No. 03-855

In The

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

-against-

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT GREEN, BRIAN PATTERSON, AND IVA ROGERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* CAYUGA AND SENECA COUNTIES, NEW YORK AND THE DEFENDANT CLASS OF LANDOWNERS IN *CAYUGA INDIAN NATION V. PATAKI* IN SUPPORT OF PETITIONER CITY OF SHERRILL SEEKING REVERSAL

William L. Dorr
Counsel of Record
HARRIS BEACH LLP
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800

Attorneys for Cayuga and Seneca Counties

Daniel J. Moore and
Brian Laudadio, *of Counsel*

Gus P. Coldebella
Counsel of Record
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000

Attorneys for the Defendant Class of Landowners

Mark S. Puzella, *of Counsel*

11 Centre Park
Rochester, New York 14614
(585) 232-6920

(5876)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	*ii*
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. IN ORDER FOR A MODERN TRIBE TO ASSERT HISTORIC PROPERTY RIGHTS, A COURT MUST REQUIRE PROOF THAT THE MODERN TRIBE IS THE SAME ENTITY AS THE HISTORIC TRIBE	10
II. THE TRIBAL STATUS ANALYSIS IN *SHERRILL* WAS ERROR BECAUSE THE COURT DID NOT REQUIRE PROOF THAT THE MODERN OIN IS THE SAME ENTITY AS THE HISTORIC ONEIDA NATION	13
A. "Federal recognition" is entitled to no weight because the OIN was recognized prior to the promulgation of regulations governing tribal status	13
B. It is the role of the court to determine tribal status	16
CONCLUSION	22

TABLE OF AUTHORITIES

Page

Cayuga Indian Nation v. Carey, 89 F.R.D. 627 (N.D.N.Y. 1981) 1

Cayuga Indian Nation v. Cuomo, 565 F. Supp. 129 (N.D.N.Y. 1983) 2

Cayuga Indian Nation v. Cuomo, 667 F. Supp. 938 (N.D.N.Y. 1987) 2, 3

Cayuga Indian Nation v. Cuomo, 730 F. Supp. 485 (N.D.N.Y. 1990) 2

Cayuga Indian Nation v. Cuomo, 758 F. Supp. 107 (N.D.N.Y. 1991) 2

Cayuga Indian Nation v. Cuomo, 762 F. Supp. 30 (N.D.N.Y. 1991) 2

Cayuga Indian Nation v. Cuomo, 771 F. Supp. 19 (N.D.N.Y. 1991) 2

Cayuga Indian Nation v. Pataki, (unpublished opinion) (N.D.N.Y. July 10, 1996) 2

Cayuga Indian Nation v. Pataki, 1999 U.S. Dist. LEXIS 5228 (N.D.N.Y. 1999) 2

Cayuga Indian Nation v. Pataki, 1999 U.S. Dist. LEXIS 6264 (N.D.N.Y. 1999) 2

Cayuga Indian Nation v. Cuomo, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999) 2

Cayuga Indian Nation v. Pataki, 79 F. Supp. 2d 66 (N.D.N.Y. 1999) 2

Page

Cayuga Indian Nation v. Pataki, 79 F. Supp. 2d 78 (N.D.N.Y. 1999) 2

Cayuga Indian Nation v. Pataki, 83 F. Supp. 2d 318 (N.D.N.Y. 2000) 2

Cayuga Indian Nation v. Pataki, (unpublished opinion) (N.D.N.Y. April 18, 2000) 2

Cayuga Indian Nation v. Pataki, 2000 U.S. Dist. LEXIS 7045 (N.D.N.Y. 2000) 2

Cayuga Indian Nation v. Pataki, 165 F. Supp. 2d 266 (N.D.N.Y. 2001) 2

Cayuga Indian Nation v. Pataki, 188 F. Supp. 2d 223 (N.D.N.Y. 2002) 2

Cayuga Indian Nation of New York v. Pataki, 2d.Cir. No. 02-6111(L) (2d. Cir. N.D.N.Y.) 1

Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974) 11, 12

Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979) 11

Golden Hill Paugussett v. Weicker, 39 F.3d 51 (2d Cir. 1954) . . . . . *passim*

Golden Hill Paugussett v. Weicker, 839 F. Supp. 130 (D. Conn. 1993) 17

Holt v. Comm'r of Internal Revenue, 364 F.2d 38 (8th Cir. 1966) 12

Page

Mashpee Tribe v. New Seaburg Corp., 592 F.2d 575 (1st Cir. 1979) 12, 19, 20

Minnesota Chippewa Tribe v. United States, 315 F.2d 906 (Ct. Cl. 1963) 9, 12

Montoya v. United States, 180 U.S. 261, 21 S.Ct. 358 (1901) 18

Oneida Indian Nation of New York v. City of Sherrill, New York, 337 F.3d 139, 165 (2d Cir. 2003) ..... *passim*

