19-2737-cv

United States Court of Appeals

for the

Second Circuit

ONEIDA INDIAN NATION,

Plaintiff-Counter Defendant-Appellee,

– v. –

MELVIN L. PHILLIPS, SR., individually and as trustee,
MELVIN L. PHILLIPS, SR./ORCHARD PARTY TRUST,

Defendants-Counter Claimants-Appellants.

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

REPLY BRIEF FOR DEFENDANTS-COUNTER CLAIMANTS-APPELLANTS

CLAUDIA L. TENNEY, ESQ.
Attorney for Defendants-Counter Claimants-Appellants
28 Robinson Road
Clinton, New York 13323
(315) 853-4979
claudiatenney@gmail.com

JOSEPH R. MEMBRINO, ESQ.
HALL ESTILL, P.C.
Attorney for Defendants-Counter Claimants-Appellants
25 Lake Street
Cooperstown, New York 13326
(202) 412-2700
jmembrino@hallestill.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PREAMBLE

In this Reply Appellants Melvin L. Phillips, Sr., and the Melvin L. Phillips, Sr./Orchard Party Trust (referred to herein collectively or individually as "Phillips") address arguments raised by Appellee Oneida Indian Nation ("OIN") in its Brief, Document 50.

INTRODUCTION

At issue in this real property case are the security of property titles and the settled expectations of citizens in central New York who hold title to and possess land within the historic Oneida reservation.

Phillips is a citizen of New York and a lineal descendant of Oneida Indian signatories to the Treaty with the New York Indians made at Buffalo Creek, 7 Stat. 550, January 15, 1838 (Buffalo Creek Treaty) (A-130). Prior and subsequent to the Buffalo Creek Treaty, traditional Oneida land tenure was in the form of familial estates. Phillips' familial title represents more than 180 years of unbroken, intergenerational possessory interest. The title to the family property at issue is documented in the "Being and Habendum" clause of Phillips' deed. (A-59 at A-65), which is recorded in Oneida County.

Notwithstanding this Court's numerous decisions[1] barring real property dispossession actions by any Indian tribe in New York, on September 18, 2017, the OIN filed a complaint (A-1) to: (1) invalidate Phillips' title to 19.6 acres[2] of the land under Phillips' recorded deed; (2) dispossess Phillips; and (3) quiet title in the OIN. On November 15, 2018, the District Court for the Northern District of New York (Suddaby, J.) granted the OIN's Motion to Dismiss Phillips' quiet title counterclaim (A-17) against the OIN on the grounds of sovereign immunity. (A-30.) Further, on July 31, 2019, the District Court granted the OINs' Motion for Judgment on the Pleadings in its quiet title claim. (A-43.)

ARGUMENT

A. The District Court Should Have Dismissed the OIN's Quiet Title Action.

The OIN's Statement of Jurisdiction at page 4 of its Brief errs in asserting that *County of Oneida v. Oneida Indian Nation* (*Oneida II*), 470 U.S. 226, 235-36

[1] *E.g.*, *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2nd Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006); *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) *cert. denied*, 565 U.S. 970 (2011); *Stockbridge-Munsee Community v. New York*, 756 F.3d 163 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1492 (2015).

[2] The OIN states that its action is limited to 19.6 acres of Phillips land, and calls it "vacant" and a "rural field". OIN's Brief at 1. But that land is where stood the house in which Phillips was born and raised. Phillips still possesses the land, which is included in his deed and is contiguous with the other land under his deed. Phillips uses it for hunting, gathering, and family meetings.

(1985) authorizes the OIN's quiet title action. In *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (*Sherrill*),[3] the Supreme Court severely circumscribed the OIN's sovereignty over and possessory interest in historic Oneida reservation lands that the OIN had asserted in *Oneida II*. In barring the OIN from exercising sovereignty over historic reservation land it had acquired from non-Indians in the open market, *Sherrill* stated "`that standards of federal Indian law and federal equity practice' preclude the [OIN] from rekindling embers of sovereignty that long ago grew cold." *Sherrill* at 214.

