No. 03-855

IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF NEW YORK IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

HISTORICAL BACKGROUND OF THE BUFFALO CREEK TREATY 3

A. A Principal Goal of Federal Removal Policy Was to Terminate Indian Sovereignty in the Eastern States 3

B. The Oneidas' Removal from New York Commenced More Than 20 Years Before the Proclamation of the Buffalo Creek Treaty . . 5

C. The Oneidas Agreed to Remove from New York in the Treaty of Buffalo Creek 8

D. After the Proclamation of the Treaty, Most Remaining Oneidas Left New York and the State and Local Governments Assumed Jurisdiction Over Their Former Lands 10

SUMMARY OF ARGUMENT 13

ARGUMENT 14

I. The Terms of the Buffalo Creek Treaty, its Role in Effectuating Federal Removal Policy, and the Area's Subsequent Jurisdictional History Demonstrate That the Treaty Ended Oneida Sovereignty over the Former Reservation . . 14

Contents

Page

II. The Oneidas' Agreement to Remove Was Binding and Relinquished Their Sovereignty over Their Former New York Lands 21

III. The Additional Reasons Offered by the Second Circuit For Its Interpretation of the Treaty Are Unpersuasive 24

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Cayuga Indian Nation v. Cuomo,
730 F. Supp. 485 (N.D.N.Y. 1990),
appeal pending (2d Cir.) 13

Cayuga Indian Nation of New York v. Village of Union Springs,
317 F. Supp. 2d 128 (N.D.N.Y. 2004) 2

Choctaw Nation v. United States,
318 U.S. 423 (1943) 15

County of Oneida v. Oneida Indian Nation,
470 U.S. 226 (1985), *aff'g in part and rev'g in part*,
719 F.2d 525 (2d Cir. 1983), *aff'g and remanding*,
434 F. Supp. 527 (N.D.N.Y. 1977) ("*Oneida II*") 1, 13, 24, 25

DeCoteau v. Dist. Co. Court for the Tenth Judicial Dist.,
420 U.S. 425 (1975) 16, 28

Fellows v. Blacksmith,
60 U.S. 366 (1857) 27

Hagen v. Utah,
510 U.S. 399 (1994) 2, 15, 16

Menominee Indian Tribe v. Thompson,
161 F.3d 449 (7th Cir. 1998), *cert. denied*,
526 U.S. 1066 (1999) 17, 18

Page

Minnesota v. Mille Lacs Band of Chippewa Indians,
526 U.S. 172 (1999) 14-15, 22, 25

New York ex rel. Cutler v. Dibble,
62 U.S. 366 (1859) 27

New York Indians v. United States,
170 U.S. 1 (1898), *rev'g*, 30 Ct. Cl. 413 (1895),
after remand, 40 Ct. Cl. 448 (1905) . . . . . *passim*

Oneida Indian Nation of New York
v. City of Sherrill,
337 F.3d 139 (2d Cir. 2003) . . . . . *passim*

Oneida Indian Nation v. County of Oneida,
414 U.S. 661 (1974) 28

Oneida Nation of New York v. United States,
43 Ind. Cl. Comm. 373 (1978) 13

Oregon Dep't of Fish and Wildlife
v. Klamath Indian Tribe,
473 U.S. 753 (1985) 15

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) 15, 16, 20, 21, 28

Seneca-Cayuga Tribe of Oklahoma
v. Town of Aurelius, 03-CV-690 (N.D.N.Y.) 2-3

Sokaogon Chippewa Community v. Exxon Corp.,
2 F.3d 219 (7th Cir. 1993), *cert. denied*,
510 U.S. 1196 (1994) 23

Page

Solem v. Bartlett,
465 U.S. 463 (1984) 18, 20

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 15, 16, 17, 27, 28

The New York Indians,
72 U.S. 761 (1867) 27

United States v. Boylan,
265 F. 165 (2d Cir. 1920), *error dismissed*,
257 U.S. 614 (1921) 10, 12, 27

United States v. Santa Fe Pacific R. Co.,
314 U.S. 339 (1941) 14, 19, 23, 24

Federal Statutes and Treaties:

Act of May 28, 1830
4 Stat. 411 (Indian Removal Act of 1830) 4, 26

Act of January 28, 1893
27 Stat. 426 10

18 U.S.C. § 1151 . . . . . 1, 12

25 U.S.C. (Indian Trade and Intercourse Act)
§ 177 13

Treaty of November 11, 1794
(Treaty of Canandaigua),
7 Stat. 44 17

Page

Treaty of February 8, 1831
7 Stat. 342 6

Treaty of October 27, 1832
7 Stat. 405, 409 App 6, 19

Treaty of January 14, 1837
7 Stat. 528 22

Treaty of January 15, 1838
(Buffalo Creek Treaty),
7 Stat. 550 . . . . . *passim*

Miscellaneous:

Brief for United States as Amicus Curiae
(No. 03-855) 24

Brief of Amicus Curiae, *County of Oneida v. Oneida Indian Nation*,
470 U.S. 226 (1985) (No. 83-1065) 19

Brief of Respondents Oneida Indian Nation of New York, et al., in Opposition to the Petition for Certiorari
(No. 03-855) 25, 27

Cohen, Felix S., *Handbook of Federal Indian Law*
(1942 ed.) 5, 6, 7, 8

Cohen, Felix S., *Handbook of Federal Indian Law*
(1982 ed.) 4

Page

Confederation of American Indians, *Indian Reservations - A State and Federal Handbook* (1986) 12

http://quickfacts.census.gov/qfd/states/36/36053.h (last visited July 13, 2004) 12

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Report of the Special Committee to Investigate the Indian Problem of the State of New York (1889) ("*1889 New York Report*") 6-7, 10

II James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (1899) ("*Messages of the Presidents*")

Message of January 27, 1825 3

First Annual Message (1829) 4, 26

Page

24 Cong. Rec. (1893) 11, 20

6 Reg. Deb. (1830) 4, 7, 26

U.S. Dept. of Commerce, *Federal and State Indian Reservations and Indian Trust Areas* (1974) 12

