016-53-cv

United States Court of Appeals
for the
Second Circuit

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION; CITIZENS EQUAL RIGHTS ALLIANCE; DAVID R. TOWNSEND, New York Assemblyman; MICHAEL J. HENNESSY, Oneida County Legislator; D. CHAD DAVIS, Oneida County Legislator and MELVIN L. PHILLIPS.

Plaintiffs-Appellants

- v -

KENNETH L. SALAZAR, individually and in his official capacity as Secretary of the U.S. Department of the Interior; P. LYNN SCARLETT, in her official capacity as Deputy Secretary of the U.S. Department of Interior, JAMES CASON, in his official capacity as the Associate Deputy Secretary of the Interior, FRANKLIN KEEL, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs, JAMES T. KARDATZKE, Eastern Regional Environmental Scientist, ARTHUR RAYMOND HALBRITTER, as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation.

Respondents-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS CENTRAL NEW YORK FAIR BUSINESS, INC.; CITIZENS EQUAL RIGHTS ALLIANCE; DAVID R. TOWNSEND, New York Assemblyman; MICHAEL J. HENNESSY, Oneida County Legislator; D. CHAD DAVIS, Oneida County Legislator and MELVIN L. PHILLIPS.

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RULE 26.1 STATEMENT

Appellants Central New York Fair Business Association (CNYFBA) and Citizens Equal Rights Association (CERA) are organized and incorporated as not for profit corporations. Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants' state that neither corporation has a parent corporation, and no publicly traded corporation owns more than 10% or more of its stock.

INTRODUCTION

The reality of these proceedings in the District Court was that fifty years of litigation over the Indian land claims so skewed the "facts" of this case that plaintiffs-appellants were denied a neutral forum in which to adjudicate their claims. Appellants do not in any way blame Senior Judge Lawrence Kahn for this reality. Judge Kahn attempted to be as impartial as the precedents of this Circuit allowed him to be. But as clearly stated in Judge Kahn's granting of the federal motion for summary judgment in his Order of March 26, 2015, plaintiffs were not allowed to argue that federal jurisdiction over the Oneidas was extinguished by the Removal Act and the Treaty of Buffalo Creek because it remains the law in the Second Circuit that "the Oneidas' reservation was not disestablished." *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443

(2d Cir. 2011) (*quoting Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 167 (2d Cir. 2003)). A-21-22. This same precedent wrongly decided that the Oneida reservation was also federal "Indian country." *Id*. at 156. These "precedents" prevented the trial court from being able to fairly adjudicate this case below because the land status and tribal status had already been decided and those "facts" could not be contested. From the very beginning of the litigation against the Secretary's Record of Decision claiming he had the authority to take fee lands in New York into trust plaintiffs-appellants were trying to fight against a completely stacked deck of "facts" against them.

Just a couple of weeks after Judge Kahn denied plaintiffs-appellants motion for reconsideration, counsel for the Citizens Equal Rights Alliance was in the National Archives in Washington D.C. doing research for the case of *Nebraska v. Parker*, ---S.Ct----(2016), 2016 WL 1092417, then pending before the United States Supreme Court. The statute at issue in the *Nebraska* case over whether the Omaha Indian reservation had been diminished was considered a precursor to the Dawes General Allotment Act of 1887. In reviewing the Senate and House records for the time period, counsel came across what was a compilation of records that appeared to have been

assembled to show how Indian tribes that were not hostile to the United States were being treated as badly as the Indian tribes that had recently fought against the United States during the Civil War. It was because of the great number of Indian tribes that had sided with the Confederacy that the very harsh Indian policy of 1871 was adopted by the Radical Republican Congress. As explained in the Citizens Equal Rights Foundation *amicus curiae* brief in the *Nebraska* case, Congress was very unhappy that all the Indian tribes were getting treated badly under the 1871 Indian policy. The Congressional response to this was to bring back the pre-Civil War assimilation Indian policy for the non-hostile Indian tribes and run the two policies simultaneously. Tribal complaints that had laid dormant like the completion of the execution of the Treaty of Buffalo Creek for the Six Nations of New York Indians by 1883 were being addressed again. Counsel not only pulled out a forgotten Congressional document for the Omaha tribe from these records but found three documents in these files that contradict or more fully explain the facts of what happened in New York in the sale of the Indian lands.

Appellants have filed a motion to supplement the record on appeal and for this Court to take judicial notice of the three documents located in the

National Archives. [1] These three documents are official records of the federal government. Appellants from the initial complaint and in every document filed below contested the "facts" of this case even refusing to file a cross motion for summary judgment because of the disputed facts. Every decision of the District Court denied these plaintiffs-appellants the right to contest these "facts." The documents speak for themselves in refuting the prior representations of the United States in the land claim litigation.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs bring this action under, *inter alia*, the Administrative Procedures Act (APA), 5 U.S.C. § 551 et. seq.; the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202; and 42 U.S.C. §§ 1981, 1983 and 1985.

