions to settle his people upon such a Slender Title, and we presume You will approve of our determining to prevent any Surveys taking Place by Virtue of that purchase

Source: Letter to the President of the United States from the "Sachems, Chiefs, and Warriors of the Five Nations Assembled in Council" at Buffalo Creek, June 2, 1789, Draper Collection, Series U, vol. 23, pp. 164-169, microfilm copy available at UCLA, Young Research Library. (Exhibit E)

10. On July 30, 1789, Six Nations chiefs rejected Governor Clinton's explanation for the making of the Treaty of Fort Schuyler and once again denied its validity because it had been concluded with unauthorized individuals. This is perhaps the Six Nations' most strongly-worded condemnation of what they see as New York State's strategy to make land cession treaties with unauthorized individuals from individual nations. The message also implies a desire to unite the Six Nations at Buffalo Creek and to regard the state reservations further east as a "trap."

> Brother: We have this Day received your Letter dated 14th Inst. in Answer to ours of 2nd June; we are very sorry you have paid so little Attention to it. We endeavoured to explain to you that you had not treated with the Chiefs, nor with persons authorized by them to dispose of our Country, but we are now sorry to find you do not wish to be convinced of an Error, which you took no previous Steps to avoid. You say the Treaties you entered into gave great Satisfaction to the Indians and would be much to their Advantage. Undoubtedly a large Sum of Money to a few Indians, *void of Principal*, would be pleasing, and their Ideas of Advantage are but momentary and never descend to Posterity, and they are too blind to see the Traps laid to disunite the Nations to which they belong. What you mean by offering your Assistance to see the Money fairly divided among those of their Nations who are entitled to receive it, we do not understand, unless you think none entitled to it but those who remain in the reserved *Trap* and who are intirely in your Power. Our Ancestors made no Distinction in a Nation; they held their Lands in common, and we do not wish to deviate from their Customs.
>
> Brother: When you proposed a Treaty in July 1788, at Fort Stanwix, we informed you that we should be on Business to the Southward with the Commissioners of Congress; upon which you postponed it until September, and then we had not returned; nevertheless you proceeded to Business (you say) in full Council according to the Custom of *your* Ancestors, after the most serious and solemn Deliberations; true, it was the Custom of your Ancestors to do Business with ours in full Council, but it was not the Custom of our Ancestors to call a Council and treat on Business of Importance to their Nations and Posterity, without the Presence or Knowledge of the Chiefs, nor was it the Custom of yours to require it; therefore we now see clearly what we before had only a glimmering View of, and that your solemn Deliberations were the dictates of Policy and your Determination was to effect a Disunion, which would terminate in our Ruin.
>
> Source: Hough, ed., *Proceedings of the Commissioners*, pp. 340-343. This letter to Clinton, dated July 30, 1789, was signed by 26 Six Nations chiefs and warriors, including five Onondaga chiefs from Buffalo Creek. (Exhibit F)

11. August 15, 1789—At Six Nations council meeting at Niagara, the "principal chiefs of the Onondagas, Cayugas, & Mohawks" complain about the New York strategy to divide and weaken the Confederacy by negotiating separate treaties with individual nations:

> About this time [July, 1789] we received an Answer to a letter we had wrote to Governor Clinton but not a Satisfactory one for he still looks upon the Unjust Purchase he made from a few of our Young People to be good and Valid & says he is Determined to Hold it fast, and that if we hinder the Surveyors in their Business he will Look upon it as a Hostile Intention and that we mean to Quarrel with him. We now intend to warn the Governor again as we did before & to tell him that we see through his Artifice in reserving small tracts of Lands to the Indians by which he hopes to Divide and Weaken us, but this we will endeavour to prevent by Sending for our People who are there to Move off to us & we have sent Belts to the Surveyors not to proceed until this Matter is Settled to our Satisfaction.
>
> Source: "Proceedings of a meeting of Onondagas, Cayugas, and Mohawks at Niagara," August 15, 1789, Public Archives of Canada, RG 10, vol. 1834-1835, folios 365-367; also available in the 50-reel microfilm collection *Iroquois Indians: A Documentary History of the Diplomacy of the Six Nations and Their League*, (Woodbridge, Conn., Research Publications, 1984), reel 39. (Exhibit G)

12. February 25, 1791—In a letter to U.S. Indian Commissioner, Timothy Pickering, the Mohawk leader Joseph Brant condemns those who had acquired or attempted to acquire Six Nations lands by treating with "individuals" and "parties without the concurrence of the whole." He claims that this strategy—to divide the Six Nations and acquire their land by holding councils with partial and unrepresentative groupings of Indian—had been followed since the end of the Revolutionary War and was intended to undermine the peace of the Confederacy.

> Sir,
>
> The law passed by Congress the 22nd July last, to regulate trade and intercourse with the Indian Nations, shews a desire in them to have justice done the Indians; that, with the assurances I have had of the good disposition of the President of the United States towards us, induces me to address you on the Subject.
>
> The number of Council fires which has since the year 1784 been kindled in our Country has kept our heads in a state of intoxication—and although your present mode of treating with us [since Congressional passage of the Non-Intercourse Act] may prevent such abuses as have been practiced from being exercised in

> future by your Citizens, yet if partial representations are still received from our people, I am afraid it will fail of effecting that happy end which our mutual interest requires. It is difficult for us to prevent individuals from addressing you with assumed power, which they have no right to; if such meet encouragement, harmony cannot be established with permanency. . . . Should individuals, or parties, without the concurrence of the whole, meet encouragements, the Five Nations cannot be happy amongst themselves; nor can that harmony subsist between them and their neighbours, as might be produced by a general representation of the causes of uneasiness where there is any, which has long been the united wish of the nations.
>
> Source: Joseph Brant to Timothy Pickering, February 25, 1791, Pickering Papers, Massachusetts Historical Society, vol. 61, folio 197-199v; also in *Iroquois Indians: A Documentary History*, Reel 40. (Exhibit H)

13. July 17, 1792—Federal Indian Superintendent Israel Chapin reports to U.S. Indian Commissioner Timothy Pickering that the Cayuga Indians have strongly protested the validity of land cession treaties to New York State. The Cayuga Nation faced circumstances similar to those confronted by the Onondagas. A majority of the Cayugas, including most of the chiefs and sachems, resided at Buffalo Creek, yet a small number of Cayugas living at Cayuga Lake had sold lands to the State of New York without the approval or participation of the rest of the Cayugas or the Six Nations Confederacy. Fish Carrier, who lived at Buffalo Creek, was the head chief and spokesman for the Cayugas. On occasion, the Buffalo Creek Onondagas requested him to act as their spokesman as well. (See, for example, Fish Carrier's speech to Israel Chapin, Sr., the U.S. Indian Superintendent to the Six Nations, October 12, 1793, ¶ 16 below.)

> The Fish-Carrier and all the Cayugas residing at Buffalow Creek were highly disaffected and at my first arrival the treatment I received from them bordered on rudeness. Whether real or not they certainly feel like an injured people. Through the influence of our friends they held a council with me. They informed me that the Indian by the name of Steel-Trap was never considered as a chief of the Nation—that he only sold their Lands to the Commissioners of New York—he only received and squandered the money—that the five hundred dollars which the Governor of New York promised to pay the Nation annually had uniformly been paid to the Usurper Steel-Trap, and none of Chief or one Nation residing at

> Buffalow Creek had received a farthing. That their Lands were now gone without their consent and without an equivalent and that they had not so much as a pipe of Tobacco to smoke with their friend.
>
> Source: Israel Chapin, Sr., to Timothy Pickering, Canandaigua, July 17, 1792, from the Pickering Papers, vol. 62, fol. 58-59v. (Exhibit I)

14. April 21, 1794—In an official reply to a message from Secretary of War, Henry Knox, the Onondaga chief, Clear Sky, and the Mohawk leader, Joseph Brant, bitterly complain that while the Six Nations chiefs have devoted great effort to mediate a peace between the Western Confederacy of Indians in the Ohio country and the United States, federal officials had done nothing to stop the fraudulent land cession treaties that had diminished the Six Nations land base. Brant complains:

> We have borne every thing patiently for this long time past; we have done every thing we could consistently do with the welfare of our nations in general—notwithstanding the many advantages that have been taken of us, by individuals making purchases from us, the Six Nations, whose fraudulent conduct towards us Congress never has taken notice of, nor in any wise seen us rectified, nor made our minds easy. This is the case to the present day; our patience is now entirely worn out . . .
>
> Source: Proceedings of a council at Buffalo Creek, in reply to a message from Secretary of War Henry Knox, April 21, 1794—Answer introduced by Clear Sky and delivered by Joseph Brant, in the presence of Israel Chapin (U.S. Agent) and Colonel John Butler (British Agent), in *American State Papers: Indian Affairs*, I, 481. (Exhibit J)

The Onondaga Nation and the Six Nations Confederacy denied the validity of the Treaty of Onondaga, 1793

15. In late 1793, New York State Commissioners held treaty proceedings at Onondaga Village with the small portion of the nation that resided there. By this treaty, New York State gained control of approximately three-quarters of the Onondaga Reservation created by the Treaty of Fort Schuyler, 1788. In return, the Onondagas received $410 and were

promised an annuity of $410, payable each June 1st. As with the Treaty of Fort Schuyler, the Onondaga chiefs at Buffalo Creek explicitly and repeatedly repudiated the treaty.

16. October 12, 1793—When the Onondaga and Cayuga chiefs at Buffalo Creek received the message from Governor Clinton, calling for a treaty conference to be held in the fall of 1793, they immediately sent word that they would not attend and asked the Governor to re-schedule it for the following spring. Several of the leading chiefs had just returned from a months-long effort to broker a peace between the hostile Western Indian Confederacy in the Ohio Country and the United States. U.S. Indian Superintendent Israel Chapin relayed the message that the Buffalo Creek Onondagas and Cayugas would not be present, and gave his opinion that the proposed treaty negotiation should not be held as planned. [The act authorizing this treaty, passed by the New York State Legislature on March 11, 1793, had named Israel Chapin as one of the three commissioners to negotiate with the Onondagas, Cayugas, and Oneidas on behalf of the state, but Chapin would not be part of the Treaty of Onondaga, 1793. See *Laws of the State of New-York, Sixteenth Session*, 1793, chapter LI, pp. 73-74.]

> Fish-carrier, Chief of the Cayuga Nation to Israel Chapin Esq., Superintendant of Indian affairs for the Northern Department, Buffaloe Creek, Oct. 12th, 1793
>
> Brother: You informed us the other day that you and two other persons were appointed by the Governor as Commissioners to treat with us for the sale or lease of our Lands, and that a meeting was proposed to be held on the lands to be sold or leased this Fall.
>
> Brother: You desired us to think of the matter and let you know when we would meet the Commissioners, and whether we would sell or lease our Lands.
>
> Brother: The season is now far advanced, and Winter is near to us, which together with the great sickness, which prevails among us, makes it difficult for us to meet you this Fall.
>
> Brother: We will meet you in the Spring, and we will either sell or lease our Land and let you know on what terms.

Source: New York State Archives, Legislative Assembly Papers (A-1823), vol. 40, pp. 297-298; also available in *Iroquois Indians: A Documentary History*, reel 42. (Exhibit K)

17. Despite this message, New York State Indian Commissioners choose to ignore the request for postponement from the head chiefs of the Onondagas and Cayugas. On February 10, 1794, the Onondaga and Cayuga Chiefs at Buffalo Creek informed U.S. Indian Superintendent Israel Chapin that they have learned that, contrary to their wishes and expectation, the state had made a treaty at Onondaga the previous November in which they had obtained a large land cession.

> Brothers—When you came here to the council last fall, you told us that the Governor of the State of New York wanted to purchase our Lands, and that he had appointed Commissioners, to treat with us for them. After considering on the matter we told you, that as it was late in the season, and many of our men had gone out a-hunting, we wished to have the matter put off while Spring [sic], and we sent a message by you to the other Commissioners, to inform them of the same. As you was one of the Commissioners and our Superintendant, we made our minds easy, but we were greatly disappointed when we heard that some of our lands had been purchased without our consent, and our minds have been much distressed in consequence thereof.

Source: "Proceedings of a council at Buffaloe Creek," February 10, 1794, O'Reilly Papers, New-York Historical Society; also in *Iroquois Indians: A Documentary History*, Reel 42. (Exhibit L)

18. General Chapin answered that he had "delivered the message to the Commissioners which you gave me last fall, and informed them, that you wished to have business delayed while spring [sic], but notwithstanding they proceeded to purchase the land belonging to the Onondaga Nation." (*Ibid.*, Exhibit L)

19. March 4, 1794—The Onondaga and Cayuga chiefs, invited by Governor Clinton to meet with him in Albany, stopped along their way at the home of U.S. Superintendent to the Six Nations, General Israel Chapin, at Canandaigua, New York. The chiefs once again told Chapin that the state treaties with the Onondagas and Cayugas were invalid and that they

intended to tell Clinton that no sale could be considered binding unless it was concluded at the Six Nations council fire at Buffalo Creek. They also requested that Chapin accompany them to Albany. In this excerpt, the Onondaga chief, Clear Sky presents the Six Nations position:

> We received the Governors message and was glad to hear it; as we wish to see the Governor and reveal our minds to him, as he has not before paid that attention to the principal chiefs which he ought, as he has been trading with but few of the Indians living at Cayuga and Onondago, which we consider as it were but children, with whom he has traded, which was not properly intitled to dispose of the lands, without our consent But has Generally Confirmed his bargains with these few and Neglected the principal Chiefs who are the proper owners of the Land. Brother, You recollect last fall we understood the Governor wished to purchase our Lands, but we declined meeting on account of the Winter Season being so near approaching and would not so well accommodate the business & desired it might be postponed until Spring. And we conceive the Governor has wished to trade with a few who reside on the Lands at Cayuga & Onondago, without Consulting the principal Chiefs, or proper owners, and we consider him as one who wishes to defraud us of our Land. . . .
>
> Brother: I hope You have paid attention to what we have said. The council which must finally terminate this business, must be holden at Buffaloe Creek the place Determined to decide all such business, so that all the Chiefs and Six Nations may have a proper understanding of all that takes place, and as the aforesaid place is the place of our doing business, shall take the Governor by the Hand and invite him there. It is our Determination to persuade the Governor to rise from His Seat and come into our Country at Buffalo Creek, the place of our doing business, and there to determine the Terms of our Bargain, As we mean this meeting to be the last respecting the lands. Former purchases made by the Governor has much disturbed our minds, as he has traded with Boys, &c. in future we mean to have the Governor come forward into our Country and make his Bargains at Buffaloe Creek.
>
> Source: New York State Archives, Legislative Assembly Papers, vol. 40, pp. 83-87; also in *Iroquois Indians: A Documentary History*, Reel 42. (Exhibit M)

20. In reply, Chapin acknowledged that the Onondagas and Cayugas had informed him that "it was not agreeable to your minds" to sell lands to the New York Commissioners; "I communicated this information to them but notwithstanding they proceeded and purchased that of the Onondagaes." (Exhibit M)

21. March 17, 1794—Accompanied by Chapin, the Onondaga and Cayuga chiefs met with Governor Clinton in Albany in March, 1794. Here, they explicitly repudiated the treaty made at Onondaga in November, 1793, and told Clinton that only a treaty at the Six Nations council fire at Buffalo Creek could be valid. They asked Clinton to send commissioners to Buffalo Creek and stipulated that U.S. officials be present to "see justice done us." In this excerpt, a spokesman identified as the Little Cayuga Chief speaks on behalf of the Onondagas:

> Three agreements were made with some of your people in our General Council which you have annulled, because they did not get the consent of your government, but the Commissioners you sent last fall made an agreement with a few of the people that live on our land, and did not obtain the consent of our head men nor the voice of our nation. It is void and we bury it. . . .
>
> Brother—you requested us to mention the time and place where you have wronged us and the particular Instances, as you consider yourself a Friend. We will tell you.
>
> What we mean is that we wanted your Commissioners to postpone the business last Year as we were not ready. But they came on like Strong headed men and Treated with Boys at Onondago. The Annual payments are made to the Indians residing there also, who wrong the Majority of their [illegible]. When we speak of you we only mean the men you sent among us. We have buried the Bargain with the Onondagoes as well as those we made with your Young Men. We hope there will be a New Bargain made to the satisfaction of the Nation.
>
> Source: "Proceedings of a Meeting between Governor George Clinton with the Cayugas and Onondagas from Buffalo Creek and Grand River," March 13-17, 1794," New York State Archives, Legislative Assembly Papers, vol. 40, pp. 225-242; also in *Documentary History*, Reel 42. (Exhibit N)

22. The spokesman made it clear that the Buffalo Creek Indians were not attempting to exclude the Onondagas and Cayugas living on the state reservations; "We shall invite the people that live on our reservations to attend the proposed Council at Buffaloe Creek. We called a Council at Onondaga and Cayuga on our way and told them of it." Rather, they were seeking a comprehensive agreement with the state, negotiated with the proper Six Nations chiefs, in the presence of federal commissioners: "Let us forget what is past—let us have a new agreement

that will give general satisfaction." The meeting ended in Albany with no confirmation of the state land cession Treaty of Onondaga, November 1793 and no agreement by the state to respond to the Onondaga and Cayuga demands.

