No. __-___

IN THE

Supreme Court of the United States

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his official capacity, *et al.*,

Petitioners,

v.

CAYUGA NATION, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005) prohibits New York tribes from unilaterally asserting sovereignty—"in whole or in part"—over fee lands recently purchased in open-market purchases from non-Indians, even though the lands are located within the tribe's historic reservation. Equitable principles sounding in laches, acquiescence and impossibility bar assertions of tribal sovereignty 200 years after the tribe was last in possession of the lands—because to do so would disrupt settled expectations measured in generations. Under *Sherrill*'s laches formulation, state and local governments continue to exercise plenary taxing and regulatory jurisdiction over the fee lands unless and until the federal government takes the lands into trust.

Questions presented:

1. In view of *Sherrill*, whether New York tribes exercise "concurrent" jurisdiction over fee lands within the plenary taxing and regulatory authority of the state and local governments, thereby enabling those tribes to engage in gaming under the Indian Gaming Regulatory Act (IGRA), and cause the same or greater disruptions of settled expectations condemned by this Court in *Sherrill*.

2. Whether fee lands under plenary state and local taxation and regulation (per *Sherrill*) constitute "Indian lands" under IGRA because those lands are located within the Cayugas' historic reservation.

3. Whether the Cayuga Nation's ancient reservation was disestablished.*

*This Court previously granted petitions for certiorari that presented the question "Whether the *Oneida* historic reservation in New York was disestablished or diminished?" *Madison Cty. v. Oneida Indian Nation of N.Y.*, 562 U.S. 960, Docket No. 10-72, October 12, 2010; and "Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneidas' alleged New York reservation?" *Sherrill*, Docket No. 03-855, 542 U.S. 936, June 28, 2004. In neither case did this Court reach the disestablishment/diminishment issue. The present question concerning the Cayugas' ancient reservation warrants review even more so because the Cayugas, unlike the Oneidas, sold all of their lands and removed from central New York, altogether abandoning their claims to the land.

LIST OF PARTIES

The following additional parties are Petitioners in this Court: Bud Shattuck, Village of Union Springs Mayor, in his official capacity; Chad Hayden, Village of Union Springs Attorney, in his official capacity; Board of Trustees of the Village of Union Springs, New York; and The Village of Union Springs, New York.

The following additional parties are Respondents in this Court: Clint Halftown, Timothy Twoguns, Gary Wheeler, Donald Jimerson, Michael Barringer, Richard Lynch, B.J. Radford, and John Does 8-20.

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RELATED PROCEEDINGS

Counsel are aware of no directly related proceedings.

OPINIONS BELOW

The opinion of the court of appeals is reported at 6 F.4th 361 (2d Cir. 2021), and appears in the Petitioners' Appendix ("Pet. App.") 1a to 41a. The opinion of the district court (Pet. App. 44a-105a) is reported at 448 F. Supp. 3d 217 (N.D.N.Y. 2020).

JURISDICTION

The judgment in the court of appeals was entered July 27, 2021. The Village of Union Springs defendants-appellants' petition for panel rehearing was denied August 20, 2021. Pet. App. at 42a-43a.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. History of the Cayugas' Reservation in central New York[1]

The Cayugas ceded all of the lands to New York State and removed from central New York through a series of state and federal treaties, altogether abandoning their lands. The relevant history is summarized below.

The Cayugas fought on the side of the British during the War of Independence, after which a large segment of the Tribe emigrated to Canada, another group moved to western New York to live with the Senecas, and a third group removed to Ohio.

1. Creation of State Reservation in 1789

On February 25, 1789, the State of New York entered into a treaty with the Cayugas still residing in New York whereby the Cayuga ceded all of their lands to the State of New York, as expressed in the treaty's first paragraph: "First, the Cayuga cede and grant all their lands to the people of the State of New York forever." Pet. App. 106a. The first paragraph's cession of all Indian lands to New York State had the effect of extinguishing Indian title to those lands, leaving New York holding the lands in fee simple. The State of New York then retroceded to the Cayugas a specific set-aside of fee lands consisting of a one

[1] The relevant history is set forth in Petitioners' counterclaim (District Court Case No. 5:14-cv-01317, Dkt #103, May 28, 2019). Many of the historical facts are also recounted in *Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485, 487-88 (N.D.N.Y. 1990).

hundred square mile tract (so-called "Original Reservation") surrounding Cayuga Lake for the Cayugas' use and occupancy. Pet. App. 106a-107a. New York State retained the exclusive right to purchase the fee lands that it had set aside for the Cayugas, upon the conclusion of the tribe's occupancy of that land, consistent with the fact New York State held the right of preemption, i.e., the right to claim the underlying fee title upon the end of Indian occupancy.

The February 25, 1789 Treaty was lawfully negotiated by New York State, exercising treaty-making powers that it possessed under the Articles of Confederation. The February 25, 1789 Treaty preceded the first Indian Trade and Intercourse Act by nearly a year, and was completed even before the federal government started functioning. The State of New York lawfully exercised its persisting treaty-making powers to extinguish whatever interests the Cayugas had in the land.

2. "Shadowy" federal reservation overlaid on top of State-created Cayuga Reservation

By Treaty of November 11, 1794 ("Treaty of Canandaigua"), between the United States and the Six Nations, the United States acknowledged that the Cayugas (and Oneidas and Onondagas) held certain reserved lands under state treaty, and the Federal Government promised "that the United States will never claim the same, nor disturb them. . . in the free use and enjoyment thereof." Pet. App. 124a-125a.

The Treaty of Canandaigua did not change the boundaries of the state-created "Cayuga Reservation," or

the title in which the land was held, and did not impair or disturb New York's right of preemption (nor did any later treaty). The Treaty of Canandaigua did not convey to the Cayugas (Oneidas or Onondagas) any interest in land. Indeed, the main objectives of the Treaty had nothing to do with the Cayugas (or Oneida or Onondagas) in central New York. Instead, the United States sought to: (1) reconfirm peace between the United States and the Senecas, in particular over that part of Pennsylvania known as the Erie Triangle and located immediately west of New York State; (2) correct an inadvertent geographical error along the western boundary of New York; and (3) relinquish any rights the United States may have acquired through that error.

U.S. Commissioner Thomas Pickering, who negotiated the Treaty of Canandaigua on behalf of the United States, sent the signed Treaty to the Secretary of War and declared in his transmittal letter that the objects of the Treaty had been obtained with respect to the Erie Triangle, while stating that, "Yet not a foot of land has been given up which by the cession then made the U. States had a right to hold: all that I have relinquished falling within the preemption right of Massachusetts, and lying within the State of New York."

In a subsequent letter to the Secretary of War, Commissioner Pickering acknowledged that the United States had neither title to, nor jurisdiction over those lands since "the whole lay within the jurisdiction of New York." Commissioner Pickering further acknowledged the illusory nature of the Treaty with respect to the United States' promise not to disturb the lands of the Oneidas, Onondagas

and Cayugas when "in fact the subject of the relinquishment was a shadow."

The federal public domain did not exist in New York and in the other Original 13 States which predated the Constitution. Because the United States had no right to lands within the jurisdiction of New York State, the Treaty of Canandaigua could not have created (and did not create) a federal Indian reservation for the Cayugas, Oneida or Onondagas on land over which New York State not only had jurisdiction but also held the right of preemption. At no time did the federal government have any claim to or interest in the land subject to the Cayuga Nation's right of occupancy. That interest resided solely in New York State.

3. Federal agents in New York State assist in state treaty-making and conveyance of Cayuga lands to New York State

The federal government stationed federal Indian agents and subagents in New York from 1792 to 1880. The federal agents and subagents resided with or near the various tribes in New York and were intimately aware of the happenings and activities of the tribes under their supervision, including relations with the neighboring non-Indians.

Until 1824, these agents reported directly to the Secretary of War, and after that, to the Commissioner of Indian Affairs, who was also in the War Department.

Israel Chapin was appointed United States Indian Agent for the Six Nations in or about 1792. He died in March 1795 and was replaced by his son, Israel Chapin, Jr.

Both Chapin Sr. and Chapin Jr. also served contemporaneously as State agents for the purpose of treating with the Oneidas, the Onondagas, and the Cayugas for the purchase of some of their lands for New York State. As early as March 11, 1793, the New York State Legislature enacted a law which appointed Israel Chapin Sr. to serve as a State agent. Israel Chapin Jr. assumed that role upon his father's death.

The New York State legislature subsequently appointed commissioners for the New York Indians, who were granted full power to make agreements or arrangements with the Six Nations respecting conveyance of their lands. Any such conveyed lands were to be held in fee simple and provided for the use of the people of New York State.

The New York State Legislature on April 9, 1795, appointed the Governor and several men to function as agents for the people of New York to make arrangements with the Oneida, Onondaga and Cayuga tribes relative to their lands. The agents were authorized to allot lands to the Indians in severalty if they desired.

New York State proceeded to negotiate a series of treaties by which the Oneidas, Onondagas and Cayugas ceded much or all of their lands.

A federal employee named Jasper Parrish, later appointed a subagent to the Federal Indian Agent, assisted New York State Indian Commissioners inviting Cayugas and Onondagas to a treaty.

4. 1795 State Treaty of Cayuga Ferry

The State of New York and the Cayugas in New York entered into a treaty on July 27, 1795, by which the Cayuga Nation ceded all of the Original Reservation save 3,200 acres contained in a tract of land two miles square and another tract one mile square for its own use and occupation (as well as an additional one mile square tract for use by a sachem named Fish Carrier). Pet. App. 113a.

Federal Indian Agent Israel Chapin, Jr. served as both a Federal and State Indian agent at the time that New York State and the Cayuga Nation negotiated the July 27, 1795 Treaty.

Both Jasper Parrish and Israel Chapin Jr. attended the 1795 treaty ceremony at Cayuga Lake. Israel Chapin Jr. attended as an official representative of the United States. Chapin's signature appears on the 1795 conveyance as the first among ten witnesses.

Following the execution of the July 27, 1795 Treaty, Agent Chapin reported to the Secretary of War that the State of New York had purchased lands from the Cayugas.

The Secretary sent a letter to Agent Chapin in which he expressed his displeasure at learning that representatives of the federal government had assisted with New York's treaty-making with the Cayugas and Onondagas, but the Secretary took no actions to challenge the July 27, 1795 Treaty.

The Federal Government briefly attempted to interfere with New York's treaty-making with the Oneida a few weeks later in 1795, but that "was the last time that the Federal Government would make even a pretense of

interfering with New York's attempts to negotiate treaties for land cessions with any of the New York Indians . . . ." 43 Ind. Cl. Comm. 373, 385 (1978).

Payments to the Cayuga Nation under the 1795 Treaty (and the 1789 Treaty) were to be paid at Canandaigua, Ontario County, New York, to the United States Agent for Indian Affairs.

The federal government had actual knowledge of the 1795 Treaty with the Cayugas.

The lands ceded under the 1795 Treaty were surveyed and sold by New York State with the actual or constructive knowledge of the federal government.

5. Federal removal policy implemented in partnership with New York State

Early in the 1800's, the Federal Government adopted an explicit policy of removing Eastern Indians to the Indian territory west of the Mississippi. Prior to adoption of the explicit federal removal policy, the federal government facilitated and encouraged removal of New York Indians by New York State including by attending state treaty-making ceremonies.

On February 15, 1803, Parrish was appointed to the position of Indian sub-agent to the Six Nations.

On February 26, 1807, Parrish travelled with Cayuga representatives to a negotiation session in Albany, New York.

a. 1807 State Treaty

The Cayuga Nation entered into a treaty with New York State on May 30, 1807, in which the Tribe ceded the

3,200 acres that had been set aside under the 1795 Treaty. Pet. App. 121a. Jasper Parrish attended the signing of the 1807 treaty as the United States Superintendent of Indian Affairs. Parrish signed and witnessed the final 1807 agreement between the Cayugas and the State of New York. Additionally, he transmitted the consideration paid by New York State for the acquisition of the Cayuga land under the 1807 Treaty.

The federal government made no pretense of objecting to the 1807 Treaty, which furthered the national goal of removing Indians from Eastern states.

b. 1838 Treaty of Buffalo Creek

The federal Treaty of Buffalo Creek (Act of Jan 15, 1838, 7 Stat.550) expressed the national government's removal policy, and called for the New York Indians to remove to the western lands upon making satisfactory arrangements for the sale of their lands to New York State. Pet. App. 130a.

Article 10 of the Buffalo Creek Treaty states that the Cayuga Indian tribe "agree[s] to remove from the State of New York to their new homes within five years and to continue to reside there." Pet. App. 138a-139a. No terms for cession of land are provided for the Cayuga because they had no lands left to convey. They agreed to remove from the Seneca Reservation on which they lived.

Because New York State held the right of preemption, the Treaty of Buffalo Creek could not dictate the terms of the sale for any tribe with lands to convey. Moreover, almost all of the Indian lands in New York had already been conveyed to the State of New York by prior state treaties with tacit or explicit federal oversight and approval, and purchased in fee simple by non-Indians.

Thus, Congress could not and did not employ the usual treaty language about cession to the federal government and return of the ceded land to the public domain; nor could Congress identify the sum certain to be paid for the land because the New York Indians had to negotiate the selling price with New York State.

The federal government's documented support for removal of New York Indians in the 1790's and early 1800's, including helping to gather Cayugas to engage in treaty-making with New York in 1795, attending signing ceremonies, and signing and witnessing treaties, together with the federal government's acquiescence to the resulting state treaties with the Cayugas (and practically every other New York State treaty with the Six Nations), renders the Treaty of Buffalo Creek a capstone on what had proved to be an effective state/federal partnership to disestablish, or at least substantially diminish, Indian landholdings in New York, including lands contained within the limits of the 1794 Treaty.

All levels of the federal government in 1838—from the President of the United States, to the members of Congress, to the Secretary of Indian Affairs—and all levels of state government including the Governor of the State of New York, the New York Legislature, and the New York Indian commissioners—not to mention the federal/state Indian agents living among the remnants of the Six Nations remaining in New York—understood that the New York Indians had largely removed to the Indian territories (or Canada) as desired by both the federal government and New York State, and that the federal government had long supported New York State's acquisition of Indian lands; and knew that Indian landholdings had already been

eliminated in the case of the Cayugas and substantially reduced in the case of the Oneidas and Onondagas.

Both New York State and the federal government intended to remove Oneida, Onondaga and Cayuga Indians from central New York and provide their conveyed lands to non-Indians for settlement and development. That was the shared intent of state and federal actors for thirty years leading up to the 1838 Treaty.

Congress, in the Treaty of Buffalo Creek, effectively ratified the prior land acquisitions by New York State by expressly authorizing the State to keep acquiring Indian lands and removing Indians, in furtherance of the federal government's long-standing removal policy and in keeping the federal government's active support of state treaty-making with the Six Nations.

The historical record thus establishes as matter of undisputed fact that the State of New York and the federal government intended the reservations of the Oneidas, Onondagas and Cayugas to be diminished to the extent Indian lands were sold in fee simple to non-Indians, and disestablished if all tribal lands were conveyed to the State and resold to settlers in fee simple.

The historical record further establishes as a matter of undisputed fact that the actions of the State of New York, encouraged and supported by the federal government, disestablished the reservation of the Cayugas by acquiring all of the tribe's lands in New York and then selling them to non-Indians in fee simple.

The Treaty of Buffalo Creek did not mention the "Cayuga Reservation" or any Cayuga lands because none existed in 1838. No one alive in 1838 believed a 64,000-acre

Cayuga Reservation still existed. The Tribe was widely reported to have no reservation. The Tribe itself said it was "without a reservation."

6. Status of Cayugas' "reservation" for past 200 years

From the time the Tribe conveyed its lands to New York State, the lands were held in fee simple as were any other lands located within the territorial sovereignty of New York State and its political subdivisions. For two centuries, the lands conveyed by the Cayugas were not treated as Indian Country—not by the non-Indian settlers who purchased the land from New York State, not by the Executive, Legislative and Judicial branches of New York State, and not by the federal government.

"'[G]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation.'" *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 277 (2d Cir. 2005) (quoting *Sherrill*, 544 U.S. at 202).

For nearly two hundred years the lands were held in fee simple by non-Indians without question as to the land's fee simple absolute title. Generations of non-Indian landowners reasonably believed the "Cayuga Reservation" did not exist other than in a historical sense—a "former" reservation—without present-day legal significance. The non-Indian character of the Cayugas' former reservation area remained undisturbed for two centuries

B. Procedural History

Jurisdictional conflicts have followed the Cayugas' modern-day purchase of fee lands within

the Village of Union Springs, which fall within the Tribe's historic reservation, owing to the Tribe's unilateral assertions of tribal sovereignty in derogation of state and local governance. Each time the Tribe's actions disrupted settled expectations.

1. *Village of Union Springs I*

The first clash occurred when the Cayugas purchased a former auto parts store in the Village and began renovating for its (undisclosed) plan to operate an electronic bingo hall inside it. Pet. App. 16a. The Village sought to stop the renovation work until the Tribe secured the necessary permits. The Tribe instead commenced a federal lawsuit challenging the Village's jurisdiction and resisting any and all local laws, regulations and ordinances that might limit its use and occupation of the fee lands. Pet. App. 16a-17a. The district court first agreed with the Tribe that the fee lands were within Indian country and beyond the regulatory authority of the Village. The Village appealed. Pet. App. 19a.

2. *Sherrill*

While the Village's appeal was before the Second Circuit, this Court decided *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), which held under equitable principles that the Oneida Indian Nation waited too long to challenge New York's governance of fee lands that were once located within the Oneidas' historic reservation. Those lands had been out of the Oneidas' possession for more than 200 years. Citing principles of laches, acquiescence and

impossibility, this Court prohibited the Oneidas from unilaterally asserting sovereignty "in whole or in part" over fee lands recently purchased by the Oneidas in open market purchases from non-Indians. Justice Ginsburg, writing for the Court, concluded that the Oneidas were precluded "from rekindling embers of sovereignty that long ago grew cold," with the passage of two centuries between the Oneidas' last possession of the land as a tribe and its "reacquisition" through open market purchases from non-Indians. *Id.* at 214. *Sherrill* noted that such unilateral assertions of tribal sovereignty over a patchwork of fee lands—and associated assertions of tribal immunity to real property taxes—was disruptive to settled expectations. *Id.* at 200. This Court identified the statutory authority under 25 U.S.C § 465 to take land into trust as "the proper avenue" for the Oneidas to reestablish sovereignty over their former reservation lands. *Id.* at 220-221.

Sherrill expressly acknowledged that the Indian laches equitable bar would apply with even greater force with respect to unilateral assertions of tribal sovereignty to resist state and local zoning and land use regulations—because of the potential for even greater disruption of settled expectations. The *Sherrill* Court expressly cited the then-pending lawsuit between the Cayugas and the Village of Union Springs—the parties now before the Court—as an example of the improper disruption of zoning and land use laws. *Id.* at 220 n.13; *see id.* at 226 n.6 (Stevens, J., dissenting).

3. *Village of Union Springs II*

Following the decision in *Sherrill*, on remand from the Second Circuit, the district court agreed with the Village that it retained intact its regulatory jurisdiction—that the gaming parcel was not in Indian country. Pet. App. 20a-21a. The district court concluded that the Cayugas' efforts to preclude application of the Village's zoning and other local laws was "even more disruptive" than the Oneidas' efforts to avoid the payment of real property taxes. *Id*.