In *Oneida Indian Nation of New York v. City of Sherrill*, 337 F. 3d, 139, 157 (2d Cir. 2003), which the Supreme Court reversed in *Sherrill*, *supra*, this Court, among other things, had reasoned that recognition of OIN sovereignty over land

[3] The OIN's Brief, at 21, argues that Phillips forfeited the *Sherrill* defense because it had not been raised in the District Court. The OIN is incorrect for two reasons. First, Phillips did raise the *Sherrill* defense. At A-151, Document 30, the District Court addresses "Defendants' Opposition Memorandum of Law" and writes that "Defendants argue that the counterclaim does not require the Orchard Party to be a federally recognized or state-recognized Indian tribe because the rights to and possession of the land in dispute are protected interests under federal law and the decisions in *City of Sherrill v. Oneida Indian Nation* (cite omitted) and *Cayuga Indian Nation of New York v Pataki* (cite omitted)." Second, *Sherrill* and this Court's subsequent decisions identify subject matter jurisdiction issues applicable to the OIN's quiet title claim that Phillips or this Court may raise at any time, and are not "forfeited" in any event. FRCP 12(h)(3).

the OIN acquired in open market purchases would not violate the "impossibility" doctrine, which barred "uprooting current property owners." *Id*.[4]

This Court subsequently concluded, pursuant to *Sherrill*, that the Supreme Court had "dramatically altered the legal landscape" (*Cayuga Indian Nation of N.Y. v. Pataki, supra*, at 273). Accordingly, it held in *Cayuga* that, "[i]nasmuch as the instant claim, *a possessory land claim*, is subject to the doctrine of laches, we conclude that the present case *must be dismissed* because the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here" (emphasis added). *Id*. at 277.

In *Oneida Indian Nation of N.Y. v. County of Oneida, supra*, this Court elaborated further on *Sherrill*'s impact, stating that a defendant in a tribal land claim did not have to establish a laches defense because *Sherrill's* bar precluded the claim based on the passage of time alone. *Oneida*, 617 F. 3d at 117.

In *Stockbridge-Munsee, supra*, at 165, this Court summarized the state of ancient New York Indian land claims post-*Sherrill*:

> In the wake of this trilogy-*Sherrill*, *Cayuga*, and *Oneida*-it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the

[4] Even this Court's pre-*Sherrill* view of the impossibility doctrine would require dismissal of the OIN's quiet title suit because the OIN's action would "uproot" (dispossess) Phillips, the current possessor and owner of the property at issue.

settled expectations of current landowners, and are *subject to dismissal on the basis of laches, acquiescence, and impossibility* (emphasis added).

The OIN's claim against Phillips shares the defects of the Stockbridge-Munsee claims: The OIN has not resided on the lands at issue since the nineteenth century; its primary reservation lands are located elsewhere; the OIN asserts a continuing right to possession based on an alleged flaw in the original conveyance to Phillips' ancestors; and Phillips' title acquisition occurred long ago, during which time the land has been owned and developed by successive Phillips family members who have lived as citizens of the State of New York.

There is no reasonable basis on which to conclude that these federal Indian law decisions give more protection to non-Indian remote successors-in-interest to historic Oneida reservation lands than to Phillips and his Oneida ancestors who, as discussed below, relied on representations by the United States in the Buffalo Creek Treaty that they could continue to live on their familial land forever, if they chose to do so.

Accordingly, this Court's decisive application of *Sherrill*'s Indian laches defense in *Cayuga*, *Oneida*, and *Stockbridge-Munsee* should have barred the OIN's quiet title claim against Phillips.

However, the District Court did not dismiss the OIN's "land claims on the pleadings."[5] Instead, it erroneously stood this Court's rule of decision on its head by granting the OIN's motion for judgment on the pleadings, dispossessing Phillips, and quieting title in the OIN.