Sizemore v. Brady, 235 U.S. 441, 35 S.Ct. 135 (1914) 12

United States v. 43.47 Acres of Land, 855 F. Supp. 549 (D. Conn. 1994) 11

United States v. Candelaria, 271 U.S. 432, 46 S.Ct. 561 (1926) ..... *passim*

United States v. Cook, 86 U.S. 591, 22 L.Ed. 210 (1873) 11

United States v. Dann, 873 F.2d 1189 (9th Cir. 1987) 11

United States v. Elm, 25 F. Cas. 1006 (N.D.N.Y. 1877) 19, 20

United States v. John, 437 U.S. 634, 98 S.Ct. 2541 (1978) 18

United States v. Joseph, 94 U.S. 614 (1876) 21

Page

United States v. Washington, 641 F.2d 1368 (9th Cir. 1981) 4, 7, 10, 11

Williams v. City of Chicago, 242 U.S. 434, 37 S.Ct. 142 (1917) 12

FEDERAL STATUTES AND REGULATIONS

25 U.S.C. § 177 1

25 C.F.R. § 83.7 . . . . . 8, 13, 16

25 C.F.R. § 88.3 14

43 Fed. Reg. 3961 (Sept. 5, 1978) 13

59 Fed. Reg. 9280 14

MISCELLANEOUS

Cohen, Felix S., *Handbook of Federal Indian Law* (1942 ed.) 21

Hauptman, Laurence M., *Conspiracy of Interests (Iroquois Dispossession and the Rise of New York State)* (1999) 20

INTEREST OF THE *AMICI CURIAE*

The *amici* are the Counties of Cayuga and Seneca, New York ("Counties"), and a class of private landowners ("Cayuga landowners"), who are defendants in a New York Indian land claim, brought in the U.S. District Court for the Northern District of New York, by two alleged successors of the historic Cayuga tribe and the United States, and captioned *Cayuga Indian Nation of New York v. Pataki*. The case was filed in 1980.[1]

The *Cayuga* plaintiffs claim that the State of New York's purchases of land from the historic Cayugas in 1795 and 1807 were invalid, because they occurred without the federal approval required by the Indian Trade and Intercourse Act, 25 U.S.C. § 177 (the "ITIA").[2] Their

---

[1] The defendant class of landowners was certified in *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627 (N.D.N.Y. 1981). The other defendant in the *Cayuga* case is the State of New York, which is also filing an *amicus* brief in this matter. As described below, *Cayuga* currently is pending before the U.S. Court of Appeals for the Second Circuit under docket no. 02-6111(L).

Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici*, its counsel, or insurers for the defendant class of landowners, made a monetary contribution to the preparation or submission of this brief.

The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.3.

[2] The tribal plaintiffs in *Cayuga* are the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma. Like the Oneida Indian Nation of New York ("OIN") in the instant case, each tribal plaintiff claims to be a successor to an historic Indian tribe that entered into the Treaty of Canandaigua with the United States. 7 Stat. 44.

has resulted in one of the largest judgments in history against the State: $248 million in damages and prejudgment interest. It has also, for more than twenty years, cast a shadow over the titles to the homes and businesses of the Cayuga landowners — thousands of residents of Central New York — who are threatened by plaintiffs' demand for ejectment. The Second Circuit now has the case *sub judice:* The State has appealed the district court's damages award, the State and *amici* herein have appealed the liability determinations against them, and the tribal plaintiffs have, among other things, cross-appealed the district court's order denying ejectment as a remedy.[3] On August 6, 2004, the Second Circuit issued an Order