The Six Nations believed that only a treaty made with the participation of the federal government is valid and they repeatedly called on federal officials and the President of the United States to investigate fraudulent purchases and assist them in the protection of their lands

23. Following the Revolutionary War, United States Commissioners informed the Six Nations at the Treaty of Fort Stanwix "that a treaty with an individual state without the sanction of Congress could be of no validity." (Oliver Wolcott, Arthur Lee, and Richard Butler to the President of Congress, dated Fort Stanwix, October 5, 1784, *Papers of the Continental Congress*, item 56, folios 133-136; Exhibit O). There is evidence that the Six Nations took this injunction seriously, even before the passage of the Non-Intercourse Act in 1790. For example, in the spring of 1788, when Governor Clinton attempted to invite the Six Nations to a treaty at Fort Schuyler, the Six Nations chiefs responded that they had "promised Congress not to attend any Council but what should be called by their Authority" (Message of the Six Nations to Governor George Clinton, dated Buffaloe Creek, May 14, 1788, in Hough, ed., *Proceedings of the Commissioners*, p. 148; see Exhibit A). The Six Nations later returned the belt inviting them to the state treaty, telling Clinton that "we are unable to meet you at the Place you propose this Year as Business of the utmost Importance to the Indian Nations calls our immediate Attention on the Treaty now held on the Ohio River." (Joseph Brant, "In behalf of the Five Nations," to Governor Clinton, July 9, 1788, in Hough, ed. *Proceedings of the Commissioners*, pp. 166-167; see Exhibit B). Brant is referring to the federal treaty with the Six Nations and other western Indian nations held at Fort Harmar.

24. During the spring and summer of 1788, as New York State, Oliver Phelps (holder of the "preemption right" to western New York), and John Livingston, instigator of the notorious "Livingston Lease," all attempted to hold land cession treaties with various groups of Indians, the Six Nations complained to federal officials about the growing pressure on their land rights and called on the federal government to assist them. In May, 1788, the Six Nations chiefs held at council at Buffalo Creek, in which they repudiated "the Lease which Mr. Livingston and his Friends had taken from some of our young Men, contrary to the Resolutions and Speech from the whole of the Sachems and Chiefs of the Six Nations" and declared their intention to attend the federal treaty on the Ohio River where "we shall . . . expect every Assistance from the Deputies from Congress to assist us in our Grievances at that Meeting." (Six Nations chiefs to Governor George Clinton, dated Buffaloe Creek, May 14, 1788, in Hough, ed., *Proceedings of the Commissioners*, p. 148; see Exhibit A).

25. When the Six Nations delegates arrived in the Ohio Country, they complained bitterly to Arthur St. Clair, Governor of the Northwest Territory, about the growing pressure for councils from men seeking to purchase their lands, including the pressure from New York. In this excerpt, Governor St. Clair reports to the following to Secretary of War, Henry Knox:

> There is another reason why the Indians have been so tardy and undecided about their meeting which has been supplied by the Governor of New York. It may not be proper for me to animadvert on the conduct of that or any Government; but it surely was very improper to call the six nations to a meeting in that State, and as I have understood for State purposes at the very time they had been called to a different part of the country for general purposes, and in which that State as a member of the U.S. was equally concerned, and no meeting is of much consequence without these nations. It has distracted them very much—they complain of it and say "they are called here and they are called there—One says here is the great Council Fire and to this you must come—another tells them there is the great Council Fire and there they must go, and a third tells them it is lighted up in a third place (that I understand is the land company that has been formed in that State to take leases of them) and they know not which to do, or whom to believe, they feel themselves like drunken men reeling from side to side and

unable to fix themselves any where." And as they are naturally, I had like to have said, not altogether unjustly, jealous of us, it has at this time increased that natural jealousy.

Source: Governor Arthur St. Clair to Secretary of War Henry Knox, dated Pittsburgh, July 5, 1788, Papers of the Continental Congress, item 50, vol. 3, folios 489-508; also in *Documentary History*, Reel 39. (Exhibit P)

26. In the spring of 1789, when state officials began arriving in Six Nations country, preparing to survey the lands that had purportedly been sold by the Oneidas, Onondagas, and Cayugas at Fort Schuyler and Albany, the previous year, the Six Nations council sent a lengthy message detailing the threat to their lands, and calling on the federal government to intervene in the controversy, investigate the circumstances, and assist the Indians in gaining redress. This message was an official communication, addressed "To the President of the United States," sent by the "Sachems, Chiefs & Warriors of the Five Nations, assembled in Council at Buffaloe Creek," dated June 2, 1789.

27. In this message, the Six Nations denied the validity of the Treaty of Fort Stanwix (see above) and in this excerpt, they call for the intervention of the federal government to protect their rights:

> We, the Sachems, Chiefs, and Warriors of the Five Nations Assembled in Council at our Great Council Fire at Buffalo Creek congratulate You upon Your New System of Government, by which You have one Head to Rule, Who we can look to for redress in all disputes which have arose or which may arise between Your people and ours . . . We request You will attend to our Complaints. . . .
>
> We feel ourselves injured by the Number of Council Fires which your people have kindled at Different places to do Business with us. . . . [There follows a detailed recitation of the events of the previous year, including a strongly-worded condemnation of the Treaty of Fort Schuyler which the message characterized as "a Fraudulent means of possessing our country" and purchased "from them who have no right to sell."]
>
> [W]e wish that in order to inform Yourselves fully of the Measures that have been taken, that You would send Commissioners to enquire into the Circumstances of these our Complaints, and take Peter Ryckman who is well acquainted with all these proceedings and who has himself been a principle instrument in Creating all the Mischief that has

been occasioned on both Sides, may also attend with them and when you have the Matter explained so that you perfectly understand it, We presume that all will be made right & that we will then be enabled to Convince you of the Sincerity and justice of our intentions by strictly adhering to all Public Treaties we engage in.

[The message is signed by seven Six Nations leaders, including the first two signers, Sharongyowanon (Clear Sky) and Kakondenayen "in Behalf of the Onondaga Nation."]

Source: State Historical Society of Wisconsin, Draper Collection, Series U, vol. 23, folios 164-169; also in *Iroquois Indians: A Documentary History*, reel 39. (See Exhibit E)

28. Following this message to President Washington, the Six Nations chiefs informed Governor Clinton that they had formally request federal intervention to protect their rights against fraudulent state treaties. This formal message was signed by five "Onondaga chiefs from Buffalo Creek," in addition to twenty-one other Six Nations leaders. The message strongly condemned the Treaty of Fort Schuyler, and concluded in the following manner:

We wrote Congress the same time [we] wrote you and requested that Commissioners might be sent either here or at our Council Fire at Buffaloe Creek to enquire into those Differences, that the Causes might be removed, and we are anxiously waiting their Answer. We hope that Congress will view our Situation impartially, and we presume the World can easily discern that it is not the Good of the State, but self Interest, that influences the Proceedings which most affect us. . . . It is hard for us to judge what are the Motives which influence your Proceedings; therefore we wish our Difference to be determined by Congress.

Source: Message to Governor George Clinton, July 30, 1789, in Hough, ed., *Proceedings of the Commissioners*, pp. 340-343. (See Exhibit F)

29. Between 1790 and 1792, the United States government sponsored three important councils with members of the Six Nations—at Tioga Point, November 1790, at Painted Post (Newtown Point), July 1791, and at Philadelphia, January 1792. The United States had a variety of goals in convening these meetings—to condole and make restitution for Indian victims of frontier violence, to inform the Six Nations of the newly-passed Trade and Intercourse Act of 1790, and, most importantly from the American perspective, to maintain peaceful relations with

the Six Nations at a time when the Western Confederacy—the Six Nations' "nephews" in the Ohio Country—were in open armed conflict with the United States. These meetings provided the framework for the making of the most important United States-Six Nations treaty, the Treaty of Canandaigua, 1794. In this excerpt, the Oneida orator, Good Peter, speaking on behalf of the entire confederacy at the Painted Post conference, presses U.S. Commissioner Timothy Pickering for assurances that the U.S. will fulfill its engagements to protect Six Nations' lands:

> "You told us (said he) that the UStates were going to take measures to prevent our being cheated—that we might keep the seats we sat on till we should think fit to sell them. You told us that no sale of land without the knowledge of the President would be good. When we owned all this land, we did not think we had too much. Yet now we have but little. But 'tis the mind of the Six Nations never to sell any more; but to keep it for our warriors for hunting ground forever: but 'tis not our wish to break our seats and make them smaller. Now the UStates have engaged to make our seats easy, we only desire they would fulfill their engagements. We are willing to do the like. This will make the chain bright on both sides."
>
> Source: From Timothy Pickering's notes at the Painted Post conference, July, 1791, Pickering Papers, vol. 60, folio 46. (Exhibit Q)

30. In March 1794, the Onondaga and Cayuga chiefs from Buffalo Creek made two explicit requests for federal assistance and involvement in their efforts to challenge the validity of the Treaty of Onondaga, 1793. At a conference in Canandaigua with U.S. Superintendent to the Six Nations, Israel Chapin, the Onondaga chief, Clear Sky requested Chapin to accompany the Indians to their meeting in Albany with Governor Clinton to voice their protest against the Treaty of Onondaga. "[A]s You being appointed to oversee Indian Affairs we look to you for advice and Desire you will go to Albany with us . . . we hope and believe that Justice will be done to us, and hope you will prevail with the Governor to come into our Country to settle the business." (Speech of Clear Sky to Israel Chapin, March 4, 1794, New York State Archives, Legislative Assembly Papers, vol. 40; see Exhibit M). Chapin agreed to accompany the Onondagas and Cayugas to their meeting with the Governor.

31. On March 17, while speaking of the Six Nations' demand for a new state treaty to overturn the land cession treaties of 1793/94, the Six Nations' spokesman expressed the Indians' desire for U.S. mediation and protection: "We wish the Superintendent appointed by the United States Genl. Chapin to be present and see justice done us in our negociations, as we look on him as our father. We do not expect that he will confine his care to us only, but that he should be a mediator between both parties." ("Proceedings of a Meeting between Governor George Clinton with the Cayugas and Onondagas from Buffalo Creek and Grand River," March 13-17, 1794, Legislative Assembly Papers, vol. 40, folios 225-242; see Exhibit N).

32. In November 1794, immediately following the signing of the Treaty of Canandaigua, a delegation of Onondaga and Cayuga chiefs requested a meeting with U.S. Indian Commissioner, Timothy Pickering and their superintendent, Israel Chapin. At this meeting, they expressed disappointment at New York State's refusal to meet the chiefs at Buffalo Creek to renegotiate the land cession treaties of 1793-1794, despite a series of letters sent by Chapin to Clinton. The Indians appear to be despairing that the state will respond to their claim and they ask for Pickering's assistance:

> Brother,
>
> We have told you that something was heavy on our minds, and as you were sent forward by General Washington and the Fifteen fires to ease the minds of the Six nations, we address ourselves to you. When we opened our minds to you the other day, you told us you would give your assistance on any thing which would be to the advantage of our nations. We thanked you and accepted of your promised assistance. Now listen to the minds of the two nations here present.
>
> Brother,
>
> It is the situation of our lands which makes our minds uneasy. We have but two small pieces left and we are desirous of reaping from them all the benefits which they are capable of yielding. The York people have got almost all our Country and for a very trifle. . . .
>
> We desire this business may first be laid before General Washington and by him be sent to the York people, and we request Gen'l Washington to ask the York

> people to grant what we desire. And we desire them to let us know quickly whether they will comply with our request. If they do, let them first inform Gen'l Chapin of their determination, and he will inform those at the Westward as well as those at the Eastward. We shall want his assistance, if our requests respecting our annual dues (?) are complied with. We wish the York people to take this matter into their serious consideration and we shall expect that they will comply with our wishes.
>
> Speech of the Onondagas & Cayugas about their reservations. Addressed to T. Pickering Nov. 16 1794, Pickering Papers, 62: 104-105v. (Exhibit R)

The Six Nations and Onondagas were repeatedly assured by federal officials that the United States Government would protect Six Nations land rights. Moreover, the Six Nations were repeatedly told that state treaties, without the sanction of Congress, could not be valid

33. As indicated above, the Six Nations had been told by United States officials at their very first treaty council—the Treaty of Fort Stanwix, 1784—that "a treaty with an individual state without the sanction of Congress could be of no validity." (Oliver Wolcott, Arthur Lee, and Richard Butler to the President of Congress, dated Fort Stanwix, October 5, 1784, Papers of the Continental Congress, item 56, folios 133-136; see Exhibit O.) Four years later, the Six Nations chiefs informed Governor Clinton that they had "promised Congress not to attend any Council but what should be called by their Authority" (Message of the Six Nations to Governor George Clinton, dated Buffaloe Creek, May 14, 1788, in Hough, ed., *Proceedings of the Commissioners*, p. 148; see Exhibit A.)

34. Although this assertion by the federal treaty commissioners would remain in question during the Articles of Confederation period, the federal relationship with Indian nations was clarified and defined with the passage of the Trade and Intercourse Act in July, 1790. Over the next five years, the United States government made repeated efforts to acquaint the Indian nations of its provisions. The first time the Six Nations were officially informed of this new

policy of the United States was at the Tioga Point conference in November, 1790. This excerpt comes from a speech by U.S. Indian Commissioner, Timothy Pickering:

> . . . I am particularly required to communicate to you, in a plain and fair manner, the late act of Congress respecting trade & intercourse with the Indian Tribes. . . .
>
> The fourth section is intended for the mutual advantage of the United States and of the Indian Tribes. In the past, some white men have deceived the Indians, falsely pretending they had authority to lease or purchase their lands: And sometimes they have seized on more lands than the Indians meant to sell them; again falsely pretending that those lands were comprehended within their purchase. Such fraudulent practices have made our brothers angry and sometimes occasioned hostilities, war & bloodshed. Yet Indians will always be exposed to such deception and impositions while they continue to sign and seal papers which they cannot read. Now brothers, to prevent these great evils in the future, the Congress declare that no sale of lands made by any Indians, to any person or persons, or even to any State, shall be valid (or of force) unless the same be made at some public treaty held under the authority of the United States.
>
> . . . lay up this law in your hearts & keep it fresh in your memories.

Source: Pickering Papers, vol. 61, folios 78-78A (Exhibit S)

35. The most significant and widely-disseminated pledge of federal protection was made by President George Washington during a visit by a Seneca delegation to the nation's capital in Philadelphia in December 1790. In response to a speech by Cornplanter, the Seneca's spokesman, who complained of fraudulent land purchases, Washington promised federal protection and cited the Non-Intercourse Act as proof of the nation's policy:

> . . . the General Government only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.
>
> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but will protect you in all your just rights.
>
> Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of fort Stanwix, the 22d of October, 1784, excepting such parts as you may have since

> fairly sold, to persons properly authorized to purchase of you. You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. It appears, upon inquiry of the Governor of New York, that John Livingston was not legally authorized to treat with you, and that every thing that he did with you has been declare null and void, so you may rest easy on that account. But it does not appear, from any proofs yet in possession of Government, that Oliver Phelps has defrauded you. If, however, you have any just cause of complaint against him, and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.
>
> Source: *American State Papers: Indian Affairs*, vol. 1, p. 142. (Exhibit T)

36. This speech by Washington, along with the Non-Intercourse Act would be printed by the federal government to be distributed to each of the Six Nations at the Painted Post Conference, in July, 1791. It would be reiterated and referred to at the U.S.-sponsored meeting with the Six Nations at Philadelphia in January 1792.