B. Phillips' Title Arises From Treaty-Confirmed Aboriginal Oneida Land Tenure Customs and Traditions.

Contrary to the OIN's assertions[6], Phillips neither claims nor needs current tribal status or tribal sovereignty to defend his possessory right and title to the real property at issue.[7] Phillips' claim arises in the context of treaty-confirmed aboriginal Oneida land tenure customs and traditions. A 19th century federal census bulletin reported on Indian land tenure in New York[8]:

---

[5] Samuel Pokross, "Dramatically Altered the Legal Landscape"? *City of Sherrill v. Oneida Indian Nation* in the Lower Court., American Indian Law Review Vol 43 No. 1, 242 at 258 (2018): "Although *Cayuga* and *County of Oneida* reached the Second Circuit after a trial and summary judgment, respectively, the Second Circuit has affirmed district court decisions applying the inherent disruption rule to bar tribal land claims on Rule 12(b)(6) motions. Tribes are not entitled to discovery or an evidentiary hearing and cannot present evidence outside the pleadings. Courts rely on judicial notice for information on the local non-Indian population and development of the area" (internal footnotes omitted).

[6] *E.g.* Document 50 at 31 *et seq*.

[7] Phillips' title is specific to the parcels his family has owned. Phillips recorded the deed of trust to honor his family's legacy and keep the land available for future generations of Orchard Party descendants.

[8] Thomas Donaldson, *The Six Nations of New York, Extra Census Bulletin, Indians*, U.S. Government Printing Office, Washington, D.C. 1892 at 12.

[L]and tenure . . . is, as a rule, secure in the families enjoying it . . . the evidence of title for many years largely depended upon visible possession and improvement, rather than upon the record evidence common to white people. Verbal wills recited at the dead feasts, in the presence of witnesses to the devise, were usually regarded as sacred, and a sale, with delivery of possession, was respected when no written conveyance was executed. The Indians preferring to hold the papers and the records themselves instead of having them moved from place to place, with a change of [tribal] clerk, there being no regular place or rules for deposit or protection. . . . Indian common law, that of immemorial custom, as with the early English holdings, has generally carried its authority or sanction with effective prohibitive force against imposition of fraud, even when occupation and improvement of public domain have been actual but without formal sanction. No well-ordered system of record for wills, grants, or transfers is in habitual use among the Six Nations. The infrequency of transfer out of a family and the publicity of the act when such a transfer is made have been esteemed sufficiently protective. There is no penalty for failure to make record, and the chain of title is not broken into so many links as to confuse the transmission. During late years farmers having made substantial improvements have secured legal advice and perfected their papers in the

usual business form common to white people, for deposit or record at county seats in which the lands and reservations are located.

This census bulletin demonstrates that New York Indians traditionally embraced individual family possessory interests in real property; they did so as the non-Indians did, but not because the non-Indians did it. Familial land tenure was organic to the Indian community and culture. Given the nature of the OIN's claim against Phillips, the census bulletin illuminates the OIN's present ignorance or disregard of Oneida customs, traditions and culture regarding Oneida land tenure.

In addition, the census bulletin belies the OIN's pejorative assertion that Phillips "manufactured his deed." In fact, Phillips walked the path that the census bulletin described. As steward of a legacy that the Phillips' family's ancestors faithfully conserved for generations, Phillips prepared a deed documenting the chain of title that had been respected by the Oneida community and the State of New York for 180 years and recorded it with Oneida County.

C. The Buffalo Creek Treaty Must be Construed as the Oneidas Understood It.

As set forth in the pleadings, the Phillips' family title derives from the Buffalo Creek Treaty and the federal treaty commissioner's contemporaneous representations to the Oneida signatories, including Phillips' ancestors, about the meaning of the treaty. The commissioner declared that the treaty meant Phillips'

ancestors could "remain on `their lands *where they reside*,' *i.e.*, they could `if they ch[ose] to do so remain *where they are* forever.'" (Emphasis in the original) *Sherrill*, at 206. The Phillips family has relied in good faith on that treaty commitment.

Treaties are to be construed as the Indians would have understood them.[9] Phillips' ancestors were parties to and beneficiaries of the Buffalo Creek Treaty. They understood the treaty to mean that they could stay in New York and be secure in their familial lands. Generations of the Phillips family have lived that promise. They are the evidence of what the Buffalo Creek Treaty meant to the Oneida signatories. Phillips' rights do not rest on a counterfactual analysis, but on a treaty legacy that Phillips and his ancestors faithfully preserved. Construction of the Buffalo Creek Treaty includes, necessarily, looking to "the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (internal quotation marks omitted). Thus not only the treaty itself but also the representations that the treaty Commissioner made to the Oneidas at the direction of the United States Senate

[9] *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *United States v Shoshone Tribe*, 304 U.S. 111 (1938).

inform the meaning of the Buffalo Creek Treaty and Phillips' ancestors understanding of it.