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 2201, 2202 and 1343.

The final order denying Plaintiffs Motion for Reconsideration was denied November 2, 2015 (A- 1) and a timely notice of appeal was filed on December 30, 2015. Docket 132.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] The Motion to Supplement the Record on Appeal and to Take Judicial Notice is opposed and still pending before this Court. Appellees have filed Responses opposing it.

ISSUES PRESENTED

1. Whether the Plaintiffs-Appellants will ever be allowed to contest the "facts" in this case to prove that the Oneida Indian reservation was never under federal jurisdiction or was ever federal Indian country to refute the claim that the Secretary has the authority to place fee lands into trust.

2. Whether this Court and the District Court have prevented themselves from exercising their proper judicial review authority to review the actions of the Secretary of the Interior to take fee lands into trust for the Oneida Indian Nation.

a. Whether the trial court erred in denying the motion for reconsideration, and in denying that the Secretary acted *ultra vires* in claiming to apply the territorial war powers by purportedly taking fee lands into trust , also ruling that the Secretary of the Interior did not violate the Administrative Procedures Act, 5 U.S.C. § 701-706, and in adopting the initial Record of Decision (ROD) in finding that the Secretary has the authority to take fee lands purchased by the Oneida Indian Nation into federal trust and in deciding that the Oneida Indian Nation is a tribe eligible for the benefits of the Indian Reorganization Act under *Carcieri v. Salazar,* 555 U.S. 379 (2009).

b. Whether the trial court erred in deciding that the case was correctly postured to allow a motion for summary judgment to be decided when plaintiffs clearly contested the facts surrounding the Treaty of Buffalo Creek?

c. Whether the trial court erred in finding that pursuant to 43 U.S.C. § 1457 and 25 U.S.C. § 9 that Congress had granted to the Secretary of the Interior the authority to convert private fee owned lands under state jurisdiction into federal lands as claimed in the 25 CFR Part 151 regulations to make those lands into "Indian country" that are no longer subject to either state jurisdiction or the Constitution of the United States?

d. Whether the trial court erred in dismissing the separation of powers constitutional claim challenging the transfer of the lands of the Verona radar station into trust for the Oneida Indian Nation?

e. Whether the trial court erred in granting the dismissal of the civil rights claims in the amended complaint?

f. Whether the trial court erred in denying Plaintiff's Motion for Limited Discovery?

g. Whether the trial court erred in dismissing Arthur Raymond Halbritter as a named defendant and real party in interest from the case?

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STATEMENT OF THE CASE

Appellants Central New York Fair Business Association (CNYFBA), Citizens Equal Rights Association (CERA) Michael Hennessy, Chad Davis and Melvin Phillips bring this appeal to challenge the authority of the Secretary of the Interior to take any lands from fee status that have been under the jurisdiction of the State of New York for over two hundred years into "trust" under the ownership of the United States. Under the definition of Indian country found in 18 U.S.C. § 1151, all lands held in "trust" for an Indian tribe become federal Indian country and are considered to be under the primary jurisdiction of the Indian tribe for whose benefit they are held. The legal mechanism that is claimed as giving this authority to the Secretary to remove state jurisdiction is 25 U.S.C. § 465 of the Indian Reorganization Act (IRA) of 1934. As argued to the District Court, the bill introduced by Commissioner John Collier to become the IRA actually contained a separate fee to trust provision that was specifically removed by Congress before the full bill substitute containing the very downsized version of the IRA was passed in 1934. Section 5 of the IRA, 25 U.S.C. § 465, does not say anything about the Secretary taking fee lands under state jurisdiction into federal trust status.

In fact, no fee land was ever taken into federal trust status before 1978. The first regulations adopted by the Secretary of the Interior claiming that he could place fee lands into trust were promulgated in 1978, forty four years after the IRA became law. These first fee to trust regulations were struck down as unconstitutional by the United States Supreme Court until the Clinton administration invoked a special rule removing the case after the decision was issued to avoid the ruling. *See South Dakota v. Babbitt*, 519 U.S. 919 (1996). The 25 CFR Part 151 regulations are the second attempt by the Secretary to create a fee to trust power from 25 U.S.C. § 465. Appellants alleged in their Amended Complaint and have argued consistently to the trial court that the Part 151 regulations are unconstitutional as *ultra vires*. This constitutional question separated this case from the other cases challenging the Record of Decision of the Secretary to take 13,000 acres of fee land into trust for the Oneida of New York.