37. In October, 1794, as the Six Nations were gathering in western New York for the negotiations that would culminate in the Treaty of Canandaigua, delegates from the Oneida Nation met with U.S. Indian Commissioner, Timothy Pickering at Canandaigua. The meeting focused on the troubled state of the Oneidas' landed affairs and on internal political divisions within the nation. Pickering offered a particularly strong statement of the federal government's understanding of the Non-Intercourse Act and its application to the New York State land cession treaties:

> I hold in my hand, & now give you, that article of the law of the U. States which was made to protect your land: keep it, and show it to every one who shall tempt you to part with them. I have explained to you what I take to be the true meaning of the law: and I believe I am not mistaken. Perhaps some may tell you that the President and Great Council of the U. States have no right to meddle with your lands, and even to keep you from being cheated out of them: But pay no regard to such men: Consider them as deceivers, who want to take your lands from under you . . .
>
> Brothers, I have just told you that by your own agreement you cannot sell or lease the remainder of your land, except to persons appointed by the State of New

York. But I now tell you further, that the State itself cannot buy it, unless the agents appear at a Council Fire kindled by the United States, and in the presence, & with the approbation of the Commissioners appointed by the President, agree on the price. And after this, the paper containing the articles of the treaty signed by the Chiefs, must be laid before the President & his Council of wise men, and be approved by them, before it can have any strength.

Brothers, I desire you to remember my words. I know you will be told the State has all the power over your lands, and that the President and his Council have nothing to do with them. But, Brothers, stop your ears, and do not believe them. The Great Council of all the United States have declared, and their words are strong, that your lands shall not be taken from you, unless by a treaty of which the President & his wise men shall approve. But, Brothers, even if the right of the United States to interfere were doubtful, your own right is certain. The land is yours; and the State cannot take it from you without your own consent. And if any agent come to you to buy it, tell them plainly, that you will make no bargain, but it in the presence of the faithful men whom the President shall appoint; and that when the bargain shall be made it shall not have any strength until the President and his Council approve it. Speak strong and be not afraid. Follow this advice, and nobody can hurt you: for the United States will protect you.

Source: Consultation between Timothy Pickering and the Oneida delegation, October, 1794, Pickering Papers, vol. 60, folios 217-230; quotes at 226-228A. (Exhibit U)

38. In May 1795, Timothy Pickering, who had recently been named Secretary of War by President George Washington, was informed that the New York State Legislature had passed an act authorizing commissioners to negotiate land cession treaties with the Onondagas, Oneidas, and Cayugas. He was further informed that, although the legislature called on Governor Clinton to request a federal commissioner to attend the negotiations, the Governor had chosen to proceed without complying with the requirements of the Non-Intercourse Act.

39. Pickering responded to New York State's defiance of federal authority in three ways: first, he directed the U.S. Superintendent for the Six Nations, Israel Chapin, Jr. to "give no aid or countenance" to the state treaty and to inform the Indians "that any bargains they make at such a treaty as that proposed to be held at Scipio, will be void; and as the guardian of their rights you will advise them not to listen to the invitation of any Commissioners unless they have

authority from the United States to call a treaty." Secondly, he requested Attorney General William Bradford to issue an official opinion as to the legality of the proposed state treaty; and finally, he sent the Attorney General's finding to Governor Clinton, as well as Chapin. The following is an excerpt from Attorney General Bradford's opinion:

> The Attorney General has the honor of stating his opinion upon the question propounded to him by the Secretary of War, viz: Whether the State of New York has a right to purchase from the Six Nations or any of them, the lands claimed by those nations and situate within the acknowledged boundaries of that State, without the intervention of the general government . . .
>
> The language of this act [the Non-Intercourse Act] is too express to admit of any doubt upon the question unless there be something in the circumstance of the case under consideration to take it out of the general prohibition of the Law.
>
> Nothing of this kind appears in the documents submitted to the attorney General. It is true, that treaties made by the State of New York with the Oneidas, Onondagas and Cayugas, previous to the present Constitution of the United States, those nations ceded all of their lands to the people of New York, but reserved to themselves and posterity forever for their own use and cultivation, not to be sold, leased, or in any other manner disposed of to others, certain tracts of their said lands, with the free rights of hunting and fishing. So far therefore as respects the lands thus reserved, the treaties do not operate further than to secure to the State of New York the right of preemption: but subject to this right they are still the lands of these nations, and their claims to them, it is conceived, cannot be extinguished but by a treaty holden under the authority of the United States and in the manner prescribed by the laws of Congress.
>
> Source: Opinion of Attorney General William Bradford, June 16, 1795, O'Reilly Papers, vol. 11, New-York State Historical Society. (Exhibit V)

40. When informed by Israel Chapin that the New York Commissioners had proceeded to negotiate a treaty with the Cayugas and Onondagas at Cayuga Ferry (Scipio), Pickering responded that "Seeing the Commissioners were acting in defiance of the law of the United States it was certainly proper not to give them any countenance; and as that law declares that such purchases of the Indians that those commissioners were attempting to make, invalid, it was also right to inform the Indians of the law and of the illegality of such purchases."

41. In March, 1802, a delegation of Seneca, Onondaga, and Cayuga chiefs from Buffalo Creek traveled to Washington, D.C. to meet with Secretary of War, Henry Dearborn. The delegation was led by the Seneca spiritual leader, Handsome Lake, and one of its main purposes was to obtain a written federal confirmation of Six Nation lands. In answer to Handsome Lake's request, Secretary Dearborn responded: "Your good father the President of the United States having seen your talk of yesterday directs me to assure you, that his ears are ever open to the just complaints of his red children and his heart ever disposed to afford them relief . . . he has instructed me to relieve your apprehensions on that subject by furnishing you with a written instrument which is to be considered as a General guarantee of all the lands within the United States to which you are entitled by reservation or otherwise with his solemn assurances that they shall not be taken from you but by and with your consent. This paper, I now on behalf of the Government of the United States present you." The document reads:

> By authority of the President of the United States.
>
> To all people to whom these presents shall come, Greeting.
>
> Whereas it has been represented by some of the Chief men of the Seneca and Onondago nations of Indians that they are entitled to certain reserved Tracts of land lying on the Cattaraugus Creek and on or near the Allegany, and which has been surveyed, laid off, and the lines regularly run and distinctly understood, but that they are not in possession of deeds securing to them the peaceable and undisturbed occupancy thereof. As well therefore to remove all apprehensions from the minds of the Chief men and on behalf of the Government of the said United States, That all lands claimed by and secured to said Seneca and Onondago Nations of Indians by Treaty, Convention or deed of conveyance or reservation, lying and being within the limits of the said United States, shall be and remain the property of the said Seneca and Onondago Nations of Indians forever; unless they shall voluntarily relinquish or dispose of the same. And all persons, Citizens of the United States, are hereby strictly forbidden to disturb said Indian Nations in their quiet possession of said land.
>
> Given under my hand and the seal of the War Office of the United States, this seventeenth day of March in the year one thousand eight hundred and two.

Henry Dearborn
Secretary of War

Source: Confirmation of land rights of Senecas and Onondagas, March 17, 1802, National Archives, RG 75, Records of the Secretary of War, Indian Affairs, Letters Sent, vol. A, pp. 192-193; also in Logan Papers, vol. 11, Historical Society of Pennsylvania, Philadelphia; and Haverford College Library, Haverford Pa., Indian Committee Records, Manuscripts Box 1. (Exhibit W)

The Six Nations and the Onondaga Nation repeatedly expressed a desire to maintain their lands, not to sell them; but when importuned by endless pressure from individual speculators and officials from New York State, they pursued a variety of strategies—including plans to lease lands rather than sell—in order to maintain title and interest in their homeland

42. Faced with increasing pressure from state officials and white land speculators for Six Nations territory, the nations of the Six Nations Confederacy tried desperately to hold on to their lands. They repeatedly told state and federal officials that the Six Nations had no desire to sell or otherwise divest themselves of their homeland. As the pressure intensified in the late 1780s and early 1790s, some of the Six Nations developed strategies to maintain their lands as best they could, such as the strategy of leasing. Denying the state's theory of preemption rights, the Six Nations claimed the right to lease land to "friends" rather than sell land to the state.

43. Two of the Six Nations would pursue this policy the most—the Oneidas and the Cayugas, but the Onondagas appear to have been influenced by this strategy as well—a strategy explained in the following excerpts from Oneida sources. The first is a memorial sent by Jacob Reed and three other Oneidas to New York State officials in February 1788, at the time of the Livingston lease:

> . . . Brothers: We are your Allies, we are a free People, our Chiefs have directed us to speak to you as such . . .
>
> Brothers: We are determined then never to sell any more; the Experience of all the Indian Nations to the East and South of us has fully convinced us, that if we follow their Example we shall soon share their Fate. We wish that our Children and Grand Children may derive a comfortable Living from the Lands which the

> Great Spirit has given us and our Forefathers. We therefore determined to lease them . . .
>
> Brothers: We are surprised to hear that you are displeased because others have accepted that, which your Chiefs have told us is beneath your Nation. But, Brothers, we are more surprised still, to learn you claim a Right to control us in the Disposal of our Lands; you acknowledge it to be our own as much as the Game we take in hunting. Why then do you say that we shall not dispose of it as we think best?
>
> Source: Memorial of Jacob Reed and three other Oneidas to "the Great Men of the State of New York," February 1788, in Hough, ed., *Proceedings of the Commissioners*, pp. 124-125. (Exhibit X)

44. The leasing strategy was an attempt on the part of the Indians to maintain maximum freedom over the disposal and use of their lands, as the Oneida chief, Good Peter, explained to Timothy Pickering in 1792 in the following excerpt:

> Bro[ther] I did not then expect [at the close of the Revolutionary War] that we should be reduced to our present situation. We then thought we should be the sole proprietors of our own land; and that our disposal of it should be optional with us, in case of a successful issue [of the war]. . . . It seems to us that we are not really freemen; nor have had the real disposal of our property. If we understand what is meant, by a person's being free and independent, as to his own property, he may either lend, or sell his property, or any portion of it as he pleases.
>
> Sources: Good Peter's speech to Timothy Pickering, Philadelphia, April, 1792, in Pickering Papers, vol. 60, folios 121-133, quote at 121-A; (Exhibit Y)

45. While the neighboring nations of the Onondagas—the Oneidas and Cayugas—were more active in the pursuit of leasing as a strategy to maintain sovereignty over their lands, it appears that the strategy held some appeal for the Onondagas. During the negotiations for the treaty of Fort Schuyler, 1788, for example, the leading Onondaga spokesman made the following offer to Governor Clinton in his first official speech: "If you are willing to take a lease of our lands, we are willing to give you one." (Hough, ed., *Proceedings of the Commissioners*, p. 184; Exhibit Z) In 1794, the Onondaga chiefs from Buffalo Creek told U.S.

Commissioner Timothy Pickering that they wished to lease their lands at Onondaga. They expressed fear that, in the wake of the 1793 Treaty of Onondaga which had been negotiated without their participation, all Onondaga lands would soon be sold to the state, without their consent.

> Brother,
>
> It is the situation of our lands which makes our minds uneasy. We have but two small pieces left and we are desirous of reaping from them all the benefits which they are capable of yielding. The York people have got almost all our Country and for a very trifle. They were not [illegible] the liberty of disposing the little that remains in such manner as will do most good to our old women and children and children's children. For this reason we desire to dispose of our land for an annual rent to be paid to us and our posterity forever. For we have nothing to leave to our children but what our little pieces of land will produce, and all they will produce will be but a trifle when divided among so many families: but it will at least relieve the poor, if we can obtain the just value of our land. And for so good a purpose we think the liberty we request will not be refused.
>
> Brother,
>
> When we desire to dispose of our lands in this manner, we do not mean to take the seats away from any families of our nations who now live upon our reservations so much as shall be proper, we shall desire to have reserved for their use. These reserves we will agree on among ourselves, if the liberty we request is granted.
>
> Source: "Speech of the Onondagas & Cayugas about their reservations. Addressed to T. Pickering, Nov. 16, 1794," in the Pickering Papers, vol. 62, folios 104-105v. (See Exhibit R)

New York State officials deliberately exploited the expressed Six Nations' desire for leases by deceptively representing the state land cession treaties as leases, not absolute sales of land. State officials also exploited the apparent division between the Onondagas at Buffalo Creek and those Onondagas who remained at the Onondaga homeland to coerce participation in state treaties

46. The purported Onondaga land cession at the Treaty of Fort Schuyler, 1788, was signed by Onondagas living at the traditional Onondaga homeland. At that time, the majority of the nation still resided to the west at Buffalo Creek, where the Onondagas had fled after the destruction of the main Onondaga village by Continental Army troops and New York militia in

1779. The Buffalo Creek Onondagas characterized the Indian signers of the Treaty of Fort Schuyler in a disparaging manner as "two Sachems one chief Warrior, and a few young Men & Women," who gathered to meet the Governor "at the instigation of a Couple of Traders residing in our Villages." (Six Nations to President Washington, July 2, 1789, Draper Collection, Series U, vol. 23, folios 164-169; see Exhibit E) The main spokesmen for the Onondagas at the Treaty of Fort Schuyler, Black Cap and Kahiktoten, explained their reason for meeting the Governor as motivated by the actions of Indians from Buffalo Creek.

> Brother! We would now assign a Reason for our Conduct [in negotiating a treaty with New York State.] We have heard of a Treaty at Kanadasegea and another held at Buffalo Creek. We were not concerned in either of these Treaties. We sent some Persons there to be Hearers or Spectators, but we had no Agency in either of those Treaties, & utterly disapprove of what was there transacted. The Lands are our own, and we appeal to you Brothers, how would you feel if People at a Distance would undertake to sell Lands which belong to you and on which you live, and therefore we must attend to our Interest and endeavour to secure something to us & our Children after us.
>
> Source: Speech by Black Cap at the Treaty of Fort Schuyler, September 10, 1788, in Hough, *Proceedings*, pp.196-197. (Exhibit AA)

47. There is considerable evidence that Governor Clinton misled the Onondagas who negotiated the Treaty of Fort Schuyler into thinking that they were signing a lease that would restore their lands from the threat of the Livingston Company. As the negotiations came to a close on September 10, 1788, Black Cap presented his view of the agreement as being something other than an absolute sale:

> We have all considered the Conversation which has passed between us since the Beginning of this Treaty. Two things were proposed us: The one a great and immediate Good, the other a continuing Good to us and our Children after us. Brother! In your Wisdom you exhorted to great Deliberation on the Subject. We have therefore chosen the latter Proposal you made to us. We have chosen to convey to you our Country in a Way in which we may receive a continual Benefit; and when the Cold comes we may be kept warm, & when hungry we may have something to subsist on.

Source: Speech of Black Cap, September 10, 1788, in Hough, *Proceedings*, p. 196. (Exhibit AA)

48. At the treaty signing on September 12, 1788, Black Cap reiterated this view of the treaty, thanking the Governor for calling "this Council Fire to establish that which we should have lost forever, without your Interposition." (*Ibid.*., p. 204; Exhibit BB)

49. When the Oneida treaty—which was negotiated immediately after the Onondaga treaty—is examined, evidence of state misrepresentation is even stronger. Governor Clinton told the Oneidas on September 20, 1788, "Be not deceived in supposing that it was our Intention to kindle a Council Fire at this Time in Order to Purchase Lands from you for our People. We have already more Lands than we have People to settle on them. If we had wanted lands for our People to settle on, we would have told you so and requested you to have sold us some and would have paid you a reasonable Price for them." (Hough, *Proceedings*, p. 223; Exhibit CC) When the Oneidas signed their land cession treaty on September 22, 1788, Good Peter declared, "My Nation are now restored to a Possession of their Property which they were in danger of having lost." (*Ibid.*, p. 235; Exhibit DD)

50. The Oneida Council later claimed that when they left Fort Schuyler in September, 1788, they were convinced that they had negotiated a lease:

> We returned home possessed with an Idea that we had leased our Country to the People of the State, reserving a Rent which was to increase with the increase of the Settlements on our Lands until the whole Country was settled, and then to remain a standing Rent forever. This, Brother, was our Idea of the Matter. We supposed that we had at the same time reserved a sufficient Tract of Country for our own Cultivation; but since we had time to consult the Writings and have them properly explained, and have seen the Proceedings of your Surveyors, we find our Hopes and Expectations blasted and disappointed in every particular. Instead of leasing our Country to you for a respectable Rent, we find that we have ceded and granted it forever for the Consideration of the inconsiderable Sum of Six hundred Dollars per Year.