D. Article 13 of the Buffalo Creek Treaty Authorized Title to Vest in Phillips.

Article 13 of the Buffalo Creek Treaty[10] (A-134) specifically authorized Orchard Party Oneida families to make "satisfactory arrangements" with the Governor of New York for the sale of their lands. While Article 13 contemplated sale of Oneida families' landholdings and provided for their subsequent emigration to the west, Article 13 did not require that outcome.[11]

Four years after the Buffalo Creek Treaty, Phillips' treaty-signatory ancestors were still on their land when they negotiated the "satisfactory

[10] The OIN's Brief, at page 35, asserts, without citation, that Phillips claims that "Article 13 of the Buffalo Creek Treaty extinguished *all* Oneida tribal ownership in New York" (emphasis added). He does not. Nor does Phillips assert that a finding that the historic Oneida reservation was disestablished by the Buffalo Creek Treaty or any other means is necessary to protect Phillips' title and possessory interest from the OIN's quiet title action. *See Sherrill*, 544 U.S. 197, 215 n. 9. Phillips' claim is based on what the Buffalo Creek Treaty did affirmatively for Phillips' ancestors' lands in New York, not what effect the treaty may have had on the interests of the historic Oneida tribe.

[11] Article 3 of the Buffalo Creek Treaty (A-132) provided that if any of the New York "tribes" did not agree to emigrate within five years they would "forfeit" their lands in the west. But there was no treaty provision for forced migration of individual families or other punitive measures. Moreover, as pledged by the treaty commissioner, the right to remain was both well understood and exercised by Phillips's ancestors.

arrangements" for the lands at Marble Hill in the June 25, 1842, Orchard Party Treaty with the State of New York (A-21) (1842 Treaty).

As with the Buffalo Creek Treaty, the 1842 treaty dealt with Oneida family estates and their improvements. Article 5 (A-23). Article 4 addressed Lot 3 which includes the portion of Phillips' land at issue here. It stated that lands of Oneidas intending to remain in New York would be "had, held, enjoyed and occupied by them collectively in the same manner and with the same right, title and interest therein as appertained to them . . . before the execution of this treaty." (A-23). The "manner" and "right" of Oneida land tenure is described above in the 1892 census bulletin, *supra*, and is documented in the Phillips' family deed.[12]

E. *United States v. Boylan*, Supports Phillips' Claim of Title.

In its Brief (at 37-43), the OIN argues that *United States v. Boylan,* 256 F. 468 N.D. NY (1919), *affirmed* 265 F. 165 (2d Cir. 1920) (*Boylan*), supports its possessory interest claim. Phillips disagrees. In *Boylan*, the United States, in order to protect the possessory interest in an Oneida family estate, acted "on behalf of

[12] New York appears to have respected the integral importance of Article 13's commitment to "satisfactory arrangements." In Article 1 of the 1842 Treaty, New York acquired Lot 2, a portion of which is Phillips' land under the deed that is not in dispute here. But the Oneida family on Lot 2, was not satisfied with the sale and remained on that land. New York issued a patent to Lot 2 to a non-Indian. When the patentee discovered the land remained in Oneida occupancy, the State did not evict the Indian family, but cancelled the patent on the bases that it "was obtained illegally, or by error, or by mistake of law or facts." Laws of New York 923d Session Chapter 529 (May 3, 1869) (A-88).

certain Oneida Indians, under the claim that they are the wards of the federal government" (emphasis added). *Boylan*, 265 F. at 165. As with Phillips' land in Oneida County, the Madison County land at issue in *Boylan* was a portion of the historic Oneida reservation. It was occupied by four Oneida families[13] of the First and Second Christian Parties who had decided, as Phillips' ancestors had, not to emigrate to the west but stay on their estate pursuant to Article 13 of the Buffalo Creek Treaty (A-134) and in reliance on treaty commissioner Gillet's commitment that they could do so.