The plenary jurisdiction restored to the Village included an anti-gaming ordinance that prohibited the Cayugas from continuing to use the parcel for gaming. The Tribe had opened its electronic bingo hall during the pre-*Sherrill* district court litigation, and now faced the full panoply of zoning, land use and anti-gaming laws that expressly prohibited its continued operation. Rather than comply with Village laws, the Tribe shuttered its gaming facility and applied to have the gaming parcel taken into trust. Pet. App. 21a.

4. Cayugas' fee-to-trust application

Based on *Sherill's* clear direction to New York tribes to seek restoration of sovereignty through the fee-to-trust process under 25 U.S.C. § 465 (now 25 U.S.C. § 5107), 544 U.S. at 220-221, the Cayugas applied to have the gaming parcel and other fee lands within the Village taken into trust. Pet. App. 20a n.8.

The fee-to-trust application proved unsuccessful over the next ten years (Pet. App. 20a n.8) largely due to internal tribal disputes. The Cayugas once again resorted to self-help to engage in gaming on the fee lands within the jurisdiction of the state and local governments. Pet. App. 21a-22a. In doing so, they unilaterally asserted tribal sovereignty to dislodge the same plenary regulatory authority that the *Sherrill* Court expressly brought within its ruling, and applied by the district court post-*Sherrill* in *Village of Union Springs II*, 390 F. Supp. 2d 203 (N.D.Y. 2005) as necessary to protect settled expectations. Pet. App. 23a.

5. *Village of Union Springs III*

The Tribe nonetheless contended and both the district and circuit courts agreed that—notwithstanding the rule in *Sherrill* prohibiting unilateral assertions of sovereignty "in whole or in part"—the Cayugas exercise a novel, never-before-recognized "concurrent" jurisdiction over the fee lands used for gaming sufficient to satisfy the requirements of the Indian Gaming Regulatory Act (IGRA). Pet. App. 26a-37a (court of appeals); 87a-88a (district court).

This case presents the question of whether the common-law rule of *Sherrill,* applied to bar unilateral assertions of sovereignty by New York tribes to protect settled and justified expectations regarding the enforcement of zoning, land use and other local laws over fee lands, is abrogated any time a tribe claims it is gaming under IGRA—when by its terms IGRA

applies only if the tribe *lawfully* exercises tribal jurisdiction and governmental power over the gaming site, and *Sherrill* by its terms prohibits such unilateral tribal sovereignty in the case of fee lands under state and location jurisdiction. The "proper" resolution of this conflict is for the tribe wishing to engage in Indian gaming under IGRA to first have the lands taken into trust. That is what the Cayugas understood was the "*proper"* course expressed in *Sherrill*. The Cayugas' frustration with their inability to secure such lands owing to its internal leadership disputes is not a basis to ignore *Sherrill* and circumvent the essential step of having its fee lands taken into trust.

6. The violence attending the continued unilateral exercise of tribal sovereignty

The Cayugas' exercise of sovereignty over fee lands in central New York, in violation of *Sherrill*, has been accompanied by episodic violence among tribal members, owing to deep divisions within the Tribe. The internal battles have resulted in public displays of violence on fee lands, to the shock and dismay of the larger community. This has included a midnight raid at gunpoint, bulldozing buildings, and street brawling. JA 1206-1249 (ECF Nos. 140 thru 146); *see Cayuga Nation v. Campbell*, 34 N.Y.3d 282, 305 (2019) (Garcia, J. dissenting) ("This dispute over Nation-held property has raged for five years. The allegations in the present complaint speak of violence, force, and theft, and [the trial court's] earlier decision attests to a lack of respect for court process. It is 'essential in an ordered

society that we 'rely on legal processes rather than self-help to vindicate [our] wrongs.'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION FUNDAMENTALLY MISAPPLIES THIS COURT'S DECISION IN *SHERRILL* AND IN THE PROCESS FEEDS JURISDICTIONAL CONFLICT.

The court of appeals' decision eviscerates *Sherrill* while creating the novel holding that the Cayugas are authorized to engage in gaming on fee lands that, under *Sherrill*, remain under the plenary taxing and regulatory authority of the Village. No court has ever deemed such fee lands to be eligible for Indian gaming under IGRA. Courts recognize such fee lands must first be taken into trust, as *Sherrill* explicitly directs and the Second Circuit concluded in *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 563 (2d Cir. 2016) (quoting *Sherrill*, 544 U.S. at 220-221). As stated by the court of appeals in *Upstate Citizens*, "any tribe seeking to conduct gaming on land must have jurisdiction over that land. [Citation.] 'Jurisdiction,' in this context, means 'tribal jurisdiction'—'a combination of tribal and federal jurisdiction over land, to the exclusion (with some exceptions) of state jurisdiction.' "); *see Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) (holding tribe required to show it lawfully exercises tribal jurisdiction over claimed former reservation lands and remanding

"Indian lands" determination to NIGC); *see also Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1149-1150 (9th Cir. 2020) (concluding tribal jurisdiction was established over non-reservation fee lands under state and local jurisdiction when taken into trust, deeming such jurisdiction to be established by operation of law) (citing *Upstate Citizens*, 841 F.3d at 569).

The court of appeals' decision in *Upstate Citizens* expressly recognized that *Sherrill* stripped tribal jurisdiction from New York's "historic" "ancient" "not disestablished" reservations, rendering the fee lands ineligible for gaming under IGRA: "The Supreme Court has already rejected the [Oneidas'] claim that it may exercise tribal jurisdiction over the Turning Stone land without the Department first taking the land into trust on the Tribe's behalf." *Upstate Citizens,* 841 F.3d at 566.[2]

The Cayugas understood that they needed to take that essential step to restore sovereignty over the fee lands. On the heels of *Sherrill*, the Cayugas applied to have the lands taken into trust, but owing to intense internal tribal disputes that spilled out into open violence in central New York, the Tribe has not succeeded (yet) in their fee-to-trust application. The self-inflicted failure to secure trust land should not excuse that step. Nor does it provide any basis to turn aside *Sherrill* and its teachings, and to reward the

[2] The court of appeals in *Upstate Citizen* analyzed the *Sherrill* /IGRA "Indian lands" issue in connection with a question of Article III standing. Even so, the analysis offered is central to its decision and therefore is not dicta (contrary to view of the lower courts).

Cayugas with the ability to game on fee lands that no other tribe enjoys.

The court of appeals in the case at bar distinguished its prior decision in *Upstate Citizens*, 841 F.3d 556, by saying it involved Class III gaming by the Oneidas versus Class II gaming by the Cayugas. Pet. App. 95a. This is a distinction without a difference. IGRA's requirements of tribal jurisdiction apply equally to Class II and Class III gaming, as the NIGC determined in the case of the Cayugas (*see*, *infra*, at 25-26) and other circuits have held. *See Kansas,* 249 F.3d at 1217 ("One condition for Class II Indian gaming is that such gaming occur only on 'Indian lands within such tribe's jurisdiction.'" (quoting [IGRA] 25 U.S.C. § 2710(b)); *N. Cty. Comm. Alliance, v. Salazar*, 573 F.3d 738, 744 (9th Cir. 2009) (same).

The court of appeals paid little heed to *Sherrill* in recognizing a novel form of "concurrent jurisdiction" over the fee lands in question The court of appeals instead looked to the definition of "Indian lands" under IGRA. It reached its unprecedented ruling by finding that the fee lands owned by the Cayugas satisfy the definition of "Indian lands" under IGRA because the fee lands are located within the limits of the Cayugas' ancient reservation—and IGRA defines Indian lands to include "any reservation." But a reservation that this Court altogether stripped of tribal jurisdiction and sovereignty, as in the case of the Oneidas' and the Cayugas' historic reservations, last occupied by the tribes 200 years ago, is legally unrecognizable as a "reservation" today. *See Upstate Citizens*, 841 F.3d at

564 n.4. Indeed, *Sherrill*'s recognition of an ancient reservation without sovereignty in whole or in part is unique to the jurisprudence addressing Indian reservations. It represents a "dramatic change" in Indian law. *Cayuga Indian Nation*, 413 F.3d at 273. The meaning of "reservation" thus "varies" in context. *See Upstate Citizens,* 841 F.3d at 564 n.4 (noting the different meaning of "reservation" after *Sherrill*).

Authorizing IGRA gaming based on the Cayugas' assertion that the fee lands comprising the gaming parcel are located within the Tribe's ancient so-called "not disestablished" reservation begs the question central to a tribe's eligibility to game under IGRA, as *Upstate Citizen* makes clear: Whether the tribe *lawfully* exercises tribal jurisdiction and governmental power over the gaming parcel. That central question cannot be answered by IGRA, which is not a jurisdiction conferring statute. Nor may a tribe arrogate to itself tribal jurisdiction over fee lands in the name of IGRA. *See Kansas,* 249 F.3d at 1229 ("Thus, an Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist. ") The court of appeals never identified the source of the Tribe's purported lawful exercise of concurrent jurisdiction over the fee lands in the Village.

The court of appeals instead mechanically read "any reservation" within IGRA's "Indian lands" to literally mean "any reservation," without consideration of the stripped tribal jurisdiction that defines New York's ancient reservations under *Sherrill*. In doing so, the court of appeals freed the

Cayugas from ever having to establish tribal jurisdiction over the gaming parcel. The flaws in that interpretation are addressed below in Section II.

The court of appeals' ruling undermines certainty and clarity in the law respecting tribal jurisdiction by extending tribal jurisdiction and governmental power to fee lands that under *Sherrill* admit of no such residual sovereign tribal power. The court of appeals ruling gives New York tribes a playbook for creating jurisdictional conflict when previously all parties understood *Sherrill* meant what it said and directed the tribes to apply to have the fee lands taken into trust.

Sherrill protects justifiable expectations of non-Indian governments and landowners rooted in their undisturbed ownership, possession and use of real property measured in generations and centuries. *See Sherrill,* 544 U.S. at 218.

Review should be granted to prevent the disruption of justifiable expectations protected by *Sherrill*. The fact that the Cayugas, the Village, the courts, the National Indian Gaming Commission, the Department of Interior and federal law enforcement officials have such different understandings of this Court's holding in *Sherrill* illustrates why review is necessary. There are live disputes between two governments fueled by jurisdictional uncertainty, made more contentious by the court of appeals' dismissive treatment of *Sherrill*.

II. THE COURT OF APPEALS' DECISION MISREADS *SHERRILL* AND THE INDIAN GAMING REGULATORY ACT TO FREE TRIBES FROM HAVING TO LAWFULLY EXERCISE TRIBAL JURSDICTION OVER THE GAMING PARCEL.

IGRA does not confer tribal jurisdiction. Rather it requires that any tribe seeking to engage in gaming under IGRA have tribal jurisdiction and governmental power over the gaming parcel, wherever it is located. The NIGC homepage respecting eligibility for gaming under IGRA (collecting "Indian lands opinions") summarizes the statutory requirements as follows:

> Indian tribes may only game on Indian lands that are eligible for gaming under the Indian Gaming Regulatory Act. Such lands must meet the definition of "Indian lands" at 25 U.S.C. § 2703, which requires that the land be within the limits of a tribe's reservation, be held in trust by the United States for the benefit of the tribe or its member(s), or that the land be subject to restrictions against alienation by the United States for the benefit of the tribe or its member(s). *Additionally, the tribe must have jurisdiction and exercise governmental powers over the gaming site.*[3]

The court of appeals misinterpreted "Indian lands" believing that "the relevant definition of 'Indian lands' contains no requirement that a tribe exercise

[3] https://www.nigc.gov/general-counsel/indian-lands-opinions (emphasis added).

jurisdiction or other governmental power over reservation property." Pet. App. 37a. That is not an accurate statement of the law and would come as a surprise not only to the Second Circuit panel in *Upstate Citizens*, but also to the National Indian Gaming Commission, which renders interpretations of "Indian lands" for gaming purposes. To be sure, the definition of "reservation" does not include an *express* requirement that the tribe have jurisdiction over fee lands within its reservation limits, but it is implicit in it—so much so that the NIGC *presumes* such jurisdiction exists for all reservations and therefore does not undertake a "complete jurisdictional analysis." *Buena Vista Rancheria of the Mi-Wok Indians,* NIGC Indian Lands Opinion, June 30, 2005, at 6 ("A tribe is presumed to have jurisdiction over its own reservation. Therefore if the gaming is to occur within a tribe's reservation, under IGRA, we can presume that jurisdiction exists.").

In the case of the Cayugas' gaming parcel on fee lands in the Village, the NIGC concluded tribal jurisdiction was missing under *Sherrill* and adhered to that position from 2005 to 2018, stating that the fee lands had to be taken into trust in order for tribal jurisdiction to be restored to these former reservation lands. It backed off of that position only after the Cayugas unilaterally reopened their gaming facility and urged the NIGC to read a First Circuit case that the Tribe argued changed the *Sherrill* analysis.[4] But

[4] The NIGC appears to have reversed in 2018 its long-held view that *Sherrill* and *Union Springs II* barred the Cayugas from exercising tribal jurisdiction and governmental power,

even then, the NIGC concluded IGRA required tribal jurisdiction to be established over the gaming parcel.

Thus, the lack of an express "tribal jurisdiction" requirement in IGRA's definition of "reservation" does not make that requirement disappear. Its absence actually proves the opposite: that tribal jurisdiction over reservation lands is so intrinsic to every actual, present-day reservation that it is implicit in the definition of "any reservation" and can be "presumed." *Buena Vista*, NIGC Indian Lands Opinion, *supra*, at 6; *see Upstate Citizens,* 841 F.3d at 564 n.4. But as *Sherrill* and *Upstate Citizens* make clear, such tribal jurisdiction is categorically barred in the case of the "former" "historic" "not disestablished" ancient reservations of the Cayugas and Oneidas.

Every conception of a reservation—before *Sherrill*—was rooted in the authority of the tribe to exercise jurisdiction over its lands and its members. Tribes naturally have jurisdiction and governmental power over tribally-owned reservation lands. *See White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 142

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misreading the First Circuit's decision in *Massachusetts v. Wampanoag Tribe of Gay Head* (*Aquinnah*), 853 F.3d 618 (1st Cir. 2017). JA 869 (ECF 131 (SMF No. 82)). That decision is on all fours with *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) which likewise is inapposite to the case at bar. *See* JA 870-873 (ECF 131 (SMF Nos. 84-95)); JA 811-813 (ECF 128 (Affidavit of Brian Schenck)). Both First Circuit decisions pertain to federal land claim settlement acts that set aside trust land for the complainant tribe, with Congress specifying the jurisdiction-sharing arrangement. No such trust land or Congressionally-specified concurrent jurisdiction exist in the case of the Cayuga's ancient reservation under *Sherrill*.

(1980) (tribes exercise "attributes of sovereignty over both their members and their territory"); *State of Alaska v. Native Vill. of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988) ("A tribe exercises its sovereign governmental authority within its tribal territory.") (citing F. Cohen, Handbook on Federal Indian Law 27 (1982 ed.)). Reservation lands are by definition immune to state and local taxation. *McClanahan v. Ariz. State Tax Comm'n*., 411 U.S. 167-170 (1973); *Yakima v. Confederated Tribes*, 502 U.S. 251, 258 (1992). Indeed, the power to tax is the power to destroy. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819). And reservation lands generally lie beyond state and local laws, including land use and zoning laws. *Alaska v. Native Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998); 25 C.F.R. § 1.4; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *Duro v. Reina*, 495 U.S. 676, 696 (1990).

Not only is tribal jurisdiction over tribal lands an essential element of an Indian reservation under this Court's jurisprudence, but numerous federal laws and regulations embody that requirement, together with the equally fundamental requirement that the federal government, through the Bureau of Indian Affairs (BIA), exercise jurisdiction over the reservation land. *See, e.g.,* 33 U.S.C. § 1377(h) (Clean Water Act) and 7 U.S.C. § 2012(n) (Food Stamps); *see also* 18 U.S.C. § 1151 (defining Indian country to include "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government . . . .") (emphasis added).

IGRA's legislative history reflects the core principles that define a reservation as lands set aside for a tribe under its jurisdiction, to the exclusion of state laws. The Senate Report on S. 555, which became IGRA, states:

> It is a long- and well-established principle of Federal Indian law as expressed in the United States constitution, reflected in Federal statues, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of state law on Indian lands, the Congress has required the consent of tribal governments before state jurisdiction can be extended to tribal lands.

S.Rep. No. 446, 100th Cong., Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3075.[5]

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[5] Congress necessarily incorporated into the definition of "Indian lands" under IGRA the prevailing pre-*Sherrill* concept of a reservation complete with tribal jurisdiction over its members and its territory:

"Indian lands" are defined in 25 U.S.C. § 2703(4) as:
(A) all lands within the limits of any Indian reservation; and
(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

Thus, a defining feature of "any Indian reservation" on which gaming can occur is that the tribe has jurisdiction over it, and can exercise governmental power over all or some of the lands within the limits of its reservation, depending on the degree of checkerboarding occurring through allotment and surplus land acts. To be sure, the history of dividing Indian reservations into fragments through federal allotment acts and surplus land acts involving Western tribes created widely varying patterns of landholdings and checkerboarded jurisdiction, which were known to Congress in 1988.

The court of appeals in *Upstate Citizens* correctly noted that "the legal implications of the term [reservation] vary," and stated that, after *Sherrill*, in the case of the "not disestablished" ancient reservations in central New York: "The Supreme Court has held that a state's long-standing exercise of jurisdiction over reservation land can preclude a tribe from reasserting its right to exercise tribal jurisdiction on that reservation land." *Id.* at 562 n.4 (citing *Sherrill*, 544 U.S. at 216-219). In other words, these ancient reservations persist today as a reservation in name only. Properly understood, *Sherrill*'s "ancient" reservations are de facto former reservations—they are not reservations that exist today in any real world sense. The fee lands within those historic reservations can legally become recognized as reservation lands again only through the fee-to-trust process. *See Sherrill*, 544 U.S. at 220-221. That is not what Congress meant when it authorized gaming on "any Indian reservation" in 1988. *See generally BedRoc*

Ltd., L.L.C. v. United States, 541 U.S. 176, 184-85 (2004) (holding that courts interpret terms used by Congress based on contemporaneous understanding at the time of enactment).

No one alive in 1988 could have envisioned an Indian reservation on which the resident Indian tribe is unable to exercise its sovereignty anywhere, "*in whole or in part.*" At no time before *Sherrill* was there ever an Indian reservation where 100% of the reservation lands were held in fee and the tribe was altogether prohibited from exercising its sovereignty over the entirety of its reservation. *Sherrill*'s legal construct of a sovereign-less ancient reservation represents a "dramatic" change in the "legal landscape." *Cayuga Indian Nation,* 413 F.3d at 273. That break in precedent was not anticipated by the courts working on the Oneida and Cayuga cases for thirty years (*Union Springs II*, 390 F. Supp. 2d at 205), and could not have been anticipated by Congress. Under *Sherrill*, tribal jurisdiction and governmental power is precisely what the Oneidas and Cayugas do not possess and cannot exercise with respect to fee lands within their historic reservations, and is precisely what the Cayugas must demonstrate to establish eligibility for gaming under IGRA.