Source: Letter of the Oneida Council to Governor Clinton, January 27, 1790, in *Ibid.*, pp. 360-361. (Exhibit EE)

51. Good Peter would later repeat this claim to U.S. Indian Commissioner Timothy Pickering at Philadelphia in April, 1792, asserting that Governor Clinton had said to the Indians at Fort Schuyler, "you have now leased to me all your territory, exclusive of the reservation, as long as the grass shall grow & rivers run. He did not say 'I buy your country.' Nor did we say 'We sell it to you.'" (Good Peter speech at Philadelphia, April, 1792, in Pickering Papers, vol. 60, folios 127A-128; see Exhibit Y) In this regard, it may be instructive to note that when John Tayler, the Agent for the New York Indian Commissioners submitted an official voucher to the state for treaty funds delivered to the Indians in 1789 and 1790, the voucher read: "To Cash paid the Indians the Amo[unt] of the Annual Rent." (New York State Archives, A0802-78, vol. 15, folio 61)

52. The second major Onondaga land cession treaty took place in November, 1793 at Onondaga. As in 1788, the state commissioners attempted to invite Onondagas from both Buffalo Creek and Onondaga, but the treaty was scheduled at a time when those residing at Buffalo Creek were unable or unwilling to attend. (Several key Onondaga chiefs, including Clear Sky, the acknowledged leader of the Buffalo Creek Onondagas had spent the entire summer of 1793 in negotiations in the Ohio country, attempting to broker a peace between the United States and the Western Confederacy of Indians.) In this treaty with New York State in 1793, themes similar to that of the 1788 Treaty of Fort Schuyler repeat themselves: the absence of Onondagas from Buffalo Creek at the treaty; the willful determination by state commissioners to proceed with treaty negotiations despite being notified that the Buffalo Creek Onondagas would not be present; the fear among the Onondaga negotiators that their western brethren would sell or lease their reservation to the state if they had the chance. But there are circumstances that

make the Treaty of Onondaga, 1793 quite different from the Treaty of Fort Schuyler, 1788. It was negotiated in violation of a federal statute, the Non-Intercourse Act, which expressly prohibited such state land cession treaties without federal oversight and participation. Unlike the Treaty of Fort Schuyler, where the state obtained a purported "ratification" of the treaty from the Buffalo Creek Onondagas in June 1790, there was never even a pretence that the state obtained subsequent ratification of the Treaty of Onondaga from those who denied its validity. And perhaps most striking of all, this time the state commissioners openly and cynically presented the land cession treaty as a lease, not a sale, throughout the negotiations leading to the signing of treaty. The state commissioners did this because they were aware of the interest, especially among the Cayugas and Oneidas, with whom they were also negotiating, to lease part of their lands.

53. In late summer of 1793, Governor Clinton appointed Simon De Witt, John Cantine, and U.S. Superintendent Israel Chapin as commissioners to negotiate with the Oneidas, Onondagas, and Cayugas. Council invitation messages were sent to Buffalo Creek as well as the Oneida, Onondaga, and Cayuga reservations to the east. On October 12, 1793, the Cayuga chief, Fish Carrier replied to the governor's invitation on behalf of the Cayugas and Onondagas at Buffalo Creek. His answer makes it clear that the invitation spoke of negotiations for a lease or a sale. "You informed us the other day that you and two other persons were appointed by the Governor as Commissioners to treat with us for the sale or lease of our Lands, and that a meeting was proposed to be held on the lands to be sold or leased this Fall." Fish Carrier said that the "season was too advanced" to make attending the state treaty feasible; moreover the Buffalo Creek Indians were suffering through a "great sickness," but he promised that the Onondagas and Cayugas would attend if the treaty were postponed until the spring. (See Exhibit K)

54. Despite the strong recommendation from Israel Chapin to postpone the treaties to allow for the participation of the Buffalo Creek Indians, De Witt and Cantine proceeded to meet first with the Oneidas and then with those Onondagas living at the reservation. The commissioners failed to convince the Oneidas to make an agreement, and when De Witt and Cantine arrived at Onondaga in November, they appeared determined to gain a successful outcome. In their opening speech, De Witt and Cantine repeatedly referred to the proposed agreement as a lease, not a sale:

> Brothers of the Onondago Nation: The great Council of our State have heard [from] your Nation and that you were willing to lease them for rents to be paid to you and your children every year forever hereafter. Brothers, our great Council suppose that you would rather lease your lands to the state than to individuals because you must know the State always pays its Debts the moment they become due & that individuals often neglect to pay till they are compelled by our laws which are attended with expense and trouble. Brothers, we are therefore sent by our great Council to enquire of you which Lands you are inclined to lease and which to keep for yourselves to live upon. After we know your minds on this subject we will tell you what we will allow you as an annual rent from the State for the lands so to be leased, and what we will besides now pay down to you.

55. The Onondaga spokesman, Kahiktoten, responded that the Onondagas had never asked the Governor to send commissioners to meet them, claiming that it was their chief at Buffalo Creek who desired to dispose of the reservation and consolidate the Onondagas at Buffalo Creek, but "we are deaf to him." The commissioners responded that the people of New York "will rejoice to hear that their ancient Brothers the Onondagaes, the Keepers of the great council fire of the six Nations, are determined not to quit the Country which was given them by the great Spirit but to enter the Earth in company with their brothers the white people of the state." They continued their speech in a similarly deceptive manner:

> We did not come to buy your land. Our Chiefs will never send to you on any such business. No Brothers, they wish you ever to live among us, they choose rather to strengthen and confirm you in your seats; the white people knows how to

make a little land productive of more than you are, they have long been accustomed to matters of that nature . . .

Your reservation now produces you but little—our great men, if you chuse, will take [care?] of such part of your Land as you do not need for cultivation, and will pay you an annual rent for the same as long as the Earth shall continue. . . . Whenever therefore Brothers, you shall point out to us such parts of your reservation you may wish to lease to our great men, we will, as observed yesterday, tell you how much we are direct[ed] to obligate the state to pay you annually forever and how much we are authorized to pay you in hand when our business is closed. . . .

After deliberating on our last speech the Onondagaes informed us that they had agreed to lease part of their Reservation; several proposals were made with respect to the bounds of the lands to be leased, till at length we agreed on those written in the deed which they executed to us. . . . They also told us, at the conclusion of our business, that their only inducement to part with their property was their apprehension that those of their Nation who reside at Buffaloe Creek would sell the whole of their reservation and leave no part for them to remain upon, and that a just dividend would bear to those Indians, if they would choose to attend when annual payments were made.

Source: Proceedings of the Negotiations between the Onondaga Nation and Commissioners of the State of New York, Simeon De Witt and John Cantine, New York State Archives, A-1823, Legislative Assembly Papers, vol. 40, folios 140-149. (Exhibit FF)

56. The preceding account comes from the official report of the negotiations submitted by De Witt and Cantine to the state legislature. In this official account, the word "sale" is never used; rather, all of the speeches of the New York Commissioners refer to "leases" and "rents." The official account seems to suggest, moreover, that the Onondagas readily acquiesced to proposed lease, if only as a way of derailing attempts by the Buffalo Creek Onondagas to dispose of the reservation entirely. There exists, however, an unofficial version that gives an insight, however dim, into the true attitude of the Onondagas to De Witt and Cantine's proposals. In the New York State Archives are rough notes kept by the Commissioners of the speeches by the Onondagas, which indicate that the Indians had no desire

to sign any agreement, even a lease, and that they did so only under pressure from the Commissioners.

> Speech of the Onondagoes in answer to the speech of the Commissioners of this morning.
>
> Br[others] The Gr[eat] men of the State of New York attend[.] We propose to give an answer in reply to your Speech. You will excuse us if we do not Repeat your speech but what we say you may depend will be the real sentiments of the Onondagoes.
>
> Br. At the Treaty of F. S. we entered into a solemn agreement which should never be infringed but it seems you now speak a different language. . .
>
> We here wish now that you will not be offended if we refuse your request. We cannot wish on this occasion to offend you we will grant your request. . . .
>
> Now B. this is the 2nd covenant we have entered into let it be the last let the subject be never again mentioned.
>
> B. This is the reply we have to make to your last speech.
>
> Cayadota
>
> B. We will now inform you what is the motive for parting with our lands now. Some of our people reside to the westward with one of our principle Chiefs and we are afraid that they might be inclined to dispose of our whole country but we are desirous of continuing here and remain with you.
>
> Source: New York State Archives, A4016, vol. 21. (Exhibit GG)

57. There is no indication in either version that the Onondagas understood the treaty as permanently selling three-quarters of their reservation. Indeed, three months later, the chief Onondaga spokesman, Kahiktoten, said in a speech in Albany that the Onondagas "are not uneasy in Respect to our lands. Last fall two of your Chiefs were Sent from you. I would not have agreed with them if I had any apprehensions that we should loose any part of it." A second Onondaga speaker expressed a similar lack of awareness that lands had been sold: "we recollect that the agreement at Fort Stanwix was that the lands reserved to us was our own, that no more

bargains could be made to take them from us. Now Brothers we have already told you that we were Satisfied with the arrangement made with your two Chiefs last fall." ("At a meeting of the Onondago Nation with his Excellency the Governor at Albany, February 15, 1794," New York State Archives, A-1823, Legislative Assembly Papers, vol. 40, folios 167-190; Exhibit HH)

58. Finally, it seems clear that at the Treaty of Cayuga Ferry, 1795, New York State Indian Commissioners once again misled the Onondagas into thinking that they were negotiating a lease, which was what the Onondaga chiefs at Buffalo Creek had requested in their speech to Timothy Pickering in November, 1794 (see above). Transcripts of the treaty negotiations with the Onondagas have not been found, however, partial transcripts of the negotiations with the Oneidas which took place immediately after the Onondaga treaty, do exist, and they contain the same "lease" and "rent" language. The chief negotiator for the state in 1795 at both the Onondaga and Oneida treaties was Philip Schuyler. The following excerpt is from his opening speech to the Oneidas, in which he refers to a petition from the Oneidas to the State Legislature for the right to lease some of their reserved lands. The speech also includes an elaborate justification for why state was meeting with the Indians without the involvement of federal commissioners in defiance of the opinion of that U.S. Attorney General William Bradford had issued the previous month:

> Brothers. Whilst our great council was deliberating on this Business, and devising means to accomplish your Desire, and to procure you a greater annual Rent, Colonel Pickering by order of the president of the United States, sent us a speech delivered by the Onondaga & Cayuga Nations at the Treaty held at Canadaghque, in which those Nations (as you had done to our great Council) also requested that their Lands might be made more productive of an annual income.
>
> In consequence, therefore, of your Request, and of that of the Onondagas & Cayugas, transmitted by order of the president, our great Council determined to afford the Relief which was requested, and passed an act authorizing us to stipulate the payment of an annual Rent for so much of the Lands reserved to your use and to the use of the Onondagas & Cayugas, as *you* or *they* should determine

> to have so appropriated; and thus our great Council *substantially acquiesced* in what *appeared* to be the intention of the President of the united states, in sending us the papers already mentioned; but they did not order us to apply for the attendance of an agent on the part of the united states, as they not only conceived it unnecessary, having always heretofore Negotiated treaties with you and with the Onondaga and Cayuga Nations, without the interference of Congress, *as with a people residing within the known & acknowledged limits of the States of New York.* But if it *even had been Necessary,* the president's Message appeared to have superseded it. Thus, Brothers, You see that Colonel Pickering had been misinformed, and has misapprehended the Business, in supposing that Governor Clinton refused to apply for an agent; . . .
>
> As it would be improper for you to rent the whole of the land reserved to your use, our great Council has therefore strictly charged us to take *particular Care* that a *sufficient* Quantity may be reserved to your Use, and never to be sold or rented, that you and your posterity may continue to enjoy the same in *peace* and *comfort* to the *End of time*. We shall therefore only ask you, if you will rent *a part* of it, and *that part* will be as follows: . . .
>
> If you choose to rent somewhat more, we will take it, and *pay more*; but if you don't intend to lease as much as is above specified, you will be paid proportionally Less. If, however, you should determine not to Lease any of the Lands reserved for your use, the treaty will be at an End, as our power to treat will terminate by such a decision on your part.
>
> Source: Proceedings of Negotiations held at Oneida, August 6, 1795, Philip Schuyler Papers, Indian Papers, Box 15, New York Public Library (Exhibit II)

59. Following the Treaty of Cayuga Ferry, 1795, the Onondaga Nation would steadfastly refuse to sign any more treaties with the State of New York, excepting two small transactions in 1817 and 1822. As it became apparent that Onondaga and Six Nations complaints to the federal government had not prevented New York State and private individuals from gaining control of Six Nations land, Indian leaders expressed a growing wariness of federal promises. In the following excerpt, the Seneca orator Red Jacket, speaking on behalf of the Six Nations, asked a federal official what good the promised protection of the United States had given the Six Nations:

> . . . Brother—You have presented us a Flag of your Nation, and hope that the American Stars may enlighten the Six Nations and their Western Brethren. We

> accept the Flag, but must remark, that our Chiefs have never been much enlightened by them, except when you have burnt our Towns where they have been flying; for such a Flag was once presented to the Onondaga Nation with a pipe and Protection, yet your People came and burnt their Town without Regard to either Protection or the Flag that was flying in it.
>
> Brother—You hope we will bury the remembrance of last War; we have done that long ago, but are apprehensive you have not. Your mind we suspect is a good deal on War, Ours on saving our Land. You are a cunning People without sincerity, and not to be trusted, for after making Professions of your Regard, and saying every thing favorable to us, you then talk about a Road and tell us that our Country is within the lines of the States. This surprises us for we had thought our lands were our own, not within your Boundaries . . .
>
> Source: Speech of the Senecas and others of the Six Nations in answer to Capt. Brueff's speech of 21 Sept. 1796 at Niagara, O'Reilly Papers, vol. 15: 41; also in *Iroquois Indians: A Documentary History*, reel 43 (Exhibit JJ)

60. In conclusion, it is apparent from the historical record that the Onondaga Nation and the Six Nations Confederacy repeatedly protested against and denied the validity of the three treaties—the Treaty of Fort Schuyler, 1788-1790, the Treaty of Onondaga, 1793, and the Treaty of Cayuga Ferry, 1795—by which the State of New York gained control of more than 99% of their lands. They repeatedly sought the assistance and intervention of the United States in their behalf to protect their lands. When these protests proved ineffectual in preventing the State of New York from acquiring their lands, the Onondaga Nation would focus increasingly in the 19th and 20th centuries on protecting their remaining territory and maintaining their cultural autonomy and independence.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 10, 2006

J. David Lehman

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE ONONDAGA NATION

Plaintiffs,

-versus- 05-CV-0314

(MOTION HEARING)

THE STATE OF NEW YORK and

ONONDAGA COUNTY

Defendants.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12207, on THURSDAY, OCTOBER 11, 2007, before the HON. LAWRENCE E. KAHN, United States District Court Senior Judge.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

APPEARANCES:

FOR THE PLAINTIFFS:
INDIAN LAW RESOURCE CENTER
BY: ROBERT T. COULTER, ESQ.
- and -
OFFICE OF JOSEPH J. HEATH
BY: JOSEPH HEATH, ESQ.
- and -
ALEXANDER, BERKEY LAW FIRM
BY: CURTIS G. BERKEY, ESQ.

FOR THE NEW YORK STATE DEFENDANTS:
OFFICE OF THE NYS ATTORNEY GENERAL
BY: DAVID B. ROBERTS, AAG

FOR THE NON-STATE DEFENDANTS:
GOODWIN, PROCTER LAW FIRM
BY: MARK S. PUZELLA, ESQ.

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

(Court commenced at 10:10 AM.)

THE CLERK: Thursday, October 11, 2007. The case is -- and I have the wrong title -- Onondaga Nation versus the State of New York, et al, Case Number 05-CV-3134. May we have appearances for the record.

MR. ROBERTS: David Roberts, Assistant Attorney General, appearing on behalf of the State of New York.

THE COURT: Mr. Roberts.

MR. PUZELLA: Mark Puzella from Goodwin, Proctor, appearing on behalf of the non-state defendants.

THE COURT: Okay.

MR. COULTER: Robert Tim Coulter for the Onondaga Nation.

MR. BERKEY: Curtis Berkey for the Onondaga Nation, your Honor.

MR. COULTER: Joe Heath for the Onondaga Nation.