The estate at issue in *Boylan* was held by tenancy in common among those families, not as land of the historic Oneida tribe.[14] The United States did not claim, and the Court did not require as a basis for the government's claim, that the lands were titled in the historic Oneida Tribe, as the OIN claims Phillips' land is in this

---

[13] The dissent in *Boylan* (265 F. at 175) succinctly describes the land tenure at issue.

> By the treaty of May 23, 1842, the Oneida reservation was divided into 19 lots; the Indians known as the Emigrating Party ceding their title to the state in lots 1, 3, 4, 5, 7, 10, and 15, and their title in lots 2, 6, 8, 9, 11, 12, 13, 14, 16, 17, 18, and 19 to the Home Party. Schedule B attached to the treaty enumerates the individuals comprising the Home Party by name and states that they hold their lands in severalty as tenants in common and owners. The lands now in question were part of lot 17, and 23 individuals, comprising 4 families, are named as tenants in common and owners of that lot; in other words, their Indian title of occupancy was changed into a title in fee simple.

[14] *Boylan*, at 174 ("The record here shows clearly that the Oneida Indians hold as tenants in common."). In Article 2 (A-132) of the Buffalo Creek Treaty, the historic Oneida tribe had agreed to accept ownership of land in the west, and, in Article 4 (A-132), exercise its sovereignty and self-governance there.

case. Instead this Court affirmed that the United States had the authority as guardian of those specific "*remaining Indians of the tribe of the Oneidas*" to bring the action against those seeking to eject the Oneida families. (Emphasis added) 265 F. at 174.

This Court did not consider the Buffalo Creek Treaty in *Boylan*, but made apparent, though indefinite, references to it. The first stated —without citation to Article 13: "[U]nder the regulations and supervision of the federal government . . . [t]he right was given to the Indians as a tribe to dispose of their lands in the state of New York, if they decided to move to Green Bay and there accept other lands allotted to them." *Boylan* at 167. Second, apparently in an attempt to demonstrate an ongoing guardian relationship, the *Boylan* Court referred to several federal treaties with the Six Nations, "one as early as 1784, and again in 1789, and 1794. Later, in 1838 another treaty was entered into relating to their lands, and again in 1842."[15]

The Buffalo Creek Treaty changed the nature and extent of the federal relationship with Oneida Indians who elected to stay in New York from that which existed under the 1794 Treaty of Canandaigua. In the Buffalo Creek Treaty, the United States authorized them to make satisfactory arrangement for their lands.

[15] Of the Six Nations, only the Seneca Nation was a party to the 1842 Treaty (7 Stat. 586).

But it did not abandon those Indians. In *Boylan*, the United States, as guardian, chose to step in and protect specific Oneida Indians'—not the historic Oneida tribe's-- possessory interest in the family estate on which they had remained. The United States acted pursuant to the guardian-ward relationship to protect their title, as possessors of the land vested in them pursuant to Article 13 of the Buffalo Creek Treaty and pursuant to Oneida land tenure customs and traditions.[16] As a result of that federal intervention, this Court affirmed "the conclusion reached by the District Court, that the United States and the *remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward*." (Emphasis added) *Boylan*, 265 F. at 175.

Boylan protected individual Oneida possessory interests, not historic Oneida tribe land title. Accordingly, if the United States were a party to this quiet title action and took the role it did in *Boylan*[17] then it would be acting to defend Phillips from dispossession by the OIN.

F. The OIN's Claim that Phillips' Land is Subject to OIN Governance Pursuant to the 2013 Land Claims Settlement Violates *Sherrill*.

[16] *See* Section B, *supra*.

[17] *Boylan* observes that "[i]t is only where Congress has enacted legislation controlling the disposition of property of Indian reservations that valid conveyances may be made." As discussed in Phillips' brief, the Buffalo Creek Treaty is that authorization.