---

[3] In the twenty-four years since the original *Cayuga* complaint was filed, the trial court issued 17 written opinions: *Cayuga Indian Nation v. Cuomo*, 565 F. Supp. 129 (N.D.N.Y. 1983) (Cayuga I); *Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938 (N.D.N.Y. 1987) (Cayuga II); *Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (Cayuga III); *Cayuga Indian Nation v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991) (Cayuga IV); *Cayuga Indian Nation v. Cuomo*, 762 F. Supp. 30 (N.D.N.Y. 1991) (Cayuga V); *Cayuga Indian Nation v. Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1991) (Cayuga VI); *Cayuga Indian Nation v. Pataki*, (unpublished opinion) (July 10, 1996) (Cayuga VII); *Cayuga Indian Nation v. Pataki*, 1999 U.S. Dist. LEXIS 5228 (N.D.N.Y. 1999) (Cayuga VIII); *Cayuga Indian Nation v. Pataki*, 1999 U.S. Dist. LEXIS 6264 (N.D.N.Y. 1999) (Cayuga IX); *Cayuga Indian Nation v. Cuomo* , 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999) (Cayuga X); *Cayuga Indian Nation v. Pataki*, 79 F. Supp. 2d 66 (N.D.N.Y. 1999) (Cayuga XI); *Cayuga Indian Nation v. Pataki*, 79 F. Supp. 2d 78 (N.D.N.Y 1999) (Cayuga XII); *Cayuga Indian Nation v. Pataki*, 83 F. Supp. 2d 318 (N.D.N.Y. 2000) (Cayuga XIII); *Cayuga Indian Nation v. Pataki*, (unpublished opinion) (April 18, 2000) (Cayuga XIV); *Cayuga Indian Nation v. Pataki*, 2000 U.S. Dist. LEXIS 7045 (N.D.N.Y. 2000) (Cayuga XV); *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001) (Cayuga XVI); *Cayuga Indian Nation v. Pataki* , 188 F. Supp. 2d 223 (N.D.N.Y. 2002) (Cayuga XVII).

requiring the parties to submit supplemental briefs after this Court renders a decision in this case to address its applicability to the issues presented in *Cayuga*.

Among the issues on appeal in *Cayuga* is the district court's grant of summary judgment on the issue of the tribal plaintiffs' "tribal status" under the ITIA, including whether the tribal plaintiffs are successors to the historic Cayuga tribe that sold land to the State in 1795 and 1807.[4] The *Cayuga* district court held that the tribal plaintiffs satisfied this element of their claim — as a matter of law, on summary judgment — merely because they were "federally recognized." *See Cayuga II*, 667 F. Supp. at 941-43. Over the State's and *amici's* objection, the *Cayuga* district court did not consider evidence that raised a genuine issue of material fact regarding the Cayugas' tribal status. This, we contend, was error.

The tribal status issue also arises in this case: the City of Sherrill ("City") asserts that summary judgment in favor of the OIN on the issue of whether its present-day purchase of lands within an historic reservation transformed the land into "Indian country," was inappropriate, given substantial evidence that the modern tribe was not a successor to the historic tribe. The Second Circuit held that because the OIN was "federally recognized," its "repossession" of historic reservation land made that land "Indian country." *See Oneida Indian Nation of New York v. City of Sherrill, New York*, 337 F.3d 139, 165 (2d Cir. 2003) ("*Sherrill*") ("We find, however,

---

[4] Other issues on appeal in *Cayuga* include the availability and application of various defenses to an ITIA claim, including abandonment, ratification, election of remedies, laches, and geographic non-applicability of the ITIA.

no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land."). The *Sherrill* court, like the *Cayuga* court, did not look past the fact of federal recognition.

Tribal status is a critical question in cases in which modern tribes assert claims based on historic property interests held by their alleged predecessors.[5] Indian title belongs to the tribe, not to individual members of the tribe, and therefore only the historic tribal entity or its successors may reach back across the centuries and threaten the long-settled titles of thousands of innocent landowners. *See, e.g., United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) (requiring proof that tribal plaintiff was same entity that signed subject treaty).

As argued herein, contrary to the rulings in *Cayuga* and *Sherrill*, federal recognition does not resolve the question of whether a modern tribe is the same entity as the historic entity and entitled to assert historic property rights. It was not until 1978 that the Bureau of Indian Affairs ("BIA") first promulgated regulations governing federal recognition. The OIN and the Cayugas were recognized prior to these regulations, at a time when tribal status was an *ad hoc* determination. Thus, unlike most other federally recognized tribes, neither tribe has been subject to a searching inquiry into their status as alleged successors to

---

[5] *Amici* recognize that in *Sherrill*, the issue of tribal status was not raised as a defense to an ITIA claim. However, because the OIN claims that the subject land is Indian country because centuries-old property transfers do not comply with the ITIA, the tribal status test should be the same in both contexts.

historic tribes. *See Golden Hill Paugussett v. Weicker*, 39 F.3d 51, 59-60 (2d Cir. 1954).