INTEREST OF THE AMICUS CURIAE

This case presents a "serious question" left open by this Court's 1985 decision in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), *aff'g in part and rev'g in part*, 719 F.2d 525 (2d Cir. 1983), *aff'g and remanding*, 434 F. Supp. 527 (N.D.N.Y. 1977) ("*Oneida II*"): whether the Oneida Indian reservation in central New York State, which was created by a state treaty in 1788 and acknowledged by the United States in 1794, was later terminated or substantially diminished when the Oneidas remaining in the area in 1838 agreed in the Treaty of Buffalo Creek to remove from New York. Treaty of January 15, 1838, 7 Stat. 550 ("Buffalo Creek Treaty" or "Treaty"); *see Oneida II*, 470 U.S. at 269 n.24 (Stevens, J., dissenting). In the years shortly before and after the proclamation of the Treaty, most of the New York Oneidas sold nearly all their lands to New York and left the State, and today the region is over 99 percent non-Indian. Nevertheless, the Second Circuit held that several parcels recently acquired by the Oneida Indian Nation of New York (the "Nation") within the 1788 reservation boundaries are not subject to local real property taxation because the land remains "Indian country" under 18 U.S.C. § 1151(a). *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003) ("*Sherrill*").

At stake here is far more than the tax status of a few isolated parcels of land. The Second Circuit's conclusion imperils the tax and civil regulatory jurisdiction that the State has exercised over this 250,000-plus-acre area for more than 150 years. Under the reasoning of *Sherrill*, the Nation may remove any land within this region from the tax rolls of local governments simply by purchasing it, thereby threatening the local tax base and financial well-being of

communities in a two-county area. The Nation has already purchased, and purported to remove from the tax rolls, over 16,000 acres of land within the 1788 boundaries.

Additionally, because federal law restricts state regulatory authority over tribal land in Indian country, *Sherrill* creates a patchwork of tribal and state civil jurisdiction that jeopardizes the orderly and uniform application of law. As this Court has recognized, "when an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Hagen v. Utah*, 510 U.S. 399, 420-21 (1994) (citation and quotation omitted). Further, the Second Circuit disregarded the importance of the justifiable expectations of those who have lived in the area for generations. *See id.* at 421 (a finding that the reservation was not diminished "would seriously disrupt the justifiable expectations of the people living in the area"). In particular, the court ignored the practical consequences to the State and local governments, as well as to the residents of the area, of returning a non-Indian area that has long been governed by the State to Indian country status.

The effects of *Sherrill* have already extended beyond the Oneidas' historic lands. In *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004), the district court, citing *Sherrill*, enjoined a New York village from enforcing its zoning and land use laws on property acquired by the Cayugas for use as a gaming hall within the approximately 64,000-acre Cayuga land claim area in western New York. *See also Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, 03-CV-690

(N.D.N.Y.) (involving other property within the Cayuga land claim area). The State and its localities have a vital interest in continuing to assert their longstanding jurisdiction over these areas as well.[1]

HISTORICAL BACKGROUND OF THE BUFFALO CREEK TREATY

The historical context of the Buffalo Creek Treaty, as well as its terms and its aftermath, makes clear why the Treaty disestablished or substantially diminished the Oneidas' claimed reservation. The Treaty itself is explicit about its background and purpose: it was the successful culmination of over 20 years of federal efforts to remove the New York Indians, including the Oneidas, from New York. Preamble, 7 Stat. at 550-51.

A. A Principal Goal of Federal Removal Policy Was to Terminate Indian Sovereignty in the Eastern States.

During the early nineteenth century, the federal government adopted a policy of removing the Indian tribes from the eastern States to frontier regions not then populated by settlers. In 1825, President Monroe recommended to Congress the "removal of the Indian tribes from the lands which they now occupy within the limits of the several States . . . to the country lying westward and northward thereof." Message of January 27, 1825, II James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents,*

1. The State's emphasis on the correct interpretation of the Treaty is not in derogation of the three other questions on which this Court granted certiorari. Nor does the State concede that the Oneidas had any valid land claim or other rights in the area before or after the proclamation of the Treaty, or that their purported successors in interest have any claim or rights today.

1789-1897 (1899) ("*Messages of the Presidents*"), at 280. Four years later, President Jackson urged that Congress "set[] apart an ample district west of the Mississippi, and without the limits of any State or Territory now formed," to which the Indians should be encouraged to emigrate. First Annual Message (1829), *Messages of the Presidents*, at 442, 458. Jackson noted that one of the problems to be remedied by removal was the conflicting assertion of State and tribal sovereignty within existing state boundaries, especially in the south. Apparently believing that Indian sovereignty in New York had already ended, he asked rhetorically, "[w]ould the people of New York permit each remnant of the Six Nations within her borders to declare itself an independent people under the protection of the United States?" *Id.* at 457. Although Jackson stated that removal "should be voluntary," he emphasized that the Indians "should be distinctly informed that if they remain within the limits of the States they must be subject to their laws." *Id*. at 458-59.

Congress adopted the Indian Removal Act of 1830 in response to Jackson's proposal. Act of May 28, 1830, 4 Stat. 411 ("Removal Act"). The Removal Act authorized the President to set aside federal lands west of the Mississippi "for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there." Section 1, 4 Stat. at 411-12. The core purpose of federal removal policy was to "mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law* 79 (1982 ed.); *see also* Remarks of Sen. Frelinghuysen, 6 Reg. Deb. 309 (1830) ("the design of the system of which the present

bill forms but a part, is really to remove all the Indian tribes beyond the Mississippi, or, in case of their refusal, to subject them to State sovereignty and legislation").

B. The Oneidas' Removal from New York Commenced More Than 20 Years Before the Proclamation of the Buffalo Creek Treaty.

In New York, the federal government actively encouraged and aided Indian removal. In 1815, the New York Indians sought the assistance and consent of the United States to their removal to the west. 7 Stat. at 550. In 1821 and 1822, the federal government assisted the Oneidas and other New York tribes in purchasing land in Wisconsin from the Menominee and Winnebago Tribes. *Id.*; *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 420 (1942 ed.). President Monroe approved both purchases (the first in full, the second in part). *See New York Indians v. United States*, 170 U.S. 1, 6-7 n.1, 14 (1898), *rev'g*, 30 Ct. Cl. 413 (1895), *after remand*, 40 Ct. Cl. 448 (1905). New York Indians recognized that the Wisconsin lands were intended to serve as a new homeland for Indians removing from New York. According to members of the Oneidas and other tribes,

> in the treaties of 1821 and 1822 it was originally the intention of the tribes . . . and the policy of this Government, to relieve the State of New York of its entire Indian population, and to provide for the Six Nations and their confederates a home in the vicinity of Green bay [sic], which should belong to them and their posterity forever.

