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

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

The Onondaga Nation responds here to the arguments of the State of New York, the County of Onondaga, the City of Syracuse and five corporations in their brief of May 25, 2012 that the District Court's dismissal of the Nation's claims was correct.[1] Contrary to these arguments, *Sherrill*, *Cayuga* and *Oneida* do not require dismissal of the Nation's claims.[2] As this Court has held, the "critical question" in these cases is "whether an award of relief to the plaintiff[] would be disruptive of justified societal expectations arising at least in part from the long lapse of time between the conduct complained of and the effort to obtain relief." *Oneida* at 136. The answer to that question with regard to the declaratory judgment claim of the Onondaga Nation is no.

The State argues, in the complete absence of a factual record, that the Nation's claims disrupt the expectations of the State and unnamed landowners. The facts established by the Onondaga Nation, however, demonstrate that landowner expectations, even if proved, could not reasonably be justified.

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[1] Because the Appellees joined in a single brief, the Onondaga Nation refers to them as "the State" for ease of identification.

[2] *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005) (*Sherrill*); *Cayuga Indian Nation v. Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied,* 547 U.S. 1128 (2006) (*Cayuga*); *Oneida Indian Nation v. County of Oneida,* 617 F.3d 114 (2d Cir. 2010), *cert. denied,* 132 S.Ct. 452 (2011) (*Oneida*).

Moreover, disruption of the State's expectations cannot be assumed simply from the existence of the Nation's claims: the declaratory judgment the Nation seeks has no coercive effect on the State as landowner, much less on the tens of thousands of unnamed landowners the State asserts will be affected.

The sovereign immunity and indispensable party grounds urged by the State as alternative bases for affirmance should not be considered by this Court without the benefit of the District Court's consideration. Accordingly, if this Court reverses the District Court's dismissal of the Nation's claims on equitable grounds, the case should be remanded to the District Court to consider the defenses of immunity and indispensable party, matters not yet addressed by that court. Whenever those issues are addressed, the Onondaga Nation will demonstrate that the State is not immune, because Congress has constitutional authority under the War Powers Clause to abrogate the State's immunity and did so in the Trade and Intercourse Act. Even if the State retains its immunity, it is not an indispensable party because it claims no interest in the lands of the non-State landowner parties.

ARGUMENT

I. Neither *Cayuga* nor *Oneida* Requires Dismissal of the Onondaga Nation's Claims.

A. The Onondaga Nation's Claim is Non-Possessory, In Contrast to the Indian Nation Claims in *Cayuga* and *Oneida.*

The State argues that this Court should affirm the dismissal of the Onondaga Nation's claim because it is "precisely the type of claim" dismissed in *Cayuga* and *Oneida.* Brief of Appellees at 24. The State's contention is wrong. It is correct that in all three cases the Indian nation plaintiff requested a declaratory judgment that the Trade and Intercourse Act had been violated by the State. But the similarity ends there. As this Court has emphasized, the claims in *Cayuga* and *Oneida* were possessory claims seeking ejectment of thousands of landowners from their homes and lands. *Cayuga* at 274 ("Plaintiffs continue to maintain on appeal in this Court, that ejectment is their preferred remedy."); *Oneida* at 121 (The Oneidas' prayer for relief seeks a declaration that they have "possessory rights to the subject lands 'that have not been terminated,'" and further seeks an injunction "as necessary to restore [them] to possession of those portions of the subject lands to which [the] defendants claim title.").

By contrast, the Onondagas assert no possessory interest of any kind. The Onondagas from the beginning have disavowed any intention of ever seeking ejectment of any landowner. The Onondaga claim does not seek to vindicate any

possessory interest, nor does the claim seek trespass damages, or any other remedy predicated on possession. This claim, therefore, falls outside the category of possessory claims found by this Court under certain circumstances to require dismissal by *Sherrill*. *Cayuga* at 276 ("[A]fter *Sherrill*, equitable defenses apply to possessory claims of this type.").

B. A Non-Possessory Declaratory Judgment in Favor of the Onondagas Would Not Be Disruptive Because It is Not Coercive.

The State also argues that the Onondaga claim, even if construed as non-possessory, nonetheless is barred because a declaratory judgment allegedly would disrupt the expectations of the defendants and myriad other landowners that their use and occupancy would never be disturbed by legal action aimed at remedying the historic loss of Onondaga land. This argument ignores the essential nature of declaratory judgments, which simply declare the rights of the parties. The Declaratory Judgment Act provides the court may "declare the rights and other legal relations" of an interested party "whether or not further relief is or could be sought." 28 U.S.C. § 2201. The State does not address the Onondagas' argument that because declaratory judgments do not mandate or prohibit action by the party against whom they are issued, a declaratory judgment here would not upset the justifiable expectations of the Defendants or other landowners.