The court of appeals did not analyze the fee status of the lands in question, *Sherill*'s complete bar against the exercise of tribal jurisdiction on fee lands within the limits of ancient New York reservations, and concluded that the Cayugas "not disestablished" reservation fell within the statutory definition of "any reservation." But fee lands that are declared by the

Supreme Court to be under the plenary jurisdiction of New York State and its political subdivisions—and conversely land over which the Cayugas are categorically barred from exercising tribal jurisdiction "in whole or in part"—fail to satisfy any accepted definition of an Indian reservation.

The subject lands have none of the defining legal characteristics of an Indian reservation. They are not (1) under BIA jurisdiction (2) held in trust or restricted fee (3) under tribal jurisdiction or (4) immune from state and local jurisdiction and taxation. Instead, the gaming parcel and other fee lands have been under the taxing and regulatory jurisdiction of New York State and its political subdivisions for 200 years, as this Court found in *Sherrill*. By every measure then, the Cayugas' "not disestablished" reservation is not a recognizable Indian reservation in any factual, practical or conventional legal sense. Rather, in all salient respects it is a former reservation only, correctly expressed by this Court in *Sherrill* (as to the similarly ancient reservation of the Oneidas) to have "once" existed, and is properly referred to as an "historic" and "ancient" reservation. *Sherrill*, 544 U.S. at 202; *id*. at 213.

This Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), addressing state criminal jurisdiction exercised over Indians on the Creek reservation in Oklahoma, has no application to this case. The Supreme Court did not discuss *City of Sherrill*, which remains controlling law with respect to New York ancient reservations. *McGirt* leaves in place the *Sherrill* equitable principles that forbid all New

York tribes from unilaterally claiming sovereignty over fee lands within their historic reservations. Those lands must be taken into trust before the tribes may lawfully exercise tribal jurisdiction and governmental power over them.

III. THE CAYUGAS' HISTORIC RESERVATION WAS DISESTABLISHED LONG AGO.

A. The historical record disproves any intent by Congress to retain a reservation for the Cayugas.

A close partnership existed between the federal government and the State of New York to successfully remove New York Indians two hundred years ago. This included federally-facilitated state treaty-making with the Cayugas that resulted in the sale of their reservation lands and removal from central New York. The Cayuga Reservation was completely converted to state fee lands by 1807. The elimination of Cayuga landholdings as the result of joint federal/state action shows that the "Cayuga Reservation" was long ago disestablished as a matter of historical fact and should be declared disestablished as a matter of law today.[6]

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[6] Two district courts have considered whether the Cayuga Reservation was disestablished; both concluded it was not, citing *Solem v. Bartlett* and noting the absence of an act by Congress to disestablish the reservation. *See Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 260 F. Supp. 3d 290, 307-15 (W.D.N.Y. 2017); *Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 317 F. Supp. 2d 128, 131-33 (N.D.N.Y. 2004), *vacated on other grounds*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005). The court of appeals has repeatedly rejected the contention that the Oneidas' reservation was disestablished or diminished, taking that position both before and after *Sherrill*, and similarly citing *Solem* and the absence of Congressional ratification of the land sales. *See Oneida Indian Nation of N.Y. v. City of*

The policies and practical considerations that underlie the decision in *Sherrill*—specifically the concepts of laches, impossibility and acquiescence rooted in unchallenged non-Indian ownership and governance since the Founding Era—should inform the disestablishment analysis.

The lands in question, as in *Sherrill*, are 99% owned by non-Indians, the population is 99% non-Indian, and the lands have long ago lost any Indian character. Over the generations since the Cayugas last possessed any tribal lands, non-Indians have owned, governed, regulated and developed the land in every way possible.

Two centuries of undisputed non-Indian ownership, occupancy and governance, resting on the mutual understanding of the state, the federal government and the Cayugas, should not be set aside based on the legal premise

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Sherrill, 337 F.3d 139, 158 (2d Cir. 2003), *rev'd and remanded on other grounds sub nom. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Oneida Indian Nation of N.Y. v. Madison Cty., Oneida Cty., N.Y.*, 605 F.3d 149, 158 (2d Cir. 2010), *vacated and remanded as moot sub nom. Madison Cty., N.Y. v. Oneida Indian Nation of N.Y.*, 562 U.S. 42 (2011). In light of the above authority, the Village asserted a counterclaim contending the Cayugas' historic reservation was disestablished but stipulated to its dismissal to conserve resources while preserving the right to appeal in the event of a change in law by this Court. *See* District Court Case No, 5:14-cv-01317, Dkt #111, June 17, 2019. The court of appeals reached the issue of disestablishment in connection with the Village's argument that *Sherrill* effectively disestablished the reservation. Pet. App. 38a-39a. Thus, the Village both by its stipulation and arguments made before the court of appeals preserved the question of reservation disestablishment for purposes of this petition. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (limiting argument in brief did not waive issue but reflected counsel's "sound assessment that the argument would be futile" in light of precedent.) Given the long standing contrary circuit authority involving the Oneidas' reservation, any further argument in the court of appeals would have been futile.

that Congress did not take sufficiently clear action to disestablish the Cayuga Reservation. To do so ignores the historic record and actual treatment of the former reservation area for 200 years.

B. This Court should adopt New York-specific disestablishment standards in light of New York State's right of preemption.

The standards for disestablishment of New York ancient reservations should be tied to the historical fact that New York State held the right of preemption such that Congress could neither provide for cession nor specify compensation.

Existing jurisprudence from this Court addresses the vastly different circumstance where Congress created a federal reservation out of the public domain, and if it desired, could clearly disestablish that reservation by including specific cession language that returned the land to the public domain. *McGirt v. Oklahoma*, __ U.S.__, 140 S. Ct. at 2462 (noting that power to breach a treaty and disestablish a reservation "belongs to Congress alone" and stating that this Court will not "lightly infer such a breach once Congress has established a reservation") (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)); *Solem*, 465 U.S. at 470 ("[O]nly Congress can divest a reservation of its land and diminish its boundaries.") Because no public domain existed in New York State, the federal government could not forge a federal reservation from it. Instead, in the case of the Six Nations and the 1794 Treaty of Canandaigua, the federal government offered vague assurances that were more "shadow" than substance, knowing that their reservations lay within the jurisdiction of New York State.

Any test for disestablishment of the Cayugas' reservation must take into account the practical and legal realities extant in New York State 200 years ago. Looking for talismanic language from Congress about cession is misguided and unwarranted. The federal government did not hold the title underlying Indian occupancy in New York State and thus could not establish the terms of cession for the Cayuga Reservation, including setting payment terms.

The continued existence of a "not disestablished" reservation confounds all stakeholders while fomenting jurisdictional disputes. This includes jurisdictional confusion among federal and state law enforcement officials when "tribal police" conducted a raid under cover of darkness to forcibly oust dissidents from several buildings, all occurring on fee lands under state and local jurisdiction, and leading to the destruction of those buildings. The outbreak of violence—including street brawling—prompted a sharp rebuke from the U.S. Attorney for the Western District of New York who issued a press release (JA 1206, ECF 140) and sent a letter to the Tribe's lawyers (JA 1243-1245, ECF 144); both the U.S. Attorneys for the Western District and Northern District of New York sent a letter to the Sherriff of Seneca County addressing the tribal violence and jurisdictional responsibilities of state and federal law enforcement officials. (JA 1247-1249, ECF 146) Citing the violent outbreak, the Assistant Secretary of Indian Affairs, within the Department of Interior, denied the Cayugas' land-in-trust application on July 21, 2020. Pet. App. 20a n.8.

At the very least, a "serious question" exists as to the disestablishment of the Cayugas' ancient reservation, warranting review. *See Cty. of Oneida v. Oneida Indian*

Nation of N.Y., 470 U.S. 226, 269 n. 24 (1985) (noting "serious question" whether Oneidas abandoned their claim to their aboriginal lands by accepting the terms of 1838 Treaty of Buffalo Creek). This Court twice granted petitions for a writ of certiorari respecting the disestablishment / diminishment of the Oneidas' ancient reservation without reaching the issue. The present case presents the opportunity to reach and resolve the question of whether the Cayugas' ancient reservation was disestablished, based on their complete abandonment of their reservation lands.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated November 17, 2021

APPENDIX

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED JULY 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2020

Argued: May 25, 2021 Decided: July 27, 2021

Docket No. 20-1310-cv

CAYUGA NATION, CLINT HALFTOWN, TIMOTHY TWOGUNS, GARY WHEELER, DONALD EMERSON, MICHAEL BARRINGER, RICHARD LYNCH, B.J. RADFORD, JOHN DOES 8-20,

Plaintiffs-Counter-Defendants-Appellees,

—v.—

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his official capacity, BUD SHATTUCK, Village of Union Springs Mayor, in his official capacity, CHAD HAYDEN, Village of Union Springs Attorney, in his official capacity, BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK, and THE VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants-Counter-Plaintiffs-Appellants.

B e f o r e:

KEARSE, LYNCH, AND CHIN, *Circuit Judges.*

Plaintiffs-Counter-Defendants-Appellees Cayuga Nation (the "Nation") and certain of its officials brought this action against Defendants-Counter-Plaintiffs-Appellants the Village of Union Springs and certain of its officials (the "Village") seeking a declaratory judgment that, as relevant here, the Indian Gaming Regulatory Act ("IGRA") preempts the Village's ordinance regulating gambling as applied to the Nation's operation of a bingo parlor on a parcel of land located within both the Village and the Nation's federal reservation, and for corresponding injunctive relief. The United States District Court for the Northern District of New York (Hurd, *J.)* granted summary judgment to the Nation. We agree with the district court that neither issue nor claim preclusion bars this suit and that IGRA preempts contrary Village law because the parcel of land at issue sits on "Indian lands" within the meaning of that Act.

We therefore **AFFIRM** the judgment of the district court, without reaching the Nation's alternate theories of immunity.

DAVID W. DEBRUIN (Zachary C. Schauf, *on the brief),* Jenner & Block LLP, New York, NY, *for Plaintiffs-Counter-Defendants-Appellees.*

DAVID H. TENNANT, The Law Office of David Tennant PLLC, Rochester, NY, *for Defendants-Counter-Plaintiffs-Appellants.*

GERARD E. LYNCH, *Circuit Judge:*

This case marks the latest installment of a decades-long dispute between the Cayuga Nation (the "Nation"), a federally recognized Indian tribe, and the Village of Union Springs, New York (the "Village"), concerning the Nation's ownership and use of a parcel of land located at 271 Cayuga Street (the "Parcel"), which sits within the bounds of both the Village and the Cayugas' historic reservation. In 2003, the Nation sued the Village seeking declaratory and injunctive relief on the theory that the reunification of the Nation's aboriginal title to the Parcel with the fee title revived the Nation's sovereignty over it so as to preclude the Village's application of its laws to regulate construction occurring there. After initially obtaining a judgment in its favor and while the Village's appeal of that judgment was pending before this Court, the Nation opened a gambling parlor, Lakeside Entertainment ("Lakeside"), on the Parcel. Thereafter, however, we remanded the case to the district court in light of the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197, 221 (2005), which had been decided while the Village's appeal was pending. On remand, the district court vacated its prior judgment, entered judgment for the Village, and dismissed the Nation's complaint. Following that judgment, the Nation shuttered Lakeside.

At least for a time. In July 2013, much to the Village's chagrin (and in apparent violation of its gambling laws), Lakeside reopened for business,

precipitating another round of litigation. Again, the Nation seeks to preclude the application of Village law, but on a different, and narrower, basis than before. Rather than claiming broad immunity based on its assertion of inherent sovereignty, the Nation now argues that Indian Gaming Regulatory Act ("IGRA") preempts the Village's anti-gambling laws. The Village contends that, in light of the prior litigation, preclusion doctrines bar the federal courts from considering the Nation's latest theory and that, in any case, IGRA does not apply to the Parcel because it does not qualify as "Indian lands," which IGRA defines as "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4)(A).

After considering the parties' cross-motions for summary judgment, the United States District Court for the Northern District of New York (David N. Hurd, *J.)* agreed with the Nation. So do we. We therefore affirm the judgment of the district court.

BACKGROUND

The history of relations between and among the federal and state governments (and their respective predecessors) and the indigenous peoples of North America, and the changing legal regimes that have governed those relations, is far too complex and lengthy a topic to be described in detail within the confines of a single judicial opinion. Nevertheless, because it is difficult to understand the issues presented in this appeal without at least

some appreciation of the context underlying the dispute, we begin with a brief, and necessarily incomplete, recitation of that history, drawing primarily from statutory history as well as prior decisions of the Supreme Court and of this Court. We then turn to the operative facts of this case, as established in the summary judgment record.

A. Historical Background

Prior to European settlement of North America, the Nation, one of the six tribes of the Haudenosaunee Confederacy (also known as the Iroquois Nations),[1] lived on lands now comprising, *inter alia,* central New York. In February 1789, weeks before government under the Constitution began, members of the Nation entered into a treaty with New York whereby the Nation ceded all of its land to the State save for approximately 64,000 acres (the "Cayuga Reservation"). *See Cayuga-Indian Nation of N.Y. v. Pataki,* 413 F.3d 266, 268 (2d Cir. 2005). In 1794, amidst rising federal concern over the potential for rekindled hostilities between the Haudenosaunee Confederacy and the young United States, the federal government and the Confederacy concluded the Treaty of Canandaigua; as is relevant here, that treaty formally recognized the Cayuga Reservation and provided that "the United States will never claim the same, nor disturb them or

[1] The others being the Oneidas, the Mohawks, the Senecas, the Onondagas, and, as of the early 18th century, the Tuscaroras. *See Cayuga Indian Nation of N.Y. v. Pataki,* 413 F.3d 266, 268-69 n.1 (2d Cir. 2005).

either of the Six Nations . . . in the free use and enjoyment thereof." Acts of Nov. 11, 1794, art. II, 7 Stat. 44,. The federal government today recognizes the Nation as the same entity with which it concluded the Treaty of Canandaigua.

The promises in the Treaty of Canandaigua were backed up, at least in theory, by the provisions of the Indian Trade and Intercourse Act, commonly referred to as the Nonintercourse Act. Passed in 1790 pursuant to Congress's authority under the Indian Commerce Clause of the Constitution, the Nonintercourse Act provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." Acts of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138.[2] Despite these statutory protections for native lands, however, New York purchased the entirety of the Cayuga Reservation in two transactions conducted in 1795 and 1807. *See Pataki,* 413 F.3d at 269. The United States neither ratified nor interfered with these transactions. *See id.* As is important for present purposes, however, the

[2] The Nonintercourse Act remains on the books today. Amended over the course of the Nation's history, its present iteration states, in relevant part, that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177

Village concedes that no Act of Congress has disestablished the Cayuga Reservation in the intervening centuries. *See, e.g., McGirt v. Oklahoma,* 140 S. Ct. 2452, 2462 (2020) ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.").

The Nonintercourse Act and the Treaty of Canandaigua were representative of federal Indian policy in the early days of the United States, commonly referred to as the "treaty era." In broad terms, the treaty era was characterized by the establishment of treaties whereby a tribe would cede much of its territory while retaining a small reservation over which the tribe would, at least in theory, be permitted to exercise sovereignty without state interference. *See generally* F. Cohen, Handbook of Federal Indian Law § 1.03 (2012) ("Handbook").[3] That policy persisted until the latter

[3] Though the overarching policy of forming treaties with tribes to establish reservations persisted until at least the end of the Civil War, beginning in the first half of the 19th Century, national expansion led to an increased use of the treaty process to remove eastern and southern tribes onto newly created western reservations. The best known example of this practice was the forcible removal of members of Cherokees, Muscogee, Seminole, Chickasaw, and Choctaw tribes to land in modern-day Oklahoma. Some Cayugas who left New York with members of other Iroquois tribes following the Treaty of Canandaigua and subsequent transactions with New York were ultimately removed to Oklahoma as well; today, they comprise part of the federally recognized Seneca-Cayuga Tribe of Oklahoma. *See Cayuga-Indian Nation of N.Y. v. Carey,* No. 80-cv-930, 1981 WL 380694, at *2-4 (N.D.N.Y. Nov. 9, 1981).

half of the 19th century and formally came to an end with the passage of the Indian Appropriations Act of 1871. Acts of Mar. 3, 1871, ch. 120, 16 Stat. 544. That act, though affirming then-existing treaty obligations, provided that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." *Id.* at 566, codified at 25 U.S.C. § 71.

The conclusion of the treaty era marked the beginning of the allotment era, which saw a shift in federal policy from forced segregation to forced assimilation of Native Americans, culminating in the passage of the General Allotment Act of 1887, commonly referred to as the Dawes Act after its sponsor, then-Senator Henry Dawes of Massachusetts. Acts of Feb. 8, 1887, ch. 119, 24 Stat. 388; *see also* Handbook § 1.04. The Dawes Act was intended to facilitate "the eventual assimilation of the Indian population and the gradual extinction of Indian reservations and Indian titles." *Montana v. United States,* 450 U.S. 544, 559 n.9 (1981) (cleaned up). To that end, the Dawes Act authorized the President to divide existing reservation lands into "allotments" for individual tribal members, "whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes." Dawes Act § 1, 24 Stat. at 388. The allotments were to be held in trust for allottees by the United States for 25 years, after which alienable title would be conveyed to the allottees in fee simple. Dawes Act § 5, 24 Stat. at 389; *see also*

United States v. Pelican, 232 U.S. 442, 446 (1914). The Dawes Act also permitted reservation land not allotted to tribal members to be sold to the federal government, which, in turn would sell the land to non-Indian settlers. Dawes Act § 5, 24 Stat. 389-90.

In 1906, Congress amended the Dawes Act to permit the Secretary of the Interior to "at any time . . . cause to be issued to [an] allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." Acts of May 8, 1906, ch. 2348, 34 Stat. 183. Thereafter, Congress passed a series of acts concerning the allotment and division of surplus lands on individual reservations. *See, e.g., Solem v. Bartlett,* 465 U.S. 463, 469-70 n.10 (1984) (discussing specific surplus lands acts). The net effect of these efforts was to reduce tribal land holdings from approximately 156 million acres in 1881 to 48 million acres in 1934. *See* Handbook § 1.04; *see also Hodel v. Irving,* 481 U.S. 704, 706-09 (1987) (recounting history of allotment era and resultant harm to tribal land interests).

The most recent shift in federal policy towards Native Americans came with the passage of the Indian Reorganization Act ("IRA") in 1934, which marked the formal end of the allotment era. *See* Pub. L. No. 73-383, ch. 576, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 *et seq*. "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973),

quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934). Among its many provisions, the IRA prohibited future allotments, restored surplus lands to tribal ownership, authorized the purchase (or repurchase) of land within or without the borders of existing reservations to be held in trust by the federal government for the benefit of tribes and the creation of new reservations, exempted tribal trust land from state and local taxation, and restored tribal sovereignty. *See generally* IRA §§ 1-19, codified as amended at 21 U.S.C. § 5101-5110. Though the IRA has been amended and supplemented in the years since its enactment, federal-state-tribal relations continue to operate under its broad framework.