Memorial of the Delegates from the Stockbridge, Munsee, Brothertown, Oneida and St. Regis, to the President of the United States, January 20, 1831, *printed in* Senate

Confidential Report on "A Treaty with the Menomonee [sic] Tribe of Indians," February 28, 1831, National Archives, M668 (Ratified Indian Treaties 1722-1869) ("1831 Senate Report"), R. 6, fr. 0336-0337.

The Menominees later disputed the validity of these land purchases. 7 Stat. at 550. To settle the matter, in 1831, the United States and the Menominees agreed to set aside approximately 500,000 acres in Wisconsin as a home for the Oneidas and the other New York Indians in exchange for a payment by the United States. Treaty of February 8, 1831, 7 Stat. 342; *see also New York Indians*, 170 U.S. at 11-14; Cohen (1942 ed.), *supra*, at 420. Representatives of the New York Indians, including Oneidas who had recently removed from New York, formally accepted and urged ratification of the Menominee treaty, agreeing that the Wisconsin acreage "contains a sufficient quantity of good land, favorably and advantageously situated, to answer all the wants of the New York Indians." Treaty of October 27, 1832, 7 Stat. 405, 409 App.

In furtherance of their removal to Wisconsin, the Oneidas, with federal encouragement, repeatedly sold land to New York in the fourteen years preceding the signing of the Buffalo Creek Treaty, and used proceeds to finance their emigration. *See* Letter of Secretary of War John C. Calhoun to Jasper Parrish, Sub-Agent of the Six Nations, April 15, 1822, VII W. Hemphill, ed., *The Papers of John C. Calhoun, 1822-1823* 43-44 (1973) (advising an Oneida faction that President Monroe believed that the Six Nations should voluntarily dispose of their New York lands and remove to Wisconsin).[2] The Removal Act debates reveal that Congress

2. *See Report of the Special Committee to Investigate the Indian Problem of the State of New York* (1889) ("*1889 New York Report*"), (Cont'd)

was aware of these transactions. *See* Remarks of Sen. Forsyth, 6 Reg. Deb. 337 (1830) ("[w]ithin a few months the Governor of New York has, under a law of the State, called together the Oneidas, and made a treaty with them"). By the time the Treaty was signed in 1838, there were nearly as many Oneidas in Wisconsin as in New York. 7 Stat. at 556 (Sch. A). The 620 Oneidas who remained in New York occupied only about 5,000 acres. *Id*.; *Sherrill*, 337 F.3d at 163.

However, as non-Indian settlement in Wisconsin increased during the 1830s, it became apparent that further removal to Wisconsin was no longer feasible. Cohen (1942 ed.), *supra*, at 420. The Buffalo Creek Treaty recited that President Van Buren was

> satisfied that various considerations have prevented those still residing in New York from removing to Green Bay [including] that many who were in favor of emigration, preferred to remove at once to the Indian territory, which they

(Cont'd)

at 287 (Treaty of August 26, 1824); at 291 (Treaty of February 13, 1829) (portion of sale proceeds to be used "for the support of a Teacher at Green Bay"); at 293 (Treaty of October 8, 1829) (portion of the sale proceeds to be paid when a majority of chiefs "signify . . . their readiness to remove to Green Bay"); at 296 (dated April 2, 1833, signifying readiness to remove); at 298 (Treaty of February 1, 1826) (sale proceeds payable when the Governor is satisfied that the Indians are about to remove to Green Bay); at 303 (Treaty of April 3, 1830) (portion of sale proceeds to be used to superintend Oneida emigration to Green Bay); at 305 (Treaty of February 26, 1834). The February 13, 1829 Treaty was signed on behalf of New York by then-Governor Martin Van Buren, who as President of the United States, subsequently proclaimed Buffalo Creek in 1840.

> were fully persuaded was the only permanent and peaceable home for all the Indians.

7 Stat. at 550. Accordingly, the United States and the New York Indians entered negotiations to remove the Indians to lands in what is now Kansas, then part of the Indian territory. Cohen (1942 ed.), *supra*, at 420.

C. The Oneidas Agreed to Remove from New York in the Buffalo Creek Treaty.

The Buffalo Creek Treaty recited that its purpose was to carry out "the humane policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory," 7 Stat. at 551, and its terms expressly provided for the removal of the Oneidas from New York. In the treaty, the Oneidas and the other New York Indians ceded to the United States nearly all the lands previously granted them in Wisconsin (excluding a tract that became the present-day Oneida reservation in Wisconsin) and received a new 1,824,000-acre reservation in modern-day Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes. . . ." Arts. 1, 2, 7 Stat. at 551-52. The new reservation was to be the "future home" of, among others, the 620 "Oneidas . . . [then] residing in the State of New York." Art. 2, Sch. A, 7 Stat. at 551-52, 556. The Treaty emphasized that the new lands were being set aside for the New York Indians in conformity with the provisions of the Removal Act. Art 2, 7 Stat. at 551. Moreover, any of the Tribes that did not "accept and agree to remove to" their new lands within five years or at such other time prescribed by the President would "forfeit all interest" in the new western lands. Art. 3, 7 Stat at 552.

Other treaty provisions likewise reflect the Oneidas' agreement to remove by providing for the exercise of tribal sovereignty only in the west. The Treaty specified that the Oneidas could henceforth "establish their own form of government, appoint their own officers, and administer their own laws" on the Kansas lands designated as "their new homes." Art. 4, 7 Stat. at 552. The treaty's terms restricted the Oneidas' exercise of these powers of tribal sovereignty and jurisdiction to "said country," *i.e.*, the part of the new reservation where the "Oneidas [were] to have their lands in the Indian Territory." Arts. 4, 5, 7 Stat. at 552. The United States promised to "protect and defend" the New York Indians "in the peaceable possession and enjoyment of their new homes." Art. 4, 7 Stat. at 552.