The OIN asserts (Brief at 31-32) that pursuant to the "Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison, and the County of Oneida," May 16, 2013 (A-39 [Exhibit D to the Complaint] (2013 Settlement)[18], Phillips' land is "subject to tribal governance." This is incorrect. The OIN's governance claim turns on the 2013 Settlement's definitions of "Nation Land" and "Reacquired Land."[19] However, the OIN's right to title and governance of any land within the historic Oneida reservation is governed not by the 2013 Settlement but by *Sherrill*'s two-step protocol: (1) voluntary, arms-length acquisition of title and possession; and (2) subsequent successful application for discretionary trust acquisition of the title by the United States. Today, none of Phillips' land, which is included in the 2013 Settlement's definition of

[18] The OIN's complaint for quiet title, however, makes no claim to Phillips' land based on the 2013 Settlement. Rather, the claim is based on "federal treaty, statutory and common law, and the Constitution." (A-18).

[19] A-41. The definitions are:

> "Nation Land" means land possessed by the OIN within the exterior boundaries of the Reservation and that (i) is the 32-acre (more or less) Boylan tract, (ii) is the 104-acre (more or less) Marble Hill tract, (iii) that is held in trust by the United States or any of its agencies for the benefit of the OIN or (iv) Reacquired Land that is within the Cap as defined in Section VI(B)(4) of this Agreement. Reacquired Land that exceeds the Cap defined in Section VI(B)(4) of this Agreement is not Nation Land as that term is defined herein.
>
> "Reacquired Land" means all land possessed by the OIN, except that Reacquired Land does not include the 32-acre (more or less) Boylan tract, the 104-acre (more or less) Marble Hill tract, or excess federal land that has been or will be transferred to the Department of the Interior pursuant to 40 U.S.C. § 523 to be held in trust for the OIN.

"Nation Land" is owned or possessed by the OIN, and none of it has been taken into trust by the United States. Thus, none of it is subject to OIN governance.

The OIN's "governance" claim has implications for lands other than Phillips' land that could rekindle the sovereignty chaos in central New York that *Sherrill* extinguished.

Each definition's operative term is "possessed." According to Section V.E.1, (A-49), mere possession of any Nation Land, including Reacquired Land, by the OIN makes it "non-taxable" by "the State or any municipal subdivision."

In section V.E.2 (A-49), the OIN recognizes that it has no comparable federal tax immunity; it acknowledges that the federal tax exemption is applicable only to Indian lands in federal trust, not those merely "possessed" by the OIN. The state-federal dichotomy in sections V.E.1 and V.E.2 exposes the tension in the OIN's "governance" claim over Phillips' land, because *Sherrill* prohibits OIN governance of Nation Land unless it is owned and possessed by the OIN and is in federal trust.

Section VI.C.1 (A-52) and Section VI.C.4 (A-53) of the 2013 Settlement purport to establish a governance relationship between the OIN and the State without regard to the Federal government.[20] Section VI.C.1, "Governmental

[20] The 2013 Settlement has not been approved by Congress pursuant to 25 U.S.C. §177 (the Indian Nonintercourse Act) even though the lack of congressional approval was the linchpin of the underlying Oneida land claims that are resolved

Coordination", states that "The Nation shall not assert sovereignty with respect to any land other than Nation Land." Section VI.C.4 provides that as to any Reacquired Land not in Federal trust, the OIN is authorized to enact ordinances that meet or exceed standards that "may govern", among other things, land use, construction, health, and the environment. Section VI.C.4 does not identify the governance standards and leaves their applicability undetermined, subject to a dispute resolution process, including arbitration.

As problematic as binary state-tribal/federal checkerboard jurisdiction was for the Supreme Court when it considered *Sherrill*,[21] the 2013 Settlement makes things more complicated by leaving central New York's jurisdictional checkerboard with *three* forms of sovereignty: (1) Federal trust sovereignty; (2) OIN non-Federal trust sovereignty; and (3) State sovereignty. A decision by this Court in favor of OIN non-Federal trust "governance" over Phillips' land, which is not in the OIN's possession, likely will lead to claims of OIN non-Federal trust sovereignty[22] over the remainder of the Marble Hill tract, most of which is

---

by the 2013 Settlement. So, on the one hand, the OIN denies that the Buffalo Creek Treaty was federal authority for vesting title in Phillips' ancestors, while on the other hand it seeks to dispossess Phillips in part on the basis of a tribal-state agreement that has not been approved by Congress.

[21] 544 U.S. at 219-220.

