

11-915

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

ERIC WILSON,

Defendant-Appellee.

On Appeal From The United States District Court
For The Northern District Of New York

**BRIEF OF THE *AMICUS CURIAE*, ST. REGIS MOHAWK TRIBE,
IN SUPPORT OF THE UNITED STATES' APPEAL OF
THE DECISION OF THE DISTRICT COURT**

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INTEREST OF *AMICUS CURIAE*¹

The St. Regis Mohawk Tribe is a federally recognized tribe residing in Northern New York. The Tribe exercises its sovereign authority over a large reservation set aside by federal treaty in 1796. Treaty with the Seven Nations of Canada, 7 Stat. 55. The Tribe has a police department formed under tribal law that polices the Tribe's reservation. In addition, the Tribe has been granted the authority to form a police department under state law. N.Y. Indian Law § 114. This law authorizes the tribal police to act as state police for the purposes of the enforcement of state and federal law against Indians and non-Indians within the boundary of the Tribe's reservation. The Tribal police officers may also be designated Customs Officer's under 19 U.S.C. § 1401(i).

In the case below, the stop was made by a tribal police officer in the Hogansburg Triangle. The United States did not dispute the defendant's assertion that the area within which the stop occurred was off-reservation. The Tribe respectfully disagrees. The Hogansburg Triangle (the "Triangle") is part of the Tribe's reservation as set aside in the 1796 treaty. The Tribe seeks amicus status in order to address the district court's statement that the "legal boundary" of the Tribe's reservation, which have been defined by that treaty and have never been

¹ Pursuant to Fed. R. App. P 29(c)(5), and Local Rule 29.1(b), counsel for *amicus curiae* counsel authored the brief in whole, and no one other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

changed, does not include the Triangle. *See* Joint Appendix at A.218, A.222, and A.223. The district court ruled based on the facts presented to it and which the United States did not dispute. Because the reservation status was not disputed, the district court erroneously declared the Triangle was not within the legal boundary of the reservation. The U.S has filed an appeal acknowledging its error but it recognizes that it must proceed based on the record before the district court. *See* Appellant Brief (App. Br.), p.11. Even so, the Tribe's brief is relevant to the disposition of this case because we seek to limit the ruling below to the facts of this particular case. The district court's statement, although based on an assumption of facts undisputed by the United States, has no basis in law and should not be affirmed by this Court as a legal holding regarding the reservation boundary. The 1796 Treaty set aside certain lands as the Tribe's reservation and that legal boundary that has never been changed by Congress. This Court should not perpetuate the district court's incorrect finding as to the boundary of the reservation since it was not fully and fairly litigated. Rather this Court should proceed, based on the assumption of the parties that the area was off-reservation, without holding that fact to have been conclusively established.

This issue is of extraordinary importance to the Tribe. The Tribe's exercise of authority under the applicable state law, which clearly delegates to the Tribe's police the authority to enforce state and federal law within "the boundary of the St.

Regis [Tribe's] reservation," is correctly asserted in the Triangle. N.Y. Indian Law, § 114 (4). The Tribe needs its full authority to police the reservation within its boundaries. If the Tribe's ability to police the entire area is called into question, the Triangle may become an area with little or no police presence, an issue that the state law was intended to address.

Further, the United States argues on appeal that even assuming the stop occurred off-reservation, the stop was lawful. The Tribe agrees. Thus, the Amicus files this brief in support of the Appellant and asks that the district court's ruling be reversed.

ARGUMENT

A. The Hogansburg Triangle is Within the Reservation Boundary.

Under New York Indian Law, § 114, the tribal police may exercise the functions of a state police officer "within the boundary of the St. Regis Reservation." § 114(8). Further a police officer has "all powers provided in the criminal procedure law [with exceptions] for the preservation of order and the public peace, and the arrest of all persons committing offenses upon the St. Regis Mohawk tribal reservation." § 114(4).

The state law does not define the Tribe's reservation. Nor does the statute make a distinction between recognized boundaries or any other boundaries. Rather, the use of the phrase can only be a reference to the boundary recognized by

the federal government. *See Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 637-641 (N.Y. 2010)(state law definition of qualified reservation is a reference to federal law); *Oneida Indian Nation v. Madison County*, 401 F.Supp.2d 219, 231 (N.D.N.Y. 2005)(state tax laws which exempt Indian reservation from taxes do not apply to land within reservation boundary).