The misplaced reliance on federal recognition is of particular significance in *Cayuga* because defendants raised genuine issues of material fact on the issue of continuous existence; evidence that the district court refused to consider given the tribal plaintiffs' federal recognition. *See, e.g., Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938, 943 (N.D.N.Y. 1987). For example, Frank Bonamie, who purported to be a Chief of the modern Cayuga Indian Nation ("Nation"), admitted in his deposition that the Nation only began efforts to organize as a "tribe" in 1971, prior to which the Cayugas did not even have titular or nominal leadership. This testimony, along with other evidence submitted to the court, was more than sufficient to establish a genuine issue of material fact on the question of whether the Nation is a successor tribe and whether it existed continuously as a tribe since the 1795 and 1807 Treaties—and, therefore whether the Nation is the same tribe that treated with New York. Thus, this Court's determination of the proper scope of the tribal status inquiry reaches beyond the *Sherrill* matter, and will directly affect the Counties and the thousands of landowners in *Cayuga*.

Finally, as in *Sherrill*, the tribal plaintiffs in *Cayuga* have made open-market purchases of land within the boundaries of their alleged historic reservation, which is also within the Counties. Like the OIN, the Cayugas assert that the those parcels are Indian country and, therefore, sovereign Indian land which is not subject to local taxation or regulation. This issue is currently the subject of litigation pending in the U.S. District Court for the

Northern District of New York. *See Cayuga Indian Nation v. Village of Union, et al.,* Civ. A. No. 5:03-CV-01270, filed Oct. 20, 2003; *see also Seneca-Cayuga Tribe v. Town of Aurelius, et al.,* 5:03-CV-00690, filed June 3, 2003.

SUMMARY OF ARGUMENT

Tribal status is a critical condition precedent to a modern tribe's right to make claims based upon centuries-old land transactions. There are two parts to a tribal status inquiry. The first asks whether a group of Indians presently constitutes a "tribe" which is eligible for federal benefits; that is, whether the tribe is recognized as such by the BIA. The second asks whether that tribe is the same entity as the historic tribe, or a valid successor entity, and therefore eligible to assert historic claims.[6] *See United States v. Candelaria*, 271 U.S. 432, 441 (1926) (defining a "tribe" as a (1) a body of Indians of the same or a similar race, (2) united in a community, (3) under one leadership or government, and (4) inhabiting a particular, though sometimes ill-defined, territory); *Washington*, 641 F.2d 1368 (requiring tribe asserting treaty rights to prove that it is the same entity named in the treaty). The *Sherrill* court ended its analysis with the first question, and refused to consider whether the OIN is a successor to the historic Oneida Nation. This was legal error because, while a modern tribe may constitute a "tribe" that is eligible for certain governmentally-provided benefits, the tribe may only assert historic property claims if it is the same entity as the historic tribe.

Proof that a tribe is a successor to its historic namesake must be a precondition to the assertion of ancient rights in land. However, the *Sherrill* court found "no requirement in the law that a federally recognized tribe

---

[6] A tribe can only be a successor to the historic entity if it has maintained a continuous tribal existence from the time of the historic tribe.

demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F.3d at 165. The *Sherrill* court's reliance on federal recognition is misplaced. While the BIA's post-1978 recognition of tribes may offer guidance to courts seeking to determine tribal status for purposes of land claims, any pre-1978 recognition is singularly unhelpful, because such determination was made before the BIA promulgated regulations that require, among other things, proof that the modern tribe is the same as the historic one. *See* 25 C.F.R. § 83.7. The OIN here, as well as the tribal plaintiffs in *Cayuga*, were recognized by the BIA at a time when tribal status was merely an *ad hoc* determination, and gave courts no indication of whether the modern tribe should be entitled to assert the ancient tribe's rights. *See Golden Hill*, 39 F.3d at 59-60 ("Before the promulgation of the [1978] acknowledgment regulations there did not exist a uniform, systematic procedure to determine tribal status within the Department of the Interior."). For tribes that were federally recognized before 1978, the question of whether a group of Indians is a "tribe" for BIA purposes is analytically distinct from, and not responsive to, the question of whether that "tribe" is a successor to the historic tribe and entitled to vindicate its rights. *Id.* ("[D]eferral [to the BIA's determination] of the issue of the tribal status was not required *nor would it aid a court in its determination.*") (emphasis added).