Finally, continuing the prior pattern of Oneida land sales to the State, followed by removal, the Treaty provided for the disposition of the Oneidas' remaining lands in New York. Although New York, which held the right of preemption, was not a party, and thus did not directly acquire the Oneidas' lands by virtue of the Treaty itself, the Treaty provided that the Oneidas "hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. at 554.

D. After Proclamation of the Treaty, Most Remaining Oneidas Left New York and the State and Local Governments Assumed Jurisdiction Over Their Former Lands.

Following the proclamation of the Buffalo Creek Treaty in April, 1840, the Oneidas entered into several treaties with the State providing for the sale of most of their remaining land in New York. *New York Indians*, 40 Ct. Cl. at 469-71; *1889 New York Report*, at 309 (Treaty of June 19, 1840); at 329 (Treaty of June 19, 1840); at 343 (Treaty of March 13, 1841); at 356 (Treaty of May 23, 1842); at 363 (Treaty of February 25, 1846). Within a decade, the vast majority of the remaining Oneidas had left New York, although most did not remove to Kansas. Approximately 400 Oneidas removed from New York to Canada, and in 1846, about 150 removed to Wisconsin. *New York Indians*, 40 Ct. Cl. at 470. By 1905, of the Oneidas still in New York, about 150 were regarded as New York citizens, while approximately 128 resided on the Onondaga reservation and were not regarded as citizens. *Id*. By 1920, the Oneidas were down to 32 acres of tribal land. *United States v. Boylan*, 265 F. 165 (2d Cir. 1920), *error dismissed*, 257 U.S. 614 (1921).

Although few New York Indians removed to Kansas, in the late nineteenth century, the Oneidas and the other New York Indians successfully petitioned Congress for permission to bring an action to seek compensation for the Kansas lands, which during the intervening years had been opened to white settlement and sold by the United States. *See* Act of January 28, 1893, 27 Stat. 426. In explaining the 1893 legislation, Senator Platt, who reported the bill out of committee, made clear that the Indians' claim was grounded in the surrender of their New York lands at the time of

Buffalo Creek Treaty and before. *See* 24 Cong. Rec. 588 (1893) (referring to "the claim of the New York Indians to be compensated for certain lands which were given them in lieu of the lands which they had in New York"). Platt explained that the New York Indians had given up lands in New York and received lands in Wisconsin, which they then gave up in the Treaty for lands in Kansas. *Id*. He argued that although the New York Indians never went to Kansas, "they gave up the New York lands," but the United States never paid them "for the surrender of their lands in New York." *Id*. at 588-89.

This Court sustained the claim, holding that the agreement of the New York Indians to remove west was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in the Indian territory. *New York Indians*, 170 U.S. at 15. Additionally, citing Article 13 of the Buffalo Creek Treaty, this Court held that, notwithstanding the Oneidas' failure to occupy the new reservation, their agreement to remove "as soon as" they sold their remaining lands to the State was sufficient to avoid a forfeiture of the Kansas lands under the Treaty's stipulation that any of the tribes that did not timely "accept and agree to remove to" those lands would forfeit them. *Id*. at 26. The Oneidas, as well as other New York Indians, shared in the money judgment awarded by the Court. *See New York Indians*, 40 Ct. Cl. at 467, 471-72.

Following the Oneidas' departure, the State and its localities assumed jurisdiction over all the former Oneida lands within the 1788 boundaries, and this jurisdiction was unquestioned until the events giving rise to this action. The area has long since ceased to be recognized or treated

as a reservation by the federal government.[3] Moreover, the area has long since lost its Indian character, and for generations has been home almost exclusively to non-Indians. Census Bureau statistics for the year 2000 show that the area is populated almost entirely by non-Indians. *See* New York Quick Facts - Oneida County (Oneida County's non-Indian population made up 99.8 percent of the county's total population)[4]; New York Quick Facts - Madison County (Madison County's non-Indian population made up 99.5 percent of the county's total population).[5]

After examining this history of the Oneidas' removal from New York, the Indian Claims Commission ("ICC") found that the Oneidas sold the bulk of their land to New

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3. As recently as 1997, the Department of Interior's Annual Report on Indian lands listed only 32 acres of land in Madison County and none in Oneida County as under BIA jurisdiction. Jt. App. (2d Cir.) 249-250. Federal government publications suggest that even those 32 acres are not characterized as "reservation" land. *See* U.S. Dept. of Commerce, *Federal and State Indian Reservations and Indian Trust Areas* 398-421 (1974) (listing Indian reservations in New York State but not listing a New York Oneida reservation). Instead, the "Oneida Nation of New York is classified as 'non-reservation, tax-exempt land,' and for that reason is not listed separately in this handbook." *Id*. at 407. *See also* Confederation of American Indians, *Indian Reservations - A State and Federal Handbook*, 194-205 (1986) (New York Oneida reservation not listed). In *Boylan*, the Second Circuit referred to the 32 acres as an "allotment." 265 F. at 173; *see* 18 U.S.C. § 1151(c) (Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished").

4. http://quickfacts.census.gov/qfd/states/36/36065.h (last visited July 13, 2004).

5. http://quickfacts.census.gov/qfd/states/36/36053.h (last visited July 13, 2004).