Under federal law, the Tribe's reservation includes all that land set aside by the Treaty with the Seven Nations of Canada, 7 Stat. 55 (1796) (the "Treaty"). It is settled law that once set aside, only Congress may disestablish or diminish a reservation. *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *United States v. Celestine*, 215 U.S. 278 (1909); *cf. Oneida Indian Nation v. City of Sherrill*, 544 U.S. 197, 216 n.9 (2005). Courts are admonished not to "lightly find diminishment." *Hagen*, 510 U.S. at 411. Thus, under federal law, unless Congress has enacted a law altering the boundaries of a reservation, that boundary remains intact. The Court in *Solem* affirmed this view, citing to the longstanding rule that, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until

Congress explicitly indicates otherwise." 465 U.S. at 470; *Mattz v. Arnett*, 412 U.S. 481 (1973) (holding that the mere fact that a reservation has been opened to settlement does not mean that it has been diminished).

The land set aside for the St. Regis Mohawk Tribe includes the area known as the Hogansburg Triangle. The land in this area was illegally purchased by the State of New York in 1824 and 1825. As noted in its App. Br., p. 11-12, the Tribe has asserted a land claim in federal court alleging these purchases were illegal and the United States has intervened in that suit as a plaintiff and supports the Tribe's position. *See* Order Granting United States' Motion to Intervene as Plaintiff, *Canadian St. Regis Band of Mohawk Indians v. New York*, No. 5:82-cv-00783-NPM-GHL (N.D.N.Y. Oct. 28, 1998), ECF No. 166. . In addition, in 2009, the Tribe filed a boundary claim, requesting a declaratory judgment that the Triangle is part of the reservation because Congress never removed from the land from the reservation. *See St. Regis Mohawk Tribe v. Paterson*, 8:09-cv-00896-NPM-GHL (N.D.N.Y.). Since there has been no Act of Congress, the Tribe considers the existence of the boundary as a given. However, to the extent there is a question as to the boundary, neither case has been resolved and any conclusion based on undisputed facts is premature.

B. The Boundary Question Was Not Litigated.

Even though there has been no Act of Congress changing the reservation boundaries, the parties below showed confusion as to the meaning of the Tribe's land claim. The witness, Tribal Police Officer Rourke, attempted to make it clear that though the area was disputed because of the land claim, he understood (correctly) that it was still within the Tribe's reservation and within the Tribe's jurisdiction. A.130-131. ("where we stopped the vehicle is technically is ... still the reserve."); A.135 (trying to explain that the area's status as the reserve is disputed); A.137 ("we cover that area, [and] N.Y. State Police say that ... [it is within our] ... jurisdiction); A.142 (stating that where the stop occurred in the Triangle is within the recognized boundary of reservation). Even worse, when the officer tried to explain the complex issue and the land claim dispute, the district court dismissed the witness' concern saying, "It is a simple matter." A.135.

The parties also utilized a U.S. Geologic Survey Map to assist in defining the "recognized boundaries" of the reservation. A.142-145, and A.63 (map). The Defendant's attorney acknowledges the land claim and appeared to consider the map as depicting the "recognized" boundaries of the reservation. A.131. But the assertion that the map represented the recognized boundary was without legal support. A.142-44. In fact, the map incorrectly shows the Triangle as outside of the reservation boundary. When shown the map, the officer agreed the stop was outside of the boundaries. A.131-132. When pressed by the district court as to

whether the stop occurred on-reservation or off-reservation, however, the tribal police officer stated it would be "off the reserve according to the map." A.135.

Despite this conflicting testimony, the United States simply left it undisputed that the stop occurred off-reservation. While those undisputed facts cannot be changed for this appeal, in the circumstances, this Court should rule based solely on the parties' assumption and not affirm the district court's conclusion and ruling that the stop was outside the "legal boundary" of the reservation for the purposes of state law or any other purpose. A.223.