The *Sherrill* court minimizes petitioner's argument by framing it as unreasonable: "Any lapse in tribal identity, Sherrill concludes, rendered the OIN's land freely alienable and precludes the tribe from asserting rights in historic reservation land." *Sherrill* at 165 (emphasis added). Certainly a one-year lapse in tribal identity, or

even a five- or ten-year lapse, might not break the connection between the historic tribe's treaty rights and the modern group claiming those rights. But, at some point, a longer lapse in tribal identity should be considered by a court in determining whether the modern tribe may assert rights in land. After all, such a lapse is evidence that the modern tribe is not the same entity as the historic one. Furthermore, when descendants of historic tribes congregate and form a new, modern tribal community after a significant lapse, that "tribe" does not assume the communal property rights of the historic tribe, because individual descendents cannot possess those rights. *See, e.g., Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 913 (Ct. Cl. 1963) ("Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendents who are no longer members of the group.") (listing cases).

The OIN, like the tribal plaintiffs in *Cayuga*, has not had a continuous tribal existence—each has had substantial periods where it simply did not exist as a tribal community. For this reason, and the reasons set forth below, this Court should reverse the judgment of the Second Circuit and, if appropriate, remand this case to the district court for a factual determination of whether the OIN may prove its "tribal status," including whether it has been in continuous existence.

ARGUMENT

The question of tribal status has two analytically distinct components. The first is whether a particular group of Indians presently constitutes a "tribe," and is eligible to receive federal benefits. The second is whether that tribe is the same entity as the historic tribe, and is eligible to assert historic claims. *See generally Washington, supra*, (distinguishing between present tribal status and historic tribal status). Even assuming the OIN presently constitutes a tribe, it was error for the *Sherrill* court to uphold the OIN's assertion of historic reservation rights absent evidence that the OIN is the same tribal entity as the historic entity.

I. IN ORDER FOR A MODERN TRIBE TO ASSERT HISTORIC PROPERTY RIGHTS, A COURT MUST REQUIRE PROOF THAT THE MODERN TRIBE IS THE SAME ENTITY AS THE HISTORIC TRIBE.

In order to assert a historic tribe's rights in land, a modern tribe must prove that it is the same entity as the historic tribe. *Washington*, 641 F.2d at 1371. In *Washington*, the plaintiff tribe sought fishing rights reserved in a treaty between the alleged predecessor of the tribe and the United States. *Id.* at 1370. The Ninth Circuit held that the plaintiff tribe had to prove that it was the same tribe as the one named in the treaty, even where it was undisputed that the individual members were descendents of the historic tribe. 641 F.2d 1368, 1370-73 (9th Cir. 1981).

Likewise, the court in *United States v. 43.47 Acres of Land* held that, absent proof that the plaintiff tribe was the same entity as the historic tribe that allegedly held an interest in land, it did not have standing to oppose a condemnation proceeding as violative of the ITIA. *See* 855 F. Supp. 549, 551 (D. Conn. 1994). The court concluded:

> Those here claiming to be entitled to cloak themselves with the mantle of the Schaghticoke Tribe are put to the test of establishing entitlement. The question is not whether that Tribe is an Indian tribe for purposes of the Act. The question is whether those who have here invoked its name are, or are qualified to represent, the Schaghticoke Tribe.

Id. at 552. The question that the *Sherrill* court refused to take up is whether the OIN is, or is qualified to represent, the historic Oneida Nation.

The decisions in *Washington* and *43.47 Acres of Land* are consistent with the communal nature of Indian treaty and property rights. Indian title is a possessory right, *see United States v. Cook*, 86 U.S. 591, 592 (1873), held in common by the tribe. *See United States v. Dann*, 873 F.2d 1189, 1195 (9th Cir. 1987); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1236 (4th Cir. 1974). Individual members of the tribe do not hold title and have no enforceable rights in tribal property.[7] *See*

---

[7] Indeed, individual Indians do not have standing to bring claims under the ITIA. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994); *Dann*, 873 F.2d at 1195; *Epps v. Andrus*, 611 F.2d 915, 918 (1st Cir. 1979).

Crowe, 506 F.2d at 1234 (noting "established principle that lands belong to Indian tribe as a community and not to members severally or as tenants in common") (citing *Sizemore v. Brady*, 235 U.S. 441, 446 (1914)); *Holt v. Commissioner of Internal Revenue*, 364 F.2d 38, 41 (8th Cir. 1966) ("No individual Indian has title or an enforceable right in tribal property.") (listing cases); *Minnesota Chippewa Tribe*, 315 F.2d at 913 ("Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendants who are no longer members of the tribe."). If all or nearly all members of the tribe abandon the tribe, the tribal entity disappears. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (listing cases). Because the land is held by the entity, and the individual members have no interest to take upon its dissolution, if the tribe ceases to exist as a tribe, the tribe's possessory interest disappears and the fee holder takes the right by operation of law.[8]

---

[8] This result is consistent with other well-established principles of Indian land tenure. For example, this Court has held that when a tribe abandons its possessory right, the fee holder takes that right by operation of law. *See, e.g., Cook*, 86 U.S. at 593 (when Indian title is abandoned, possession attaches itself to the fee without further grant). The Court has also noted that a tribe s interest came to an end when right of continued use was abandoned. *See Williams v. City of Chicago*, 242 U.S. 434 (1917).