Following the passage of the IRA and the quasi-restoration of the reservation system, the issue of whether and to what extent allotment-era policies had worked to diminish reservations established by treaty was a frequent topic of litigation. The Supreme Court, while acknowledging that the allotment-era Congress "anticipated the imminent demise of the reservation and, in fact, passed the [surplus lands] [a]cts partially to facilitate that process" and, accordingly, had "failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off [a] reservation," nonetheless has held that the division and allotment of tribal lands did not by itself terminate existing treaty reservations. *Solem,* 465 U.S. at 468-69.

Instead, the Court has held that, because only Congress holds the power to establish and termi-

nate reservations, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470, citing *United States v. Celestine,* 215 U.S. 278, 285 (1909). Accordingly, treaty reservations persist unless Congress "clearly evince[s] an intent to change [their] boundaries" through legislation. *Id.* (citation and internal quotation marks omitted); *compare also, e.g., Mattz v. Arnett,* 412 U.S. 481, 506 (1973) (1892 act opening Klamath River Reservation to settlement under Homestead Act did not disestablish reservation) *with, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 597-98 (1977) (language in 1904 act providing that Rosebud Sioux Tribe "do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted" disestablished reservation). Or, as the Court put it more recently, "[i]f Congress wishes to break the promise of a reservation, it must say so." *McGirt,* 140 S. Ct. at 2462. Accordingly, many reservations persist today notwithstanding that much of the land within them has long since left tribal hands; for example, much of northeastern Oklahoma, including most of the City of Tulsa, remains the Creek reservation, though nearly all of the land comprising it is owned by non-Indians. *See id.*

Separately, as will become relevant in this case, in the wake of the Supreme Court's decision in

Bryan v. Itasca Cty., 426 U.S. 373 (1976), in which the Court reaffirmed that states generally lack authority to regulate Native Americans on reservation land, tribes began experimenting with gambling facilities as a means of generating revenue. *See* Handbook § 12.01. By the 1980s, tribal gaming had become both a significant source of revenue for many tribes and a considerable source of tension between tribes running gambling operations and the governments of the states in which their reservations were located. *See id.* Against that backdrop, Congress enacted IGRA in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Pub. L. No. 100-497, § 3, 102 Stat. 2467, codified at 25 U.S.C. § 2702(1). IGRA preempts all state and local regulatory authority over certain classes of gambling conducted on "Indian lands," defined, in relevant part, as "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4)(A). Most importantly for the present case, IGRA's regulatory and preemption scheme extends to the type of electronic bingo that the Nation offers customers at Lakeside, which falls within the statutory category of class II gaming.[4] *See id.*

[4] "IGRA divides gaming into three classes, subjecting the classes to varying degrees of regulatory control." *United States v. Cook,* 922 F.2d 1026, 1033 (2d Cir. 1991). Class II gaming includes, in relevant part, "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto,

§ 2703(7) (defining "class II gaming"); § 2710(a)(2) ("Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter."). In short, the tribes decide whether to undertake class II gaming, subject to regulation by the federal government, not the states.

B. Prior Litigation and The Sherrill *Decision*

Perhaps because the affected tribes were dispossessed of their lands long before allotment even began, no allotment era legislation (nor any legislation passed since) disestablished the Cayuga Reservation or any of the other reservations established through the Treaty of Canandaigua, including the Oneida Nation's reservation (the lands comprising which New York State acquired in the early 19th century, again without federal ratification). *See Oneida Indian Nation v. Oneida Cty.,* 719 F.3d 525, 528-29 (2d Cir. 1983). Accordingly, beginning in the 1970s, the Cayuga and Oneida Nations (along with other tribes, discussion of which we omit) filed a series of cases in federal court seeking

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punch boards, tip jars, instant bingo, and other games similar to bingo." 25 U.S.C. § 2703(7)(A). Contemporary electronic bingo machines such as those featured at Lakeside, outwardly resemble slot machines (which fall within the more stringently regulated category of class III gaming, *see id.* §§ 7(B), 8) but determine results differently from standard slot machines. *See generally, e.g., United States v. 162 MegaMania Gambling Devices,* 231 F.3d 713 (10th Cir. 2000) (examining similar class II gaming device and holding that it was not class III slot machine).

various remedies under the theory that the transactions through which New York acquired their respective reservations were void *ab initio* because they violated the Nonintercourse Act. The Oneida Nation first pursued—and ultimately succeeded on—a fairly narrow claim for damages in the form of fair-market rental value for the land comprising its reservation for the two years prior to the initiation of its action. That dispute wound up before the Supreme Court twice. In its first decision, the Court reversed the district court's dismissal for lack of federal jurisdiction. *See Oneida Indian Nation v. Oneida Cty.,* 414 U.S. 661, 665 (1974). In its second decision, the Court affirmed that the Oneida Nation could pursue a claim for wrongful dispossession while leaving open "[t]he question [of] whether equitable considerations should limit the relief available to the present day Oneida Indians." *Oneida Cty. v. Oneida Indian Nation,* 470 U.S. 226, 253 n.27 (1985).[5]

Building on this early success, the Oneida Nation pursued another strategy to reassert its rights over its historic reservation: purchasing land within the

[5] The Cayuga Nation filed a separate action seeking considerably broader relief including, *inter alia,* a declaration of its ownership rights over the Cayuga Reservation, ejectment, and trespass damages in the form of fair rental value from the time of the Nation's dispossession through the date of judgment. *See Cayuga Indian Nation of N.Y. v. Cuomo,* 565 F. Supp. 1297, 1306 (N.D.N.Y. 1983). That action remained pending for over two decades and was ultimately resolved in the State's favor following the Supreme Court's decision in *Sherrill,* discussed *infra. See Pataki,* 413 F.3d at 268.

reservation's bounds in open market transactions. The Oneida Nation then refused to pay local property taxes levied on the properties it had purchased on the theory that its repurchase of the properties had unified the fee titles to the properties with the Oneida Nation's aboriginal title and thus worked a restoration of its sovereignty to the exclusion of local regulation. In February 2000, the Oneida Nation sued the City of Sherrill, which was attempting to evict the Oneida Nation from one such property for unpaid taxes, in the Northern District of New York. The Oneida Nation sought a declaration that the parcel in question qualified as "Indian country" within the meaning of the Major Crimes Act, 18 U.S.C. § 1151 *et seq*. (the "MCA"), and was thus exempt from state and local taxation.[6] *See Oneida Indian Nation of N.Y. v. City of Sherrill,* 145 F. Supp. 2d 226*,* 237 (N.D.N.Y. 2001). That case (along with other related cases

[6] The MCA defines Indian country as, in relevant part, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. Although the MCA itself governs the prosecution of certain crimes committed in Indian country, the Supreme Court has recognized that its definition of Indian country "generally applies as well to questions of civil jurisdiction." *DeCoteau v. District Cty. Ct. for Tenth Judicial Dist.,* 420 U.S. 425, 427 n.2 (1975) (citations omitted). Accordingly, it has long been the rule that tribal land in Indian country is not subject to state or local taxation. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458 (1995) (collecting cases).

with which it was consolidated) was assigned to Judge Hurd, who, in 2001, entered judgment for the Oneida Nation on the tax immunity claim. *Id.* at 267-68. In 2003, a divided panel of this Court affirmed that judgment. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 145-46 (2d Cir. 2003). The City of Sherrill petitioned the Supreme Court for a writ of certiorari, which the Court granted in June 2004. *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 542 U.S. 936 (2004) (granting petition for writ).

While that case was wending its way through the judicial system, the Cayuga Nation pursued similar efforts, which we recount in greater detail. Beginning in 2002, the Nation began purchasing properties within the bounds of the Cayuga Reservation in open-market transactions. In April 2003, the Nation purchased the Parcel, which had most recently been used as an auto parts store. In early October 2003, the Cayugas appointed a tribal code officer and began construction on the Parcel; the Nation did not consult the Village or otherwise engage in the ordinary permitting process established by state and local law before beginning construction. Soon after the Nation began construction, the Village issued a series of stop work orders citing the lack of required permits. The last such order was dated October 15, 2003.

On October 19, 2003, the Nation sued the Village, the Town of Springport, and the County of Cayuga in the Northern District of New York. *See* Complaint, *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs,* No. 03-cv-1270 (N.D.N.Y. Oct. 19,

2003), ECF No. 1 (the "2003 Complaint" and "2003 Litigation"). The 2003 Complaint sought a declaration that the Village's attempts to regulate the Nation's activity on the Parcel "violate the 1794 Treaty of Canandaigua; the Nation's sovereignty, which derives from Article I, Section 8 and Article II, Section 2, Clause 2 of the United States Constitution and from federal common law, and the Non-intercourse Act (25 U.S.C. § 177); and 25 C.F.R. 1.4" *id.* ¶ 32, and an injunction against future enforcement actions. That complaint did not reference IGRA or any plans to conduct gambling on the Parcel. In its answer and counterclaim, the Village alleged that "the Village Clerk received an anonymous telephone call indicating that the Nation was planning on opening a gaming operation on the [Parcel]." 2003 Litigation, ECF No. 9 ¶ 86. The case was assigned to Judge Hurd, who had also presided over the Oneida Nation's tax immunity case.

On November 12, 2003, the Nation adopted a class II gaming ordinance, a prerequisite for tribes seeking to operate class II gaming facilities on Indian land under IGRA. *See* 25 U.S.C. § 2710(b)(1)(B). Six days later, the National Indian Gaming Commission ("NIGC"), the agency within the Department of the Interior that regulates IGRA gambling, approved the Nation's gaming ordinance. On December 11, 2003, the Nation moved for summary judgment. The following month, the NIGC's acting general counsel sent a letter to the Village's then-Mayor advising him that the NIGC had approved the Nation's gaming ordinance.

On February 10, 2004, the Village cross-moved for summary judgment in that action or, in the alternative, for a preliminary injunction barring the Nation from operating a class II gaming facility on the Parcel until the Nation had complied with IGRA. The Village also argued that, assuming it could not generally regulate the Parcel without infringing upon the Nation's sovereignty, the Parcel's proximity to a school coupled with the Nation's apparent plans to open a gaming facility thereon constituted exceptional circumstances justifying the application of local law.[7] This marked the first appearance of IGRA in the 2003 Litigation. The Nation argued in opposition that the Village had no standing to seek relief under IGRA and that exceptional circumstances did not exist because IGRA provides a comprehensive federal regulatory scheme that would govern any gaming that might occur on the Parcel.

On April 27, 2004, the district court granted summary judgment to the Nation, reasoning that the Parcel qualified as "Indian country" within the meaning of the MCA and, accordingly, was exempt from state jurisdiction. *See Cayuga Indian Nation of N.Y. v. Vill. of Union Springs,* 317 F. Supp. 2d 128 (N.D.N.Y. 2004) *("Union Springs I").* The dis-

[7] Though states broadly lack authority to regulate the activity of tribal members on reservation lands, the Supreme Court has held that "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 331-32 (1983), citing *Puyallup Tribe v. Washington Game Dept.,* 433 U.S. 165 (1977).

trict court further agreed that the Parcel's proximity to a school was not an exceptional circumstance because "[t]he Nation correctly points out that it is governed by IGRA, which preempts state and local attempts to regulate gaming on Indian lands and thus, such a consideration is irrelevant here." *Id.* at 148. The district court further denied the Village's motion for a preliminary injunction because it had not made the requisite showing of irreparable harm. *Id.* at 149-50.

On May 31, 2004, while the Village's appeal of that decision was pending, the Nation opened Lakeside and began conducting class II gaming on the Parcel. The NIGC exercised its authority to regulate gaming at Lakeside, conducting regular site visits and requiring the payment of quarterly fees.

On March 29, 2005, however, the Supreme Court reversed this court's decision in the Oneida Nation's tax immunity case. *See Sherrill* 544 U.S. at 221. Though the Court did not disturb the conclusion that the Oneida Nation's reservation qualified as Indian country within the meaning of the MCA, it concluded that permitting the Oneida Nation to revive "present and future Indian sovereign control, even over land purchased at market price, would have disruptive practical consequences." *Id.* at 219. Accordingly, the Court held that the tribe's "long delay in seeking equitable relief against New York or its local units . . . evoke[d] the doctrines of laches, acquiescence, and impossibility, and render[ed] inequitable the piecemeal

shift in governance [that] suit [sought] unilaterally to initiate." *Id.* at 221.[8]

Thereafter, we remanded the Village's still-pending appeal of *Union Springs I* for reconsideration in light of *Sherrill*. The Village did not invoke IGRA in its brief on remand and instead took the position that, under *Sherrill,* it was entitled to apply its laws to all activities on the Parcel. The Nation endeavored to distinguish *Sherrill* but did not invoke IGRA except to emphasize that it had not brought a claim under IGRA, that it was not seeking relief under IGRA, and that no IGRA-related issues were before the district court. The Nation also did not make any arguments specifically related to Lakeside or to gambling. Ultimately, the district court concluded that the Nation's efforts to preclude the application of zoning and other local land use laws was "even more disruptive" than the Oneida Nation's efforts to avoid the payment of

[8] In dictum, the Court observed that "Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land 'shall be exempt from State and local taxation.'" *Id.* at 220, quoting *Cass Cty. v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 114-15 (1988). Perhaps stimulated by this dictum, weeks after *Sherrill* was decided, the Nation applied to the Department of the Interior to have the Parcel and other lands within its reservation taken into trust. The Department ultimately denied the application in July 2020. *See* July 31, 2020 Letter from Tara Sweeney to Clint Halftown, Dkt. No. 75.

local taxes and, accordingly, vacated the prior judgment entered for the Nation and entered judgment for the Village. *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs,* 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) *("Union Springs II").* The Nation did not appeal, and Lakeside shut its doors.

B. Subsequent Developments and The Proceedings Below

Some years later, the Nation determined that it was time to try its hand at gaming again. On May 30, 2013, the Nation informed the NIGC that it had renewed Lakeside's class II gaming license and, in accordance with NIGC regulations, provided the agency with various environmental, public health, and safety attestations as well as background check materials on various employees. On July 3, 2013, Lakeside re-opened for business. That same day, the Nation, through its counsel, wrote to various state and local officials advising them of Lakeside's reopening and of the Nation's position that the class II gaming that the Nation would offer at Lakeside was governed by IGRA to the exclusion of state and local regulation because Lakeside sat on "Indian land" as defined therein.

Six days later, the Village issued the Nation an order to remedy zoning violations premised on the Nation's operation of a bingo facility without a Village-issued license in violation of a 1958 games of chance ordinance (the "1958 Ordinance"). On August 8, the Nation wrote Defendant-Appellant Howard Tanner, Union Springs' zoning officer,

requesting the issuance of a certificate of occupancy. Tanner responded by letter seeking additional information and advising that the 1958 Ordinance required the Nation to seek a license to run a bingo operation. The Nation submitted a new application for a certificate of occupancy that addressed the issues that Tanner had identified save for the alleged violation of the 1958 Ordinance the following December. Four days after that, the Village served additional orders to remedy citing the Nation's lack of a certificate of occupancy authorizing a change in use of the Parcel and the Nation's purported violation of the 1958 Ordinance.

On February 21, 2014, Tanner visited Lakeside and identified three building code issues. The Nation addressed the identified issues, and on a March 7 return visit, Tanner advised representatives of the Nation that Lakeside met code standards for fire/life safety. On March 24, however, Tanner sent a letter advising the Nation that he could not issue a certificate of occupancy for Lakeside because it was in violation of the 1958 Ordinance and because the Nation had not obtained a use variance. Shortly thereafter, the Nation, through counsel, responded by letter setting forth its position that it need not obtain a use variance under local zoning law and, in any event, to the extent that the Village believed that the use variance was required under the 1958 Ordinance, IGRA preempted that requirement. On October 27, the Village advised the Nation of its intent to take enforcement action against Lakeside and Nation officials.

The next day, the Nation and its officials (then styled as John Doe Plaintiffs) brought this action against the Village, its board, and various Village officials in the Northern District of New York, where the matter was assigned to Judge Hurd. The Nation sought a declaration that: (1) the 1958 Ordinance is preempted by IGRA, (2) even if the 1958 Ordinance itself is not preempted by IGRA, IGRA's criminal enforcement provisions vest the federal government with exclusive jurisdiction to enforce the 1958 Ordinance, and (3) any civil action against the Nation or its officials to force compliance with the 1958 Ordinance would be barred by sovereign immunity. The Nation also sought injunctive relief precluding the Village from taking further action against it or its officials. Soon after filing the complaint, the Nation sought and obtained a temporary restraining order, which the parties extended by joint stipulation throughout the course of the action.[9]

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[9] Early on in the litigation, The Cayuga National Unity Council, which claims to be the legitimate leadership of the Nation, moved to intervene and have the suit dismissed. Although the Council was denied leave to intervene, the district court granted the Village's early motion to dismiss, reasoning that the Nation's standing to sue on behalf of the tribe was intertwined with questions of tribal law that the federal courts lacked jurisdiction to resolve. *Cayuga Nation v. Tanner,* No. 14-cv-1317, 2015 WL 2381301, at *3-4 (N.D.N.Y. May 19, 2015). The district court also held that the individual plaintiffs—who at that point were still styled as John Does—also lacked standing because they had failed to plead a credible threat of imminent prosecution. *Id.* at *5 n.8. On appeal, we reversed that dismissal, reasoning that it was appropriate to

While the action was pending, the Nation continued to expand its footprint in the Cayuga Reservation. In 2018, the Nation promulgated a penal code, created a police force and court system to enforce it, and contracted for a prison to incarcerate those convicted of violating it. In a 2019 letter, the director of the Bureau of Indian Affairs affirmed the federal government's position that the Nation was entitled to enforce its penal code against Native Americans within the boundaries of the Cayuga Reservation because the Reservation constituted "Indian country" under the MCA. That same year, the chairman of the NIGC determined that the NIGC would again regulate gaming at Lakeside; since then, the NIGC has conducted regular site visits and has accepted the Nation's payment of quarterly fees pursuant to IGRA and its implementing regulations.

On May 22, 2019, the Nation amended its complaint; the amended complaint identified named tribal officials as Plaintiffs and alleged facts occurring since the Nation filed suit in 2014 but sought no additional relief. On September 4, the parties cross-moved for summary judgment. On March 24, 2020, the district court granted summary judgment to the Nation. *Cayuga Nation v. Tanner,* 448 F.

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defer to the Bureau of Indian Affair's decision to recognize Clint Halftown, who brought both this suit and the 2003 Litigation on behalf of the tribe, as the Nation's authorized representative. *See Cayuga Nation v. Tanner,* 824 F.3d 321, 328 (2d Cir. 2016). We further concluded that the individual plaintiffs had satisfied the low threshold to bring a pre-enforcement challenge. *Id.* at 330-33.

Supp. 3d 217 (N.D.N.Y. 2020). The district court rejected the Village's argument that issue and claim preclusion barred the Nation's suit and, on the merits, concluded that the Parcel qualified as "Indian lands" under IGRA, thus preempting the 1958 Ordinance and divesting the Village of jurisdiction to regulate gaming thereon. The district court further agreed that IGRA's criminal enforcement provisions separately divested the Village of jurisdiction to enforce the 1958 Ordinance and that the Nation enjoyed sovereign immunity from any civil suit to enforce the 1958 Ordinance. This appeal followed.