THE COURT: Very good. Well, I see we have a few people joining us in the audience, but I'll still go into the law. And I think we'll begin since -- well, actually, you brought the motion, so, Mr. Roberts, if you want to begin and sort of sum up your position. I'm pretty much familiar with the issues. And you have about 10 or 15 minutes anyways. So go ahead. Or less if you went.

MR. ROBERTS: Your Honor, you are being over

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modest when you say you are pretty much familiar with the issues. This Court had directly before it a very similar matter in the Oneida case, and that issue, that case has been briefed by both sides in detail. As far as the ramifications that it has in this matter, insofar as the motion that's brought on behalf of the defendants in this matter is based on the doctrine of laches. In sum, our contention is that this case is clearly a disruptive possessory land claim that is precisely the sort of action that the Supreme Court in Sherrill, the Second Circuit in Cayuga and this Court in Oneida held to be barred by the equitable principles of laches and impossibility and acquiescence, and there's the shorthand that's sort of developed in this -- those cases where we speak of laches as being a basis of this defense.

And I think that one of the pitfalls that comes about when you start trying to categorize the nature of a defense is that you tend to fall into tests where you're looking for certain essential elements that need to be present. And the argument that's been made in this case, and it was also made in the Oneida case, and certainly now is being made by the Oneidas in the Second Circuit, is along the lines that the traditional elements of a laches defense were inappropriately applied by this Court in the Oneida case. We would respectfully disagree with that kind of loss on what the Supreme Court held on Sherrill and what the Second Circuit

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UNITED STATES COURT REPORTER - NDNY

held in Cayuga. The equitable principles that flow from those three long established equitable defenses are what govern in this case. And as this Court has already held, the grounds for dismissal that are urged with respect to latches are well established, are based upon facts that are largely self-evident, facts of which this Court can take judicial notice and facts which are appropriately resolved on a summary motion, a Rule 12(b)(6) motion in this case, without the need for factual development, without the need for trial or development of summary judgment arguments. And in this case, of course, there will be contested issues of fact. I don't know that summary judgment could be granted if we were to go down that path. I think what we're talking about in this case is what the Second Circuit envisioned in Cayuga. This is a complaint that was -- that raises a claim that was void at its inception and it was subject to dismissal. I misspoke there. Subject to dismissal abnitio is what it held in the Cayuga case. And so, based on that, we're moving to dismiss on the complaint. This is not a motion that should be converted into a summary judgment motion. As this Court has already held in Oneida, the factual issues that are presented on this motion, to the extent there are any, are matters of which the Court can take judicial notice and are properly grounds for this motion.

THE COURT: At this point in time, shouldn't we

wait to see what the Second Circuit does with the cases pending up there that could affect this case?

MR. ROBERTS: Well, at least insofar as you fully know the issue that the State took up to the Second Circuit is the novel part of the Oneida decision, and that was the determination that the plaintiff could pursue a fair compensation claim based on contract principles that did not void the underlying transactions that are being challenged in the case. And at least so far as the State is concerned, that's not an issue that's in any way, shape or form present in this case. So I don't know that there's guidance to be gained by the Second Circuit on the issue we took up on appeal, which really was novel.

The other issue that the plaintiffs want to -- you know, they're attacking this Court's application of Cayuga in the Second Circuit. But as you know, Cayuga is a Second Circuit decision, and that's not a novel issue, it's not an issue that we would urge -- or would think is something that the Second Circuit is going to revisit after only three years, two years. And so I don't know there's much to be gained by waiting.

The other aspect of the request for a delay, obviously, is that our motion isn't based solely on the issue of latches. It's also based on the Eleventh Amendment. And insofar as our motion is based on Eleventh Amendment

principles, they're clearly established principles that are fully elucidated in our briefs. I won't repeat it all here, but the short of it is that's a separate and independent ground of dismissal, it's been asserted in this matter, that was not available to the State in the Oneida matter, and that a dismissal on that grounds is also fully warranted in this case.

THE COURT: Thank you. Anything you want to add, Mr. Puzella?

MR. PUZELLA: If I may just speak for a moment --

THE COURT: Sure.

MR. PUZELLA: -- about Rule 19. I, obviously, echo all of Mr. Roberts' arguments, but I would like to just focus for a moment on the Rule 19 arguments that flow in conjunction with the sovereign immunity rule, Eleventh Amendment arguments.

In particular, there -- the disjuncture between the plaintiffs' view of the rule 19 argument and the defendants' view, at bottom, this case, if you look at the complaint, concerns the propriety of the treaties between the State and the tribe. There's no theory articulated in the complaint as to how one could attack the title held by the present day landowners except through that treaty. So with respect to Rule 19, there's no separate approach to the

non-state -- the non-state defendants that would avoid the State in that determination. So as a result, the State is, if you read the complaint, the focus of the complaint. All of the allegations concerning a route to liability, if you will, flow directly through the State, and there's no other theory articulated.

THE COURT: So you're saying if I dismiss the State claim, yours has to follow?

MR. PUZELLA: Necessarily.

THE COURT: Okay.

MR. PUZELLA: Thank you.

THE COURT: Okay. And Mr. Coulter, I think you're arguing for the tribe?

MR. COULTER: Yes. Good morning.

I would like to address the latches issue and Mr. Berkey, co-counsel, will address the immunity issue and the question of joinder of parties.

I think the large issue today is whether the Onondaga Nation, having been excluded from the federal court and the state courts for more than 185 years, will ever be allowed to proceed with its land rights case.

THE COURT: Well, when you say it's been excluded for 180 years, or whatever, could they have brought this action 20, 30 years ago? In other words, they seemed to join this late at this point. But you answered that, go

ahead. Could they have brought this action decades ago?

MR. COULTER: The law wasn't changed to permit bringing an action such as this until, at the earliest, 1974, when the Supreme Court didn't -- never decided that these actions were viable legally until 1985.

THE COURT: Right.

MR. COULTER: And so there were a number of reasons, particularly the rule that applied then and now that latches was not an available defense in cases such as these, and the action of Congress in enacting 28 USC 2415, which made it clear there was no time limit for actions for title. So that, yes, theoretically, it was possible to file an action as early as 1985, but the Nation did act rather promptly after that. There certainly has been no unreasonable delay.

The point that I'm wanting to make concerning the motions right now is that, the question is whether the Nation will ever have an opportunity to get any relief. The question is not whether the particular declaratory judgment prayed for in the complaint is necessarily proper, but whether there's any relief that can be granted to the Nation, taking the allegations of the complaint as true.

Now, the Nation has suffered enormously for well over 200 years because of very blatant, straight forward and willful violations of the federal law by the State of New York in acquiring the Onondaga land. The State did that, not

only in violation of the federal laws and the federal Constitution, but in violation of New York State's own laws and Constitution, and in violation of the treaties that have been made with the Haudenosaunee and the Onondaga Nation. And that was all done with just a pittance of token compensation to the Nation.

Now, the defendants, in essence, are arguing that because all that happened so long ago, that the Nation shouldn't be allowed to proceed with its case at all. But that proposition that the mere passage of time is sufficient to bar a suit such as this is a proposition that's never been accepted in federal law. As this Court recognized and observed in its Oneida decision in May, the law is that the defense of latches is not available in lawsuits such as this, lawsuits by an Indian nation to vindicate its rights under the federal Trade and Intercourse Acts except in the class of cases that are possessory and disruptive. Now, this case is neither one.

THE COURT: Well, what are you seeking as declaratory relief? In other words, you're not seeking the lands, am I correct about that?

MR. COULTER: That's correct.

THE COURT: And you're not seeking money?

MR. COULTER: That's correct.

THE COURT: So what are you asking the Court to

do?

MR. COULTER: Solely for a declaratory judgment. The declaratory judgment would require nothing of any party, would not be any -- would not constitute any form of coercive relief, and would not lead to any indirect results that would be coercive or disruptive.

Now, the Nation has not in this case asserted any possessory right at all, has not asserted a right to any relief that's possessory in nature. The Nation also hasn't asserted a right to any relief that's based on a right of possession. And I also want to make clear, as we made clear in the briefs, that the Nation does not want to accomplish an eviction or an ejectment indirectly either by a declaratory judgment that would somehow have the result of invalidating present day deeds or titles. The Nation doesn't want that. That is not what we request. And we would at every stage want to be sure that a declaratory judgment doesn't do that. That would be tantamount to an eviction; the Nation does not intend to do that and will not do that.

THE COURT: But what would you want this Court to do? If you were the Court, what would you want me to declare?

MR. COULTER: The essence of it, and I think at the very least the Court can declare that what the State of New York did in acquiring the Onondaga Nation's lands, and

it's practically all their land, that that was in violation of the federal Trade and Intercourse Acts, in violation of the treaties made with the Haudenosaunee and the Onondaga Nation, and in violation of the United States Constitution. That is the very minimum. Exactly how that declaratory judgment should read, how far it should go is open to discussion. We have said that the Nation would like a declaration that title is still in the Nation. But that does not mean that the Nation intends to invalidate the deeds and documents of title held by present day landowners. No, because that would, that would, in effect, throw them off their lands, throw them out of their homes. We don't want that. And we want to be absolutely clear about that. No declaratory judgment we're requesting should go that far. That would be tantamount to ejectment, and the Nation denies that.

THE COURT: So if I heard you right, you're asking the Court, among other things, or whatever you're asking, to award title to the tribe with the understanding that everything would stay the same but they have title?

MR. COULTER: Well --

THE COURT: Not sure --

MR. COULTER: -- the term "title" has many different meanings.

THE COURT: That's why I'm asking. Right.

MR. COULTER: This is an action for title, but

the only relief we're requesting is a declaratory judgment. And we believe that any declaratory judgment in a case such as this should be one that does protect against unfair or unjust outcomes for present day land holders. So when we say a declaratory judgment about title, we do not mean something that would have the effect, direct or indirectly, of throwing people off their land or out of their homes. That is not what we want. We're speaking of a title that is more abstract, more general than that; a title that does not carry with it possessory interests. That is possible. That concept of title is well known.

THE COURT: Is that a concept of law? Does that exist in the law?

MR. COULTER: Oh, yes.

THE COURT: Gives people title without any right to do anything to the land or evict or to change possession forever?

MR. COULTER: That's right. For example, the Seneca Nation's title to Salamanca is that way. The United States often claims this kind of title. So does the State of New York. In the case of U.S. v Beach -- Beecher versus Weatherby, in 1875, the concept of bare title is discussed. Likewise, in the case of the Western -- or the Shoshone Indians versus the United States, a Supreme Court decision in, I believe, 1936 also discusses this same concept, the idea of

title that does not necessarily carry with it any beneficial interests as such. That concept exists. Sadly, we have only one word to cover all those different concepts, we always say title, that that means so many different things.

I want to be clear that the Nation is not requesting a declaratory judgment that would directly or indirectly disturb the possession of anyone holding land today. Whatever it takes, that's what the Nation wants, we do not want to disturb the possession or expectations of present day landowners.

THE COURT: You don't want to disturb title either of the people who have title in the land?

MR. COULTER: Title in the sense of documents, deeds and so on. Of course, it's clear, if one invalidates the deed of someone, that can be tantamount, it can be eviction by another name. The Nation has said that's unfair. The Nation itself has been thrown off its lands, and it doesn't want to do that to anyone else. It knows how that feels. And the Nation has foresworn that, both in this lawsuit and publicly; they do not want that. And we want to be sure that a declaratory judgment doesn't have that affect.

The Nation wants declaratory judgment because the Nation thinks these land rights issues should be resolved through negotiation, through agreement, through Government to Government talks with the federal government, first of all,

and with the State of New York, so that these issues can be resolved correctly and fairly and on a Government to Government basis. But when we initiated talks with the State of New York in the 1990s, the State of New York ended up telling us that they will not proceed further until the Nation filed its case in court. We can see their point, in a sense. We thought it was a shame to stop the effort to resolve it by an agreement. But they said you got to file your case in court before we'll talk any further. They want to know -- understandably, perhaps -- they want to know, do we really have a case? Is what the State did really wrong? Was it really in violation of the law? Of course, it was, and that's why we're here. We want this Court to say so. Then we believe that negotiations can proceed.

You know, the Nation also believes that it's useful and valuable to have a declaratory judgment about these things because the Nation wants to have a more effective voice in protecting the earth, in protecting this land particularly and protecting Onondaga Lake particularly for demanding a cleanup and restoration of this territory and that lake in particular.

The Nation also has felt enormous pain for generations, knowing and seeing that the legal system of this country and the legal system of this state has been unwilling to provide any redress, has been unwilling to acknowledge in

any way that a very blatant violation of the law took place to deprive the Nation of its lands. They rightfully have felt that they're not being accorded the quality before the law. It's understandable that they feel marginalized and discriminated against. And a declaratory judgment in this case would go very far toward healing that wound. It would also go far toward wiping away the stain of what has been done, a stain on the honor of this country and a stain on the history of the state.

That's why we've asked for a declaratory judgment. That's what the Nation wants. We do not want anything that's going to disrupt the neighbors of the nation. We don't want to do that directly or indirectly. We want them to live comfortably and well with the Nation just as they do now. This suit is not disruptive. And if this Court sees anything in the suit that's disruptive, we think a declaratory judgment -- we know that a declaratory judgment can be written that would not be disruptive. It would not be possessory in any way and it would be perfectly consistent with the Cayuga decision.

THE COURT: What is the position of the federal government? Obviously, they haven't intervened. I don't know why. What's the status there, if you want to comment on that?

MR. COULTER: I got a telephone call late yesterday afternoon from the Interior Department saying that

I'm authorized to say this morning, and I've informed Mr. Puzella and Mr. Roberts, that the Interior Department is processing a litigation request, that is a request by the Department to -- the Justice Department to initiate litigation in support of the Onondaga Nation. I'm authorized to say that, based upon conversations with an individual in the Interior Department, that the Solicitor's Office in the Interior Department has recommended that litigation by the United States in support of the Onondaga Nation proceed. They have said, as of yesterday afternoon, that that litigation request should be forwarded to the Justice Department in about ten days. That's as much as I know.

THE COURT: Do you think that's essential for your case, that they should be here so we can take care of other claims that they bring up, Mr. Roberts?

MR. COULTER: Well --

THE COURT: The State?

MR. COULTER: -- the United States has the obligation to do that under the treaties that they've signed with the Haudenosaunee, they should do that in all honor and fairness. And, actually, the United States has filed suit in almost all of the other Trade and Intercourse Act claims in this state. That gives us some information about what they're likely to do. And they generally do that at the 11th hour and 50 minutes. But beyond that, I don't know what to say. I

don't think it's essential. In other words, I think this case can proceed, and Mr. Berkey will elaborate, this case can proceed very well even if the State of New York is not a party. We think the state action doesn't have immunity. But even if they were found to have immunity, we think the case should and can proceed fairly, in good conscience whether the state is here or not and whether the United States is here or not.

THE COURT: Are there any facts in your case that distinguish your claims from the Oneida Nation? Especially as to continuing possession? Is there any legal significance to any difference? And is there a difference?

MR. COULTER: Well, the Nation, the Onondaga Nation has presented its case very, very differently from the beginning. We have not ever sought possessory relief. That declaratory judgment we're asking for isn't predicated on any possessory claim at all. That's, that's the difference. The Onondaga Nation, to be very blunt about it, doesn't want a casino, will never have a casino, it is not seeking lands for a casino or for any purpose like that. That's the difference. Even though it may not have particular legal significance, it's on everybody's mind, the Onondaga Nation does not want a casino. This litigation has nothing to do with a casino.

THE COURT: And that's on the record.

MR. COULTER: Well, yes.

THE COURT: Go ahead.

MR. COULTER: I would be delighted. I think the whole world knows that. But if there's any doubt about it, I want to remove that.

Another thing that I'm quite sure, although we haven't had a council meeting to confirm this, we don't need one, I'm quite sure that the Onondaga Nation will ever accept money in exchange for land rights. It's morally repugnant to them. It isn't a question of law, but they simply would not do it and be regarded as selling their mother. They simply would not do that; that's the difference.

THE COURT: I understand you don't want money and you don't want the land back and you don't want land rights. And I know you want to wipe away, as you say, the stain and the pain of what's happened in the history here. But what are you asking the Court to do besides that? Is there anything tangible we can do to redress the wrongs, let's say, that exist?

MR. COULTER: The only relief we're asking for is what's in our complaint. A declaratory judgment is, indeed, what we want. We don't envision, by the way, any further judicial action. Of course, the future will bring whatever the future brings. I may not be here. These chiefs and clan mothers may be gone some day, but nothing is envisioned, there's no other shoe to fill.