II. THE TRIBAL STATUS ANALYSIS IN *SHERRILL* WAS ERROR BECAUSE THE COURT DID NOT REQUIRE PROOF THAT THE MODERN OIN IS THE SAME ENTITY AS THE HISTORIC ONEIDA NATION.

The Second Circuit in *Sherrill* held that the tribal status question turns on whether a group of Indians is recognized by the BIA under 25 C.F.R. § 83.7 for purposes of eligibility for federal Indian benefits. *Sherrill*, 337 F.3d at 166-67. The court summarily held that "it is undisputed that the OIN is federally recognized and the Bureau of Indian Affairs exercises jurisdiction over it." *Id.* The court's restricted inquiry into tribal status was error because tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status for purposes of asserting historic property claims. *See Golden Hill Paugussett Tribe*, 39 F.3d at 57 (distinguishing tribal status for federal benefits and for an ITIA claim).

A. "Federal recognition" is entitled to no weight because the OIN was recognized prior to the promulgation of regulations governing tribal status.

In 1978, the Department of the Interior first promulgated regulations setting forth the criteria and procedures for determining tribal status for purposes of eligibility for federal benefits. *See* 43 Fed. Reg. 3961 (Sept. 5, 1978). These regulations expressly exempted from the new standards those groups "currently acknowledged as Indian tribes" at that time by the

Department of the Interior; the OIN, as well as the tribal plaintiffs in *Cayuga*, were among those exempted. 25 C.F.R. § 88.3; *see also* 59 Fed. Reg. 9280 (1994) (describing the history of BIA recognition procedures). As a result, the BIA has never subjected the OIN to an analysis of its status as a successor to the historic Oneida tribe, and judicial deference to the BIA's determination is inappropriate. *See Golden Hill*, 39 F.3d at 59-60 ("Before the promulgation of the [1978] acknowledgment regulations there did not exist a uniform, systematic procedure to determine tribal status within the Department of the Interior. Therefore, deferral of the issue of the tribal status was not required *nor would it aid a court in its determination.*") (emphasis added).[9]

Indeed, in *Sherrill*, Judge Van Graafeiland makes this very point in his dissent. He suggested that the court's reliance on BIA recognition was misplaced because, among other reasons, recognition was granted to the OIN prior to the creation of the BIA regulations:

> In describing the BIA tribal recognition process prior to the passage of these regulations, the First Circuit has stated that the BIA 'has not historically spent much

---

[9] Respondents may attempt to distinguish *Golden Hill* because it involved a tribe that was not already federally recognized. Because the issue in that case was whether the litigation should be stayed pending a BIA determination regarding the Golden Hill Paugussetts federal recognition, however, the Second Circuit squarely addressed the question of what implications such recognition, *if obtained*, would have on the tribe s standing under the ITIA. The court analyzed when, and whether, BIA recognition of a tribe informs the tribal status inquiry precisely the same question at issue here. Thus, any such contention by the OIN is meritless.

> effort in deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the [BIA] has dealt.' It seems unlikely that the Oneida Indian Nation of New York, volunteered to the BIA any evidence that would have weakened its tribal recognition claim, especially when one considers that they apparently were unresponsive to Sherrill's discovery requests on this issue during litigation. *Our court ought not accept reflexively BIA recognition as dispositive of continuous tribal existence when that recognition was granted before the Bureau had adopted its comprehensive criteria and when the record contains such compelling evidence of tribal dissolution.*

Sherrill, 337 F.3d at 173-74 (citations omitted) (emphasis added).

In contrast to the *ad hoc* determination made with respect to those tribes recognized prior to 1978, several of the "mandatory criteria for federal acknowledgment" found in the BIA's regulations require proof that that petitioning group is the same entity as the historic entity. For example, a petitioning group must demonstrate that:

> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from *historical times until the present.*
>
> ****

> (c) The petitioner has maintained political influence or authority over its members as an autonomous entity *from historical times until the present.*

Id. at § 83.7(b), (c) (emphasis added). Thus, for those tribes, like the OIN, whose "recognition" predates the BIA regulations, the question of whether an aggregation of Indians is a "tribe" for purposes of federal benefits is analytically distinct from the question of whether that "tribe" is a successor to the historic tribe. Because the OIN has not been subject to an examination of its tribal status, this Court should reverse the decisions of the lower courts and, if appropriate, remand the case for further proceedings to determine the OIN's tribal status.