DISCUSSION

We review a grant of summary judgment de novo. *See, e.g., Mitchell v. City of New York*, 841 F.3d 72, 77 (2d Cir. 2016). Ordinarily, "[w]here cross-motions for summary judgment are filed, a court must evaluate each party's own motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Hotel Employees & Rest. Employees Union, Local 100 of N.Y. v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 543 (2d Cir. 2002) (internal quotation marks omitted). In this case, however, the parties have stipulated to the operative facts; they disagree only as to the proper application of specific legal doctrines to those facts, namely the applicability of claim/issue preclusion and the appropriate construction of IGRA, which are issues that we review de novo.

See, e.g., Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 218 (2d Cir. 2014) ("Our review of a district court's interpretation of a statute, a pure question of law, is . . . de novo."); *Uzdavines v. Weeks Marine, Inc.,* 418 F.3d 138, 143 (2d Cir. 2005) (applicability of estoppel doctrines presents pure question of law reviewed de novo).

For the reasons discussed herein, we agree with the district court that neither claim nor issue preclusion bars this action and that the Parcel sits on "Indian lands" within the meaning of IGRA. We therefore affirm the judgment of the district court.

I. Preclusion Doctrines

The Village asserts, as threshold defenses, both issue and claim preclusion, contending that IGRA preemption was actually litigated in 2003 or, in the alternative, that the Nation was required to litigate it then and cannot do so now. Like the district court, we disagree.

A. Issue Preclusion

Issue preclusion, also referred to as collateral estoppel, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to [a] prior judgment." *New Hampshire v. Maine,* 532 U.S. 742, 748-49 (2001). "The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell,* 553 U.S. 880, 891 (2008). A party may invoke issue preclusion only if: "(1) the identical issue was raised in a previous proceeding;

(2) the issue was actually litigated and decided in the previous proceeding; (3) the party [raising the issue] had a full and fair opportunity to litigate the issue [in the prior proceeding]; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Marvel Characters, Inc. v. Simon,* 310 F.3d 280, 288-89 (2d Cir. 2002) (citation and internal quotation marks omitted).

To support its argument that IGRA preemption was both litigated and decided in the prior action, the Village points to an isolated passage of *Union Springs I* in which, holding that the Parcel's proximity to a school was not an exceptional circumstance justifying the application of local law, the district court observed that "[t]he Nation correctly points out that it is governed by IGRA, which preempts state and local attempts to regulate gaming on Indian lands, and, thus, such a consideration is irrelevant here." 317 F. Supp. 2d at 148. As the Village tells it, that passage demonstrates that "the district court's 2004 opinion relied on the Cayugas' articulation of IGRA preemption as blocking state and local laws," Appellants' Br. at 29, and that, therefore, *Union Springs II,* which resolved the 2003 Litigation in the Village's favor, implicitly resolved the issue of IGRA preemption in its favor as well.

But the district court's passing reference to IGRA in *Union Springs I* did not decide whether IGRA preempted any specific local law. Indeed, there was no need for it to do so. The 2003 Litigation arose out of the Nation's claim of tribal immunity from

the Village's jurisdiction to enforce its zoning laws, and the district court ruled for the Nation on that issue. The Nation had not begun gaming, the Village had not invoked the 1958 Ordinance, and the Nation did not premise its immunity claim on preemption.

Further, even assuming, *arguendo,* that *Union Springs I* actually had decided IGRA preemption, that judgment was later vacated, and "[a] judgment vacated or set aside has no preclusive effect." *Stone v. Williams,* 970 F.2d 1043, 1054 (2d Cir. 1992). And the final order and judgment that did emerge from the 2003 Litigation—*Union Springs II*—does not even mention IGRA. Notwithstanding, the Village posits that, since *Union Springs II* was decided in its favor, the IGRA issue was decided in its favor as well because the Nation "waive[d] and abandon[ed] . . . the IGRA preemption argument" by failing to assert it at that stage of the litigation. Appellants' Br. at 30. But that argument strains credulity.

True, the Nation affirmatively invoked IGRA during the 2003 Litigation; it did so, however, in response to the "exceptional circumstances" argument that the Village raised in support of its summary judgment motion. The Nation's argument was premised on the mere existence of IGRA's comprehensive regulatory scheme as opposed to the scope of any of its specific provisions. On remand after *Sherrill,* the Village, buoyed by a favorable change of law, abandoned the exceptional circumstances argument altogether; there was, indeed, no reason for the Village to invoke it, nor, therefore,

for the Nation to pursue its response to that point. The district court, limiting itself to the claims made by the Nation and the arguments advanced by both sides, held that, under *Sherrill,* the Nation could not invoke its inherent sovereignty to claim immunity from local zoning and land use laws. *Union Springs II,* 390 F. Supp. 2d at 206. Nothing about that simple holding implicates IGRA.

Of course, issue preclusion extends not only to issues that are expressly decided but also to those issues that are "by necessary implication adjudicated in the prior litigation." *Rezzonico v. H&R Block, Inc.,* 182 F.3d 144, 148 (2d Cir. 1999). But the Village cites no authority for the novel proposition that a judgment can be deemed to have implicitly resolved an issue that was not the basis of, or otherwise intertwined with, any claim that was actually asserted in the underlying litigation. To the contrary, "[i]t is well established that although an issue was fully litigated and a finding on the issue was made in the prior litigation, the prior judgment will not foreclose reconsideration of the same issue if that issue was not necessary to the rendering of the prior judgment." *Halpern v. Schwartz,* 426 F.2d 102, 105 (2d Cir. 1970). The 2003 Litigation was resolved on the straightforward holding that *Sherrill* defeated the Nation's claims of sovereignty. Thus, no IGRA ruling was "necessary to the rendering of [that] judgment," *id.,* such that issue preclusion would not bar its relitigation in this case even if *Union Springs II* had decided it which, as discussed, it did not.

By any measure, thus, the Village's assertion of issue preclusion fails.

B. Claim Preclusion

The Village argues in the alternative that, even if the issue of IGRA preemption was not actually litigated and decided in the 2003 Litigation, the Nation was required to raise it at that time and cannot do so now. Again, we disagree.

"Under the doctrine of . . . claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *TechnoMarine SA v. Giftports, Inc.,* 758 F.3d 493, 499 (2d Cir. 2014) (internal quotation marks omitted). Of course, given the liberal rules regarding joinder of claims, *see* Fed. R. Civ. Pro. 18, claim preclusion does not bar every claim that *could* have been raised in a prior action. Rather, for claim preclusion to apply, the later suit must "involv[e] the same cause of action" as the earlier suit. *EDP Med. Computer Sys., Inc. v. United States,* 480 F.3d 621, 624 (2d Cir. 2007) (internal quotation marks omitted). "Suits involve the same claim (or 'cause of action') when they arise from the same transaction, or involve a common nucleus of operative facts. *Lucky Brand Dungarees v. Marcel Fashions Grp.,* 140 S. Ct. 1589, 1595 (2020) (citations and internal quotation marks omitted).

The Village argues that, even though the Nation had not begun gaming (nor had it passed a gaming ordinance that the NIGC would need to approve

before the Nation could legally commence gaming under IGRA) when it filed the 2003 Complaint, it had formed an intention to do so and, accordingly, was required to interpose an IGRA preemption claim at that point. Under this view, the "transaction" is the Nation's course of conduct from its purchase of the Parcel until the opening (and closing, and reopening) of Lakeside. But even assuming that the pre-enforcement challenge proposed by the Village would have been ripe—a contention that the Nation rejects but that we need not and thus do not resolve—the Village's argument reaches too far.

We and several of our sister circuits have long held that, for the purpose of analyzing claim preclusion, "the scope of the litigation is framed by the complaint at the time it is filed." *Computer Assocs. Int'l v. Altai, Inc.,* 126 F.3d 365, 369-70 (2d Cir. 1997) (cleaned up).[10] Consequently, "[w]here

[10] The Village argues that this rule "evolved in the context of serial violations of copyright, trademark, securities, antitrust and other laws perpetrated by a serial wrongdoer . . . [and] is properly limited to serial violation cases." Appellants' Br. at 36-37. While the Village may be correct that we have most frequently applied this facet of claim preclusion doctrine in serial violation cases, neither we nor our sister circuits have ever understood it to be limited to those contexts. Nor would limiting the rule in that fashion serve its underlying purpose, *i.e.,* to bring "certainty and predictability" to this area of the law by avoiding "disputes about whether plaintiffs could have amended their initial complaints to assert claims based on later-occurring incidents." *Morgan v. Covington Twp.,* 648 F.3d 172, 178 (3d Cir. 2011) (collecting cases).

the facts that have accumulated after the first action are enough on their own to sustain the second action, the new facts clearly constitute a new 'claim,' and the second action is not barred by [claim preclusion]." *Storey v. Cello Holdings, LLC,* 347 F.3d 370, 383 (2d Cir. 2003); *see also Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2305 (2016) ("[D]evelopment of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim.").

Here, the current litigation arises out of facts that have accumulated since the first action that are more than enough on their own to support it. When the 2003 Complaint was filed, the Nation had not begun gaming, and the Village had not sought to enforce the 1958 Ordinance. Instead, the Village cited the Nation for failing to comply with altogether different regulations—those relating to zoning and construction—and the Nation claimed complete immunity from local jurisdiction. IGRA, notably, would not have provided the Nation with a defense against any of the ordinances that the Village was seeking to enforce, none of which related to gambling.

By 2013, the state of play had changed significantly. The Supreme Court's decision in *Sherrill* having undermined its claim to broad immunity from local regulation, the Nation had endeavored to comply with various applicable building codes and the like—the precise sort of regulations from which it had claimed immunity in 2003—but was actively conducting a gambling operation on the Parcel. It was at that point that the Village sought

to enforce the 1958 Ordinance; in response to that enforcement effort, the Nation sought a declaration not that it is *immune* from Village law as a quasi-sovereign entity, but that the specific sliver of local law that the Village was attempting to enforce is *preempted* by a specific federal statute. Although the two proceedings may "involve[] the same parties, similar or overlapping facts, and similar legal issues," *Interoceanica Corp. v. Sound Pilots, Inc.,* 107 F.3d 86, 91 (2d Cir. 1997) (citation omitted), we readily conclude that the two sets of threatened enforcement actions represent discrete transactions so as to render claim preclusion inapplicable.

Nor does our decision in *Waldman v. Village of Kiryas Joel* command a contrary result. 207 F.3d 105 (2d Cir. 2000). There, we affirmed the dismissal of certain claims in Waldman's third complaint against the Village of Kiryas Joel after concluding that it was barred by his two prior suits against the same municipality, even though the relief that he sought in the third case—an order dissolving the Village of Kiryas Joel—was distinct from the relief that he had sought in the prior cases. *Id.* at 112-14. But while the Village of Union Springs argues that the situation is essentially identical here, it ignores the fact that our decision in that case was premised on the fact that the incidents giving rise to the claims at issue in the third complaint had already occurred when the prior complaints were filed. *Id.* at 110-12. We therefore concluded that Waldman could not avoid preclusion merely by including some new facts while also "claim[ing] that the Village [of Kiryas Joel] may be

dissolved *solely* on the basis of facts that have existed for over two decades." *Id.* at 112 (emphasis in original). In contrast, as we held in *Computer Associates,* "[w]ithout a demonstration that the conduct complained of in the [second] action occurred prior to the initiation of the [first] action, [claim preclusion] is simply inapplicable." 126 F.3d at 369. As already discussed, the claims in this case arise out of events that entirely postdate the 2003 Complaint. Consequently, *Waldman* is inapposite.

Ultimately, the Village mistakes its plausible argument that the Nation *could* have litigated this claim in 2003 as providing support for its assertion that the Nation therefore was *required* to litigate this claim in 2003. But claim preclusion has never been so broad as to require a party to do what the Village insists that the Nation should have done in 2003: comb the books for every ordinance that could be enforced against any use the Nation might make of the property and challenge them all or forever forego the right to challenge any of them. Thus, while we do not foreclose the possibility that claim preclusion might appropriately bar a case where a party "launch[es] a series of lawsuits to challenge different local laws . . . despite the lawbreaker knowing the full universe of laws that apply to its actions," Appellants' Br. at 36, the litigation history between the parties here falls short of that characterization. We therefore reject the Village's assertion of claim preclusion.

II. The Merits

This case turns on a straightforward question of statutory interpretation. As we and our sister circuits have held, IGRA preempts all state and local legislation and regulation relating to gambling conducted on "Indian lands," as defined in that statute. *See Mashantucket Pequot Tribe v. Town of Ledyard,* 722 F.3d 457, 469-70 (2d Cir. 2013) (noting that IGRA "was intended to expressly preempt the field in the governance of gaming activity on Indian lands"), quoting *Gaming Corp. of Am. v. Dorsey & Whitney,* 88 F.3d 536, 544 (8th Cir. 1996); *see also, e.g., Pueblo of Pojoaque v. New Mexico,* 863 F.3d 1226, 1235 (10th Cir. 2017) (IGRA "expressly preempt[s] state regulation of gaming activity that occurs on Indian lands") (emphasis omitted). The dispositive question, thus, is whether the Parcel sits on Indian lands within the meaning of IGRA. We readily conclude that it does.

"In interpreting a statute, we look first to the language of the statute itself. When the language of the statute is unambiguous, judicial inquiry is complete." *Marvel,* 310 F.3d at 289-90 (cleaned up). Here, we need look no further than the plain language of IGRA.

IGRA defines "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any

> Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). That definition is notably expansive, encompassing *"all* lands within the limits of *any* Indian reservation." Taken alone or in combination, the terms "any" and "all" convey nearly limitless breadth. *See, e.g., United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"), quoting Webster's Third New International Dictionary 97 (1976). Moreover, "Congress did not add any language limiting the breadth of [these words], so we must read [IGRA] as referring to all [reservations]." *Id.* As the parties have stipulated, and as every state and federal court to consider the issue has concluded,[11] the Cayuga Reservation has not been disestablished and persists today within the boundaries set forth in the Treaty of Canandaigua. The Parcel sits within those boundaries. That would seem to be the end of the matter.

In the face of this clear language, the Village contends that the term "reservation" implies the exercise of tribal jurisdiction, which, the Village reasons, the Cayugas cannot lawfully do within their reservation under *Sherrill.* But we need not resolve whether the Nation's apparent exercise of,

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[11] *See, e.g., Cayuga Indian Nation of N.Y. v. Gould,* 14 N.Y.3d 614, 639-40 (2010) (collecting cases).

at a minimum, concurrent jurisdiction over the Parcel and other property that it owns within the Cayuga Reservation (represented, for example, by its police force and court system) may be logically squared with *Sherrill*'s holding because the relevant definition of "Indian lands" contains no requirement that a tribe exercise jurisdiction or other governmental power over reservation property. That conclusion is reinforced by the fact that IGRA's secondary definition of Indian lands, which applies to restricted fee and trust lands, *does* contain a requirement that the tribe "exercise[ ] governmental power" over those lands. 25 U.S.C. § 2703(4)(B). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally." *Russello v. United States,* 464 U.S. 16, 23 (1983) (internal quotation marks omitted).[12] We presume that intention here and thus discern no basis to read extratextual limitations into the statute.

Equally unpersuasive is the Village's contention that Congress could not have intended the term "reservation" to encompass what it characterizes as

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[12] Of course, another provision of IGRA limits class II gaming to "Indian lands within such tribe's jurisdiction," 25 U.S.C. § 2710(b)(1). However, that provision is relevant only to whether gaming is legal under IGRA, which the Village lacks authority to enforce. Accordingly, we need not address the Village's arguments regarding that provision. To the extent that the Village takes issue with the NIGC's decision to authorize and regulate gambling at Lakeside, its remedy is to seek judicial review of that decision. *See* 25 U.S.C. § 2714.

a "not disestablished ancient reservation that is stripped of tribal jurisdiction." Appellants' Br. at 45. Setting aside the basic principle that we have "no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress must have intended something [narrower]," *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 794 (2014), the backdrop against which IGRA was enacted does not support the Village's position in any case. By 1988, it was well understood that "[o]nce a block of land is set aside for an Indian Reservation *and no matter what happens to the title of individual plots within the area,* the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 465 U.S. at 470 (emphasis added). Moreover, the Cayuga Reservation's existence had not been forgotten to history: claims concerning the Oneida Nation's reservation, established by the Treaty of Canandaigua and acquired by New York State thereafter, had twice reached the Supreme Court within the preceding 15 years, and the Cayuga Nation was actively pursuing claims related to its own reservation. And, as countless Acts of Congress make clear, when Congress wishes to exclude specific reservations from the scope of legislation, it knows how to do so. *See, e.g.,* Dawes Act § 8, 24 Stat. at 390. Much as the Village may argue otherwise, it plainly did not do so here.

Finally, the Village's position is irreconcilable with the Supreme Court's recent decision in *McGirt v. Oklahoma,* in which the Court held that the

Creek reservation, encompassing a significant portion of northeastern Oklahoma, including much of the city of Tulsa, remained "Indian country" under the MCA and, accordingly, that the State of Oklahoma lacked authority to prosecute Native Americans for crimes committed against other Native Americans committed thereon. 140 S. Ct. at 2476-82. The Village attempts to dismiss *McGirt* as merely a case concerning the interpretation of specific treaties. However, while much of the decision focuses on whether the Creek reservation survived certain historical developments, the Court nevertheless made it absolutely clear that, because the reservation persists, "the MCA applies to Oklahoma according to its usual terms." *Id.* at 2478. That is so despite the fact that, as Oklahoma argued in that case and the Village argues in this one, "Tribe members today constitute a small fraction of those now residing on the land." *Id.* at 2470. Given that the MCA's definition of Indian country is largely identical to IGRA's definition of Indian lands, we can only conclude that IGRA applies to the Cayuga Reservation.

Moreover, while *McGirt* does not cite or otherwise mention *Sherrill,* the Court's forceful reaffirmation in *McGirt* of Congress's singular power to disestablish a reservation further underscores the infirmity of the Village's position here. The Village would have us read *Sherrill* to hold that the Cayuga Reservation is a "de facto *former* reservation[ ]" that "[does not] exist today in any real world sense." Appellants' Br. at 45 (emphasis in original). Adopting the Village's position, however, would be

akin to interpreting *Sherrill* to have effectively disestablished the Cayuga Reservation. To the extent that were ever a plausible interpretation of *Sherrill, McGirt* forecloses it.[13]

Accordingly, we hold that the Parcel qualifies as "Indian lands" within the meaning of IGRA and that IGRA accordingly preempts any and all state or local laws that directly or indirectly purport to regulate or limit gaming on the Parcel, including the 1958 Ordinance. Because the 1958 Ordinance is preempted entirely, we need not decide whether IGRA's criminal enforcement provision vesting exclusive jurisdiction in the federal government to enforce state gambling law in "Indian country" as defined under the MCA, 18 U.S.C. § 1166, supersedes 25 U.S.C. § 232's grant of criminal jurisdiction over tribal members to New York State.[14]

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[13] Even prior to *McGirt,* the Village's reading of *Sherrill* would be hard to square with the actual holding of that case and the Court's well established disestablishment jurisprudence. As the New York Court of Appeals succinctly put it in 2010, *"Sherrill* dealt with whether a tribe could exercise sovereign power over reacquired land for purposes of avoiding real property taxes—not whether reacquired land is ascribed reservation status under federal law." *Gould,* 14 N.Y.3d at 641-42.