York State with the knowledge of the United States in a series of negotiated transactions beginning in 1795. *Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 375 (1978). The ICC also found that Article 13 of the Buffalo Creek Treaty constituted a federal authorization for the Oneidas to convey their remaining lands to the State. *Id*. at 385. Additionally, it concluded that in purchasing Oneida land, New York had been doing "what would otherwise have been the Government's job, *i.e.*, buying lands from the New York Indians in order to persuade them to move west. . . . In New York State the state was carrying out [the Federal Government's removal] policy. . . ." *Id*. at 405.[6]

SUMMARY OF ARGUMENT

The Treaty of Buffalo Creek disestablished or nearly entirely diminished the Oneida reservation. It was designed "to release the Eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites," *New York Indians*, 30 Ct. Cl. at 450, and thereby to end the very types of jurisdictional conflicts involved here. The Treaty continued the removal of the New York Oneidas that had begun more than 20 years earlier with the knowledge and encouragement of the United States. The Oneidas and the other New York Indians agreed in the

6. Although two district court decisions held that the Buffalo Creek Treaty did not retroactively ratify prior land purchases by the State so as to extinguish any causes of action for violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, these cases did not address the issue of whether the Treaty prospectively terminated reservation status. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485, 492-93 (N.D.N.Y. 1990), *appeal pending* (2d Cir.); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 539 (N.D.N.Y. 1977), *aff'd and remanded*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part and rev'd in part*, 470 U.S. 226 (1985).

Treaty to give up most of the Wisconsin lands that had been set aside for the removal of the New York Indians, and the Oneidas remaining in New York also agreed to remove from New York to a new reservation created for them by the United States in the Indian territory halfway across the continent. Following proclamation of the Treaty, the vast majority of the remaining Oneidas sold their lands and left New York. Although few Oneidas settled on the new reservation, they ultimately sought and accepted the value of their western lands following this Court's decision in *New York Indians*. By agreeing to remove from New York, by selling nearly all their lands to the State and leaving New York, and by accepting the new reservation, the Oneidas, with Congressional approval, released and relinquished all their tribal rights, including all tribal sovereignty, over their former New York lands. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 356-58 (1941).

ARGUMENT

I. The Terms of the Buffalo Creek Treaty, its Role in Effectuating Federal Removal Policy, and the Area's Subsequent Jurisdictional History Demonstrate That the Treaty Ended Oneida Sovereignty over the Former Reservation.

A consideration of the terms of the Buffalo Creek Treaty, its historical role in implementing federal Indian policy, and the area's subsequent treatment leads to one conclusion — the reservation has been disestablished or almost entirely diminished.

1. Like all federal Indian treaties, the Buffalo Creek Treaty must be interpreted in view of its historical context. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526

U.S. 172, 196 (1999) (this Court looks "beyond the written words to the larger context that frames" the treaty, including the history of the treaty, the negotiations and the practical construction adopted by the parties). In particular, the manner in which the Indians understood the terms of an agreement is a key guide in construing federal Indian treaties. *Id*. Of course, this Court "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to [the] tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citation and internal quote omitted); *see also Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice").

Because this Court has repeatedly faced the question of when a reservation has been disestablished and diminished in cases interpreting allotment-era surplus land acts, the principles articulated in those decisions are applicable in determining whether the Buffalo Creek Treaty disestablished or diminished the Oneidas' reservation. Under these cases, the critical inquiry is whether there is a "congressionally manifested intent" that reservation status end. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[o]ur touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose"); *Hagen*, 510 U.S. at 414 (reservation diminishment is evidenced by "congressional intent with respect to those lands inconsistent with the continuation of reservation status"). Although congressional intent to terminate or diminish a reservation must be "clear and plain," and this Court "resolve[s] any ambiguities in favor of the Indians, and . . . will not lightly find diminishment," the Court will not disregard clear expressions of intent to diminish

or terminate a reservation. *Yankton*, 522 U.S. at 343-44 (citations and quotations omitted); *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 447 (1975). This Court gives primacy to congressional intent to diminish in the surplus land act cases even where the enactment merely ratifies an agreement previously negotiated with the Indians. *See Yankton*, 522 U.S. at 339 (statute ratified and incorporated agreement in its entirety); *DeCoteau*, 420 U.S. at 441 (same).

In the surplus land act cases, as in cases interpreting treaties, this Court does not limit its inquiry to the text alone. Also relevant are the historical context surrounding the act's passage, and the subsequent treatment, jurisdictional history, and settlement pattern of the area in question. *See Yankton*, 522 U.S. at 344; *Rosebud*, 430 U.S. at 587; *DeCoteau*, 420 U.S. at 442; *see also Hagen*, 510 U.S. at 412 ("our traditional approach to diminishment cases . . . requires us to examine all of the circumstances surrounding the opening of a reservation"). In evaluating the subsequent jurisdictional history, "the single most salient fact is the unquestioned actual assumption of state jurisdiction over the . . . lands." *Rosebud*, 430 U.S. at 603.

All of these factors indicate that Congress intended, and even under the most generous construction of the Buffalo Creek Treaty, the Oneidas must have understood, that their agreement to remove terminated their jurisdiction over the lands they no longer occupied in 1838; at most only the 5,000 acres that the Oneidas then occupied would retain reservation status, and then only until the Oneidas sold them and left. And in fact, within a decade after the Treaty's proclamation, nearly all the Oneidas had done so, relinquishing their jurisdiction over those lands as well.

2. The intent of both the United States and the Oneidas to disestablish or nearly entirely diminish the Oneidas' New York reservation is apparent from the terms of the Buffalo Creek Treaty. It documented the long history of federal efforts to remove the Indians, including the Oneidas, from New York, and stated that the removal agreed to in the Treaty was undertaken pursuant to the federal Removal Act. Additionally, in Article 13, the Oneidas agreed to remove "as soon as" they disposed of their remaining New York lands.

The Buffalo Creek Treaty is flatly inconsistent with continuing Oneida sovereignty in the area. The Oneidas' agreement to dispose of their New York lands and remove to a new "permanent home" in the Indian territory and to "establish their own form of government" and "administer their own laws" there, rather than on the New York lands from which they had just agreed to remove, superseded whatever rights the Oneidas may have had in the region under the 1794 Treaty of Canandaigua. Treaty of November 11, 1794, 7 Stat. 44.[7] Their agreement to remove "can by no means be reconciled with" the Nation's claim to jurisdiction over the area under the 1794 Treaty. *Yankton*, 522 U.S. at 345.