The officer's testimony illustrates that the issue was not as clear-cut as the district court concluded it to be. Significantly, there was no written stipulation in this case. As the United States notes in its App. Br., p. 11-12, this particular fact was simply never contested in the briefings of the parties because the government (i.e., the U.S. Attorney Office for the Northern District) only recently learned that the federal land claim litigation, in which the United States is a party, already defined the U.S. position as to the continuing existence of the reservation in that area. Since the question of whether the stop occurred off-reservation went undisputed, the district court's conclusion that the stop did not occur within the "legal boundary" of the reservation should not be affirmed so as to serve as legal precedent or to have a future preclusive effect. See Wright, Miller & Cooper, 18A Fed. Prac. & Proc. Juris, §4443 (2d Ed.); *cf. Arizona v. California*, 530 U.S. 392,

414-15, *supplemented*, 531 U.S. 1 (2000) ("preclusion attaches only '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.' Restatement (Second) of Judgments § 27, p. 250 (1982).").

C. The Map Does Not Depict the Legal Boundary.

Simply because a map depicts a reservation boundary does not mean it is the "legal boundary." The only legal boundary is the one as defined in the Treaty. Courts are reluctant to use maps alone as determinative evidence of reservation diminishment or disestablishment. *See, e.g., Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 162 n.20 (2d Cir. 2003) (noting that "the fact that certain . . . maps of the area . . . omit mention of an Oneida reservation in New York State does not conclusively indicate disestablishment."), *rev'd on other grounds and remanded*, 544 U.S. 197 (2005); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1029 n. 11 (8th Cir. 1999) (noting that maps which either refer to the Yankton Sioux Reservation or lack any such reference were found by the Supreme Court in *South Dakota v. Yankton Sioux Tribe* to have "limited interpretive value," and "problems associated with relying on the presence or absence of a cite on a map is illustrated by the failure of a prestigious map maker to include the states of North Dakota, South Dakota, Oklahoma and parts of Minnesota, Iowa, and Kansas in one

world atlas.”), *cert. denied*, 530 U.S. 1261 (2000); *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 690 (9th Cir. 1976) (recognizing that even though the President or Secretary of Interior could extinguish an executive order reservation to make way for railroad, it could not be done by such informal means as approving a map, when the Secretary’s approval of map does not purport to terminate reservation and when the Secretary obviously did not intend his approval of the map to terminate the reservation); *Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F.Supp.2d 698, 772 (E.D. Wis. 2004) (refusing to rely on government-created maps in finding that reservation was diminished because “the maps do not reflect any legal analysis of reservation boundaries and, therefore, are of little value in the court’s analysis.”), *aff’d*, 554 F.3d 657 (7th Cir. 2009).

The fact is there is no support for the U.S. Geologic Survey Map depiction to stand as the representation of the reservation's legal boundary. There is no evidence as to how it was drawn or the legal basis for the boundary depiction. The only known official survey of the reservation as defined in the 1796 treaty occurred in 1799 and that survey map depicts a boundary survey line goes from east to west in a straight line and does not cut out the Triangle. *See Addendum A.*²

² This version of the 1799 survey map appears to be the only version available in the Archives. While it has been annotated by an unknown party to show the illegal purchases, even those annotations do not show a boundary change from the original survey.

CONCLUSION

Under these circumstances where the issue was not litigated and the Tribe's ability to exercise criminal jurisdiction within its reservation boundaries is of utmost importance, the Tribe respectfully requests that this court refrain from making any legal conclusions as to the boundary of the Tribe's reservation. Rather the court can, and should, decide this case based on the parties' assumptions and based on the appeal as framed by the United States without perpetuating the error of fact below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules, I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains, as measured by the word-processing system used to prepare this brief, approximately 2,307 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further I hereby certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared using a 14- point, Times New Roman font, a proportionally spaced typeface.