[14] Though we need not resolve the Nation's sovereign immunity claim for the same reason, we note that all parties now agree that the portion of the judgment below providing that "[t]he Nation enjoys tribal sovereign immunity from any suit by defendants to enforce the [1958] Ordinance," 448 F. Supp. 3d at 246, is correct under our decision in *Cayuga Indian Nation of N.Y. v. Seneca Cty.,* 978 F.3d 829 (2d Cir. 2020). We express no view as to whether the Village would be able to

CONCLUSION

For the reasons stated herein, the judgment of the district court is AFFIRMED.

seek prospective injunctive relief against individual tribal officials compelling compliance with the 1958 Ordinance were it not otherwise preempted.

APPENDIX B -ORDER DENYING PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 20, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of August, two thousand twenty-one,

Before: Amalya L. Kearse,
Gerard E. Lynch,
Denny Chin,
Circuit Judges.

Docket No. 20-1310

Cayuga Nation, Clint Halftown, Timothy Twoguns, Gary Wheeler, Donald Emerson, Michael Barringer, Richard Lynch, B. J. Radford, and John Does 8-20,

Plaintiffs-Counter-Defendants-Appellees,

v.

Howard Tanner, Village of Union Springs Code Enforcement Officer, in his official capacity; Bud Shattuck, Village of Union Springs Mayor, in his official capacity; Chad Hayden, Village of Union Springs Attorney, in his

official capacity; Board of Trustees of the Village of Union Springs, New York; and the Village of Union Springs, New York,

Defendants-Counter-Claimants-Appellants.

ORDER

Board of Trustees of the Village of Union Springs, New York, Chad Hayden, Bud Shattuck, Howard Tanner and Village of Union Springs, New York having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

APPENDIX C - MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DECIDED MARCH 24, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5:14-CV-1317

CAYUGA NATION, DONALD JIMERSON, MICHAEL BARRINGER, GARY WHEELER, RICHARD LYNCH, CLINT HALFTOWN, TIMOTHY TWOGUNS, B.J. RADFORD, and JOHN DOES 8-20,

Plaintiffs,

–v–

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity, CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity, BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK, VILLAGE OF UNION SPRINGS, NEW YORK, and BUD SHATTUCK, Village of Union Springs Mayor, in his Official Capacity,

Defendants.

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DAVID N. HURD
United States District Judge

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MEMORANDUM–DECISION and ORDER

I. INTRODUCTION

This case arises out of a dispute between the tribal leadership of plaintiff Cayuga Nation (the "Nation" or the "Cayugas") and the elected officials of defendant Village of Union Springs (the "Village" or "Union Springs") over whether the municipality may regulate the Tribe's gambling activities at 271 Cayuga Street, a parcel of historic reservation land the Cayugas repurchased from the open market in 2003.

The parties have cross-moved for summary judgment on stipulated facts, and each side has supplemented the record with additional material in support of their respective contentions. The motions have been fully briefed and will be considered on the basis of the submissions without oral argument.

II. BACKGROUND

Although the Nation filed this legal challenge in 2014, the origins of this controversy can be traced back to promises made by the newly formed federal

government well over two hundred years ago. Two in particular—one secured by law; the other pledged in treaty—helped set the stage for a massive shift in federal Indian policy that arrived in the early twentieth century. A quick review of all three historical developments is essential to untangling the contemporary posture of this case.

A. Relevant History

Before beginning, however, the reader should understand that a comprehensive account of North American tribal relations with European colonists encroaching on aboriginal lands would be significantly more convoluted than the brief, incomplete narrative presented in this opinion. *See, e.g., Seneca Nation of Indians v. New York ("Seneca I"),* 206 F. Supp. 2d 448, 455-98 (W.D.N.Y. 2002) (chronicling these shifting relations in a suit by the Senecas to recover ownership of certain islands in the Niagara River).

Indeed, the Nation correctly points out that the details of this complex history are mostly absent from the limited fact record developed by the parties in this case. *See* Pls.' Response to Defs.' Local Rule Statement ("Pls.' Response to Defs.' Facts"), Dkt. No. 137-1 at pp. 2-4[1] (objecting to the Village's repeated citation to other tribal litigation as purportedly undisputed fact sufficient to support its bid for summary judgment).

Thus, to the extent that some of the following background is drawn from litigation that is unre-

[1] Pagination corresponds to CM/ECF.

lated to the ongoing land-use dispute between the Cayugas and Union Springs, it is included here as necessary context only; it will not be considered part of the fact record for purposes of resolving the cross-motions for summary judgment.

1. Nonintercourse Act

On July 22, 1790, exercising its authority under the Indian Commerce Clause of the Constitution, U.S. Const. art. I, § 8, Congress enacted the Indian Trade and Intercourse Act. *Seneca I,* 206 F. Supp. 2d at 482. More commonly known as the Non-intercourse Act, "[t]he law codified a hodgepodge of federal powers, some intended to protect the federal treaty power, others related to trade." Gregory Ablavsky, *Beyond the Indian Commerce Clause,* 124 YALE L.J. 1012, 1044 (2015).

Reenacted several times between 1793 and 1802, and later modified in 1834, the Nonintercourse Act remains on the books today. 25 U.S.C. § 177; *Seneca I,* 206 F. Supp. 2d at 482 (describing the Act's passage and revision history). In both its original formulation and in subsequent iterations, the Nonintercourse Act barred "sales of tribal land without the consent of the United States." *Oneida Indian Nation of N.Y. v. County of Oneida,* 617 F.3d 114, 116 (2d Cir. 2010).

2. Treaty of Canandaigua

Faced with the prospect of renewed hostilities from tribal resistance to its ongoing westward expansion, in 1794 the United States sought to bro-

ker what it hoped would finally be a lasting peace with the Iroquois Confederacy, a group of six member nations that included the Cayugas. *Seneca Nation of Indians v. New York ("Seneca II"),* 382 F.3d 245, 256-57 (2d Cir. 2004); *Seneca I,* 206 F. Supp. 2d at 486-87.

On November 11, 1794, after nearly a month of tense negotiations, an envoy from the United States and representatives for the six Iroquois member nations executed the Treaty of Canandaigua. *Seneca II,* 382 F.3d at 256-57; *Seneca I,* 206 F. Supp. 2d at 486-93. Although the talks had focused mainly on issues raised by the Senecas, the Treaty's final language included, *inter alia,* an acknowledgment by the federal government that certain lands were reserved to the Cayugas and to the other Iroquois member nations for their "free use and enjoyment." *Id.*

The parties have stipulated that the lands reserved to the Cayugas in the Treaty of Canandaigua encompassed 64,015 acres within the present-day boundaries of Cayuga and Seneca Counties in the State of New York, an area which the parties refer to as the "Cayuga Historic Reservation." Joint Stipulated Facts ("JSF"), Dkt. No. 123 at ¶¶ 4-5.

Unfortunately, though, the Cayuga Historic Reservation did not remain in the Nation's possession for long, since the State of New York continued to aggressively negotiate the purchase of huge chunks of reserved land from the Iroquois without the federal approval mandated by the Non-intercourse Act. *County of Oneida v. Oneida Indian*

Nation, 470 U.S. 226, 232 (1985); *Seneca I,* 206 F. Supp. 2d at 540. While these unauthorized land transfers were initially condemned by federal officials, subsequent administrations became increasingly accepting of New York's unilateral behavior as federal Indian policy shifted toward removing tribes westward. *See Seneca I,* 206 F. Supp. 2d at 540.

As relevant here, between 1795 and 1807, "the State of New York acquired all of the land encompassed within the Cayuga Historic Reservation." JSF ¶ 6.[2] Thereafter, the Cayugas dispersed—some members of the Tribe headed west to join the Senecas on their lands, others sought refuge in Canada, and still others remained behind in the area near Cayuga Lake. *Cayuga Indian Nation of N. Y. v. Village of Union Springs,* 317 F. Supp. 2d 128, 132 & n.4 (N.D.N.Y. 2004).

3. Indian Reorganization Act

State and federal efforts to displace, disperse, or remove Indian tribes continued in various forms throughout the nineteenth century. *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.,* 337 F.3d 139, 148-49 (2d Cir. 2003). By the late 1800s, however, the federal government had shifted toward a policy of "allotment." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 253-54 (1992).

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[2] It should go without saying, but the Nation contends these sales were unlawful. JSF ¶ 6.

"The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima,* 502 U.S. at 254. "In the years in which the allotment policy was followed, Congress also stripped tribes of their authority to govern themselves, instead providing that Indians residing on allotted lands would eventually be subject to state civil and criminal jurisdiction." *Upstate Citizens for Equality, Inc. v. United States,* 841 F.3d 556, 561 (2d Cir. 2016) (citation omitted).

All of this came to an abrupt halt in 1934, with the passage of the Indian Reorganization Act ("IRA"). *Upstate Citizens for Equality, Inc.,* 841 F.3d at 560-61. "The IRA repudiated the allotment policy and aimed to restore to tribes, or replace, the lands and related economic opportunities that had been lost to them under it." *Id.* at 561. "The IRA's implementing regulations, promulgated by the U.S. Department of the Interior, create a process by which tribes and individual Indians can request that the Department take land into trust on their behalf." *Id.* at 562. "Land held by the federal government in trust for Indians under this provision 'is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or, (3) state criminal and civil jurisdiction [over Indians], unless the tribe consents to such jurisdiction.'" *Id.* at 561 (quoting *Connecticut ex rel. Blumenthal v. U.S. Dep't of the Interior,* 228 F.3d 82, 85-86 (2d Cir. 2000)).

B. First Round of Litigation

The Cayugas remain a federally recognized Indian tribe, with a present-day membership of approximately 400 adult citizens. JSF ¶¶ 1, 7. The parties have stipulated that the federal government recognizes the Nation as the same entity with which it entered into the Treaty of Canandaigua back in 1794. *Id.* ¶¶ 1-2. The parties have further stipulated that "the Cayuga Nation today possesses a federal reservation that has not been disestablished." *Id.* ¶ 3.

1. The Cayugas Begin Economic Development

Yet up until the last few decades, "the Nation had no land and very little economic development." Halftown Decl., Dkt. No. 124-3 at ¶ 11. In 2002, by unanimous resolution of the Cayuga Nation Council, Chief Vernon Isaac authorized Clint Halftown ("Halftown"), a Councilmember, to pursue economic development on behalf of the Nation. Pls.' Local Rule Statement ("Pls.' Facts"), Dkt. No. 124-2 at ¶ 2. Under Halftown's guidance, the Cayugas initiated a series of open market purchases of real property in Cayuga and Seneca Counties. JSF ¶ 8.

On April 28, 2003, the Nation purchased 271 Cayuga Street in Union Springs, New York (the "Parcel" or the "Property") in fee simple by indenture deed. JSF ¶ 9. The parties agree that the Parcel's use prior to the Nation's purchase (as the site of an auto parts store) complied with the Village's zoning and land-use laws. Defs.' Local

Rule Statement ("Defs.' Facts"), Dkt. No. 131 at ¶ 10.

But the Nation had other plans for the Property, which is situated within the boundaries of the Cayuga Historic Reservation. JSF ¶ 10; Pls.' Facts ¶ 8. In early October 2003, shortly after promulgating a set of tribal ordinances, the Cayugas appointed a tribal code officer and began renovating the Parcel. Defs.' Facts ¶ 15[3]; Pls.' Facts ¶¶ 12-13.

The Village issued a series of Stop Work Orders and other violation notices alleging that the construction activities at the Parcel violated its local laws and ordinances, but the Nation asserted that its inherent tribal sovereignty rendered those laws and ordinances inapplicable to the Property. Defs.' Facts ¶¶ 30, 32, 34.

2. The Nation Files Suit

On October 20, 2003, the Nation filed suit in the Northern District of New York in an effort to vindicate this inherent sovereignty argument against Union Springs.[4] *Cayuga Indian Nation of N.Y. v.*

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[3] The Village offers up a blow-by-blow account of these construction activities, which began with alterations to the site's parking lot in late August 2003. But as the Nation again correctly points out, some of the Village's purportedly "undisputed" historical facts about this land-use dispute are not properly presented in the record. In any event, the Nation acknowledges that it began work at the Parcel in earnest in October and so the story begins here. *See, e.g.,* Pls.' Response to Defs.' Facts ¶ 15.

[4] This litigation also involved the Town of Springport and the County of Cayuga.

Village of Union Springs et al., 5:03-CV-1270-DNH-DEP (the "First *Cayuga* Litigation") at Dkt. No. 1. The Village counterclaimed, complaining that the Cayugas had "failed to disclose the nature or type of economic development" they ultimately had in mind for the Parcel. *Id.* at Dkt. No. 9.

The lawsuit set off a round of preliminary motion practice. The Nation moved for an emergency restraining order and an injunction that would prevent Union Springs from enforcing its local laws against the Property while the Village, for its part, cross-moved to dismiss the Cayugas' suit in its entirety. First *Cayuga* Litig. at Dkt. Nos. 2, 10.

On October 21, 2003, the Court granted the Nation's request for a temporary restraining order against the Village's enforcement efforts and *sua sponte* issued a reciprocal order blocking the Cayugas from further construction, renovation, or demolition activities at the Property. First *Cayuga* Litig. at Dkt. No. 4. Shortly thereafter, the Court heard oral argument and reserved decision on the pending motions. *Id.* at Dkt. No. 23.

In the meantime, the Nation moved ahead with its plans. On November 12, 2003, the Nation's Council adopted a Gaming Ordinance, which among other things created a tribal Gaming Commission and set forth in detail how gaming operations would be conducted on land owned by the Tribe. JSF ¶ 16; Pls.' Facts ¶ 9; Defs.' Facts ¶ 41.

On November 14, 2003, the temporary restraining orders dissolved, First *Cayuga* Litig. at Dkt. No. 27, and less than a week later, the Nation received approval from the National Indian

Gaming Commission ("NIGC"), an independent federal agency, to conduct Class II Gaming on Nation-owned land.[5] JSF ¶ 17; Defs.' Facts ¶ 42.

On November 28, 2003, the pending motions in the First *Cayuga* Litigation were denied. *Cayuga Indian Nation of N.Y. v. Village of Union Springs,* 293 F. Supp. 2d 183 (N.D.N.Y. 2003). The Nation promptly moved for summary judgment, seeking a declaration that the Parcel qualified as "Indian country" and that, consequently, Union Springs could not apply its local laws to the Property. First *Cayuga* Litig. at Dkt. No. 37.

On April 23, 2004, the Court awarded summary judgment to the Nation, declaring that the Property qualified as "Indian country" within the meaning of federal law. *Cayuga Indian Nation of N.Y. v. Village of Union Springs ("Union Springs I"),* 317 F. Supp. 2d 128, 143 (N.D.N.Y. 2004). Accordingly, the Court permanently enjoined the Village "from applying or enforcing" its "zoning and land use laws, or any other laws, ordinances, rules, regulations or other requirements which seek or purport to regulate, control, or otherwise interfere with activities by or on behalf of the plaintiff Cayuga Indian Nation of New York occurring on the Property." *Id.*

On April 27, 2004, the Village appealed *Union Springs I* and sought to stay the permanent injunction pending resolution of the appeal. The Village's

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[5] Class II Gaming is a term of art defined by federal law, and includes things such as "the game of chance commonly known as bingo." 25 U.S.C. § 2703(7)(A)(I).

request was denied by this Court in a published order on May 20, 2004, *Cayuga Indian Nation of N.Y. v. Village of Union Springs,* 317 F. Supp. 2d 152 (N.D.N.Y. 2004), and then by a motions panel of the Second Circuit on July 15, 2004, *see* First *Cayuga* Litig. at Dkt. No. 72.

3. Lakeside Entertainment Opens for Business

While the Village's appeal from *Union Springs I* languished at the Circuit, the Nation completed renovations on the Property. The Cayugas' code officer inspected the newly renovated building and concluded that it complied with the Nation's building code and other tribal laws. Pls.' Facts ¶ 15. On May 31, 2004, the Cayugas opened Lakeside Entertainment Facility ("Lakeside Entertainment" or the "Facility"), an electronic bingo hall, where the Tribe began conducting Class II gaming activities in accordance with its tribal Gaming Ordinance. JSF ¶¶ 19, 54.

The story gets more complicated from here. As it turns out, the Cayugas' dispute with Union Springs over the applicability of its local laws to Nation-owned property was not the only tribal land dispute wending its way through the federal appeals process.

Before the First *Cayuga* litigation was even filed in late 2003, this Court had already heard and decided a property tax dispute between the Oneida Nation and several municipal defendants in nearby Oneida County, New York. *Oneida Indian Nation*

of N. Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226 (N.D.N.Y. 2001).

In broad terms, the contours of the Oneidas' dispute with the locals was similar to the litigation brought by the Cayugas against Union Springs. There, the Oneidas had purchased fee simple title to certain real property within the boundaries of the tribe's historic reservation, asserted tribal sovereignty over the repurchased land, and refused to recognize state and local municipal authority to assess and collect property taxes on the reacquired parcels. *Oneida Indian Nation of N.Y.,* 145 F. Supp. 2d at 231-34.

As in the First *Cayuga* litigation, this Court had found in favor of the Oneidas, holding that the repurchased properties were exempt from state and local taxation as "Indian country" within the meaning of federal law. *Oneida Indian Nation of N.Y.,* 145 F. Supp. 2d at 266. And a divided panel of the Second Circuit initially agreed with that bottom-line conclusion. *Oneida Indian Nation of N. Y. v. City of Sherrill, N.Y.,* 337 F.3d 139 (2d Cir. 2003).

4. The Supreme Court Decides *Sherrill*

But the Supreme Court granted certiorari and reversed. *City of Sherrill, N. Y. v. Oneida Indian Nation of N.Y. ("Sherrill"),* 544 U.S. 197 (2005). With the support of the federal government as *amicus,* the Oneidas had argued that prior Supreme Court precedent already recognized the continued validity of the Tribe's "aboriginal title to their

ancient reservation land," even if fee title was in the hands of other, modern landowners. *Id.* at 213.

Building on this favorable precedent, the Oneidas claimed they could revive complete sovereign tribal authority over discrete parcels of their historic reservation land by reunifying the fee title with this existing aboriginal title; *i.e.,* by making open market purchases of fee land situated within the reservation's historic boundaries. *Sherrill,* 544 U.S. at 213.

The Supreme Court rejected this "unification theory," relying on various equitable considerations to conclude that permitting the Oneidas to reestablish "present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences." *Sherrill,* 544 U.S. at 219.

The Supreme Court then identified a solution to the Oneidas' desire to avoid state and local taxation on the repurchased parcels: the land-into-trust process established by the IRA in 1934, which authorized the Secretary of the Interior to take land into trust for the benefit of an Indian tribe. *Sherrill,* 544 U.S. at 220. And with that helpful observation, the Supreme Court remanded the Oneidas' tax dispute back to the lower courts. *Id.* at 221.