Confronted by the evidence that 25 U.S.C. § 465 cannot be the source of the authority for the Secretary to take fee land into trust, the trial court cited 43 U.S.C. § 1457 and 25 U.S.C. § 9 in its final order granting summary judgment to the Secretary for the general authority to expand 25 U.S.C. § 465 in the Part 151 regulations. These statutes had never before appeared in the

litigation below. Appellants responded with a Motion for Reconsideration challenging the constitutionality of 43 U.S.C. § 1457. Appellants argued that 43 U.S.C § 1457 was copied from 1 Revised Statutes §441. This true vestige from the Civil War Reconstruction laws was the main provision of the Indian policy of 1871, known for ending the making of treaties with the Indians. Appellants challenged the constitutionality of 43 U.S.C. § 1457 as being a territorial war power. A war power statute is unconstitutional if it applied to land under state jurisdiction without some emergency or exigent circumstance existing to displace the normal rule of law. Judge Kahn did order the defendants to answer the motion for reconsideration.

Appellants also challenged that the Secretary has never recognized the Oneida Indian Nation of New York. This argument for these appellants was more than just an attempt to hold the Secretary to the decision of the United States Supreme Court in *Carcieri v. Salazar*. Appellants conceded that Bureau of Indian Affairs Commissioner Ada Deer recognized Arthur Raymond Halbritter as the leader of the New York Oneida in 1993 but this recognition was not anything like the 25 CFR Part 83 process that was required under federal regulation for tribal recognition.

All of the arguments of plaintiff-appellants in the District Court were contradicted by the express findings of this Court in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003), that this Court opined was not overruled by the United States Supreme Court in 544 U.S. 197(2005). This Court then ruled in *Oneida Indian Nation v. Madison County*, 665 F.3d 408 (2d Cir. 2011) that this Court itself does not have the authority to overrule a prior panel of Judges that concluded that the Oneida Indian reservation was subject to federal jurisdiction and was never diminished or disestablished by Congress. *Id*. at 443. These two Second Circuit precedents prevented plaintiffs-appellants from having an impartial and fair forum in which to present their arguments against the Secretary's authority to take fee lands into trust pursuant to the Record of Decision.

STANDARD OF REVIEW

Review of a denial of a motion for reconsideration is reviewed under an abuse of discretion standard. *Williams v. Citigroup Inc*., 659 F.3d 208, 212 (2d Cir. 2011).

This Court reviews a district court's decision to grant summary judgment *de novo*. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). Summary judgment is appropriate only if "there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Miller*, 321 F.3d at 300.

The grant of a Rule 12(b) Motion to Dismiss is subject to *de novo* review. *Allaire Corp. v. Okumus,* 433 F.3d 248, 249-250 (2d Cir. 2006). *See also, Ehrenfeld v. Mahfouz*, 489 F.3d 542, 547 (2d Cir. 2007)(question of statutory interpretation is subject to *de novo* review). All allegations in the complaint must be accepted as true and all inferences drawn in Plaintiffs' favor. *Allaire Corp.,* 433 F.3d at 249-250; *Caiola v. Citibank*, *N.A.,* 295 F.3d 312, 321 (2d Cir. 2002). In reviewing a Rule 12(b)(1) dismissal on appeal, factual findings are reviewed for clear error and legal conclusions *de novo. Zappia Middle East Construction Company Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 249 (2d Cir. 2000).

The denial of discovery is reviewed for abuse of discretion, and to the extent that a discovery request was not properly considered, it is subject to *de novo* review. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 175-76 (2d Cir. 1998).

SUMMARY OF ARGUMENT

The main thrust of plaintiffs-appellants case below was that the state reservation of land created by the Treaty of Fort Schuyler executed between

the State of New York and the Oneida Indian Tribe in 1788 did not create any federal interest in the reservation land that was wholly owned by the State of New York. Attorneys for the United States beginning in 1970 with the land claim litigation tried to apply terms and law developed in the Western United States over the expanses of public domain land to disrupt the settled interests of the original Colony of New York to have disposed of their public lands. In the Western public land States to this day a majority of the land within their exterior boundaries is federal public land still controlled under the Property Clause, Art. IV, Sec. 3, Cl. 2, territorial power of Congress. This fact creates constant jurisdictional conflict between these States and the United States even before the Indian reservations with their federally protected interests and sovereignty are included.

From the moment the Citizens Equal Rights Foundation wrote its amicus curiae brief for the *City of Sherrill* litigation in 2004 it has argued how completely inappropriate it was to allow the United States to apply legal terms and definitions that developed as federal jurisdiction spread West--like the meaning of Indian country—to land transactions that were concluded before 1850.

This case challenges the Record of Decision of the Secretary of the Interior deciding that she has the authority to take fee land purchased by the Oneida Indian Nation into federal trust ownership pursuant to the Administrative Procedures Act (APA). This claim includes the question of whether the Oneida Indian Nation was an Indian tribe recognized and under federal jurisdiction on June 1, 1934 under *Carcieri v. Salazar*, 555 U.S. 379 (2009).