The non-coercive nature of declaratory judgments is well-established. *See, e.g., Perez v. Ledesma,* 401 U.S. 82, 112 (1971) (Unless a declaratory judgment is followed by a "decree for damages, injunction, specific performance" or similar remedy, it is not "immediately coercive."). Soon after the Declaratory Judgment Act was enacted, its purpose was explained:

> The statute providing for declaratory judgments . . . should be liberally construed to accomplish the purpose intended, i.e. to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships.

Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 325 (4th Cir. 1937) (quoted with approval in *Beacon Construction Company, Inc. v. Matco Electric Company, Inc.*, 521 F.2d 392 (2d Cir. 1975)). *See also Steffel v. Thompson,* 415 U.S. 452, 482 (1974) ("A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions.")(Rehnquist, J. concurring); *Browning Debenture Holders' Committee v. Dasa Corporation,* 524 F.2d 811, 816 (2d Cir. 1975) ("Unlike damages and injunctive relief, which apply significant sanctions and thereby deter future conduct, a declaratory judgment has no practical effect . . . ."). Federal courts have "unique and substantial discretion" to decide whether to declare the rights of litigants under the Declaratory Judgment Act. *Peconic Baykeeper, Inc. v. Suffolk County,* 600 F.3d 180, 187 (2d Cir. 2010). In

light of the non-coercive nature of declaratory judgments, that discretion should be exercised here in order to declare the historic injustice of the loss of Onondaga Nation lands at the hands of New York State. A declaration that the State violated the Trade and Intercourse Act can be issued without upsetting expectations of the Defendants and other non-party landowners, because the judgment would not lead to the loss of any land or dispossession of any landowner.

C. A Declaratory Judgment Would Not Be Disruptive Because It Can Be Crafted to Avoid Such Effects.

The District Court's discretionary authority should have been exercised to shape the declaratory judgment so as to avoid any disruption to the land titles of the Defendants, and by implication, to the titles of landowners not joined as defendants. The Onondaga Nation specifically requested such prophylactic provisions in the judgment as prohibiting injunctive or other coercive relief and ensuring that the judgment does create undue disruption to non-Indian land ownership. Plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss at 9, Docket No. 84. The District Court improperly ignored that request.

Three principles support the issuance of a declaratory judgment tailored to the unique and limited nature of the Onondaga Nation's claim and the special circumstances here. First, the District Court has wide latitude to determine appropriate remedies for violations of the Trade and Intercourse Act. Although

the Act declares that Indian land purchases not made by a congressionally-ratified treaty shall not be valid, the Act, as the Supreme Court has noted, contains no remedial provision. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 237 (1985) (the Act "does not speak directly to the question of remedies for unlawful conveyances of Indian land.") (*Oneida II*). Thus, the District Court may use its discretion to protect against unduly disruptive effects of a declaratory judgment premised on a violation of the Act.

Second, the Onondaga Nation is entitled to whatever relief its legal theory may support under the facts alleged, which must be taken as true at this stage of the case. The heart of the Nation's case is that the State of New York violated the Trade and Intercourse Act and the Treaty of Canandaigua when it acquired Nation land between 1788 and 1822. The District Court may grant any relief that this legal theory supports, whether or not it was specifically pled in the prayer for relief. Federal Rules of Civil Procedure Rule 54(c) (The final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."). The District Court's authority under Rule 54 is sufficient to issue a declaratory judgment that avoids the disruption of settled expectations of landowners that is prescribed by *Cayuga* and *Oneida.*

Third, contrary to the State's argument, a declaration of formal legal title in the name of the Onondaga Nation would neither contravene the "historic concept

of Indian title as a right of occupancy and possession" nor expand the cause of action for "wrongful possession" recognized by the Supreme Court in *Oneida II*. Brief of Appellees at 36. The State's argument is tantamount to arguing that Indian nations cannot have interests in land that do not also include a right to possession. The law of Indian land title contains no such construct. *Oneida II* recognized a right of possession because that was the right the Oneida Nation asserted in that case. As the Supreme Court noted, "Accepting the premise of the Court of Appeals that the case was essentially a possessory action, we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (*Oneida I*). There is no suggestion in *Oneida I* that the Court intended that the cause of action recognized there be the exclusive means to vindicate Indian land rights or that Indian nation interests in land be limited to the right of possession.