The Oneidas could not reasonably have expected to continue to exercise jurisdiction over lands they had already left and were now leaving. *See Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 458 (7th Cir. 1998) (Menominees "could not reasonably have expected to continue" to exercise

7. Article II of the 1794 Treaty expressly contemplated that the Oneidas might one day sell their lands, providing that "the said reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." 7 Stat. at 45.

hunting and fishing rights retained in 1831 treaty following an 1848 treaty in which they agreed to leave Wisconsin and move to a new reservation 300 miles away), *cert. denied*, 526 U.S. 1066 (1999). And it is inconceivable that the United States intended to terminate Oneida sovereignty over the 5,000 acres the Oneidas then occupied and remove them half a continent away while simultaneously preserving their sovereignty over a quarter of a million acres of land that the United States had encouraged them to sell to New York and that they no longer even occupied in 1838. These lands not only had been claimed by the white settlers who had moved into the area by 1838, but had been sold by the Oneidas themselves for disposition to those settlers. Thus, Congress's approval of the Oneidas' agreement to sell their remaining lands and remove from New York reflected its recognition of the *de facto* diminishment that had already occurred. *See Solem v. Bartlett*, 465 U.S. 463, 471 (1984) (citations omitted).

3. This interpretation is confirmed by the Treaty's broader historical context. The Oneidas' agreement to remove from New York to a new home in the middle of the American continent was the culmination of a removal process that had begun more than 20 years earlier with the participation and encouragement of the federal government. By 1838, nearly half of the New York Oneidas had removed to Wisconsin, and the New York Oneidas occupied only about 5,000 acres within the 1788 boundaries. Both the Indians and the United States acknowledged that this process was designed to remove the Indians, including the Oneidas, from New York State to a remote part of the western frontier where they would be far from advancing white settlements. *See* 1831 Senate Report, R. 6 at fr. 0336-0337. During the two decades leading up to the Buffalo Creek Treaty, the frontier continued to move westward; the Indians' new home

was initially to be in Wisconsin, and then in the Indian territory west of the Mississippi. But the goal of removing the Indians from New York remained constant. Moreover, the federal removal policy's goal of avoiding conflicts of state and tribal sovereignty could be accomplished only if Oneida sovereignty over the area they no longer occupied, and the area from which they were to remove, was ended.

"In view of this historical setting, it cannot now be fairly implied that tribal rights of the [Indians] in lands outside the [new] reservation were preserved." *Santa Fe*, 314 U.S. at 358. Contrary to what the Second Circuit believed, the "central bargain" of Buffalo Creek was not simply the Indians' exchange of their Wisconsin lands for new lands west of the Mississippi. *See Sherrill*, 337 F.3d at 160; *see also id.* at 164 (the land exchange was the "rationale for the award" to the New York Oneidas and others in *New York Indians*). The Second Circuit failed to recognize that the Wisconsin lands and the Oneidas' New York lands were inextricably linked because the Wisconsin lands had been set aside for the removal of all New York Indians. Indeed, in 1832, New York Indians, including Oneidas who had recently removed, accepted the United States' treaty with the Menominees regarding this land, agreeing that the Wisconsin lands were sufficient for "all" the "wants" of the New York Indians. Treaty of October 27, 1832, 7 Stat. 405, 409 App; *see also* Brief of Amicus Curiae United States at 30, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (No. 83-1065). The Oneidas' surrender in the Buffalo Creek Treaty of most of the Wisconsin lands provided to them in the Menominee treaty was simply another step in their ongoing removal from New York. As Senator Platt recognized decades later in explaining why

the Indians should be allowed to sue the United States for the value of the western reservation they had never occupied, the Kansas lands were given to the Indians in lieu of their New York lands. *See* 24 Cong. Rec. 588-89 (1893).

4. Finally, the treatment of the area within the 1788 boundaries following the Treaty's proclamation strongly supports the view that both Congress and the Oneidas understood that the Treaty would terminate Oneida sovereignty in New York. After 1840, the remaining Oneidas sold virtually all of their remaining lands, and most left New York. For over a century and a half, state and local governments have exercised jurisdiction over nearly all the lands within the 1788 boundaries, and these lands have been populated almost exclusively by non-Indians. The Second Circuit's cavalier dismissal of this history, *Sherrill*, 337 F.3d at 163-64, is particularly untenable given that the Oneidas' removal both before and after the Treaty's signing was undertaken by New York and the United States precisely with the goal of ending the Oneidas' sovereign rights in New York. In contrast to the surplus land act allotments, where the Indians were expected to remain on their allotted lands in the vicinity of lands that were opened to settlement by others, the premise of the Buffalo Creek Treaty was that the Oneidas were to leave New York entirely and relocate on a new reservation. That the area has been for many years populated almost exclusively by non-Indians bears out this expectation. As this Court has held, "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471 (citations omitted); *see also Rosebud*, 430 U.S. at 604-05 (the

"longstanding assumption of jurisdiction by the State over an area that is over [99 percent] non-Indian . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset" by the strained reading of the statutes urged by the tribe).

Not surprisingly, the federal government has long since ceased to treat the 250,000-plus-acre area as a reservation. *See Rosebud*, 430 U.S. at 604-05 (the fact that neither Congress nor the Bureau of Indian Affairs has sought to exercise its authority over an area or to challenge the State's exercise of authority is a factor entitled to weight as part of the jurisdictional history). Accordingly, although a small number of Oneidas remained in New York, and continued to occupy a small parcel that eventually dwindled to 32 acres, the language, background and subsequent history of the Buffalo Creek Treaty compel the conclusion that the Oneidas relinquished all of their tribal sovereignty over all their former lands in New York when they accepted the new western reservation.

II. The Oneidas' Agreement to Remove Was Binding and Relinquished Their Sovereignty over Their Former New York Lands.

1. There was nothing conditional about the Oneidas' relinquishment in the Buffalo Creek Treaty of their sovereignty over New York lands. In reaching the contrary conclusion, the Second Circuit characterized the Treaty as an "agreement to agree" conditioned upon subsequent land sales to New York State. *Sherrill*, 337 F.3d at 161. The language of the Treaty itself, in which the Oneidas agreed

to remove "as soon as" they disposed of their lands, not "only if" they were able to sell them, refutes this interpretation. The phrase "as soon as" refers to when, not whether, the Oneidas were to remove.[8] That most of the remaining Oneidas sold nearly all their lands to New York and removed within ten years after the Treaty's proclamation strongly suggests that they shared this interpretation. The Second Circuit's statement that "the sales to New York State were never accomplished, and the planned removal never took place," *Sherrill*, 337 F.3d at 162, is simply wrong. Although few Oneidas removed to Kansas, most Oneida land was sold to New York and the vast majority of the Oneidas left the State. *See New York Indians*, 40 Ct. Cl. at 469-71.