In addition, to the APA claims, plaintiffs contested the completeness and historical accuracy of the administrative record. Many of the documents composing the administrative record are not contemporaneous historical records but instead are assertions of fact from the myriad of land claim cases brought by the New York tribes and United States. Because Plaintiffs considered that the facts of the case had not been determined and were still disputed they did not file a cross motion for summary judgment against the United States. The facts regarding the Treaty of Buffalo Creek and whether the Oneida Indian Nation remained "under federal jurisdiction" after the Treaty of Buffalo Creek are the main factual disputes. In fact, counsel for plaintiffs in doing research in the National Archives for another case after the November 2, 2015 final order of Judge Kahn found three irrefutable federal documents

explaining the history and application of the Treaty of Buffalo Creek that contradict the "facts" in the administrative record and as stated by the United States in their pleadings in this case. Plaintiffs submitted a motion to this Court attaching these documents to allow this Court to decide how this appeal should proceed.

Plaintiffs argued from their initial complaint forward that the Indian Reorganization Act was not the legal basis of the authority of the Secretary to take fee lands into federal trust for an Indian tribe. It is and was the position of plaintiffs that this extraordinary claim of authority could only derive from a territorial war power. In granting the United States' Motion for Summary Judgment the trial court cited 43 U.S.C. § 1457 and 25 U.S.C. § 9 in addition to 25 U.S.C. § 465 as giving the Secretary the authority to take land into trust for the Oneida Indian Nation. By definition 43 U.S.C. § 1457 is a statute that applies territorial war power authority. Plaintiffs challenged whether 43 U.S.C. § 1457 is unconstitutional in their motion for reconsideration to the order granting summary judgment. Plaintiffs also believe that 43 U.S.C. § 1457 is the true legal basis of the 25 CFR Part 151 regulations and therefore appeal the decision to grant summary judgment against their constitutional claim in their third cause of action of the amended complaint.

Plaintiffs also contest three issues that were dismissed for failure to state a claim. These include whether the trial court was correct in concluding that a federal Indian reservation existed to require the transfer of lands from the Verona radar facility. If the Treaty of Buffalo Creek was authorized by Congressional statute and constituted the final termination of federal Indian title and all federal claims on behalf of the New York Indians to their state reservations then this issues was wrongly decided. Similarly, the whole context of the civil rights claims changes if the United States deliberately misrepresented the affect and intent of the Treaty of Buffalo Creek.

The law regarding tribal sovereign immunity and the naming of Arthur Raymond Halbritter as a defendant and real party in interest has changed since the trial court dismissed Mr. Halbritter from the case. *See Michigan v. Bay Mills Indian Community,* 134 S.Ct 2024, 2035 (2014). Plaintiffs are entitled to sue Mr. Halbritter in his capacity as leader of his tribe.

Lastly, Plaintiffs question whether their motion for limited discovery was properly denied by the trial court.

The above constitute what would be the normal issues for this appeal had plaintiff-appellants ever had a fair forum below to litigate these issues. But all of these issues were tainted by the contradictory precedents of this

Court that expressly reject the effect of the Treaty of Fort Schuyler of 1788 on the land status and found that a federal Indian reservation exists that is federal Indian country and has never been diminished or disestablished.

ARGUMENT

Since it is apparent that the side that wins the controversy over what the "facts" of this case really are is probably going to win this case, plaintiffs-appellants have no choice but to oppose the precedents of this Court that have prejudiced their due process right to a fair and impartial tribunal from the moment this litigation began. Plaintiff-appellants do not blame this Court for the erroneous "facts" in these precedents. These "facts" were intentionally misconstrued from the very beginning of the land claim litigation by the Attorneys representing the Indian tribes with the help of the Nixon Administration. The Citizens Equal Rights Foundation, the sister organization of appellant Citizens Equal Rights Alliance (CERA), has been writing *amicus curiae* briefs in various Indian cases to the United States Supreme Court explaining how William Veeder as Special Counsel for Indian Affairs under the Nixon Administration was secretly working with and advising the Indian tribal interests including the American Indian Movement from 1969 through 1974. When President Nixon was forced to resign over the Watergate scandal his staff stayed on to prepare memoranda for President Ford explaining the main policies of the Nixon administration. One of these memoranda was found by counsel for CERA in the Ford Presidential Library at the University of Michigan and is the Memoranda prepared for President Ford so that he would

continue the Nixon Indian Policy. This Nixon Memo was attached as an exhibit in the District Court attached to plaintiffs Response to Motion for Partial Dismissal. The Nixon Memorandum (A 114-199) explains in its last section what the United States could do in promoting tribal sovereignty to the constitutional structure and state jurisdiction. (A 176-189). This goal of unlimited federal power can only be countered by applying the rule of law to the United States, including the Secretary of the Interior.

The first part of the Argument details how appellants allege that the United States misconstrued the "facts" in the land claim litigation and then extended those mistruths into this case. It then applies the land status history used in the Supreme Court ruling in *City of Sherrill* with the incontrovertible facts in the three recently found documents to show that the Oneida reservation was a state reservation that the State of New York was entitled to sell.