THE COURT: You're saying no matter what I decide, you're not going to appeal me?

(Laughter.)

THE COURT: You said no further legal action.

MR. COULTER: No, no, sometimes we've been asked whether we're asking for a declaratory judgment now, but oh, in the future then you'll ask for evictions, then you'll be seeking land for a casino, then you'll try to throw everyone off their land.

THE COURT: I take you at your word. That's not in my mind.

MR. COULTER: No, no. And if ever such litigation were brought, that litigation should be decided on its merits. And if the Cayuga decision holds, then such a decision -- I mean, that is, such a litigation would probably be dismissed. But, by the way, I want to be clear, we think Cayuga was wrong, and we will reserve our arguments about that for appeal, but we understand that this Court is bound to apply the Cayuga decision as it reads it.

I think I can sum up by saying, even if this Court does find that there's something disruptive or possessory about this claim, that even so, the Nation has got to have a hearing about any latches defense that's presented. That's an affirmative defense. We simply do not accept the fact that the facts about latches are self-evident or that

they can all be subject to judicial notice. That is not the road to go. We do admit that 200 years or so have passed, but virtually every other fact is in dispute. And we believe that the defendants should be put to the test of proving that there has been an opportunity to sue, that there has been unreasonable delay, because they can't prove that. They can't prove, I believe, that they're actually prejudiced or that something unfair happened. I think they'll have an almost impossible job to prove that they come to the court with clean hands, particularly the State of New York. They're not in a position to ask this Court to dismiss this case on the ground of fairness when they, in fact, have been guilty of such bad faith in the past.

Now, these are matters to prove. I'm not asking the Court to accept my word at this time. But I am saying that this is not the kind of case where a summary ruling about latches can or should be made. Cayuga doesn't demand that. Cayuga said that that case could have been dismissed abnitio, but it didn't say on a 12(b)(6) motion, on a hearing. In fact, Judge Cabranes mentioned the hearings and evidence and decisions that have been made by latches in this case. Certainly didn't hold that a case could be dismissed on a 12(b)(6) motion without any proof. That just isn't possible in a case like this, where all of the facts about latches are in dispute. So we think that we need an opportunity to

confront the evidence and present evidence of our own on all the issues of latches. This case shouldn't be dismissed on that basis, particularly at this stage.

And I should leave it at that and let my co-counsel address the other issues.

THE COURT: Before we get to Mr. Berkey, I think maybe we could let the State respond briefly to what you just said, and we'll do the same with Mr. Berkey, if that's okay.

MR. COULTER: Okay. Fine.

THE COURT: Mr. Roberts.

MR. ROBERTS: Yes, sir. The main thing I would point out, and we just ask you to take a look at the complaint itself, the first amended complaint, you know, when Mr. Coulter stands up and says that they don't seek to disrupt present day owners of fee title that live within the claim area, that's completely inconsistent with the relief that's sought in this case. It's inherently disruptive.

What they seek is a declaration that the ancient treaties by which title passed from the Onondagas to the State and ultimately through generations to the current people that live in a swath that runs 10 to 40 miles wide from the Canadian border down to the Pennsylvania border, bisecting the State of New York, they're asking this Court to issue an order that would say that the plaintiffs in this case hold fee

title to that swath of land. There are a couple of very strange aspects of their assertion that that would not be disruptive to the people in the claim area.

First of all, this Court made clear in its holding in the Oneida case that that kind of possessory claim, even though it's couched as a declaratory relief claim, is inherently disruptive. It doesn't -- there's no mandate that there be a request for ejection in the complaint before the Court can conclude that it's disruptive. The Oneidas in the case before Judge McCurn, in the decision that's published at 199 FRD, Judge McCurn was confronted with a very similar claim where the Onaidas were saying all we seek is a judgment from this Court that will assure that our historic rights that were violated by virtue of the state's treaties with us violated the Nonintercourse Act is all we ask for, we wouldn't eject anyone. And Judge McCurn and this Court alluded to that language in its decision in Oneida. Judge McCurn held that the simple request for the declaratory relief simply sets the stage at a later juncture for the ultimate ejectment of everybody who lives there. And that, in itself, is inherently disruptive.

THE COURT: I don't think he said he did want fee title. I don't think he used the word "fee". It was more abstract.

MR. ROBERTS: It's definitely abstract. But if

you look in their briefs, they actually say they want fee title. And the thing that's strange about this contention is that it turns the ancient doctrine of discovery on its head. As the Court fully knows, the doctrine of discovery would hold that the crown holds fee title to lands in the country that's being colonized, and that remains subject to the possessory aboriginal right of the natives that live there. And that's the title, the aboriginal title that was extinguished in the treaties that were entered into in this case.

THE COURT: Legally distinguished?

MR. ROBERTS: Pardon me?

THE COURT: Is it legally distinguished?

MR. ROBERTS: Yes, sir. And the thing that's strange about the argument you're hearing here today from the plaintiffs is that they're asking this Court as a remedy for its ancient transfer of an exclusively possessory interest in the lands, it should be remedied today by a Court declaratory judgment that would give them fee title but only a bare title under which the current occupants would have what essentially adds up to a right to possess, undisturbed by the plaintiff. So what they're asking for is a role reversal. What they're asking for is that this Court enter a judgment that would afford them a bare title without any right to possess and that the people that are currently there can, although they had, you know, a good valid deed to the farm that they might be

living on, actually only hold some bare title to continue to occupy that land. It's a very confounding source -- or sort of title that the plaintiffs are asking for in this case. And this -- I don't think this Court has a legal basis whatsoever, as flexible to what the principles might be, to afford a court leave to fashion equitable relief in the way it does justice. The Court can completely alter the underlying interests in the land that are at issue in this case in the manner in which the plaintiffs suggest. And the reason they go through all those gymnastics is because they're trying to find some way of wiggling around clear precedent that came from both this Court and the Second Circuit in Cayuga that spell doom to their claim.

THE COURT: Trying to find some way to get justice.

MR. ROBERTS: If they're trying to find some way to salvage a claim so they would be in a position to assert, we don't know. I mean they, they -- what -- the purpose of a declaratory judgment, one would think, is to provide people with useful remediable guidance as to what their rights and obligations are. What the plaintiffs are asking this Court to do is to completely undercut the validity of title in this gigantic swath of land and to essentially unsettle and cloud the question of what the rights are of everybody that lives in that area. And we would submit that

this is a strange and unwarranted conclusion for the plaintiffs to be urging on this Court. Thank you.

MR. PUZELLA: One minute.

THE COURT: You want a minute? Well, you want to add to that?

MR. PUZELLA: Just a word or two. Counsel suggested that there's nothing in the complaint suggesting that the claim is predicated on a possessory right.

THE COURT: Right.

MR. PUZELLA: I think if you review the complaint, you'll see that the claim is exclusively predicated on a possessory right insofar as the claim is premised upon a claim of aboriginal title that has never been distinguished. And, as the Court knows, aboriginal title is exclusively possessory. So there's -- it simply is not the case that the claim of title, whatever, theoretical, abstract, whatever we call it, isn't predicated in a possessory right. In the complaint, it's exclusively predicated on a possessory right.

The second point I wanted to make is that counsel also commented that another purpose of this abstract or theoretical title is to give the Nation a voice in protecting the lake and its lands and so forth. That speaks to the question of whether the declaration the Court might issue is coercive or not. That voice is only effective if there's the -- you know, the force and effect of this Court

behind it. Without the declaration having some teeth, that voice is meaningless. So there's no scenario under which it can get a declaration that is anything but coercive.

THE COURT: Okay.

MR. PUZELLA: Thank you.

THE COURT: You want a brief surrabuttal?

MR. COULTER: Very briefly. The defendants are attempting to put words in the mouth of the Onondaga Nation the Nation has asserted to right of possession, whatever, and doesn't intend to do that, even indirectly. They're doing that because that's the only way they can make this case fit the Cayuga exception. This argument that Indian title is exclusively possessory is completely wrong. That is not the law of the United States. Indian title, in any event, includes all the incident of ownership without exception. I refer you to United States versus Mitchell, 1835, Justice Baldwin. The Nation has not requested fee title. The Nation has requested no possessory relief whatsoever. I think it can be said that the issue today is not whether the Nation is entitled to a particular declaratory judgment without title or anything else, but whether the Nation is entitled to any relief at all. That's all this Court needs to find, is that the Nation may be entitled to some form of relief, taking the allegations of the complaint as true, as the Court must.

It seems to me that even though there may be

disputes to certain aspects of the declaratory judgment, that there is certainly some form of declaratory judgment with appropriate protective provisions, with appropriate safeguard elements to assure that these disruptive or possessory elements do not enter in; that some form of relief can be granted. And that's as far as we need to go to defeat this motion.

THE COURT: You're asking the Court to use its own creativity. Shouldn't you spell out what you think the Court should do?

MR. COULTER: Certainly. That should take place in the course of litigation.

THE COURT: But at this point you don't know exactly what, specifically?

MR. COULTER: I'm sorry, I'm trying to look around the light.

THE COURT: Yeah.

MR. COULTER: Sorry, it seems awkward. But it's all right.

THE COURT: Okay. I'm just thinking, what specifically, instead of abstractly, would you like this Court to grant in terms of relief?

MR. COULTER: I think this Court can grant a declaratory judgment, essentially, as prayed in the complaint. I think that, in light of Cayuga, it would be, should be the

case that appropriate protective language be included in the declaratory judgment to assure that this kind of misunderstanding doesn't take place. The Onondaga Nation isn't asking for some form of title that would secretly carry with it a right of possession that would somehow indirectly result in dispossession of the Nation's neighbors. That can be written right into the declaratory judgment. I haven't drafted that though. I mean, it's a bit early in the litigation --

THE COURT: Okay.

MR. COULTER: -- to actually draft it, but I think it could be done. And I do think, at a bear minimum, a declaratory judgment determining that the land was originally the land of the Onondaga Nation and the Haudenosaunee and that it was taken from them in violation of the Trade and Intercourse Act, in violation of the treaties and in violation of the Constitution, at a bear minimum, that is possible and have no possessory claims at all.

THE COURT: And say that, however, there is no relief the Court can grant?

MR. COULTER: We don't want coercive relief such as an injunction or something of that nature. It's not needed. We haven't asked for it.

THE COURT: Okay. I see. We still have some time left.

MR. ROBERTS: Could I just clarify one thing? The place where you'll find their suggestion that they hold fee title is on page 27 of their memorandum of law in opposition. And it's also referenced in footnote 3 of the supplemental memoranda that were submitted.

THE COURT: I'll read that. And I already have. And we'll say what he said.

MR. COULTER: Yes, sir. That's where you'll find it.

MR. BERKEY: Your Honor, Curtis Berkey for the Onondaga Nation. I'll address the Eleventh Amendment and the indispensable parties issues.

It's our position that if the United States were to intervene or file an action in support of the Nation, that both of these issues would be moot; that the lawsuit could go forward notwithstanding these defenses. We've briefed the Eleventh Amendment issue fully in the papers. I would want to supplement one aspect of that argument.

There's the question about how specific Congress needed to be in 1790 when it adopted the Trade and Intercourse Act, as you'll recall, our position is that that statute never gave the State of New York's immunity with regard to actions to enforcing its provisions. The defendants say that Congress needed to be specific and explicit. It needed to spell out with magic words that the Onondaga Indian

Nation could sue the State of New York and other states in federal court. It's our position that that degree of specificity is not required simply for the reason that the Eleventh Amendment was adopted eight years after the Trade and Intercourse Act. There was no Eleventh Amendment in effect at the time the Act was passed. In fact, there's pretty good argument that the State didn't even have immunity at the time the Trade and Intercourse Act was passed. In 1793, the Supreme Court said that citizens could sue states in the courts that were available at the time. So to require Congress in 1790 to adhere to a standard that was adopted by the Supreme Court in 1985, and in the Tuscarora decision, 1960, the specific abrogation standard, a modern standard, would be unfair. We wouldn't expect Congress to be that explicit in 1790.

It's our position that because the purpose of the statute was to control Indian land transactions in a centralized authority in Congress, which was necessary to maintain peace on the frontiers and the states where the principal cause of warfare at the time, that would haven been inconceivable that Congress pass a law directed at the states while at the same time exempting them from its enforcement. That's why the statute can be read, should be read as abrogation.

We also in our briefs have argued that Congress

had such authority under the war powers clause, and that relates to the problems the states were causing the frontier, the adoption of the war powers clause is related to the problems that the new Government was having with regard to conflict that the states were causing. The framers intended to give Congress ample authority to maintain peace by passing statutes that were regulating Indian lands. And that authority is certainly broad enough to authorize Congress to abrogate state immunity. Last year, in 2006, the Supreme Court said that under appropriate circumstances Article One powers of Congress could be read to authorize abrogation of state immunity, and this is one of those circumstances.

On the indispensable party argument, indispensability, there are two questions there. The first one, of course, is whether the State is necessary to the adjudication of the issues here. The State is here principally as a landowner. The interests they assert is that of an ordinary landowner, another party in the chain of title, if you will. This is not the first time this issue has come up. Judge Port, in 1977, in the first Indian land claim, the Oneida test case, directly and squarely held that the State of New York was not an indispensable party to that land claim. That case, for that purpose, is indistinguishable from our case. It's on point. It's four square applicable. And that, itself, should be enough to dispose of the indispensable party

argument. If we were to apply the Rule 19 facts, we believe that the result would be exactly the same as Judge Port reached in 1977. If the State is not a party to this action, they're not bound by anything that happens here. There's no possible way that their interest in the lands that they hold would be affected. They have no legal interest in the lands of the other defendants. This is not a case where there are competing defendants, different groups of defendants claim the same parcel of land. These are different parcels of land. So there's no, there's no adverse affect on the State's interests there.

In any event, the non-state defendants certainly can adequately represent the interests of the State of New York. There's no dispute about that. They haven't said that they can't. They haven't made that point. It's an obvious point that fully applies here.

Even if the State is found to be necessary, then the next question, of course, is: Should the case proceed in their absence? And the rule requires balancing of the equities. The specific language, as you know, is should the case proceed in equity and good conscious? Here, the prejudice to the Onondaga Nation is severe. It is significant. It's substantial. The reason for that is there's no other place the Nation can go to have this case heard. In 1952, Congress eliminated state courts as forums to

hear these claims, in 25 USC 233, or 232 I believe it is. There's no administrative body where this claim can be heard. Defendants say to go to Congress for this relief. We all know that's a highly speculative option. And I think it's safe to say that Congress would take no action on a petition from the Onondaga Nation unless there is some judicial determination that at a minimum the Trade and Intercourse Act was violated. Congress is not going to act in a vacuum. They're not going to act in the absence of some judicial determination. So this is it for the Onondaga Nation. This is the only place where this claim can be adjudicated and can be heard. Contrasted with the prejudice to the Nation, it's not -- it would not be unfair for this case to go forward without the State of New York. As I say, the non-state defendants can actually represent them. The State would not be bound if they're not a party. There might be some -- if there's an adverse determination on a point of law or fact, the prejudicial effect of that is not adequate to satisfy the -- to, to meet the requirement of a severe impairment of their interests in this case. And for all practical purposes, they're already here. They're required by state law to pay the costs of the defense of the non -- of the private, the non-state parties in this case. They're already involved here. They have -- they're playing a role. Whether they're a formal party or not.

And, finally, your Honor, there's no prejudice to the non-state defendants if this case goes forward without the State of New York. They can put up an adequate defense and vigorously defend it. Not the kind of case where the State possesses evidence, documents that no one else has access to. These issues will be decided based on historical documents we all have access to, we can all analyze. There's no special role they play with regard to evidence, or in any other way for that matter.

So, to conclude, we believe this case can go forward without the State if you find they're a necessary party. And thank you.

THE COURT: Thank you. Mr. Roberts, you want to respond, and then Mr. Fuzella?

MR. COULTER: Yes, sir. First of all, the plaintiffs have responded to our Eleventh Amendment motion partly on the basis of what Curtis Berkey just said. The other aspect of their argument have been based on a claim that ex-party Young would permit the Court to address this claim, notwithstanding the Eleventh Amendment defense. It hasn't been discussed by Curtis in his arguments, so I won't discuss it here. It's adequately covered in our papers. The two primary cases on that issue, and they're dispositive, the Cortland case versus the State of Ohio and the Western Mohegan case, they lay to rest any assertion that the ex-party Young

doctrine would form a basis for the Court to entertain this claim.