B. It is the role of the court to determine tribal status.

Golden Hill also instructs that even if the BIA acknowledges a tribe for purposes of federal benefits, the court should make the ultimate judicial determination of tribal status. *Id.* at 58.[10] The court should apply the test enunciated in *Candelaria*, 271 U.S. at 441, "without regard to whether or not the particular group of Indians at issue ha[s] been recognized by the Department of the Interior." *Golden Hill* at 59.

In *Golden Hill*, a group of Indians sued under the NIA to regain possession of alleged aboriginal land in

---

[10] For this reason, the *Sherrill* court cannot be understood to have considered tribal status to be a political question (*see Sherrill,* 337 F.3d at 166), because that would have resulted in the overruling of *Golden Hill sub silentio*, a result not favored by the courts.

Connecticut. When they filed suit, the plaintiffs were not a federally recognized tribe, though they had presented a petition to the BIA seeking recognition. The district court dismissed the action, holding that the plaintiffs were required to exhaust the BIA's administrative procedures before seeking a judicial determination of tribal status under the NIA. *See Golden Hill Paugussett Tribe v. Weicker*, 839 F. Supp. 130, 135 (D. Conn. 1993).

The Second Circuit affirmed, but did so on a different ground. Rather than relying on exhaustion principles, it instead invoked the doctrine of primary jurisdiction to provide the BIA an opportunity to consider the plaintiffs' pending petition for federal recognition. *Golden Hill*, 39 F.3d at 59-61. Importantly, the court concluded that the *Candaleria* test, discussed *infra*, and not the mere fact of federal recognition, governed tribal status, because it was developed "*after* Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs *and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior.*" Id. at 60 (emphasis added) (citations omitted).

In rejecting federal recognition as the exclusive test for tribal status, the *Golden Hill* court acknowledged that BIA resolution of "factual issues regarding tribal status will be of considerable assistance to the district court in ultimately deciding [plaintiffs' claims]." *Id.* at 60. Nevertheless, judicial deference to BIA recognition of tribal status attaches only to *factual findings* made in reaching that conclusion. It does not require a federal court to recognize a plaintiff as a "tribe of Indians" as a matter of

law. *See id.* ("A federal court, of course, retains final authority to rule on a federal statute, but should avail itself of the agency's aid in gathering facts and marshalling them into a meaningful pattern."). In other words, any weight accorded to BIA recognition of tribal status stems not from the recognition itself, but from the factual findings that underlie the recognition. Accordingly, while the "two standards overlap, . . . their application might not always yield identical results." *Golden Hill*, 39 F.3d at 59.[11]

Golden Hill demonstrates that the *Candaleria* test, not mere federal recognition, governs whether the OIN (and, likewise, the tribal plaintiffs in the *Cayuga* litigation) qualify as a "tribe of Indians" under the ITIA. Consequently, the Second Circuit's limited analysis of this issue, which did not recite or apply the *Candaleria* factors, was flawed.

In *Candelaria*, this Court set forth the controlling standard for tribal status. It defined a "tribe" as a (1) a body of Indians of the same or a similar race, (2) united in a community, (3) under one leadership or government, (4) and inhabiting a particular, though sometimes ill-defined, territory. *Candelaria*, 271 U.S. at 441 (*citing Montoya v.*

---

[11] The Second Circuit s reliance in *Sherrill* on *United States v. John*, 437 U.S. 634 (1978) for the proposition that there is no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land, *Sherrill*, 337 F.3d at 165, is misplaced. There, the Court merely noted that, after the removal of the Choctaw tribe from Mississippi, there remained persons in Mississippi who were properly regarded . . . as Indians. *Id.* at 644. The Court never addressed the question raised here: i.e. whether the remnant Indians constituted a valid successor tribal entity such that they could assert a claim based on historic property rights. Consequently, *John* is inapposite.

United States, 180 U.S. 261, 266 (1901)). *See also Golden Hill*, 39 F.3d at 59. A review of the limited record evidence pertaining to tribal status suggests that the OIN would fail to meet the requirements of the *Candelaria* standard.