I. WHAT WAS THE LAND STATUS AFTER THE CITY OF SHERRILL RULING?

A. The Misconstruing of the "Facts" in the Land Claim cases was Intentional.

The Supreme Court's *City of Sherrill* decision gives an accurate history of the treaties and federal laws discussed in the prior litigation affecting Indian land status in New York. Research done since the *City of Sherrill* ruling into the Nixon Indian Policy has revealed that material facts were intentionally left out of the tribal and federal applications of the Nonintercourse Act in the

Oneida Test Case.[2] -. The Oneida test case led to the decisions in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*) that allowed the Oneida Indian Nation to sue to claim aboriginal rights they contended were violated by New York not complying with the Nonintercourse Act of 1790, 25 U.S.C. § 177. These cases were the basis of all of the land claim cases brought in New York by various Indian tribes. These cases are also the basis of the Indian tribes claiming that the State of New York does not have primary civil jurisdiction over the former state reservations that finally culminated in the Supreme Court's *City of Sherrill* decision.

The Nixon Memorandum included in the Appendix was submitted as an exhibit to the District Court below. It specifically implies that two major facts were omitted in claiming the Nonintercourse Act of 1790 applied to the sales of the state reservation lands in New York. First, while the memo cites the Removal Act as applying to the Cherokee Nation no mention is made of the fact that the federal Removal Act of 1830, 4 Stat. 411, applied to all remaining Indians East of the Mississippi River and the concomitant fact that the Treaty of Buffalo Creek, 7 Stat. 550, was a Removal Act treaty intended to disestablish whatever federal interest had been created in New York by the Treaty of Canandaigua, 7 Stat. 44. A 137. Not applying the Removal Act and Treaty of Buffalo Creek in New York were deliberate omissions.

These deliberate omissions of fact that were deemed contrary to the

[2] While it is true that the United States Department of Justice was not representing the interests of the Oneida Indian Nation in the Test Case, there are documents that prove that White House counsel William Veeder was directly assisting the Oneida attorneys in the case.

interests of the Indian tribes and the United States were a major part of the Nixon Indian Policy. While not declared in his Memorandum to Congress in July 1970, the deliberate omission or rewriting of facts to favor the United States and tribal interests became the norm from 1955 until 1995. In 1955 when Vice President Nixon was in charge of Indian Affairs the Bureau of Land Management began the Records Improvement Program creating the Historical Indices. These Historical Indices are literal rewrites of the land status history of every location ever handled by the General Land Office to omit all facts contrary to any Indian claim. The United States spent years attempting to get these historical indices accepted under the federal rules of evidence as public records. *See generally Amoco Production Co. v. United States*, 619 F.2d 1383 (10th Cir. 1980).

Counsel for CERA as a brand new attorney smacked into these rewritten "facts" in her first major water cases and quickly learned to find the original tract book records from the General Land Office to refute the "facts" of the Historical Indices presented by attorneys representing the United States in the early 1990's. In particular, every site identified as a first or second form reclamation withdrawal as a potential reservoir site had its original land records deliberately and specifically rewritten to favor any Indian tribal interest. Today, the Bureau of Land Management describes the Historical Indices as "chronological narratives." *See* glorecords.blm.gov under Land Status Documents.

In addition, CERA has only in the last few months located a Department of the Interior Memorandum dated April 6th, 1878 addressed to Representative D.C. Haskell, detailing the circumstances leading to the 1898

New York Indians decision that specifically states that the Treaty of Buffalo Creek was executed under the authority of the Removal Act. This is the first of the three documents requested to be included in the Motion to Supplement the Record pending before this Court. The Removal Act was specifically drafted to meet the obligations of the federal government to the States to remove the Indians, dispose of the federal "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi so that state jurisdiction would no longer be impaired in the Eastern states. A-140.

The second omitted fact was that the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceded that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act. A-140. This 1834 act was passed by Congress after Chief Justice Marshall tried to interfere with the Removal Act with his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832).

The remaining Indians in New York were promised in the 1830's that they would be given their own land by the federal government if they would leave New York and make their homes in Kansas or Wisconsin. The situation in Kansas did not work out for the New York tribes. *See New York Indians v. United States*, 170 U.S. 1, 21 (1898). Many New York bands entered into the Treaty of Buffalo Creek, 7 Stat. 550, to receive their own land. As a matter of federal land law, the Removal Act operated by exchanging the lands where the federal government was protecting the Indian title in a sovereign state for actual federal territorial lands in the West. Most of these people settled in

Wisconsin on federal reservations purchased for them from the Menominee Tribe. Those that remained in New York were told that federal protection of Indian title and their federal ward status would end at the ratification of the Treaty of Buffalo Creek pursuant to the Removal Act and the Trade and Intercourse Act of 1834. Because many different bands of various tribes were involved in the Treaty of Buffalo Creek, amendments were made and Congress ratified the Treaty of Buffalo Creek in 1840. President Martin Van Buren then entered the Proclamation making the Treaty of Buffalo Creek complete. *See New York Indians* at 10, Fn.1, Finding 10.