On the contrary, the Supreme Court has acknowledged that Indians might hold non-possessory interests in land protected by the Trade and Intercourse Act. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (The Act is intended to protect the unfair disposition by Indians of lands "owned or possessed by them" to parties other than the United States); *see also, Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) ("[T]he Act

applies to any title or claim to real property, including nonpossessory interests."). It is correct that so-called Indian title is sometimes characterized as a right of "use and occupancy." But that does not prevent an Indian nation, like other landowners, from holding a right to property without the corresponding right of occupancy. Land tenure in the City of Salamanca, New York, where the Seneca Nation of Indians holds underlying title while non-Indian landholders maintain possessory rights, is but one example of the many ways in which property rights can be divided under existing law. *See Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 544 (2d Cir. 1991)

D. A Declaratory Judgment Would Serve a Useful Purpose in Clarifying Legal Relations Between the Onondaga Nation and the State of New York.

The Supreme Court has recognized that the "propriety of issuing a declaratory judgment may depend on equitable considerations and is also informed by the teachings and experience concerning the functions and extent of federal judicial power." *Green v. Mansour*, 474 U.S. 64, 72 (1985). In deciding whether to issue such a judgment, the District Court may consider "equitable, prudential, and policy arguments." *MedImmune v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). This Court has identified two factors that should guide district courts in determining whether to exercise their discretion under the Declaratory Judgment Act: a declaration may be issued "(1) when the judgment will serve a useful

purpose in clarifying and settling the legal relations at issue; and (2) when it will afford relief from the uncertainty that gave rise to the proceedings." *State of New York v. Solvent Chemical Company, Inc.*, 664 F.3d 22, 26 (2d Cir. 2010). Here, both considerations are present. The District Court erred in refusing to issue the requested declaratory judgment.

The question of whether the State of New York lawfully acquired Onondaga Nation land has remained unresolved for generations. Congress never authorized such acquisitions, as it was required to do. Nonetheless, the Governor of the State has refused to enter into discussions to resolve the Nation's land rights issues in part because of the doubt and uncertainty surrounding this question. Clarification from the federal courts that the State violated federal law in acquiring the Nation's land will establish a foundation and framework for discussions aimed at improving the relationship between the State and the Nation and at providing a path forward for the Nation and its neighbors. As a result, a declaratory judgment is an ideal vehicle to assist the parties in clarifying a critical aspect of their legal and political relationship.

A ruling that equitable principles preclude the federal courts from hearing the Onondaga Nation's claim does not extinguish the Nation's title to its lands protected by the Treaty of Canandaigua. It does not end the dispute over the legality of the State's actions. Uncertainty and doubt will persist. A properly

framed declaratory judgment could foreclose additional years of controversy by answering the central question that has adversely affected relations between the Onondaga Nation and the State: whether the State lawfully acquired the Nation's land.

E. A Declaratory Judgment Would Not Affect Landowners Who Have Not Been Sued.

The State argues that a declaratory judgment in favor of the Onondaga Nation against the small number of landowners who have been named as defendants would nonetheless "cast doubt on the title of every landowner, present and future" in a claim area the State estimates to comprise 2.5 million acres. Brief of Appellees at 37. Setting aside the State's exaggerations, the Nation notes that no court has yet determined the effect a declaratory judgment would have against parties who are not sued and who cannot be bound by the judgment. It is axiomatic that persons not parties to a lawsuit are not bound by the judgment.

Although the courts that have considered this issue have intimated, without deciding, that there may be effects, the issue is far from resolved. The District Court in *Oneida* noted that even in the case of possessory actions based on the Trade and Intercourse Act, the most that could be said was that such claims "might" affect the rights of private landowners who are not named as defendants. *Oneida Indian Nation v. County of Oneida,* 500 F. Supp. 2d 128, 137 (N.D.N.Y.