[22] In this regard it is important to recognize that OIN non-Federal trust sovereignty status may be permanent, because trust acquisition by the United States, with its attendant costs of trust administration, is discretionary and based, in part, on need. 25 U.S.C. §465, 25 CFR §151.3(a)(3). The OIN reports that it "consists of

occupied by non-Indians under recorded titles, and none of which is in the OIN's possession.[23]

The foregoing provisions of the 2013 Settlement Agreement on which the OIN relies for "governance" authority are by their terms not as expansive as the OIN would lead this Court to believe. Section V of the 2013 Settlement is entitled "Resolution of Tax Disputes." (A-44). The last subsection of Section V is entitled "Compliance with Agreement Deemed Compliance with Applicable State Law." (A-50). The state law encompassed by "compliance" is limited to "State law related to the payment and collection of taxes."

---

approximately 1,000 enrolled Members, about half of whom still live on their homelands." https://www.oneidaindiannation.com/about/ For those members, the OIN presently has nearly 18,000 acres of trust land in central New York. https://www.oneidaindiannation.com/wp-content/uploads/2019/03/Historical-Timeline-2019.pdf

[23] The Marble Hill tract encompasses not only the 19.6 acres at issue in this case and the remainder of the land under Phillips' deed, but also approximately 80 acres of land under recorded deeds held by non-Indians. Moreover, the definition of "Nation Land" is not limited to the 104 acre Marble Hill tract. "Nation Land" includes 25,370 acres of "Reacquired Land" in Central New York. (A-41, 52). The 2013 Settlement defines "Reacquired Land" as "all land possessed by the Nation." The OIN (Brief at note 21 misrepresents Phillips' reference to *Shenandoah v. U.S. Dep't of Interior*, 1997 WL 214947 at *8 n.6 (N.D.N.Y. Apr. 14, 1997), *aff'd*, 159 F.3d 708 (2d Cir. 1998). Phillips did not cite *Shenandoah* as having "adjudicated the status" of any Marble Hill land. Rather Phillips cited Judge Pooler's statement in *Shenandoah* that a parcel of land that was: (1) in close proximity to land under Phillips' deed; and (2) the subject of the Buffalo Creek Treaty and the 1842 Treaty was not "on Oneida Nation territory."

In summary, nothing in the 2013 Settlement—to which the United States is not a party--authorizes the State to confer title, sovereignty or sovereign immunity on the OIN with respect to Phillips' land (or the remainder of the Marble Hill tract possessed by non-Indians) contrary to, or in the absence of compliance with, the voluntary purchase and federal trust acquisition requirements of *Sherrill*.

G. The Common Law Immovable Property Exception Bars the OIN's Sovereign Immunity Defense.

In its October 12, 2010, grant of *certiorari* in *Oneida Indian Nation v. Madison County*, 605 F. 3d 149 (2d Cir. 2010), the Supreme Court described the context that *Sherrill* had established for the OIN's sovereign immunity claims.

> [T]his Court expressly rejected the tribe's claim that its sovereign immunity prevented the City of Sherrill in Oneida County, New York, from collecting unpaid property taxes through foreclosure and eviction. Despite *Sherrill*, in these two related cases involving attempts by Madison County and Oneida County to foreclose on OIN-owned fee parcels for nonpayment of lawfully imposed taxes, the lower court held that the remedy of foreclosure is barred by tribal sovereign immunity from suit - a decision which two court of appeals judges expressly (and the third, in effect) implored this Court to review.[24]

The Supreme Court then identified two questions raised by this Court's decision:

[24] https://www.supremecourt.gov/qp/10-00072qp.pdf

> 1. whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes.
>
> 2. whether the ancient Oneida reservation in New York was disestablished or diminished. *Id.*

Confronted with the grant of the Counties' petition for *certiorari*, the OIN acted to avoid review of its sovereign immunity and the status of its historic reservation. In *Madison County v. New York*, 131 S, Ct. 704 (2011), the Supreme Court, *per curiam*, reported that

> the Nation advised the Court through a letter on November 30, 2010, that the Nation had, on November 29, 2010, passed a tribal declaration and ordinance waiving "its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States."