The Removal Act was written to fulfill the United States relinquishment of any claim of federal "Indian title" to the original colonies that maintained the right of preemption and actual fee title over all of the lands within their borders. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The Removal Act was the act of disestablishment or diminishment of the only interest the federal government claimed to hold: "Indian title." Once "Indian title" was relinquished in a treaty pursuant to the Removal Act, the land East of the Mississippi River pursuant to the 1834 Indian Trade and Intercourse Act ceased to be federal Indian country. The Treaty of Buffalo Creek set up the relinquishment of all federal Indian title, rights and interests claimed to be held by the United States in trust for the Indian tribes and by the Indian tribes in New York based on the Treaty of Canandaigua of 1794 as proclaimed by the Senate on April 4, 1840. *New York Indians* at 170 U.S. 1, 21. It did not matter that not all of the Indians were removed. Those that remained in New York understood that all federal protection over the state reservations of land ceased. Affidavit of Melvin Phillips, A-203, 208.

As stated so clearly in the second document attached to the Motion to Supplement the Record, the Indians also understood as Rev. Stat. § 2114 makes absolutely clear, once a treaty pursuant to the Removal Act was ratified, the United States retained exclusive jurisdiction over the Indians only "at their new residence." Once relinquished by the United States and Congress, "Indian title" was gone forever and cannot be restored. New York allowed the Indians to remain but under their exclusive jurisdiction. Only by omitting the facts surrounding the Treaty of Buffalo Creek could there be any claim that New York had wrongfully sold the state lands reserved for the Indian tribes. More specifically, the United States knew that 25 U.S.C. § 177 had ceased to apply to New York by 1842 and that the Treaty of Buffalo Creek was fully executed.

As explained to the District Court by these plaintiffs-appellants, the "Indian title" was expressly relinquished by the United States and all New York Indians with the Treaty of Buffalo Creek. The 1834 Indian Trade and Intercourse Act defined Indian country as applying to land where the United States still held the "Indian title." Once the Indian title was relinquished there were no longer any federal restrictions on alienation over the state reservation. *See United States v. Boylan*, 265 F. 165, 167-8 (2nd Cir. 1920). According to the facts included in the *New York Indians* decision, the Oneida Indians had already ceded their entire reservation prior to the Treaty of Buffalo Creek. *New York Indians* at 8, Fn 1, Finding 7.

Once Indian land is alienated by act of Congress, even if the Indian tribe reacquires them, the protections of the Nonintercourse Act no longer apply. *See South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 505-06 (1986).

There is and was no remaining federal interest in New York to any of the remaining state reservations.

This Court's precedent also claims that the Oneida and other New York Indian tribes were never paid what they were owed under the Treaty of Buffalo Creek. The third document requested to be made part of the record in Appellants motion to supplement the record is the Petition of the Six Nations New York Indians to receive the final payments under the Treaty of Buffalo Creek. The memorandum attached to the petition clearly lays out the sums to be paid and explains the problem of determining which remaining Indians were eligible for the payments. It also contains the request for Congress to pass new legislation to allow the obligations of the United States to be fulfilled. After the special legislation was passed by Congress as this Petition and Memorandum requested more years passed but the Six Nations were fully compensated under the Treaty of Buffalo Creek by the Court of Claims in 1905. *New York Indians v. United States*, 40 Ct. Cl. 448 (1905).

The only possible exception to state jurisdiction applying to the remaining Oneida Indian reservation was the potential application of the federal term Indian country.

These plaintiffs-appellants correctly alleged the facts of this case to the District Court. The only things missing were the specific documents proving that the United States had actually known the truth of the land status in New York before the land claim litigation

B. How the Supreme Court's *City of Sherrill* Decision Should Have Been Applied to the Prior Rulings of this Court

The United States Supreme Court in the *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) decision changed the previous land status history of the Oneida Indian reservation. The main change in *City of Sherrill* was the acknowledgement that the 1788 Treaty of Fort Schuyler was a complete cession of the Oneida lands to the State of New York. This meant that the Indian reservation that was created was a state reservation wholly owned and under the exclusive jurisdiction of the State of New York. Because the preemptive rights also were exclusively in the State of New York Justice Ginsburg rightly concluded but did not actually come out and say that there never was a basis for applying 25 U.S.C. § 177 in the State of New York. Instead, the majority applied the doctrine of laches to undo the harm that had been created in ever allowing the Oneida land claim test case to go forward.