5. Lakeside Entertainment Closes its Doors

The Cayugas knew that the outcome of the Oneidas' tax litigation might well impact their abil-

ity to continue gaming at Lakeside Entertainment, so the Nation took seriously the Supreme Court's advice about the land-into-trust process established in the IRA.

On April 14, 2005, the Nation applied to the Department of the Interior to have some of its repurchased fee land, including the Parcel, taken into trust. JSF ¶ 15. As of today, the Tribe's application is still pending. *Id.;* Defs.' Facts ¶ 62. Shortly thereafter, the Second Circuit remanded the Village's pending appeal in *Union Springs I* for reconsideration in light of the Supreme Court's decision in *Sherrill*. First *Cayuga* Litig. at Dkt. Nos. 74, 78.

With the benefit of *Sherrill*'s guidance, this Court determined that the Cayugas' attempt to invoke tribal sovereignty over its repurchased fee land as a way to completely avoid the Village's local laws was at least as "disruptive" to modern governance as the Oneidas' parallel effort to invoke tribal sovereignty over its repurchased fee land as a way to completely avoid state and local taxation. *Cayuga Indian Nation of N.Y. v. Village of Union Springs ("Union Springs II"),* 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005). Accordingly, this Court vacated the permanent injunction it had entered in favor of the Nation in *Union Springs I* and granted summary judgment to the Village instead. *Id.*

The Nation did not take an appeal from *Union Springs II*. Defs.' Facts ¶ 64. Instead, either shortly before or just after the litigation ended, the Cayugas shut down Lakeside Entertainment. JSF ¶ 20.

C. Second Round of Litigation

Understandably, though, the Nation was not ready to scrap all the time and money it had invested in getting Lakeside Entertainment up and running. JSF ¶¶ 24-25. Instead, the Cayugas continued to follow the various tribal land disputes that were working their way through the state and federal court systems, and the Tribe's legal counsel met periodically with representatives from the NIGC. *Id.*

Among other things, the Nation kept a close eye on the Oneidas' ongoing efforts to establish the Turning Stone Casino Resort on historic reservation land in Oneida County. JSF ¶¶ 24-25. And on at least one occasion, the Cayugas sought from NIGC a formal opinion concerning whether the Parcel qualified as "Indian lands" within the meaning of the federal Indian Gaming Regulatory Act ("IGRA"). Defs.' Facts ¶¶ 71-73.

1. The Cayugas Get Back into Gaming

Eventually, the Cayugas decided to act. On May 7, 2013, the Nation renewed its Class II gaming license for Lakeside Entertainment in accordance with the federal regulations promulgated by the NIGC. JSF ¶ 26. This license renewal process required the Tribe to submit environmental, public health, and safety attestations for the Facility and to provide background check materials on certain "key employees" and management staff. *Id.* ¶¶ 27, 30-33. The Nation also obtained an architect's

report in an effort to determine whether the Facility complied with "applicable codes." *Id.* ¶ 29.

Later that month, the Nation notified the NIGC that the Tribe had completed this gaming license renewal process and intended to reopen Lakeside Entertainment. JSF ¶ 27; Defs.' Facts ¶ 76. Once again, the Cayugas' code officer inspected the Facility and concluded that it remained in compliance with tribal codes and other laws. Pls.' Facts ¶ 15.

On July 3, 2013, the Nation reopened Lakeside Entertainment. JSF ¶ 28. That same day, the Cayugas' legal counsel disseminated a letter to various federal, state, and local officials advising that the Tribe had resumed Class II gaming at the Parcel. *Id.* ¶ 35.

According to the Nation's letter, the gaming activity at the Property was lawful in light of IGRA, which preempted state and local efforts to regulate Class II gaming activity on non-trust, Tribe-owned land. JSF ¶ 35. Indeed, as the letter pointed out, the gaming activity at Lakeside Entertainment looked a whole lot like the Oneidas' gaming activity at the nearby Turning Stone Casino Resort, which at that particular time sat on repurchased fee land not yet taken into trust by the Department of the Interior. Ex. K to JSF ¶ 35; Pls.' Facts ¶ 62.

2. Union Springs Renews Enforcement Efforts

The Nation's letter did not deter the Village. On July 9, 2013, a Union Springs code enforcement official served an "Order to Remedy Violations" on the Tribe.[6] JSF ¶36. According to this Order to Remedy, the Cayugas were "operating bingo without a license" in violation of the Village's "Games of Chance" Ordinance (the "Gaming Ordinance" or the "Games of Chance Ordinance"). Ex. L to JSF ¶36; Pls.' Facts ¶61.

Enacted by Union Springs in 1958, the Gaming Ordinance prohibits bingo and other games of chance but carves out an exception for fundraising activities by non-profit organizations, which can seek a bingo license or permit from the Union Springs Board of Trustees ("Village Board"). Ex. D to JSF ¶22; Defs.' Facts ¶25. The Gaming Ordinance was the only alleged violation actually described in this first notice. Ex. L to JSF ¶36.

The Order to Remedy touched off a back-and-forth between the parties that consumed the rest of 2013 and most of 2014. First, on July 23, 2013, the Nation's counsel sent a letter to Union Springs Attorney Chad Hayden ("Village Attorney Hayden") reiterating the Tribe's view that IGRA preempted state or local efforts to regulate tribal gaming activity on repurchased fee land. JSF ¶37. The Cayugas' letter explained that while the Tribe was

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[6] Each violation notice warns that noncompliance "may constitute an offense punishable by fine or imprisonment or both." Pls.' Facts ¶64.

happy to comply with other local laws, the Games of Chance Ordinance could not be applied to Lakeside Entertainment in light of IGRA's preemptive effect. *Id.*

Thereafter, the Nation attempted to comply with other aspects of the Union Springs zoning code. On August 8, 2013, Lakeside Entertainment Manager Betty Jane Radford ("Radford") submitted a completed application for a Certificate of Occupancy to Union Springs Code Enforcement Officer Howard Tanner ("Code Enforcement Officer Tanner"). Ex. N to JSF ¶ 38. In her accompanying letter, Radford explained that the Nation's architect had determined that the Facility was code compliant, and further stated that the Tribe's own health and safety codes were "at least as stringent as the state and local codes that govern in Union Springs." *Id.*

On August 13, 2013, Code Enforcement Officer Tanner wrote back, instructing Radford to complete a permit application in accordance with certain state regulations. Ex. O to JSF ¶ 39; Pls.' Facts ¶ 68-69. Code Enforcement Officer Tanner's letter also asked Radford "to apply for a license to operate a bingo hall in the Village pursuant to the Games of Chance Ordinance dated May 19, 1958." Ex. O to JSF ¶ 39.

On December 19, 2013, Radford submitted to Code Enforcement Officer Tanner a another application for a Certificate of Occupancy for Lakeside Entertainment. Ex. P to JSF ¶ 40. Radford's second submission included a lengthy Code Compliance Review completed by an architect retained by the Nation. *Id.;* Pls.' Facts ¶¶ 70-71.

These submissions did not satisfy the Village. On December 23, 2013, a few days after Radford submitted the second application for a Certificate of Occupancy, the Village served two additional "Orders to Remedy Violations." Ex. Q to JSF ¶ 41; Pls.' Facts ¶ 73.

As before, one notice alleged that the Nation's Class II gaming activities at Lakeside Entertainment violated the Village's Games of Chance Ordinance. Ex. Q to JSF ¶ 41; Pls.' Facts ¶ 74. But this time around, the Village also faulted the Facility for allegedly violating 19 N.Y.C.R.R. § 1202.3, a regulation which prohibits changes "in the nature of the occupan[c]y of an existing building unless a Certificate of Occupancy authorizing the change has been made." JSF ¶ 41; Pls.' Facts ¶ 75.

Although both notices instructed the Nation to achieve compliance by December 28, 2013, Ex. Q to JSF ¶ 41, operations at Lakeside Entertainment seem to have continued unabated. On February 21, 2014, Code Enforcement Officer Tanner inspected the Facility and identified three building code issues that needed to be handled. JSF ¶ 42; Pls.' Facts ¶¶ 77-78. The Nation quickly addressed these problems and, on a March 7 return visit, Code Enforcement Officer Tanner stated that the Facility met building code requirements for "fire/life safety." JSF ¶ 43; Pls.' Facts ¶ 79.

Still, though, Union Springs was not satisfied. On March 24, 2014, Code Enforcement Officer Tanner wrote back to Radford, informing her that he could not grant a Certificate of Occupancy to Lakeside Entertainment because it was "still in

violation of the zoning law of the Village of Union Springs and the 1958 games of chance ordinance which prohibits bingo in the Village." Ex. R to JSF ¶ 44; Pls.' Facts ¶¶ 81-82. According to Code Enforcement Officer Tanner, the Nation needed to obtain (1) a use variance from the Village's Zoning Board of Appeals and (2) a bingo permit from the Village Board. *Id.*

On April 2, 2014, the Nation's counsel wrote to Village Attorney Hayden, reiterating that IGRA preempted the Village's attempt to apply the Gaming Ordinance to Lakeside Entertainment. Ex. S to JSF ¶ 45. The letter further explained that, because the Parcel sits within a "Commercial Zoning District" as that term is defined in the Village Zoning Law, no use variance was necessary. *Id.;* Pls.' Facts ¶¶ 86-89. Finally, the letter advised that, to the extent the Village believed the Nation needed to obtain the use variance to avoid the Games of Chance Ordinance, that extra step would also be preempted by IGRA. Ex. S to JSF ¶ 45.

3. This Lawsuit is Filed

On October 28, 2014, the Nation and John Does 1-20 filed suit against Union Springs, the Village Board, and a group of Village officials. Dkt. No. 1. This time around, the Cayugas sought to vindicate their contention that IGRA preempts the Village's renewed efforts to regulate, block, or restrict the Class II gaming activity at Lakeside Entertainment. *Id.*

The Nation sought an emergency restraining order and an injunction that would prevent Union Springs from enforcing its local laws and ordinances against the Property. Dkt. No. 5. After this Court entered an order temporarily restraining the Village's enforcement efforts, Dkt. No. 7, the parties stipulated to maintain the status quo until the Tribe's application for a preliminary injunction could be decided, Dkt. No. 12, 19.

But the case hit a roadblock almost immediately. On November 13, 2014, the Cayuga Nation Unity Council (the "Unity Council") moved to intervene as a defendant and to dismiss the action. Dkt. No. 27. According to the Unity Council's filings, Halftown—who had led both the initial effort to build Lakeside Entertainment and the renewed effort to reopen it—had been ousted from his leadership position within the Tribe and therefore had no authority to institute litigation on behalf of the Nation. *Id.* While the parties briefed the leadership dispute with the Unity Council, the Village cross-moved to dismiss the Tribe's suit. Dkt. No. 32.

On December 19, 2014, the Unity Council's motion to intervene was denied. *Cayuga Nation v. Tanner,* 2014 WL 12591881 (N.D.N.Y. Dec. 19, 2014). There, the Court recognized that there was an ongoing leadership dispute within the Tribe that had taken a series of twists and turns, but noted that the Bureau of Indian Affairs ("BIA") had long recognized Halftown as the Nation's federal representative for government-to-government purposes. *Id.* at *2-*3. Accordingly, the Court conclud-

ed the Unity Council lacked standing to intervene. *Id.* at *3.

4. The Nation is Forced to Appeal

However, on May 19, 2015, the Court granted the Village's cross-motion to dismiss the Nation's suit for lack of standing, vacated the temporary restraining order, and closed the case. *Cayuga Nation v. Tanner,* 2015 WL 2381301 (N.D.N.Y. May 19, 2015). In the Court's view, the tribal leadership dispute first hinted at by the Unity Council's attempt to intervene had become impossible to unravel because it involved disputed issues of tribal law, a matter outside the jurisdictional purview of an Article III court.[7] *Id.*

With the Nation forced to appeal, Dkt. No. 53, the Village took the opportunity to pounce, serving the Tribe with four new Orders to Remedy Violations the very next day, JSF ¶ 46. These new notices alleged the Nation had failed to secure a Certificate of Occupancy or a bingo permit for Lakeside Entertainment.[8] Ex. K to Tanner Decl.,

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[7] A full account of the leadership dispute can be found in the district court opinion rejecting the Unity Council's challenge to federal administrative decisions recognizing Halftown and his leadership group as the Tribe's federal representative. *Cayuga Nation v. Bernhardt,* 374 F. Supp. 3d 1, 5-9 (D.D.C. 2019).

[8] The parties agree that the Village served four additional notices at this time, JSF ¶ 46, but contrary to the parties' joint representation, copies do not appear attached as Exhibit T on CM/ECF. The Court has referred to the copies it was able to find attached to Code Enforcement Officer Tanner's declaration instead.

Dkt. No. 125-11; Pls.' Facts ¶¶ 91-92. One of these notices also alleged that the Facility's sprinkler system was inadequate, and cited a violation of New York State's building code. Pls.' Facts ¶ 93. The Nation fixed the sprinkler system issue but kept gaming. *Id.* ¶ 94.

This touched off a round of emergency motion practice: the Doe plaintiffs sought an opportunity to amend the pleading to identify themselves as Halftown and two of his fellow Councilmembers; the Nation itself sought an injunction pending appeal. Dkt. Nos. 52, 54. A second temporary restraining order was entered while those requests were briefed.

On June 11, 2015, the Court granted the Nation's motion for an injunction pending appeal but denied the Does' motion for reconsideration, finding their assertions of harm that might flow from the Village's vague threats of future enforcement activity too speculative to warrant partial reinstatement of the suit. *Cayuga Nation v. Tanner,* 108 F. Supp. 3d 29 (N.D.N.Y. 2015). However, the Court observed that amendment of the complaint to identify the Doe plaintiffs might well be warranted if the standing issue were resolved favorably to the Nation on appeal. *Id.* at 34 & n.5.

On June 2, 2016, a panel of the Second Circuit sided with the Cayugas and vacated the dismissal order. *Cayuga Nation v. Tanner,* 824 F.3d 321 (2d Cir. 2016). Although the Circuit acknowledged that "federal courts lack authority to resolve internal disputes about tribal law," the panel concluded that a court faced with such a dispute need only

address "whether there is a sufficient basis in the record to conclude, without resolving disputes about tribal law, that the individual may bring a lawsuit on behalf of the tribe." *Id.* at 328.

Tackling this more limited standing inquiry, the Circuit concluded that it could appropriately defer to the BIA's decision to recognize Halftown as the Nation's federal representative, regardless of the limited or interim nature of the BIA's recognition decision. *Cayuga Nation,* 824 F.3d at 330. The panel also concluded that a subset of the Doe plaintiffs, properly identified, had "adequately alleged that they face a credible threat of prosecution" from the Village's enforcement efforts. *Id.* at 331-32. However, the Second Circuit declined to weigh in on the merits of the parties' land-use dispute, including but not limited to the Village's claim that res judicata barred the Nation's suit in light of the final outcome of the First *Cayuga* Litigation all the way back in 2005. *Id.* at 333 & n.10.

5. A Return to the Status Quo

On remand, neither player sought to advance the litigation. Instead, on June 23, 2016, the parties entered into a stipulation that kept in place a temporary injunction precluding the Village from "taking any steps to restrict, interfere with, punish, or otherwise penalize any actions taken by the Cayuga Nation, its officer, employees, or other representatives in furtherance of Class II gaming activities at Lakeside Entertainment, including but not limited to any effort to enforce the 1958

'Games of Chance' Ordinance or the Union Springs Zoning Ordinance or to penalize noncompliance with the Orders to Remedy that have been issued." Dkt. No. 73 (citing Dkt. No. 7).

For the next three years, the parties periodically renewed the terms of this initial stipulation and filed with the Court a series of status reports as they continued to "explore ways to resolve their dispute without further litigation." Dkt. Nos. 75, 77, 79, 81, 83, 85, 87, 89, 93, 95. While the parties remained at a standstill, the NIGC announced it would once again recognize and regulate the Nation's gaming activity at Lakeside Entertainment. Ex. U to JSF ¶ 47; Pls.' Facts ¶¶ 51-60. Since that announcement, the NIGC has approved the Cayugas' Class II Gaming Ordinance. Ex. V to JSF ¶ 53. The Tribe currently pays quarterly fees to NIGC based on its "Assessable Gaming Revenue" in accordance with IGRA and applicable NIGC regulations. JSF ¶ 49.

In short, the Nation has come a long way since 2002, when it first began to pursue economic development efforts. These days, the Tribe owns and manages forty-two housing units for its citizens on Cayuga Historic Reservation land, which it constructed with grant funding from United States Department of Housing and Urban Development. Pls.' Facts ¶¶ 17-18. The Nation provides scholarships to Cayuga citizens, helps arrange health care through the Indian Health Service, and participates in child welfare matters concerning Cayuga children. *Id.* ¶¶ 19-22.

More recently, the Nation has established its own law enforcement apparatus and court system. Pls.' Facts ¶¶ 26-30, 43-48. This Cayuga Nation Police Force patrols Nation-owned properties, including Lakeside Entertainment. *Id.* ¶ 31-38. And although it does not receive federal funding, the Police Force does participate in training events with the federal government. *Id.* ¶¶ 40-41.

Yet even today, the situation at Lakeside Entertainment remains in flux. For one thing, the Village continues to deny that the Nation validly exercises any "government power" over its lands or its citizens. Pls.' Facts ¶ 11. And local municipalities like Seneca and Cayuga County continue to deny the legitimacy of the Nation's law enforcement activities. Defs.' Facts ¶¶ 88-89.

D. Ending the Stalemate

On March 27, 2019, in an effort to finally move this litigation toward a resolution, the Court held a status conference with the parties and then set a date certain on which a bench trial in this matter would begin. Shortly thereafter, the parties agreed to a briefing schedule with a set of stipulated facts that would allow the case to be resolved on the papers alone. Dkt. No. 98.

On May 22, 2019, in accordance with the parties' agreement, the Cayugas, along with a group of tribal officials and employees, filed a three-count amended complaint seeking declaratory and injunctive relief against Union Springs and its officials. Dkt. No. 100.

Thereafter, the parties stipulated to dismiss a counterclaim asserted by the Village, which alleged that the Tribe's federal reservation had been validly disestablished at some point after the Treaty of Canandaigua in 1794. Dkt. No. 112; *see also Cayuga Indian Nation of N.Y. v. Seneca County, N.Y.,* 260 F. Supp. 3d 290, 309-15 (W.D.N.Y. 2017) (dismissing similar counterclaim alleging that the 1838 Treaty of Buffalo Creek disestablished, or terminated, the Cayugas' reservation).

On September 4, 2019, the parties cross-moved for summary judgment on the basis of joint stipulated facts supplemented by additional evidentiary material briefed in the traditional manner. The matter is ripe for decision.

III. LEGAL STANDARD

The entry of summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment is a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (citing FED. R. CIV. P. 56(c)). A fact is "material" for purposes of this inquiry if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). And a "genuine" dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

"When deciding a summary judgment motion, a court must resolve any ambiguities and draw all inferences from the facts in a light most favorable to the nonmoving party." *Ward v. Stewart,* 286 F. Supp. 3d 321, 327 (N.D.N.Y. 2017) (citation omitted). Accordingly, summary judgment is inappropriate where a "review of the record reveals sufficient evidence for a rational trier of fact to find in the [non-movant's] favor." *Treglia v. Town of Manlius,* 313 F.3d 713, 719 (2d Cir. 2002) (citation omitted).