2. More importantly, characterization of the Oneidas' agreement to remove as conditional is contradicted by this Court's decision in *New York Indians*. In short, this Court has already interpreted the Buffalo Creek Treaty as an agreement by the Oneidas to remove. Indeed, as the Court recognized, the Indians' agreement to remove to the west was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in the Indian territory. *New York Indians*, 170 U.S. at 15. By virtue of that agreement, the Oneidas obtained an interest in the new lands that the United States became obliged to pay for years later, after it sold the land to non-Indian settlers. *See id.* at 26, 36. The possibility that the Oneidas might not actually remove

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8. This Court recently characterized a treaty containing an agreement to remove "as soon as" an expected imminent event occurred as a removal treaty. *See Mille Lacs*, 526 U.S. at 189-90 n.4 (1999) (noting that the United States negotiated several "removal treaties" with Indian tribes in 1837 including one with the Saganaws, 7 Stat. 528, 530, in which "said tribe agrees to remove from the State of Michigan, as soon as a proper location can be obtained").

and their failure actually to occupy the Kansas lands did not undo their agreement or vitiate their rights to that territory. *Id*.

3. The benefit of the Oneidas' new reservation came with a corresponding burden, which the Nation now seeks to disavow: by agreeing to remove, the Oneidas relinquished tribal rights over their New York lands. *See, e.g.*, *Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 225 (7th Cir. 1993) (tribe's acceptance of treaty benefits implies acceptance of treaty burden of surrender of right of occupancy), *cert. denied*, 510 U.S. 1196 (1994). This Court's precedent establishes that in accepting a new reservation, an Indian tribe may release and relinquish its rights in other lands. Thus, in *United States v. Santa Fe Pacific R. Co.*, the United States undertook by statute to extinguish Indian title to certain western land for the benefit of a railroad, subject to the limitation that that title could be extinguished only by the Indians' "voluntary cession." *Santa Fe*, 314 U.S. at 344. The Walapai Indians requested that a new reservation be created for them because of the encroachment of settlers onto their lands. The President created the new reservation by executive order, although only a few Walapais actually moved there. Nevertheless, this Court found that there was "an indication that the Indians were satisfied with the proposed reservation." *Id*. at 357. It concluded that even though the Walapais never made an explicit "voluntary cession" of their former lands, the creation of the new reservation and the Walapai's acceptance of it amounted to a relinquishment of the Walapai's "tribal rights in lands outside the reservation and notoriously claimed by others."

Id. at 357-58.[9] In this case, there is far more than "an indication" that the Oneidas were "satisfied" with their new reservation: they entered into a federal treaty agreeing to remove far away to the new reservation and ultimately recovered the value of the new reservation in this Court. Consequently, their "acquiescence in that arrangement" relinquished their sovereignty over their former lands outside the new reservation.[10] *Id*. at 358.

III. The Additional Reasons Offered by the Second Circuit For Its Interpretation of the Treaty Are Unpersuasive.

1. The primary rationale relied upon by the Second Circuit in concluding that the Oneidas could have understood the Buffalo Creek Treaty as preserving sovereignty over their former New York lands was that their agreement to remove was conditional. *See Sherrill*, 337 F.3d at 161. Only in light of this view do canons of treaty

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9. In *Santa Fe*, this Court found that creation of an earlier reservation never accepted by the Walapais did not extinguish their claim to their old lands. *Santa Fe*, 314 U.S. at 354-55. That holding does not control this case because the Oneidas agreed in the Buffalo Creek Treaty to remove from New York to their new reservation and accepted the benefit of the new reservation.

10. The United States' claim in its amicus curiae brief in opposition to the petition for certiorari that *Santa Fe* is inapposite here because it involved aboriginal rather than reservation land is belied by this Court's application of *Santa Fe* to the Oneida land claim. *See* Brief for the United States as Amicus Curiae (No. 03-855) at 11-12; *Oneida II*, 470 U.S. at 247-48 (citing *Santa Fe*, 314 U.S. at 346, 354).

construction relied upon by the circuit court, *id.* at 158-59; *see also Mille Lacs*, 526 U.S. at 196; *Oneida II*, 470 U.S. at 247, become helpful to respondents. In support of this view, the Second Circuit cited a statement apparently made to the Oneidas by Ransom Gillet, the United States treaty commissioner who negotiated the Buffalo Creek Treaty. *See* Brief of Respondents Oneida Indian Nation of New York, et al., in Opposition To the Petition For Certiorari at 10a-11a (No. 03-855); *Sherrill*, 337 F.3d at 161-62. Even if the statement is appropriately considered in interpreting the Treaty,[11] the court misunderstood its import.

At most, Gillet's statement advised the Oneidas that they would not be forcibly removed from the lands they occupied in 1838. This was not a new policy. Such voluntary removal was consistent with federal removal policy as articulated in the Removal Act's text (Indians could "choose to exchange" their lands for new western lands), and with President Jackson's view that removal "should be voluntary."

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11. An unauthenticated photocopy of a handwritten version of this document appears in the record below as an exhibit to an attorney affidavit. Jt. App. (2d Cir.) 1312-13. In this Court, the Nation included a transcription of the Gillet statement in the appendix to its brief in opposition to the petition for certiorari. Respondent's Brief in Opposition to the Petition for Certiorari, 10a-11a. The Gillet statement was not incorporated into the Treaty's text, unlike a similar assurance given to the St. Regis Indians. Supp. Art., 7 Stat. at 561, 564 (explicitly providing that the United States would not compel the St. Regis Indians to remove). *See New York Indians*, 170 U.S. at 22-23 (treaty proviso adopted by the Senate never became effective because there was no evidence that the President ever approved it.)

See Removal Act, 4 Stat. at 411-12; First Annual Message, at 458. Consistent with this policy, and with federal encouragement, the Oneidas had been voluntarily removing from New York to Wisconsin during the 20 years before the Treaty's proclamation.