The other aspect of his argument which I will address here goes to the question of whether or not the Nonintercourse Act was enacted under the war powers authority of Article I. The case law doesn't bear that out. The Cayuga decision by the Second Circuit back in 1985 -- I'm sorry -- 2005, expressly says that the Nonintercourse Act was enacted pursuant to the Court's -- to Congress' authority under the Indian Commerce Clause, Article I. And that holding has been reestablished in a number of other cases also cited in our briefs. So I think they're barking up the wrong tree to claim that the war powers authority of Congress were the basis, and I think the only reason they're doing that is because of the Seminal case. Seminal made very clear that the Indian Commerce Clause is not a source of congressional authority that would permit Congress to override the State's immunity embodied in the Eleventh Amendment. And it -- therefore, even if they clearly and expressly in the language of the statute, as is required under Tuscarora and the other cases, had indicated an intent to make the states amenable to suit, it still would have been beyond the authority of Congress to have done so. And that's why they have done additional gymnastics to assert in this Court that the war powers authority is the source for the Nonintercourse Act. It's simply not borne out

by the case law, and Seminal makes it clear that that's a doomed argument.

The other part of the argument that you heard was that the Nonintercourse Act predated the Eleventh Amendment and, therefore, could not have anticipated a need, Congress could not have anticipated a need to expressly indicate in the text of the statute that the states were to be made amenable to suit in federal court. The argument, of course, overlooks the fact that two of the transactions that are challenged in this case took place before the Nonintercourse Act even existed. The 1788, 1789 treaties between the State and the Onondagas predated the statute under which they claim it's invalid.

The other aspect of this -- that particular argument ignores the fact that the Nonintercourse Act originally enacted in 1790 expired by its own terms after three years. And it was subsequently reenacted several times through and into probably 1822. Probably four, five different permutations of that statute have, obviously, many of which postdated the enactment of the Eleventh Amendment, I think in 1790...

MR. BERKEY: 1798.

MR. ROBERTS: Yeah, 1798. So the other point we make too is the State's sovereign immunity is not something that resides solely as a result of the enactment of the

Eleventh Amendment. The sovereign immunity of the states is something that's inherent in the states. I think that the uproar among the ... people of the 1790s, there was, there was a tremendous uproar when Chisolm versus Georgia was rendered because it never occurred to anyone that states could be dragged into court until the decision was rendered. And it's my understanding that the Eleventh Amendment was thereafter passed by Congress and the states, as well as an amendment to the Constitution to make clear that that sovereign immunity was there. But it's not something that was just created in the first instance in 1798.

Those are all the points I'll make. Thank you.

THE COURT: Mr. Puzella, do you want to add anything to that?

MR. PUZELLA: If I could address the Rule 19 argument.

THE COURT: Yeah, sure.

MR. PUZELLA: I won't rehash the non-State defendants' reply, but I would direct the Court to the reply. I think it addresses many of the arguments made. But I would like to make four quick points.

First, with respect to the notion that the State is just another landowner and that the case can proceed without them, that's simply not the case. As one reads the complaint, you'll see that the ultimate question here is the

state's conduct with respect to the treaties and the tribe. So the only path to get to the non-state defendants today is through that treaty. So they're much more than just another landowner. They are the source of all title. And that's not to say that they're just there as a predecessor in title, as the Nation phrases it. They're more than that. They are, they are responsible and have a governmental interest in -- and this is in the Second Circuit case, the Thruway decision, in securing and protecting property rights acquired on behalf of the people of the State. Through that treaty, the State of New York acquired property interests on behalf of the people of the State. So they had an interest there apart from its interest as just a property owner. So I think that's an important point.

Turning to the issue of Judge Port's decision in 1977, it's a fellow district court decision, I would just direct the Court to the Second Circuit opinion in the Seneca case, which is both more current and, of course, a Second Circuit opinion. Also, in the decision by Judge Port, that there's really no analysis in that decision of the 19 -- the Rule 19 factors, it's quite conclusory. I direct the Court to page --

THE COURT: You don't have to cite that.

MR. PUZELLA: -- 546. It's a short section, there's no analysis, so I don't think it's necessarily

informative, particularly in light of the former cases.

The next question is whether state title will be affected. And this is touched on in our reply, but there's this, I think, disconnect with the plaintiffs' point of view of the case and their view of the Nonintercourse Act. The Nonintercourse Act is really an all or nothing proposition. If the treaties entered into with the State and the Nation on the other hand are void abnitio, it is in the least case that all of the parcels and titles in the entire claim area have a cloud on them. It may not be the case that those issues or just those deeds and titles are thrown out the window. But they at the least have a cloud in them. And I think the Court recognized that in the Oneida decision, I think it was the Oneida EBG properties case. This Court wrote: Even lawsuits brought by a smaller number of defendants more carefully chosen creates substantial unrest in the community and raises the specter of widespread loss of lands for private landowners in the claim area. So I think that that's reminiscent of the same notion; that the Nation can't necessarily pick and choose among those landowners in the claim area whose title they'd like to attack. It exposes all of the titles to at least, you know, unrest, a cloud, and so forth.

The last point is with respect to the equitable factors that go into the Rule 19(b) analysis. First, that's equitable and not bound necessarily by the four factors

articulated there. But, more importantly, as set forth in the reply, the state's sovereign immunity in many respects trumps the balancing test set forth there. So if the Court finds that sovereign immunity applies and turns now to the Rule 19 argument, in 19(b) at least that immunity trumps the balancing of those factors. Thank you.

THE COURT: Okay. A brief response.

MR. BERKEY: Yes.

THE COURT: And then we'll --

MR. BERKEY: Very briefly, your Honor. Three points on the Eleventh Amendment. Counsel cited from the Second Circuit's decision with regard to the source of Congress' authority to pass the Trade Intercourse Act. The issue of whether that was exclusive authority was not litigated in that case. That was purely dictum. You're not bound by that. Secondly, it's not necessary for Congress to specify the source of its authority to pass the act. It could have -- it could be several sources of authority in the Constitution. Secondly, on the Cortland case, the Cortland case does not apply here for the simple reason that the Nation is not seeking the same -- exactly the same relief that was sought by the Cortland Tribe against the State of Ohio in this case. In that case the core sovereign interest of the State were directly implicated because the relief sought to invalidate virtually every single state law, every regulatory

law that applied to that land. Because of that extreme intrusion in the state sovereignty, the Court found that ex-party Young was not available. And that's not our case at all. We make no request of any kind with respect to jurisdiction and sovereignty.

Finally, counsel mentioned that -- suggested that there's no authority for the proposition that the war powers clause is a source of congressional authority to abrogate state immunity. I direct your attention to the First Circuit's decision in 1996, in the case Diaz-Gandia versus Dapena, where the Court expressly found that that clause was a source of authority to abrogate. Thank you.

THE COURT: Thank you all. It's very interesting, and I know it's significant to the parties. And we have all the submissions, I'll read everything over, and my clerk and I will be working on it. And I thank you very much.

MR. ROBERTS: Thank you.

MR. FUZELLA: Thank you.

(Court adjourned at 11:15 AM.)

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C E R T I F I C A T I O N

I, BONNIE J. BUCKLEY, RPR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

_____

BONNIE J. BUCKLEY, RPR
USDC Court Reporter - NDNY

DATED: NOVEMBER 13, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONONDAGA NATION,

Plaintiffs,

v. 5:05-cv-0314 (LEK/RFT)

STATE OF NEW YORK, GEORGE PATAKI, *In His Individual Capacity*, DAVID PATTERSON, ONONDAGA COUNTY, CITY OF SYRACUSE, HONEYWELL INTERNATIONAL, INC., TRIGEN SYRACUSE ENERGY CORPORATION, CLARK CONCRETE COMPANY, INC., VALLEY REALTY DEVELOPMENT COMPANY, INC., and HANSON AGGREGATES NORTH AMERICA,

Defendants.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On March 11, 2005, the Onondaga Nation filed suit in the Northern District of New York, seeking a declaratory judgment (i) that certain treaties dating from the late 18th and early 19th centuries are null and void, and (ii) that the land conveyed by those agreements remains the property of, and title thereto is held by, the Onondaga Nation and Haudenosaunee, a confederacy of Nations which includes the Onondaga. See Compl. ¶¶ 6, 44. An Amended Complaint followed on August 1, 2005, which is the subject of the Motions to dismiss presently before the Court. Dkt. Nos. 29, 43,

45. The Onondaga Nation ("Nation" or "Onondaga") names as Defendants the State of New York and George Pataki,[1] in his individual and official capacity as Governor of New York at the time of filing ("State Defendants"), and the City of Syracuse, Honeywell International, Inc., Onondaga County, Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc., and Hanson Aggregates North America ("Non-state Defendants"). In these grouping, the State Defendants and Non-state Defendants each moved to dismiss the action in its entirety on August 15, 2006. For the reasons that follow, their Motions are granted; and the Onondaga's suit is dismissed with prejudice.

II. BACKGROUND

Plaintiff, the Onondaga Nation, is recognized by the United States as an "Indian nation," with a population primarily located on its reservation south of Nedrow, New York. Compl. ¶ 6. The government of the Onondaga Nation, the Onondaga Council of Chiefs, is recognized by the United States through the Secretary of the Interior, and the relationship of the Nation with the United States has never been terminated. Id. The instant action is brought by the Nation both on its own behalf and on the behalf of the Haudenosaunee. According to Plaintiff, the Haudenosaunee is known in English as the "Six Nations Iroquois Confederacy," and it entered into the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794. Id. The Onondagas are the "firekeepers" of the Haudenosaunee, and Plaintiff brings this suit by authority of the Council of Chiefs of the

[1] David Patterson serves as the current Governor of New York. Pursuant to Federal Rule of Civil Procedure 25(d), David Patterson is substituted in place of former-Governor George Pataki to the extent that the latter is sued in his official capacity; as Plaintiffs names Pataki as a Defendant in his individual capacity, as well, Pataki remains a party to this action.

Haudenosaunee in addition to that of its own Council of Chiefs. Id.

The Nation alleges that various lands situated in present-day central New York were unlawfully acquired by the State of New York in violation of the federal Indian Trade and Intercourse Acts, the United States Constitution, the Treaty of Fort Stanwix of 1784, and the Treaty of Canandaigua of 1794. Am. Compl. ¶ 2. This action seeks, *inter alia*, an express declaration that such was the case. The Nation cites as the basis for it claims federal common law; the United States Constitution; the Indian Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834, codified at 25 U.S.C. §177; the Treaty of Fort Stanwix of 1784, 7 Stat. 15; and the Treaty of Canandaigua of 1794, 7 Stat. 44. Id.

Given the nature of Plaintiff's claim, the State of New York is sued as the original purchaser of the land in question, which the State continues to partially occupy or claim an interest therein. Id. ¶ 7. The Governor is sued in his individual and official capacity, as Plaintiff alleges "he is acting beyond the scope of his constitutional and other authority in unlawfully claiming an interest in the plaintiff's lands." Id. ¶ 10. Similarly, Onondaga County, New York and the City of Syracuse are named for occupying or maintaining an interest in some portion of the land. Id. ¶¶ 11-12. Honeywell International, Inc. is sued on the same basis; the Nation alleges, in particular, that the corporation has "industrial properties along the southwest shore of Onondaga Lake" which "have degraded the land to which the Onondaga Nation holds title under federal law." Id. ¶ 13. The Nation also alleges that Clark Concrete Company, Inc. and Valley Realty Development Company, Inc., the former's subsidiary, occupy or claim an interest in the land and have operated a gravel mine that has impaired and displaced the "head waters of Onondaga Creek" and "areas of extreme archeological and cultural sensitivity for the Onondaga Nation." Id. ¶ 14. Hansen Aggregates North

America is sued for occupying or claiming part of the subject land, including property known as "Jamesville quarry," a large open pit mine that has "devastated" the area and "degraded the land to which the Onondaga Nation holds title under federal law." Id. ¶ 15. Finally, the Nation alleges that Trigen Syracuse Energy Corporation occupies or claims some of the land, a portion of which contains an energy "cogeneration" plant that emits hydrochloric acid and dioxins which have "polluted the air and degraded the land to which the Onondaga Nation holds title." Id. ¶ 16. In broad terms, Plaintiff describes the aboriginal Onondaga Nation within New York State as being located between the aboriginal land of the Oneida Nation on the east and the Cayuga Nation on the west; it was situated between the St. Lawrence River, along the east side of Lake Ontario and south to the border with Pennsylvania, varying in width from about 10 to 40 miles. Id. ¶ 16. According to the Nation, this aboriginal zone "has never been sold, ceded, or given up by any Indian nation or entity." Id. ¶ 22.

The Nation recounts that in September of 1788, individuals claiming to represent the Onondaga Nation negotiated a treaty with the State of New York, resulting in a document purporting to cede and grant to the State of New York all of the Nation's land except for a limited tract which the Nation would retain. Id. ¶ 26. Plaintiff asserts that neither the Onondaga Nation nor the Haudenosaunee authorized or consented to such a treaty. Id. ¶ 25. Later, on June 16, 1790, the State of New York entered a treaty with persons claiming to represent the Nation "'ratify[ing] and confirm[ing]' the 1788 'treaty.'" Id. ¶ 29. Also in 1790, the United States Congress passed the Indian Trade and Intercourse Act governing the purchase of Indian land, which, as re-enacted and codified, has remained in continuous force. Id. ¶ 30. Plaintiff cites the provision that: "No purchase, grant, lease or other conveyance of land, or of any title or claim thereto, from any Indian

nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or conveyance entered into pursuant to the Constitution." Id.; 25 U.S.C. §177. The Nation contends that the June 16 treaty was ineffective to convey title to any lands, because it could have no legal effect until it was recorded as required by state law, and at the time it was recorded, on November 25, 1791, it was in contravention of the United States Constitution, the Indian Trade and Intercourse Act of 1790, and the Treaty of Fort Stanwix of 1784." Id. ¶ 31. The treaty concerning the Onondaga territory, according to Plaintiff, was only properly approved by the New York State Act of April 10, 1813, thus rendering the 1788 and 1790 treaties a "nullity" in view of its conflict with the Constitution and the first Indian Trade and Intercourse Act. Id. ¶¶ 32-34.

In 1793, New York entered into another treaty with persons claiming to represent the Nation, whereby two tracts set aside for the Onondaga by the 1790 treaty were released to New York. Id. ¶ 35. Plaintiff alleges that a third treaty conveying further Onondaga lands "in defiance of Congress's express prohibition set forth in the Indian Trade and Intercourse Act of 1793" followed in 1795 between New York and persons claiming to represent the Nation. Id. ¶ 36. Later, in 1817, another such treaty was entered into by New York and persons claiming to represent the Nation, conveying away two additional tracts of land set aside by the 1790 treaty. Id. ¶ 37. In 1822, a fifth treaty was made between the State and persons claiming to represent the Nation, which conveyed another portion of land.

The Nation alleges that the each of the aforementioned treaties "were never approved or ratified by the Onondaga Nation or the Haudenosaunee" and none "were made by persons having authority or legal capacity to convey the land." Further, the Nation states that the treaties were at no point ratified or approved by the United States, such that "[n]o part of the subject land has ever been

ceded or given up pursuant to a treaty or conveyance entered into under the Constitution nor pursuant to any act of Congress." Id. ¶¶ 39-40. From this premise, Plaintiff contends that "because of the failure of the New York legislature to approve the 'treaties' as required by New York's Constitution and the Act of 1788, and also independently because of the failure to record the 1790 treaty until after the effective date of the United States Constitution and the first Indian Trade and Intercourse Act," the land purported to have been conveyed "remains the property of the Onondaga Nation and the Haudenosaunee." Id. ¶ 41.

Predicated on the alleged defectiveness of these treaties, this action asserts that "[b]ecause the defendants base their claimed interests in the subject lands on the void 'treaties,' the defendants have no lawful interest in the subject land." Id. ¶ 44. The Nation maintains that it has consistently protested New York State's exercise of jurisdiction over the land in question; however, the Nation emphasizes that "federal courts were not open to hear these cases until 1974 at the earliest, and that the prima facie elements of the claims were not upheld until 1985." Id. ¶ 46. Plaintiff also makes reference to practical difficulties in pressing its claims, including "lack of financial resources, lack of access to attorneys, lack of federal court jurisdiction, and an inability to communicate with and understand the English language adequately." Id. ¶ 47. The Nation states that it has nonetheless retained "cultural, spiritual, legal, and political ties to the subject land" and attempted to protect sites of importance from external harms. Id. ¶ 49.