2007). On appeal, this Court also noted that a claim that challenges the legality of the original transaction "at least potentially, by extension" calls into question the titles of subsequent landowners. *Oneida* at 137. As noted above, the risk that a declaratory judgment here might "by extension" operate beyond the narrow confines of this case can be ameliorated by protective provisions in the judgment itself. The Onondaga Nation's position is clear: The effects of this action can and should be limited to the named Defendants.[3]

II. The State's Title Expectations Cannot Be Presumed To Be Reasonable and Justified.

The question of whether the expectations of the State, the County of Syracuse, the City of Syracuse and the corporate entities are "settled" and "justified" cannot be answered with self-serving assertions that have not been tested by traditional judicial methods of factual development. *See*, *Oneida* at 127, 137 (disruptiveness is to be determined by "the degree to which these claims upset the justifiable expectations" of landowners that are "broadly held."). Critically, as the Supreme Court has noted, expectations about property interests cannot have

[3] The State's reliance on *Oneida Tribe of Indians of Wisconsin v. AGB Properties, Inc.*, Civ. A. No. 02-CV-233, 2002 WL 31005165, at *6 (N.D.N.Y. Sept. 5, 2002) is misplaced. In that case the Oneida Tribe sought ejectment and trespass damages against a large class of landowners. No such relief is sought here. No court has addressed the question of whether a declaratory judgment that does not seek any possessory remedy has any affect on landowners who are not sued.

legal consequences unless they are "reasonable." *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 482 (1988). In that case, the Court ruled that the State took title to tidelands upon admission to the Union even when such waters were not navigable. Record title holders of such lands argued that no such State interest should be recognized because it would upset their expectations, developed since 1817, that their interests would not be disturbed. The Court rejected that argument, holding that such expectations were unreasonable in light of the public expressions by the State that it claimed tidelands. *Id.* at 482.

Similarly, in light of the lengthy, persistent, and widespread efforts by the Onondagas and others associated with them to assert their land claims, there can be no justified and reasonable expectations on the part of the State and other Defendants that their interests in land would never be challenged. This case is thus not like *Oneida,* where "significant and justified expectations" arose "as a result of the [long] lapse of time during which the plaintiffs did not seek relief." *Oneida* at 135. This is especially true in light of the fact that the State knew it was violating the Trade and Intercourse Act in acquiring the lands of the Six Nations, including the Onondaga Nation. *See, e.g., Cayuga Indian Nation of New York v. Pataki,* 165 F. Supp. 2d 266, 334 (N.D.N.Y. 2001) (In 1795, the Secretary of War informed New York Governors Clinton and Jay that the Act prohibited the sale of Indian lands except pursuant to a federal treaty). The efforts of the Onondaga

Nation were public and widespread. No reasonable person could conclude that the Nation would accede to New York State's unlawful conduct. In any event, the questions of whether the Defendants had expectations and whether they were reasonable are factual ones to be answered after the Onondaga Nation has been afforded a fair opportunity to present evidence and develop the facts. The District Court erred in denying the Nation that opportunity.

III. This Court Should Not Consider the Alternate Grounds Urged by the State Before the District Court Has Ruled on Them.

The State argues that this Court in the alternative should affirm the District Court on the grounds that the State is immune from suit under the Eleventh Amendment and that the entire lawsuit should be dismissed because the State is an indispensable party under Rule 19. The District Court has not addressed these arguments, and this Court should not do so in the absence of such consideration. If this Court reverses the District Court on its equitable bar ruling, as the Onondaga Nation argues it should, the case should be remanded for consideration of these other issues.

"A federal appellate court does not consider an issue not passed upon below." *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000). Although the rule is not jurisdictional, prudential considerations counsel against this Court addressing the Eleventh Amendment and indispensable party issues. First, due to

briefing size limitations, these issues have not been fully briefed in this Court. Second, this Court may benefit from the District Court's consideration of these issues, some of which are matters of first impression presenting mixed questions of law and fact. For example, the District Court is especially well-situated to assess the four considerations about whether, if the State cannot be joined, the action should nonetheless proceed in "equity and good conscience" without it. For these reasons this Court should follow the circuit's "preferred practice to remand such issues for consideration by the district court in the first instance." *Schonfeld v. Hilliard,* 218 F.3d 164, 184 (2d Cir. 2000). In the event the Court nonetheless chooses to decide these issues, the Onondaga Nation briefly addresses them below.

A. Pursuant to Its Constitutional War Powers Authority, Congress Has Abrogated New York State's Eleventh Amendment Immunity in the Trade and Intercourse Act.

To determine whether Congress has validly abrogated state sovereign immunity, a court must determine whether Congress has expressed an intent to abrogate the State's immunity and whether Congress has acted pursuant to a valid exercise of constitutional authority. *Seminole Tribe v. Florida,* 517 U.S. 44, 55 (1996). Here, the answer to both questions is yes.