In retrospect, the Supreme Court should have admitted that they were wrong in ever entertaining the idea that 25 U.S.C. § 177 had ever applied to the Indian lands in New York. The only way the Non Intercourse Act could apply was if the United States held the Indian title to the land. But in New York, the state held the Indian title also known as the preemptive right as an original colony. After the adoption of the Constitution the United States did have a general trust responsibility over the Indian tribes for their protection and to prevent conflicts. Before the creation of the federal reserved rights doctrine in *United States v. Winans*, 198 U.S. 371 (1905) it was generally understood that the federal interests over land sometimes overlapped with tribal interests but that the general trust responsibility over Indians and the trust responsibility owed to all the people to dispose of the public domain were separate duties. In fact the United States Supreme Court just

reestablished that distinction in *Nebraska v. Parker*, ruling that even though the boundary of the Omaha Indian reservation was not clearly diminished by the act of Congress that the justifiable expectation factors from the ruling may be applied to the question of whether the declaration that the reservation was opened to again become public domain land subject to settlement was enough to confer state jurisdiction. The important point for this Court to understand is that the land status was supposed to be subject to the public land laws and the Indian trust was supposed to be about the Indians themselves.

Another reason there was so much confusion in applying the *City of Sherrill* ruling was the deliberate crossing up of the land status with the Indian trust responsibility in the unification theory that was being asserted by the Oneida tribal members and the United States. The unification theory was an attempt to create a new application of the federal reserved water rights doctrine for land. The very heart of the unification theory was the claim that reacquiring lands within the former reservation boundaries automatically vested them with all of the rights of the former Indian owners as if those rights had been reserved indefinitely just because Indians had once been present. Again, just this year the Supreme Court has ruled that a general federal reserved water rights doctrine that applies just because Indians once occupied an area cannot exist. *See Sturgeon v. Frost*, ---S.Ct ----- (2016), 2016 WL 1092415.

What all of this means is that there never was any legitimate claim in the United States that the Oneida Indian reservation was in any way subject to the public land laws of the United States or the authority of Congress. Not only was 25 U.S.C. § 177 inappropriately asserted as applying, the Treaty of

Canandaigua of 1794 that was actually not even properly executed as a matter of federal public land law in New York was touted as being federally preemptive of all New York state interests. Two of our Founding Fathers were involved in the land speculation in Pennsylvania and Ohio of the former New York Indian lands (Robert Morris and Alexander Hamilton) and used their considerable influence to convene federal treaty negotiations at Canandaigua in 1794, 7 Stat. 44. The Treaty of Canandaigua accomplished the required cessions of land from the New York Indians for their Ohio and Pennsylvania claims while allowing them to continue to occupy the land set aside for them by New York.

The Indian land status mess in New York starts with the Treaty of Canandaigua because while the United States could accept the relinquishment of the occupancy rights of the New York Indian tribes in Ohio and Pennsylvania under the Treaty Clause to meet the requirement of the discovery doctrine for the federal land sales in those states it did not have any sovereign authority over any land in New York to grant a use or usufructury right to any Indian tribe. The United States did not have any territorial or public domain land subject to the Property Clause in New York. The Treaty of Canandaigua generously allowed the Indians to remain on their state reservations of land and hunt and fish just as New York had agreed. Essentially, the federal negotiator readily conceded everything the Indian tribes requested in New York over which the United States had absolutely no authority or jurisdiction in order to obtain their relinquishment of federal Indian title in Ohio and Pennsylvania. There never has been a federal Indian reservation in the State of New York.

It is understandable how this Court was taken down the primrose path by the tribal and federal claims to have mistakenly concluded that there was some sort of federal interest in the Oneida Indian reservation in the land claim litigation. The Supreme Court's *City of Sherrill* ruling did make it very clear that those tribal and federal interests had long ago grown cold and had not continued to exist even though it did not explain why this Court's conclusions that a federal Indian reservation existed and that it was federal Indian country were incorrect. This Court's decision in *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 416 (2d Cir. 2011) does not abide by the Supreme Court's *Sherrill* ruling in concluding that there still remained a federal Indian reservation and that it was federal Indian country.

These plaintiffs-appellants also argued continuously below that the former Oneida reservation is not and never was federal Indian country. In several of their briefs they tried to explain that the definition of Indian country had essentially changed over time from a description of an area with Indian conflicts as it was first defined in New York into what has now become a federal land status definition that removes state jurisdiction. Even citing the changes in the statutory definitions could not budge the application of this Court's prior precedents. *See also Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003). Now plaintiffs-appellants have found a federal legal memorandum explaining how the definition of Indian country changed from before the Civil War to after the Civil War and requested that it be added to the record in this case. No main party in the *City of Sherrill* case made an argument that the definition of Indian country had changed over time and now meant something completely different from how it had started. Simply

put the Supreme Court in the *City of Sherrill* ruling stopped the federal reserved rights doctrine from further expanding but did not confront the mistaken facts presented in over forty years of litigation. It left this Court to try to sort out how to apply what it had said.