For example, there is considerable record evidence establishing a lack of Oneida leadership or governance. *Candelaria*, 271 U.S. at 442. This element of the *Candelaria* standard requires a showing that individuals or groups within the alleged tribe exercise influence over "significant elements in the lives of the people," that "people order their lives in response to these leaders' requirements in some significant way," and that such leadership is "passed on in some orderly way." *Mashpee*, 592 F.2d at 583-85. Record evidence shows, however, that the Oneida lacked the requisite tribal governance for much of the 19th century. In *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877), the Northern District of New York observed that the Oneidas no longer had active tribal governance. "Since [the 1830s], [the Oneida] tribal government has ceased as to those who remained in [New York] state. It is true those remaining here have continued to designate one of their number as chief, but his sole authority consists in representing them in the receipt of an annuity which he distributes amongst the survivors." A chief that merely distributes annuity funds does not satisfy the requirement that leadership exert influence over significant elements of people's lives.

Not only had Oneida leadership diminished to the point of irrelevancy by 1877, but by 1891 it had disappeared altogether. Record evidence shows that by 1891 the Oneidas ceased to designate tribal chiefs at all.

The 1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, at 314, stated that "the Oneida have no tribal relations, and are without chiefs or other officers."

The record also suggests that the Indian "community" requirement of the *Candelaria* test cannot be satisfied by the Oneida. *Candelaria*, 271 U.S. at 442. The First Circuit elaborated on the community requirement, stating that "an Indian community is something different from a community of Indians . . . it has some boundary that separates it from the surrounding society, which is perceived as Indian and not merely as neighborhood or territory." *Mashpee*, 592 F.2d at 586. In *Elm*, the Northern District of New York discussed the Oneidas' lack of community. The court stated in 1877 that the Oneidas "do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skin, they are identified with the rest of the population." 25 F. Cas. at 1008. Secondary sources chronicling the history of the Oneidas similarly note the lack of community within the tribe and the "hopeless division among [them]." *See, e.g.*, Laurence M. Hauptman, *Conspiracy of Interests (Iroquois Dispossession and the Rise of New York State)*, (1999).

Several administrative and secondary sources note that the tribe had ceased to exist in New York by the early 20th century. For example, in 1916 the Office of the U.S. Attorney for the Northern District of New York wrote a letter asking the Department of Interior for its view on the status of the Oneida reservation in New York. The Department of Interior Assistant Commissioner of Indian

Affairs responded by writing that "as a tribe these Indians are known no more in that state." Nine years later, in 1925, a letter from an Assistant Commissioner of Indian Affairs to Mrs. Henrietta White, referring to the Oneidas, repeated that "as a tribe these Indians are no longer known in the State of New York." In 1942, Felix Cohen's Handbook of Federal Indian Law discussed the Oneidas and noted that "as a tribe these Indians are known no more in [New York]." *Id.* at 416-17 (1942 ed.).

Finally, even this Court has remarked that by 1876 the Oneidas had lost the indicia of a "tribe" and, as a result, it was "clear" that a certain provision of the ITIA "could have no application" to the group. *See United States v. Joseph*, 94 U.S. 614, 616-18 (1876) (affirming finding that the Indians of the village or pueblo of Taos, New Mexico did not constitute a tribe for purposes of an ITIA claim, and noting that the Oneidas were similarly situated).

Because the district court and Second Circuit failed to analyze whether the OIN is a tribe under the four-part *Candelaria* test or whether they have been a "tribe" since the time of the alleged illegal transactions in the 18th and 19th centuries, if this Court determines that the subject parcels are within an existing Oneida Indian Reservation, the case should be remanded for a hearing on the continuous tribal existence of OIN to allow for the development of a full factual record.[12]

---

[12] Given the Oneidas lack of continuous tribal existence, the OIN would similarly fail to satisfy the BIA s present regulations governing federal recognition of Indian tribes.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the U.S. Court of Appeals for the Second Circuit and, if appropriate, remand this case for a determination of the OIN's tribal status.

Respectfully submitted,

CAYUGA COUNTY AND
SENECA COUNTY, NEW YORK,

By: _____
William L. Dorr
HARRIS BEACH LLP
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800 (Telephone)
(585) 419-8811 (Facsimile)

Daniel J. Moore
Brian Laudadio
Of Counsel

DEFENDANT CLASS OF
LANDOWNERS in *Cayuga Indian Nation of New York v. Pataki*,

By: _____
Gus P. Coldebella
GOODWIN PROCTER LLP
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000 (Telephone)
(617) 523-1231 (Facsimile)

Mark S. Puzella
Of Counsel

Dated: August 12, 2004