In response to the OIN's action, the Supreme Court decided to

> vacate the judgment and remand the case to the United States Court of Appeals for the Second Circuit. *That court should address, in the first instance, whether to revisit its ruling on sovereign immunity in light of this new factual development, and—if necessary—proceed to address other*

questions in the case consistent with its sovereign immunity ruling.

(Emphasis added) *Id.*

Today, a decade later, the OIN once again claims sovereign immunity in this Court, this time in an attempt to nullify Phillips' title, contrary to *Sherrill* and this Court's decisions. This Court should reject that attempt. *Sherrill*'s holding that sovereign immunity cannot bar collection of taxes on land as to which the OIN's sovereignty had long since been extinguished, should apply equally to protect Phillips' title to land over which the OIN's sovereignty is also extinct.[25]

The OIN (Brief at 54) contends that no court has concluded that the historic Oneida reservation has been disestablished. In that regard, it attempts to distinguish the OIN from the tribe in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018). In *Upper Skagit*, the OIN states that the Upper Skagit tribe "had purchased on the open market land that had once been, but was no longer, part of its reservation" (Brief at 54). Phillips submits that the OIN's purported distinction is without a difference. The inability to exercise sovereignty is the key issue in this case and in *Upper Skagit*. The OIN and Upper Skagit Tribe can invoke sovereign

[25] The OIN argues (Brief at 55) that the State conferred tribal sovereignty on Phillips' land in the 2013 Settlement. That is incorrect; tribal sovereignty exists as a matter of federal, not state, law. Moreover, the 2013 Settlement is incapable of "rekindling embers of sovereignty that long ago grew cold" (*Sherrill, supra,* at 214) in a way that would dispossess Phillips or invalidate any other possessory interest within the 300,000 acre historic Oneida reservation. *See also* note 20, *supra*.

immunity only to the extent each has authority to exercise sovereignty. While *Upper Skagit* involved an attempted exercise of sovereignty on a disestablished reservation, this case addresses the OIN's attempts to exercise sovereignty that *Sherrill* disestablished without ruling whether the historic Oneida reservation itself had been disestablished.

In other words, *Sherrill*, as construed by this Court, precludes the OIN from exercising sovereignty, or invoking sovereign immunity, to dispossess any person of immovable historic reservation property that has not been voluntarily acquired and is not in Federal trust. Accordingly, this Court should find that the immovable property exception in the common law[26] of sovereign immunity, an exception that this Court has not heretofore considered, bars the OIN's sovereign immunity defense against Phillips' counterclaim for quiet title.

CONCLUSION

For the foregoing reasons, Phillips asks this Court to: (1) reject the OIN's attempt to circumvent *Sherrill*, *Cayuga*, *Oneida*, and *Stockbridge-Munsee*; (2)

[26] Phillips' Brief at 46 *et seq*. The OIN (Brief at 55, note 24) refers to sovereignty of foreign missions within the United States. But as this Court stated and the OIN itself acknowledges in its citation to *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 373–74 (2d Cir. 2006), *aff'd and remanded*, 551 U.S. 193 (2007), the status of foreign sovereigns is not a matter of common law, but is "subject to the unique regulations of the forum jurisdiction." The common law, not "unique regulations", was the lens through which the Supreme Court examined the tribal sovereign immunity claim in *Upper Skagit*.

preserve the certainty and finality that those decisions provide to Phillips and all other central New York landowners; (3) vacate the District Court's dismissal of Phillips' counterclaim; and (4) instruct the District Court to dismiss the OIN's quiet title claim with prejudice and quiet title in Phillips.

Respectfully Submitted,

/s/ Claudia L. Tenney
Claudia L. Tenney, Esq.
Attorney for Defendants-Counter Claimants-Appellants
28 Robinson Road
Clinton, New York 13323
(315) 853-4979
claudiatenney@gmail.com

Joseph R. Membrino, Esq.
Hall Estill, P.C.
Attorney for Defendants-Counter Claimants-Appellants
25 Lake Street
Cooperstown, New York 13326
(202) 412-2700
jmembrino@hallestill.com

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), the word limit of Local Rule 32.1(a)(4) (A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this document contains 5747 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Times New Roman.

Dated: New York, New York
May 11, 2020

Respectfully Submitted,

/s/ Claudia L. Tenney
Claudia L. Tenney, Esq.