Instead of realizing that the Supreme Court itself was not yet ready to confront the Nixon Indian Policy this Court ruled in *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011) that this Court itself does not have the authority to overrule a prior panel of Judges that concluded that the Oneida Indian reservation was subject to federal jurisdiction and was never diminished or disestablished by Congress. These decisions rendered the District Court powerless to alter these precedents from this Court.

II. HAS THIS COURT ABROGATED ITS ROLE TO REVIEW THE SECRETARY'S ACTIONS BY CIRCUMSCRIBING ITS OWN AUTHORITY WITH ITS UNREVIEWABLE PRECEDENTS?

While the United States Supreme Court made the initial errors to allow the Oneida test case to proceed and then acknowledged that a federal common law possessory claim by the Indian tribes could be pursued, it never actually agreed or approved of any expansion of federal authority in its decisions. This is why the Supreme Court in the *City of Sherrill* decision could apply the doctrine of laches and summarily end the land claim litigation. Unfortunately, this Court was not as coy about extending federal authority in its rulings. This Court in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139,

167 (2d Cir. 2003) intermixed an incorrect decision that the Oneida reservation was federally created by the Treaty of Canandaigua with the modern definition of Indian country to effectively allow the United States to rewrite history and create a federal Indian reservation where no such reservation had ever been created. This Court inadvertently massively expanded federal authority under the federal reserved rights doctrine. By refusing to alter its ruling after the Supreme Court decision and then conflating *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011) to be beyond its judicial review reach this Court has effectively abrogated its judicial review authority over this case.

A. The Applicable Standards for Deciding the Motion for Reconsideration, Motion for Summary Judgment and Motion for Partial Dismissal Could not and Can not be applied in this case.

Because the plaintiffs-appellants were not allowed to contest any of the material facts in this case because of this Court's precedents that say even another panel of judges cannot consider the "facts" as already decided, all of the judicial decision making standards could not be fairly applied in this case. Usually, the facts as stated in the complaint are assumed to be true against a

motion to dismiss. None of plaintiffs facts were accepted as true because they contradicted the precedents of this Court.

Similarly, a case is not appropriate for summary judgment if there are any genuine issues of material of fact that have not been determined. All of the evidence is supposed to be construed in the light most favorable to the non-moving party. Plaintiffs complaint and amended complaint contested every major fact and yet the District Court had no choice but to apply the precedents of this Court and decide that there were no remaining genuine issues of material fact.

Finally, the Motion for Reconsideration standard was even denied to plaintiffs. The District Court cited law to uphold the power of the Secretary never cited by any party in the case. Normally, a reviewing court may not uphold an agency decision based on reasons not articulated by the agency in its decision. *See SEC v. Chenery Corp*., 318 U.S. 80, 87 (1943).

B. This Court's existing precedents also prevent a determination of whether the Oneida tribe is eligible for the benefits of the IRA under *Carcieri v. Salazar* or whether the Part 151 regulations are beyond the authority of the Secretary to promulgate or whether Arthur Raymond Halbritter should have been included as a real party in interest as the tribal leader of the Oneida Indian Nation.

This Circuit in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003) accepted the massive expansion of federal authority that it could retroactively give an Indian tribe its sovereignty back by reuniting fee title with the claimed unextinguished Indian title. This was the unification theory expressly rejected by the Supreme Court in *City of Sherrill*. This decision began with the majority expressly holding that the Oneida Indian Nation was a federally recognized Indian tribe. *Id*. at 144.

Appellants specifically alleged in their Motion for Reconsideration that the additional authority cited by Judge Kahn as to the authority of the Secretary to use territorial war powers as codified in 43 U.S.C. § 1457 to subvert the jurisdiction of a state when there is no emergency or special circumstance for invoking the war power is unconstitutional. Appellants have a due process right to have this decision reviewed. But this Court has accepted essentially unlimited power regarding Indians in the United States and the Secretary since its' ruling in 2003 and refused to limit it even after the Supreme Court ruled to the contrary. See *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011). This Court has already circumscribed its own judicial review authority and or impugned its neutrality to such a degree that it is futile for the Appellants to make their claims that the

Part 151 regulations exceed the Secretary's authority, that they have a civil right to due process of law or that Arthur Raymond Halbritter should be a named defendant as a real party in interest. Just as the District Court was shackled by these precedents this Court is shackled as well and cannot provide a fair forum to review any of the issues presented on appeal without first resolving the "fact" issues presented by the Appellants. The United States has already made its position quite clear in its strenuous objection to the Motion to Supplement the Record that in its view this Court is bound by its precedents and has no authority to change them.

Appellants Request they be allowed to file a supplemental brief or a new opening brief if the contradictory facts in this Court's precedents affecting this case are ever finally determined.

CONCLUSION

This Court should find a way to reconcile its precedents and own jurisdiction to allow plaintiffs-appellants a fair forum in which to present their claims against the Secretary's authority to take land into trust and remand this case to the unshackled District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 7,877 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

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