Nothing in the Gillet statement suggested that the Oneidas' original 250,000-plus-acre reservation was to remain intact. In fact, the statement contradicted that view, advising the Oneidas that "[t]hey can, if they choose to do so, *remain where they are* forever" (emphasis added). Even giving this statement the construction most favorable to the Oneidas, it would have meant that, at most, the Oneidas could continue to occupy only the 5,000 acres they had held in 1838, and that for as long as they did so, the tract would retain reservation status.[12] The Gillet statement certainly cannot be construed to assure the Oneidas that their reservation would continue even after they decided to sell their remaining lands to New York and leave the State. Thus, "as soon as" the remaining Oneidas sold all but 32 acres of their remaining lands, they had no reason to believe that tribal sovereignty would continue over lands they no longer occupied.

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12. The better view, consistent with federal removal policies, is that the Gillet statement did not assure the Oneidas that tribal jurisdiction would continue even over any lands that they retained after the Buffalo Creek Treaty. *See, e.g.*, First Annual Message at 459 (the Indians "should be distinctly informed that if they remain within the limits of the States they must be subject to their laws"); Remarks of Sen. Frelinghuysen, 6 Reg. Deb. 309 (1830) (Indians refusing to remove would be subject "to State sovereignty and legislation").

Gillet's promise that the Oneidas would not be *forcibly* removed therefore cannot qualify or limit the Oneidas' binding agreement to remove from New York. His statement should be given the "sensible construction" that the United States would not force the remaining Oneidas to leave New York before they sold their remaining lands to the State, rather than being understood to impugn their agreement to remove and terminate their sovereignty in New York.[13] *See, e.g.*, *Yankton*, 522 U.S. at 344-46 (where provision apparently preserving treaty rights appeared in text of Indian land cession agreement that Congress codified in surplus land act, this Court gave the provision a "sensible construction" rather than reading it to "eviscerate[]" the clear intent of the agreement to terminate the treaty rights). Indeed, in his letter to the Indian Affairs Commissioner, Gillet himself characterized his statement simply as an assurance that the Oneidas would not be compelled to remove without selling their land to New York. Respondents' Brief in Opposition, at 7a.

Accordingly, respondents can find no comfort in the canons of treaty interpretation. As this Court concluded in *Yankton*, "[t]he principle according to which ambiguities are resolved

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13. In *Fellows v. Blacksmith*, 60 U.S. 366 (1857), this Court held that only the United States could forcibly remove the Senecas from their reservations pursuant to Buffalo Creek. *See also New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 371 (1859) (same); *The New York Indians*, 72 U.S. 761, 770 (1867) (New York could not tax the Seneca lands "[u]ntil the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations"). Similarly, the Second Circuit's earlier reference in *Boylan* to the "reservation" as in existence at the time of the Oneidas' 1842 treaty with New York, *see Sherrill*, 337 F.3d at 162-63, at most indicated that the "reservation" continued after Buffalo Creek to the extent that the Oneidas continued to occupy land in New York.

to the benefit of Indians tribes is not . . . 'a license to disregard clear expressions of tribal and congressional intent.'" 522 U.S. at 349, citing *DeCoteau*, 420 U.S. at 447; *see also Rosebud*, 430 U.S. at 587 (canon "does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary"). This Court must give effect to the Buffalo Creek Treaty's terms as agreed to by Congress and the Oneidas: "Congress and the tribe spoke clearly. Some might wish they had spoken differently, but we cannot remake history." *DeCoteau*, 420 U.S. at 449.

2. The Second Circuit's other arguments in support of its interpretation are likewise meritless. The court erred in relying heavily on the absence of explicit language of cession and payment in the treaty to support its conclusion that the treaty did not terminate the Oneida reservation. *See Sherrill*, 337 F.3d at 159-61. The underlying fee to the Oneida lands was held by New York State, which was not a party to the Buffalo Creek Treaty, rather than by the United States. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (original 13 states held the fee title or preemptive right to Indian lands within their boundaries). Instead of ceding their New York lands to the United States, which had no right to them, the Oneidas agreed in Article 13 to remove to the new reservation "as soon as" they sold their remaining New York lands to the State.[14]

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14. The Court erroneously contrasted the Oneidas to the Senecas and the Tuscaroras, who in the Buffalo Creek Treaty expressly ceded lands to Ogden and Fellows, the holders of the right of preemption to those Tribes' lands in western New York. 7 Stat. at 557-61. *See Sherrill*, 337 F.3d at 161. Unlike New York State, Ogden and Fellows were parties to the Treaty, and thus the Treaty contained a cession directly to them. Because New York was not a party to the Treaty, the most the Oneidas could agree to was removal following separate sales of their remaining lands to New York. 7 Stat. at 554.

3. Finally, the court below mistakenly held that the New York Oneidas were not intended to share in the Kansas lands because they "had a permanent residence in New York State." *Sherrill*, 337 F.3d at 162 n.17. Article 2 of the Treaty, read as a whole, refutes that finding. The Buffalo Creek Treaty set apart an amount of land in Kansas more than sufficient to provide 320 acres to each of the New York Indians enumerated in the census set forth in Schedule A to the treaty, including the 620 New York Oneidas specifically identified in Schedule A. *See* Sch. A, 7 Stat. at 556; *New York Indians*, 40 Ct. Cl. at 458. The treaty expressly provided that the Kansas lands were "intended as a future home" for the Oneidas residing in the State of New York, with the land to be divided equally according to the numbers set forth in Schedule A. 7 Stat. at 551-52. Moreover, the New York Oneidas shared in the recovery in *New York Indians.* Accordingly, the only viable conclusion is that the Oneidas agreed in the Buffalo Creek Treaty to remove from New York, and the Treaty disestablished or nearly entirely diminished the Oneidas' 1788 reservation.

CONCLUSION

For the foregoing reasons, amicus curiae State of New York respectfully urges this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit and declare that the lands at issue are not "Indian country," because the Oneidas' 1788 reservation was disestablished or almost entirely diminished by the Buffalo Creek Treaty.

Respectfully submitted,

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