Non-Indians have extensively populated and developed the aboriginal lands subject to the treaties during the many years subsequent to the allegedly illegitimate conveyances. Id. ¶ 50. Plaintiff, however, alleges that New York and the other defendants have known or had reason to know of the Nation's continual claim to ownership. Id. ¶ 52. Indeed, Plaintiff asserts that the State

conducted itself in "bad faith by, among other things, deliberately dealing with individuals who lacked authority to act for the Nation, by deceiving these persons and the Nation about the nature of the transactions, and by ignoring the federal government's explicit warnings not to violate the Trade and Intercourse Act . . . ." Id. ¶ 53. On the basis of this history, the Nation now seeks a declaratory judgment ruling that "the purported conveyances of the 'treaties' of 1788, 1790, 1793, 1795, 1817, and 1822 were and are null and void" and "the subject land remains the property of the Onondaga Nation and the Haudenosaunee, and that the Onondaga Nation and Haudenosaunee continue to hold title to the subject land." Id.

III. DISCUSSION

a. Standard of Review

A complaint is subject to dismissal for failure "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss pursuant to Rule 12(b)(6), a district court must accept the allegations made by the non-moving party as true and "draw all inferences in the light most favorable" to the non-moving party. In re NYSE Specialists Sec, Litig,, 503 F.3d 89, 95 (2d Cir. 2007). To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

b. Sherrill, Cayuga, and Oneida

The legal ground on which Plaintiff's claims rest has undergone profound change since the Nation initiated its action on March 11, 2005. Whatever the viability of the Nation's claims to the

subject lands at the time of filing, the law today forecloses this Court from permitting those claims to proceed. See County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (reserving "the question whether equitable considerations should limit the relief available"); Cayuga Indian Nation v. Pataki, 413 F.3d 266, 273 ("The Supreme Court's recent . . . has dramatically altered the legal landscape against which we consider plaintiffs' claims.").

Within weeks of the filing of the instant suit, on March 29, 2005, the Supreme Court issued a decision in the case of City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005), which addressed the Oneida Nation's claim that it need not pay taxes on historic reservation land, pursuant to the 1794 Treaty of Canandaigua, which had been re-acquired in fee. The Oneidas, like the Onondaga Nation, are direct descendants of one of the nations comprising the Haudenosaunee, and they maintained claims relating to land conveyed by 18th and early 19th century treaties with New York State. The Oneidas sought "declaratory and injunctive relief recognizing . . . present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations." Id. at 214. The Court determined that such a "disruptive remedy" was precluded by the "long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties." Id. at 216-217. Sherrill considered the practical implications of the Oneidas' claims in light of "standards of federal Indian law and federal equity practice." Id. at 214. Without identifying precise pre-conditions for an equitable bar to historical land claims, the Court concluded that "the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches,

acquiescence, and impossibility." Id. at 221. As such, the sought relief was deemed "inequitable." Id.

On June 28, 2005, the Second Circuit decided Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), based on the principles of Sherrill. It ruled that land claims brought by the Cayuga Nation, which derived from late-eighteenth-century treaties with New York State, were equitably barred by the doctrine of laches, as articulated in Sherrill. 413 F.3d at 268. The district court had found that certain treaties between the Cayuga Nation and the New York were not properly ratified by the federal government, rendering them invalid under the Nonintercourse Act, and that the Plaintiff's suit was not otherwise barred; a verdict for Plaintiff was ultimately returned in the amount of $247,911,999.42, reflecting the fair market value of the subject land as well as fair rental value damages for 204 years, plus prejudgment interest. Id. Cayuga overturned this verdict and entered judgment for the defendants, declaring that "if the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under Sherrill and could dismiss on that basis." Id. at 278.

Broadly, Sherrill was understood to mean that equitable doctrines may appropriately be applied to Indian land claims, "even when such a claim is legally viable and within the statute of limitations." Id. at 273. The Cayuga court determined that "Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally." Id. The court concluded that the monetary damages immediately at issue in Cayuga, in part a monetazation of an ejectment claim, did not alter the fact that "plaintiffs' claim is and has always been one sounding in ejectment; plaintiffs have asserted a continuing right to immediate possession

as the basis of all of their claims . . . ." Id. at 274. This underlying "possessory land claim," regardless of the remedy, was found to be plainly disruptive under the principles of Sherrill. "[D]isruptiveness is inherent in the claim itself -- which asks this Court to overturn years of settled land ownership -- rather than an element of any particular remedy which would flow from the possessory land claim." Id. at 275.

The Caygua court made clear that a traditional delineation between actions at law and equity does not stand in the way of Sherrill's concern with, and potential bar to historic, forward-looking claims which disturb existing governance and rights. Id. ("Whether characterized as an action at law or in equity, any remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York, can only be understood as a remedy that would similarly "'project redress into the present and future.'" (quoting Sherrill, 544 U.S. at 202)). After determining that the Cayuga's claim was a possessory land claim and that such a claim is subject to the Sherrill formulation of the laches doctrine, the court found that the equitable considerations which had barred the Oneidas' sovereignty and tax claims operated to defeat the Cayugas' action; indeed, these considerations were taken directly from the Sherrill opinion. See id. at 277. No claims by the Cayuga survived this ruling, including their trespass action because "there can be no trespass unless the Cayugas possessed the land in question." Id. at 278.

Recently, on August 9, 2010, the Second Circuit decided Oneida Indian Nation v. County of Oneida, 2010 U.S. App. LEXIS 16426 (2d Cir. Aug 9, 2010) ("Oneida"), a land-claims case wherein the court further articulated the scope and application of its earlier Cayuga decision. The Oneidas asserted a possessory claim to significant acreage in New York State on the basis of invalid treaties and the Nonintercourse Act, and they sought damages for trespass as well as actual

restoration of possession of the subject land. This Court, considering a motion for summary judgment by New York State and named defendant counties, held that the Oneidas' claims predicated on a continuing right to possess the land were equitably barred by laches under Sherrill and Cayuga. See Oneida Indian Nation v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007). Apart from what the Court understood as the plaintiffs' "possessory claims," this Court also ruled that the Oneidas asserted a claim against New York State to reform land sale contracts that were void for unconscionability -- a claim which the Court viewed as non-possessory. Id. On appeal, the Second Circuit affirmed the dismissal of the possessory claims; however, it reversed the Court's ruling on the contract reformation claim, finding that it was barred both by New York's sovereign immunity and by the same equitable defenses articulated in Sherrill and Cayuga because the claim would similarly undermine and disrupt settled land ownership and expectations. Oneida Indian Nation, 2010 U.S. App. LEXIS 16426 at *10.

The Oneida court's analysis began with a restatement of Cayuga's holding on possessory land claims: "[A]ny claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title -- are by their nature disruptive and that, accordingly, the equitable defenses recognized in Sherrill apply to such claims." Oneida Indian Nation, 2010 U.S. App. LEXIS 16426 at *34. Turning to Oneidas' possessory claims, regardless of whether the relief sought was ejectment or damages, the court found the case indistinguishable from Cayuga for purposes of a laches defense. Id. at *36.

> Here, as in Cayuga, a tremendous expanse of time separates the events forming the predicate of the ejectment and trespass-based claims and their eventual assertion. In that time, most of the Oneidas have moved elsewhere, the subject lands have passed into the hands of a multitude of entities and individuals, most of whom have no connection to the historical injustice the Oneidas assert, and these parties have

> themselves both bought and sold the lands, and also developed them to an enormous extent. These developments have given rise to justified societal expectations (expectations held and acted upon not only by the Counties and the State of New York, but also by private landowners and a plethora of associated parties) under a scheme of "settled land ownership" that would be disrupted by an award pursuant to the Oneidas' possessory claims.

Id. at *37 (citing Cayuga, 413 F.3d at 275).

As Sherrill and Cayuga signaled, the term "laches" serves as "convenient shorthand" for equitable principles which bar possessory claims in such circumstances. Id. at *38, 42 (rather than a true laches defense, Cayuga invoked "distinct, albeit related, equitable considerations"). It "does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." Id. at *39. Thus, in determining whether Sherrill's formulation of "laches" may bar a plaintiff's claims, courts do not need to find an unreasonable lack of diligence by that plaintiff under the circumstances in initiating an action. Id. at *39-42. Nor is this equitable defense limited to "possessory" claims; Oneida states that the "defense is properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief." Id. at *63-64. Sherrill demonstrates as much in barring the Oneida's action for equitable and declaratory relief as to taxes on land already owned by the Oneidas.

Given the centrality of "disruptiveness" in Sherrill and its express, dispositive role in the Cayuga analysis, the court in Oneida declared that the laches-related defense is "potentially applicable to all ancient land claims that are disruptive of justified societal interests that have

developed over a long period of time, of which possessory claims are merely one type, and regardless of the particular remedy sought." Id. at *67. The court then found that the contract-based claim, which this Court had permitted to proceed, falls within this large category by "call[ing] into question the validity of the original transfer of the subject lands and at least potentially, by extension, subsequent ownership of those lands by non-Indian parties . . . ." Id. at *68. Such disruption would necessarily be occasioned by the contract claim because it "amounts to the assertion that the agreement by which the State of New York purported to acquire title was unconscionable," which would render that contract invalid and unenforceable. Id. at *70-71. The claim itself, and the question of what remedy might be fashioned, would thus pose have serious implications for the settled expectations of private land owners, municipalities and New York State.

c. The Onondaga Claims

Sherrill, Cayuga and Oneida foreclose any possibility that the Onondaga Nation's action may prevail; the Court is bound by these precedents to find the Nation's claims equitably barred and subject to dismissal. As detailed above, the Onondaga seek declaratory judgment (i) that certain treaties dating from the late 18th and early 19th centuries are null and void, and (ii) that the land conveyed by those agreements remains the property of the Nation. These claims are predicated on assertions that the land in question "has never been sold, ceded, or given up by any Indian," that New York State knew or should have known that its purchases of the land violated the U.S. Constitution, Nonintercourse Act, and federal and pre-constitutional treaties, and that the private named defendants have no lawful interest in the subject land because the their possession rests on such allegedly void treaties. Plainly, the Nation's claims represent the type of inherently disruptive action which Cayuga instructs is barred under Sherrill's formulation of a laches defense. Cayuga,

413 F.3d at 275. That the Onondaga are pursuing only a declaratory judgment at this juncture is of no matter; the claims themselves expressly seek to undermine the validity of the original transfer of the subject lands and dramatically upset the settled expectations of current land-owners. While Plaintiff does not request possession or damages in the instant action, the Nation seeks an order by this Court that title to various parcels of land in New York State under public and private ownership belongs to the Onondaga. Indeed, the declaratory relief sought would apply to all land conveyed by the challenged treaties, despite the Onondaga naming a limited set of Defendants. It is indisputable that these claims, possessory in nature and sounding in the ejectment of the present owners, are located at the center of the range of claims barred under Cayuga. Moreover, as Oneida holds, the equitable bar is properly applied to "any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief." Oneida, 2010 U.S. App. LEXIS 16426, at *63-64.

The Nation's Complaint asserts claims which are equitably barred on their face. Cayuga states that, were the Tribe in that case to file "its complaint today, exactly as worded," it would be subject to dismissal "*ab initio*," on the basis of laches. Cayuga, 413 F.3d at 278. The Onondagas' action cannot be different, as it evidences the same essential qualities which the Second Circuit found barred the claims in Cayuga and Oneida. According to Plaintiff's Amended Complaint, the last allegedly invalid treaty conveying a portion of the subject land was effected in 1822. Thus, approximately 183 years separate the Onondagas' filing of this action from the most recent occurrence giving rise to their claims. In other words "a tremendous expanse of time separates the events forming the predicate of the . . . claims and their eventual assertion." Oneida, 2010 U.S. App. LEXIS 16426, at *37. It follows that throughout the subject land in central New York,

"'generations have passed during which non-Indians have owned and developed the area.'" Cayuga, 413 F.3d at 277 (quoting Sherrill, 544 U.S. at 202). The Court takes judicial notice that the contested land has been extensively populated by non-Indians, such that the land is predominantly non-Indian today, and has experienced significant material development by private persons and enterprises as well as by public entities. Cayuga, 413 F.3d at 277; see FED. R. EVID. 201.

During the long period between the signing of the challenged treaties and the filing of the instant suit, New York State has exercised sovereign control over the subject land, allowing the creation and maintenance of long-settled expectations concerning land ownership in countless innocent purchasers and others. Cayuga, 413 F.3d at 277. That the delay between the Onondagas' action and the allegedly defective conveyances may not be attributed to the Nation but to outside forces, including the actions of federal and state authorities, does not deter the Sherrill laches defense from application in the circumstances of this case. Id. at 279. Oneida explained the equitable bar as focusing "on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." Oneida, 2010 U.S. App. LEXIS 16426, at *39. These considerations are manifestly present here. As such, the Onondagas' claims are equitably barred under Sherrill and Cayuga.

Given this mandatory basis for dismissing Plaintiff's claims, discovery and further development of the record would be inappropriate and superfluous. The dispositive considerations which compel this Court to dismiss the claims are "self-evident," Oneida Indian Nation, 500 F. Supp. 2d at 136 n.2 (N.D.N.Y. 2007); and the Cayuga court expressly instructs a district court to

dismiss a complaint when confronted with one such as the plaintiff Tribe filed in that case. Cayuga, 413 F.3d at 278. The profoundly disruptive nature of the Onondaga Nation's claims is readily identifiable throughout its Amended Complaint, situating those claims well within the scope of the equitable bar outlined by controlling precedent. Therefore, as a matter of law, the Nation's action fails to state a claim for which relief may be granted. In light of the foregoing analysis, the action is dismissed with prejudice.

IV. CONCLUSION

Accordingly, it is hereby:

ORDERED, that the State Defendants' Motion to dismiss (Dkt. No. 43) is GRANTED, and it is further

ORDERED, that the Non-state Defendants' Motion to dismiss (Dkt. No. 45) is GRANTED, and it is further

ORDERED, that Plaintiff Onondaga Nation's Amended Complaint (Dkt. No. 29) is DISMISSED with prejudice, and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties.

IT IS SO ORDERED.

DATED: September 22, 2010
Albany, New York

Lawrence E. Kahn
U.S. District Judge

* * * * * *UNITED STATES DISTRICT COURT* * * * * *

NORTHERN DISTRICT OF *NEW YORK*

JUDGMENT IN A CIVIL CASE

DOCKET NO 5:05-CV-0314 (LEK/RFT)

ONONDAGA NATION,

Plaintiff,

-against-

STATE OF NEW YORK, GEORGE PATAKI, *In His Individual Capacity*, DAVID PATTERSON, ONONDAGA COUNTY, CITY OF SYRACUSE, HONEYWELL INTERNATIONAL, INC., TRIGEN SYRACUSE ENERGY CORPORATION, CLARK CONCRETE COMPANY, INC., VALLEY REALTY DEVELOPMENT COMPANY, INC., and HANSON AGGREGATES NORTH AMERICA,

Defendants.

_____ **JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

XX **DECISION by COURT. This action came to trial or hearing before the Court. The issues have been tried and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that in the above entitled action, the case is DISMISSED and judgment is entered in favor of the defendants as against the plaintiff, in accordance with the MEMORANDUM-DECISION and ORDER of the Honorable Lawrence E. Kahn, U. S. District Judge, dated September 22, 2010.

DATE: September 22, 2010

LAWRENCE K. BAERMAN
CLERK OF THE COURT

Scott A. Snyder
Courtroom Deputy to the
Honorable Lawrence E. Kahn

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONONDAGA NATION,

Plaintiff,

Civil Action No. 05-CV-314 (LEK/RFT)

v.

THE STATE OF NEW YORK, GEORGE PATAKI, In His Individual Capacity, DAVID PATTERSON, ONONDAGA COUNTY, CITY OF SYRACUSE, HONEYWELL INTERNATIONAL, INC., TRIGEN SYRACUSE ENERGY CORPORATION, CLARK CONCRETE COMPANY, INC., VALLEY REALTY DEVELOPMENT COMPANY, INC., and HANSON AGGREGATES NORTH AMERICA,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Onondaga Nation, Plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of the district court dismissing this action, entered on September 22, 2010.

Dated: October 20, 2010

s/Curtis G. Berkey
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PROOF OF SERVICE

I hereby certify that on February 28, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Joseph J. Heath
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