While an affirmative statement of Congressional intent to abrogate is required for statutes passed after the adoption of the Eleventh Amendment,

Congress's intent may be implied in statutes passed before the Amendment's adoption. *See County of Monroe v. Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982) (It was not necessary for the Federal Extradition Act to expressly abrogate Eleventh Amendment immunity because the Act was enacted in 1793, before the Amendment was adopted). In this case, then, no affirmative statement that Indian nations have a cause of action to enforce the Act against states is required.

The terms of the Trade and Intercourse Act and its contemporary legal context show that Congress intended that Indian nations be able to enforce the Act against states where federal court jurisdiction was otherwise available.[4] The Act was specifically crafted to address a problem created and perpetuated by state governments. *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1981), *cert. denied*, 452 U.S. 968 (1981). By its express terms, the Act applies to "any state, whether having the right of preemption or not." 1 Stat. 137 (1790). By declaring certain Indian land transactions invalid, Congress necessarily contemplated that the issue of the legality of the transaction would at some point be litigated. *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 535 (2d Cir. 1983), *aff'd on other grounds*, 470 U.S. 226 (1985) (relying on congressional intent to find an implied right of action under the Trade and Intercourse Act). Without the

[4] This Court's decision in *Oneida* at 131-35, does not preclude consideration of this argument, because it was not presented to or addressed by the Court in that case.

ability to overcome the states' immunity, Indian nations, as the principal beneficiaries of the Act, would have been disabled from enforcing the Act against the primary threat to the security of their lands. The Act was adopted in a legal and political climate in which unfair and fraudulent state "treaties" in defiance of the national government's authority threatened the peace of the United States. It is inconceivable that Congress would have contemplated that the Act could not have been enforced against the states, the principal source of that threat.

The second part of the *Seminole Tribe* test is met here as well. Congress has authority under the War Powers Clause of Article I of the Constitution to abrogate New York State's immunity from suit.[5] Although this is an issue of first impression in this Court, the First and Fifth Circuits have ruled that Congress has War Powers authority to abrogate state immunity. *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609 (1st Cir. 1996) (Veterans Re-employment Rights Act, which authorized suit against a state, is a legitimate exercise of Congress's

[5] *Dicta* in *Seminole Tribe* suggesting that Congress may not abrogate state immunity through the exercise of any Article I power does not preclude this argument. The Supreme Court has subsequently upheld Congress's authority under the Article I Bankruptcy Clause power to abrogate state immunity, noting that *Seminole Tribe* had not "fully debated" the issue. *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). Moreover, the First Circuit has held that the *Seminole Tribe* statement "does not control the War Powers analysis." *Diaz-Gandia*, 90 F.3d at 616, n. 9.

constitutional war powers); *Peel v. Florida Dept. Of Trans.*, 600 F.2d 1070 (5th Cir. 1979).[6]

There is ample evidence that Congress was exercising its War Powers in enacting the Trade and Intercourse Act. A major purpose of the Act was to avoid war with Indian nations, who "have constantly had their jealousies and hatreds excited by the attempts to obtain their land." *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 534, n.10 (2d Cir. 1983) (quoting Secretary of War Henry Knox to Governor Blount of North Carolina). Noted Indian law scholar Felix Cohen confirms this conclusion, writing that the war powers "underlay much of the federal power exercised over Indian land and Indians during the early history of the Republic." Felix Cohen, *Handbook of Federal Indian Law* at 93 (1942). Chief Justice John Marshall explicitly tied the Trade and Intercourse Act to the constitutional war power:

> [The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes.* These powers comprehend all that is required for the regulation of our

[6] One case has held that the War Powers Clause does not authorize Congress to abrogate state immunity under the Trade and Intercourse Act. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir. 2000). Because that case was decided before *Central Virginia Community College*, which clarified that Congress had authority under those Article I powers that could be interpreted to subordinate state immunity to the need for federal uniformity in the area of regulation at issue, the continuing validity of that case is questionable. In any event, that decision does not bind this Court.

> intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

Worcester v. Georgia, 31 U.S. 515, 562 (1832) (emphasis in original).[7]

B. The State of New York is Not an Indispensable Party.

The non-State Defendants argue that if this Court affirms on the alternate ground of State Eleventh Amendment immunity, the entire action must be dismissed because the State is an indispensable party. Brief of Appellees at 50-57. On the contrary, the State is neither a required party under Rule 19 nor is it needed for a complete and fair adjudication of the Onondaga Nation's claims.