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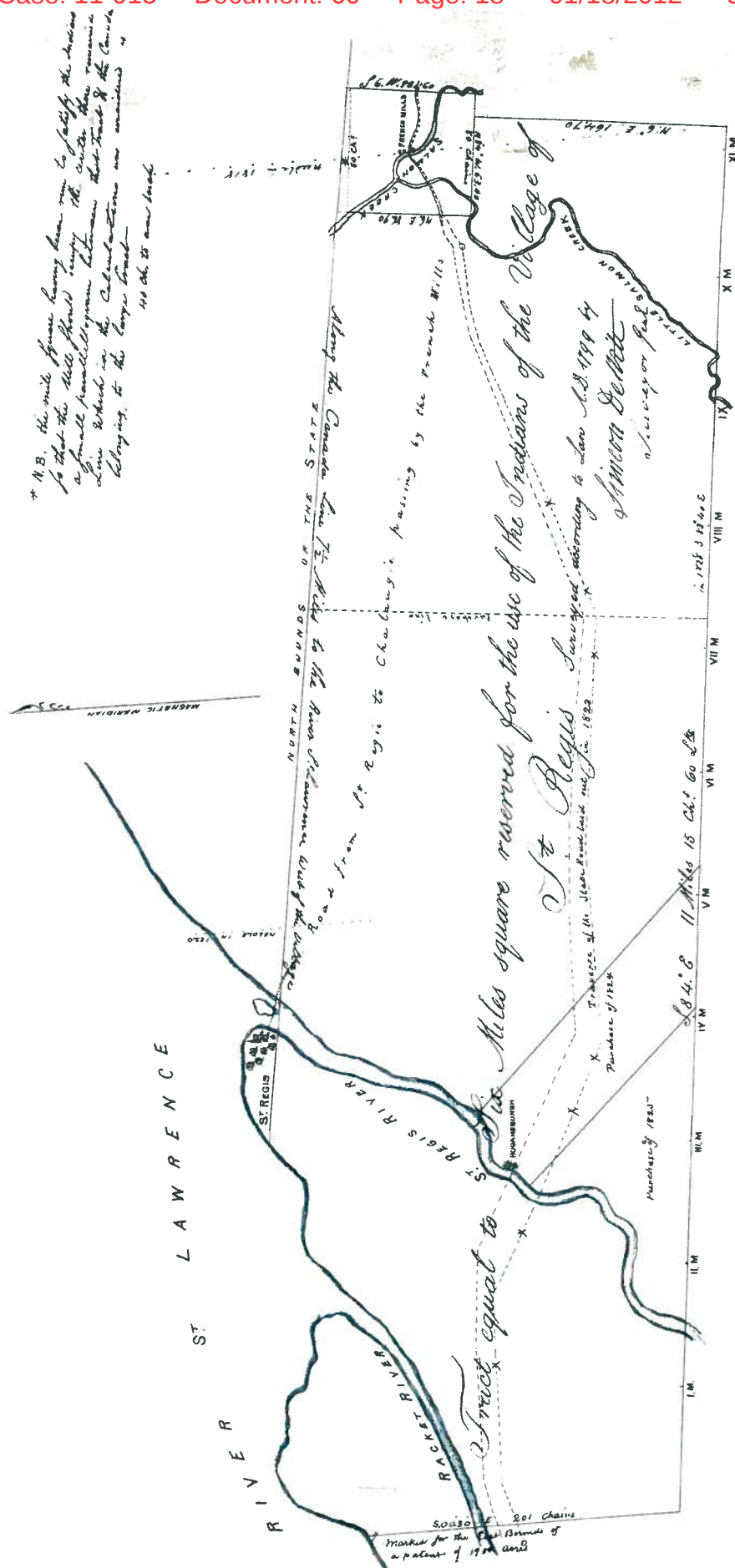
CERTIFICATE OF SERVICE BY CM/ECF

I, the undersigned attorney, hereby certify that on July 8, 2011 I caused to be served a copy of the *Brief of the Amicus Curiae St. Regis Mohawk Tribe In Support of the United States' Appeal of the Decision of the District Court* on the United States Court of Appeals for the Second Circuit and counsel for all parties by uploading to the Second Circuit's ECF system a Portable Document Format (PDF) version of the Brief.

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Addendum A

1799 St. Regis Mohawk Tribe Reservation Map



Amat. 10. 11. 22

New York

882

5604-1884

(Copy of map of) Tract equal to six miles square reserved for the use of the Indians of the Village of St. Regis. (Shows purchases of 1824 & 1825.) "See Map No. 1052 for St. Regis Sands in Canada."

Simeon De Witt,

17 x 28 $\frac{1}{2}$ ins.

Surv. 1799

Surv.

Annot. dr.

40 ch. to 1 in.

map on trac.

cloth