The argument that the State is a required party is based on the erroneous premise that a declaratory judgment in favor of the Onondaga Nation will "challenge the State's very sovereignty over the claimed lands." Brief of Appellees at 51. Even a cursory reading of the Onondagas' complaint will show

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[7] The Onondaga Nation has also stated a claim against the Governor of New York under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), alleging that he is acting beyond his authority by asserting interests in land in violation of federal law. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) does not bar this claim, because the Onondaga Nation does not seek to "invalidate all statutes and ordinances purporting to regulate the lands, nor does it seek to "eliminate altogether the State's regulatory power," nor establish a right to possession, as the Coeur d'Alene Tribe did. In addition, that case is distinguishable in that the courts of New York State are not available to hear the Nation's federal law claim. 25 U.S.C. § 233, which granted limited civil jurisdiction to State courts, specifically stipulates that State courts shall not have jurisdiction over "Indian land claims arising before September 13, 1952."

that the Nation seeks no relief with regard to the nature or scope of New York State's sovereign jurisdiction over lands to which the Nation claims title. Title to land and sovereignty over that land are analytically distinct concepts, and one does not necessarily follow the other. The quiet title action in *Coeur d'Alene* implicated sovereignty interests because the Tribe in that case specifically sought to invalidate all state laws and ordinances previously applicable to the land at issue. The Onondaga Nation seeks no such relief here.

Moreover, there is no legal or practical reason why the State needs to be a party to the disputes between the Onondaga Nation and the non-State Defendants with regard to their interests in the subject land. The State is not a party to the deeds by which those Defendants hold their lands. As Judge Posner of the Seventh Circuit stated in a dispute involving a tribal claim to land once held by the United States:

> To exaggerate slightly (because the U.S. appears to be in occupation of some of the land . . .), it is as if every time someone claimed that someone else was encroaching on his property he would have to sue not only the alleged encroacher . . . but also the alleged encroacher's predecessors in title right back to King James or Lord Baltimore (here the U.S.).

Sokaogon Chippewa Community v. Wisconsin, 879 F.2d 300, 304 (7th Cir. 1989).

See also, ABKCO Music, Inc. v. La Vere, 217 F.3d 684, 687 (9th Cir. 2000)

(persons who have relinquished their interests in property or whose interests are not actually affected by the suit are not indispensable).

The State's interest in participating in an adjudication of its "rights" under the challenged treaties is insufficient to give it required party status under Rule 19. A resolution of the dispute between the Nation and the non-State Defendants will not bind New York State; the State may defend its "treaties" at some other time, if it chooses to do so, without being bound by the ruling here. *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102, 109-111 (1968) (A judgment is "not *res judicata* as to, or legally enforceable against a nonparty.").

Even if this Court or the District Court finds that the State is a required party, this action may in "equity and good conscience" be adjudicated in its absence. Rule 19(b). The non-State Defendants rely principally on *Seneca Nation of Indians v. State of New York*, 383 F.3d 45 (2d Cir. 2004) in support of their argument that this action should be dismissed. That case does not apply here, because the Indian nation plaintiff there was seeking to invalidate an easement held by the State. By contrast, an action implicating the land rights of the non-State Defendants would not affect the interests of the State, because the State has no interest in the lands held by the non-State Defendants. Regarding the argument that the State has a governmental interest in preventing clouds on the titles of landowners who trace their titles to the State's original unlawful transaction, as

noted, the Nation urges that the declaratory judgment be designed to avoid such effects on the landowners who have not been joined.

CONCLUSION

In *Cayuga*, this Court held that the equitable doctrines of *Sherrill* may be applied to "ancient Indian land claims" in "appropriate circumstances." *Cayuga* at 273. In *Oneida*, the Court acknowledged that the *Sherrill* equitable defense "is potentially applicable to all ancient land claims that are disruptive of justified societal expectations that have developed over a long period of time. . . ." *Oneida* at 136. Because the Onondagas seek the limited remedy of a declaratory judgment that would avoid disturbance to whatever expectations the State and its co-defendants may have, and because the Onondagas took every available opportunity to protest the loss of their lands at the hands of New York State, this case does not present circumstances appropriate for dismissal. No decision of this Court or the Supreme Court establishes a *per se* rule that Indian nation claims to interests in land that was taken from them in the early years of the United States are barred as a matter of law without consideration of the facts.

The District Court's decision dismissing this action should be reversed. If this Court decides to reverse the equitable doctrine rationale for the dismissal, the alternate grounds urged by the State should not be considered. Rather, the case

should be remanded for the District Court's consideration of the Eleventh Amendment immunity and indispensable party defenses in the first instance.

Dated: June 8, 2012

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 5,496 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14 point Times New Roman.

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I hereby certify that on June 8, 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.

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