"Where, as here, the parties have cross-moved for summary judgment, a reviewing court 'must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *Ward,* 286 F. Supp. 3d at 327 (quoting *Marcano v. City of Schenectady,* 38 F. Supp. 3d 238, 246 (N.D.N.Y. 2014) (McAvoy, J.)). "In undertaking this analysis, it bears nothing that 'a district court is not required to grant judgment as matter of law for one side or the other.'" *Id.*

IV. DISCUSSION

The Nation's amended pleading asserts three counts. Count One alleges that IGRA preempts state and local civil enforcement proceedings that might prohibit the Tribe from conducting Class II gaming at Lakeside Entertainment. Am. Compl. ¶¶ 80-85. Count Two alleges that IGRA preempts state and local criminal enforcement proceedings with respect to the Tribe's Class II gaming at the

Facility. *Id.* ¶¶ 86-91. And Count Three alleges that tribal sovereign immunity bars state and local enforcement efforts regardless of whether or not IGRA preemption applies. *Id.* ¶¶ 92-96. The Nation seeks declaratory and injunctive relief. *Id.* ¶¶ 85, 91, 96.

A. Preclusive Effect of Prior Litigation

At the outset, however, Union Springs contends that collateral estoppel and res judicata bar all three of the Nation's claims. Defs.' Mem., Dkt. No. 135 at 10, 13-30. First, the Village argues that estoppel applies because the Tribe already litigated IGRA preemption and tribal sovereignty in the First *Cayuga* Litigation. *Id.* And even if estoppel does not apply, Union Springs insists res judicata should bar this suit, since the Nation "could have" and "should have" raised these IGRA preemption claims in the first round of litigation. *Id.*

"Res judicata and collateral estoppel are related but distinct doctrines that may bar a party from litigating certain claims or issues in a subsequent proceeding." *Flaherty v. Lang,* 199 F.3d 607, 612 (2d Cir. 1999). "Both doctrines have a common objective: the finality of judgments, and they often overlap in a particular case." *Parker v. Corbisiero,* 825 F. Supp. 49, 54 (S.D.N.Y. 1993).

"Under the doctrine of res judicata, or claim preclusion, 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action.'" *Flaherty,* 199 F.3d at 612

(quoting *Rivet v. Regions Bank of La.,* 522 U.S. 470, 476 (1998) (emphasis in original)). "In contrast, collateral estoppel, or issue preclusion, 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated by the same parties in a future lawsuit.'" *Id.* (quoting *Schiro v. Farley,* 510 U.S. 222, 232 (1994)).

1. Collateral Estoppel

First, Union Springs contends that collateral estoppel bars all of the Nation's claims. Defs.' Mem. at 18-25. According to the Village, in *Union Springs I* the Cayugas "raised, and this Court expressly adopted, IGRA preemption as a complete defense to the enforcement of Village laws seeking to regulate the use of the [ ] Parcel." *Id.* at 10. Thus, the Court's later, contrary determination in *Union Springs II*—which went the Village's way in light of the Supreme Court's intervening decision in *Sherrill* and from which the Nation did not take an appeal—means that the Tribe is now estopped from relitigating IGRA here in a second suit. *Id.*

"Under either federal law or New York State law, collateral estoppel, or issue preclusion, bars the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding, regardless of whether the two suits are based on the same cause of action." *Postlewaite v. McGraw-Hill,* 333 F.3d 42, 48 (2d Cir. 2003). However, "in order for a judgment to be preclusive, the issue in question must have been actually

decided, and its determination must have been essential to the judgment." *Id.* In other words, "[i]f an issue was not actually decided in the prior proceeding, or if its resolution was not necessary to the judgment, its litigation in a subsequent proceeding is not barred by collateral estoppel." *Id.*

Collateral estoppel thus "applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was [a] full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *Flaherty,* 199 F.3d at 613 (quoting *United States v. Hussein,* 178 F.3d 125, 129 (2d Cir. 1999)).

Upon review, that test is not met in this case. Union Springs spends pages of its opening brief delivering an exhaustive account of what it clearly believes to have been unfair or deceitful behavior by the Nation in the First *Cayuga* litigation. Defs.' Mem. at 13-16, 18-20. In the Village's view, the Cayugas unfairly "concealed" their plan to eventually conduct gaming activities at the Property. *Id.* at 19. According to the Village, the Tribe knew from the very beginning of its renovations that the Games of Chance Ordinance would be an impediment to the kind of activity the Nation had planned. *Id.* at 19-20.

That may all be true. But in arguing that the Nation should be estopped from litigating IGRA's preemptive effect in this second lawsuit, Union Springs distorts certain elements of the parties' litigation history. As relevant here, the Village rips

from context a short quotation from *Union Springs I* to claim that this Court "expressly adopted the Cayugas' IGRA-based preemption argument." Defs.' Mem. at 22 (quoting *Union Springs I,* 317 F. Supp. 2d at 148).

The Court did no such thing. The Nation filed the first suit in October 2003, nearly a full year before Lakeside Entertainment opened in May 2004. Accordingly, the Tribe's claim in the First *Cayuga* Litigation involved a dispute with Union Springs over its attempt to regulate construction and renovation activities at the Parcel, not its present effort to block or restrict the Tribe's gaming activities. Indeed, the pleading filed by the Nation in the first suit alleged that an Indian tribe could revive tribal sovereignty over, or at the very least render state and local laws completely inapplicable to, reacquired fee land situated within the boundaries of a historic reservation. First *Cayuga* Litig., Dkt. No. 1 at ¶¶ 3-4, 25.

Union Springs I agreed with that rationale. First, the Court declared that the Property qualified as "Indian country," a status which generally exempted it from the application of state and local regulation. *Union Springs I,* 317 F. Supp. 2d at 148. Second, the Court rejected an attempt by Union Springs to argue that "exceptional circumstances" warranted the application of state and local law despite the Parcel's newfound status as Indian country. *Id.* at 144-48.

As part of that "exceptional circumstances" argument, the Village had claimed that information about the Nation's "planned use for the Property"

was "vital" to making an informed determination about whether its local laws should still apply. *Union Springs I,* 317 F. Supp. 2d at 148. The Village, it turned out, had learned through an anonymous tipster that the Tribe planned to open a gaming operation on the Parcel. *Id.* at 149 & n.21.

Union Springs I rejected that assertion. The Court explained that any tribal gaming activity that might take place down the road would be subject to the independent, comprehensive federal regulatory scheme set forth in IGRA. *Union Springs I,* 317 F. Supp. 2d at 148. Thus, *even if* the Tribe eventually planned to use the Property for gaming, that activity would not be the sort of "exceptional circumstances" sufficient to justify the application of the Village's local regulations. *Id.*

Union Springs I went on to refuse the Village's request to enjoin the Tribe from gaming at the Property until the Nation could demonstrate so-called IGRA compliance because, *inter alia,* the Cayugas had not even "commenced any gaming activities on the Property that could be considered an IGRA violation." *Union Springs I,* 317 F. Supp. 2d at 150.

Indeed, the Court noted it was arguable whether Union Springs had even provided fair notice to the Nation of this defensive assertion of IGRA, since the issues in dispute in the First *Cayuga* Litigation —in both the Nation's complaint and in the counterclaim interposed by the Village—related to the applicability *vel non* of local laws to Indian country. *Id.* at 149 & n.21. The Cayugas did not raise,

and the Court did not address, IGRA's preemptive effect on those local laws. *Id.*

Later, in *Union Springs II,* the Court vacated the permanent injunction it had previously entered in favor of the Nation. 390 F. Supp. 2d at 206. Because *Union Springs I* had relied on "traditional notions of Indian sovereignty" to enjoin the Village from enforcing any of its local laws against the Property, equitable relief on that basis was improper in the wake of *Sherrill,* which held that a tribe cannot revive unilateral sovereign authority over discrete parcels of historic reservation land through open market purchases. *Id.* Accordingly, the Court granted summary judgment in favor of the Village. *Id.*

There is not a single mention of IGRA in *Union Springs II.* Properly understood, then, Union Springs is wrong to claim that preemption "was actually litigated and actually decided" or even "necessary to support a valid and final judgment on the merits" in either *Union Springs I* or *Union Springs II. See Flaherty,* 199 F.3d at 613.

To the contrary, the First *Cayuga* Litigation was about invoking tribal sovereignty over historic reservation land repurchased in fee as a way to completely avoid the application of any state and local laws. In *Union Springs I,* the Court held that this strategy was permissible. The Supreme Court held otherwise in *Sherrill.* That change in the law is reflected in the unappealed judgment in *Union Springs II.*

This suit asks a different question: what to do about otherwise applicable local laws that touch on

tribal gaming activity? The Nation alleges that state and local efforts to enforce those laws are preempted by IGRA. Because that is an entirely different issue than the one that prompted the First *Cayuga* Litigation, collateral estoppel is no bar to these proceedings.

2. Res Judicata

Alternatively, Union Springs contends that res judicata bars the Nation's suit because it involves "the very same parcel of land in the Village and the very same actions by the Cayugas in operating Lakeside Entertainment in violation of local laws." Defs.' Mem. at 26.

"Under both New York law and federal law, the doctrine of *res judicata,* or claim preclusion, provides that '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Maharaj v. Bankamerica Corp,* 128 F.3d 94, 97 (2d Cir. 1997) (Cardamone, J.) (quoting *Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981)). Unlike collateral estoppel, "[r]es judicata applies to any claim or defense previously available, whether or not it was actually litigated or determined." *Oneida Indian Nation of N.Y. v. New York,* 194 F. Supp. 2d 104, 125 (N.D.N.Y. 2002) (Kahn, J.) (citing *Tucker v. Arthur Andersen & Co.,* 646 F.2d 721, 727 (2d Cir. 1981)).

"In determining whether a second suit is barred by this doctrine, the fact that the first and second suits involved the same parties, similar legal

issues, similar facts, or essentially the same type of wrongful conduct is not dispositive." *Maharaj,* 128 F.3d at 97. "Rather, the first judgment will preclude a second suit only when it involves the same 'transaction' or connected series of transactions as the earlier suit; that is to say, the second cause of action requires the same evidence to support it and is based on facts that were also present in the first." *Id.*

Union Springs asserts that the First *Cayuga* Litigation and the Nation's current lawsuit "are part of the same, single continuous transaction" because, in the Village's view, "[n]othing changed factually or legally since the Cayugas voluntarily shut down Lakeside Entertainment in response to *Union Springs II."* Defs.' Mem. at 27, 29.

But that is the wrong way to think about claim preclusion. "For the purposes of *res judicata,* the scope of litigation is framed by the complaint at the time it is filed." *Computer Assocs. Int'l, Inc. v. Altai, Inc.,* 126 F.3d 365, 369-70 (2d Cir. 1997) (cleaned up). Thus, "[t]he *res judicata* doctrine does not apply to new rights acquired during the action which might have been, but which were not, litigated." *Id.*

As explained in significant detail *supra* and as the Nation sets forth in its own brief in opposition, the First *Cayuga* Litigation was about whether the Village's zoning and land-use laws applied to renovation and construction on the Property, a discrete parcel of historic reservation land reacquired in an open market transaction, despite the Tribe's asser-

tion of tribal sovereign authority. Pls.' Response Mem., Dkt. No. 137 at 16-23.

Consequently, the enforcement activity that brought the Nation into federal court in 2003 stemmed from the Tribe's renovation and construction activities. *Id.* at 17-18; *see also* First *Cayuga* Litig., Dkt. No. 1 at ¶ 28 (describing "Stop Work" Orders and "Orders To Remedy Violations" that asserted "work [at the Parcel] was proceeding without Village zoning and building permits, an asbestos survey[,] or filed architect plans.").

The dispute in this second case is about whether Union Springs can apply otherwise applicable local law(s) to regulate tribal gaming activities despite an assertion of IGRA's preemptive effect over that field. Pls.' Response Mem. at 19-20. As one would expect, the enforcement activity that brought the Tribe into federal court this time is based on new (and different) enforcement efforts undertaken by the Village on that score. *Id.*

To be sure, Lakeside Entertainment had opened by the time the Second Circuit finally remanded the First *Cayuga* Litigation for consideration in light of *Sherrill.* But the Nation did not amend its operative complaint to add claims based on IGRA preemption before *Union Springs II* was decided in 2005. And it was under no obligation to do so. *See, e.g., Computer Assocs. Int'l, Inc.,* 126 F.3d at 370.

In reply to this argument, Union Springs emphasizes the sweeping nature of the injunction entered in *Union Springs I* and argues that res judicata precludes a party "from launching a series of lawsuits to challenge different local laws in successive

actions—breaking off one law at a time, as each is enforced against it, despite the lawbreaker knowing the full universe of laws that apply to its actions." Defs.' Response Mem., Dkt. No. 138 at 14.

That is certainly one way to caricature the parties' litigation history. A more balanced view, however, is that the adverse judgment left unappealed by the Nation in *Union Springs II* is a post-*Sherrill* confirmation that the Village, notwithstanding tribal sovereignty, retains authority to apply its local laws to historic reservation land reacquired by the Tribe in fee (such as the Parcel) while this litigation is a live dispute over whether a specific federal law preempts that otherwise retained authority in connection with a specific kind of activity. Accordingly, res judicata does not bar these proceedings.

B. IGRA Preemption

Congress enacted IGRA in 1988 as a "compromise solution to the difficult questions involving Indian gaming." *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002). As the Second Circuit has confirmed, the Act was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." *Mashantucket Pequot Tribe v. Town of Ledyard,* 722 F.3d 457, 469-70 (2d Cir. 2013) (citation and internal quotation marks omitted).

IGRA provides a statutory basis for (1) "the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficien-

cy, and strong tribal governments" and (2) "the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences." 25 U.S.C. § 2702(1)–(2). The Act provides for independent federal regulatory authority and federal standards for gaming on Indian lands. § 2702(3). The Act also establishes the NIGC as a commission within the Department of the Interior ("DOI") to monitor tribal gaming and to promulgate the regulations and guidelines necessary to implement the statute. §§ 2704(a), 2706(b).

"The Act divides gaming on Indian lands into three classes—I, II, and III—and provides a different regulatory scheme for each class." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 48 (1996). Lakeside Entertainment is considered Class II, which includes bingo, pull-tabs, punch boards, and other similar games. 25 U.S.C. § 2703(7)(A); *Ysleta del Sur Pueblo v. Texas,* 36 F.3d 1325, 1330 (5th Cir. 1994) ("IGRA defines Class II gaming as bingo and other non-banking card games (i.e., card games in which the casino has no economic interest in the outcome).").

IGRA subjects this intermediate class of gaming to a kind of joint tribal/federal regulation. 25 U.S.C. § 2710(a)(2). The Act provides that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands within such tribe's jurisdiction*, if (A) such Indian gaming is located within a State that permits such gaming . . . , and (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by

the [NIGC] Chairman." § 2710(b)(1) (emphasis added).[9]

1. Civil Enforcement

In Count One, the Nation alleges that IGRA preempts the Village's civil enforcement efforts against the Class II gaming activity at Lakeside Entertainment. Am. Compl. ¶¶ 80-85. The Nation alleges it is therefore entitled to declaratory and injunctive relief from the Village's ongoing refusal to grant the Facility a Certificate of Occupancy, whether this denial is based on the Games of Chance Ordinance or on other aspects of the Village's zoning and land-use laws. *Id.* According to the Cayugas, the broad sweep of IGRA's preemptive effect precludes the Village from directly or indirectly interfering with the Tribe's Class II gaming activities. *Id.*

Union Springs asserts that Lakeside Entertainment cannot receive the benefit of IGRA's preemptive effect because the Property does not qualify as "Indian lands" within the meaning of the statute. Defs.' Mem. at 33-38. The Village also contends that the Parcel does not fall within the Tribe's "jurisdiction" because the Cayugas do not exercise any real "governmental power" over the land. *Id.* According to the Village, the ongoing governance activities described at length in the Nation's briefing—like the tribal police force and

[9] Although the Village attacks the jurisdictional component(s) of this language, it is undisputed that the other requirements for Class II gaming are met. Pls.' Mem. at 22.

courts—are nothing more than a sham. *Id.* at 38 & n.11.

The Village insists that under *Sherrill* and *Union Springs II,* "the Cayugas exercise no sovereign authority whatsoever over the fee lands they own, and instead are subject to state and local taxation and state and local laws including land use and zoning, and otherwise are fully subject to the jurisdiction of New York State and its political subdivisions." Defs.' Mem. at 36. In the Village's view, "[t]his leaves no room for tribal self-governance and no possibility of the Cayugas' fee lands qualifying as 'Indian lands' under tribal governmental power." *Id.*

The Nation, on the other hand, lays out a convincing argument for why this zero-sum conception of post-*Sherrill* tribal authority is incorrect. Pls.' Mem. at 19-31. Initially, though, the Cayugas argue that preemption principles render the Village's arguments about the precise nature and extent of tribal governmental power totally irrelevant. *Id.* at 21. The Tribe points out that IGRA sets up an administrative enforcement scheme that vests the NIGC with authority to make determinations about the lawfulness of tribal gaming. *Id.* According to the Nation, "[i]f the Village believes that such gaming is unlawful, its remedy is to ask NIGC and its Chairman to bring an enforcement action." *Id.*

The Nation then goes on to explain that there is no minimum quantum of "governmental power" that a tribe must exercise over a piece of land before it can qualify under the territorial jurisdic-

tional provisions identified by the Village. Pls.' Mem. at 21-23. Rather, a parcel of tribe-owned land satisfies IGRA as long as the tribe "may exercise *some* jurisdiction" over the land, and therefore even concurrent jurisdiction with state and/or local authorities is sufficient to satisfy this requirement. *Id.* at 22-27.

a. Indian lands

Union Springs' jurisdictional argument actually conflates language found in two different subsections of IGRA. First, the Village argues that the Property does not qualify as "Indian lands" within the meaning of the Act.

IGRA defines "Indian lands" to mean (A) "all lands within the limits of any Indian reservation" and (B) "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and *over which an Indian tribe exercises governmental power."* 25 U.S.C. § 2703(4) (emphasis added).

As the Nation points out, Union Springs seems to be suggesting that the additional qualifying language found in subsection (B); that is, the underlined requirement that a tribe "exercise[] governmental power" over the land in question, should also apply to the language in subsection (A), which sweeps in "all lands within the limits of any Indian reservation" without any qualifier about the exercise of governmental power.

That is the wrong way to read the "Indian lands" definition. *See* Pls.' Response at 23-25. Where, as here, Congress has included a qualifier in one subsection of a statute but omitted it from another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Allison Engine Co., Inc. v. United States ex rel. Sanders,* 553 U.S. 662 (2008).

It is undisputed that the Cayugas, a federally recognized Indian tribe, are the same entity with which the United States entered into the Treaty of Canandaigua. JSF ¶¶ 1-2. It is undisputed that the lands recognized and identified as reserved for the Cayugas in that Treaty constitute the Cayuga Historic Reservation. *Id.* ¶ 4. It is undisputed that the Property is situated within the boundaries of this Cayuga Historic Reservation. *Id.* ¶ 10. And for present purposes, it is also undisputed that the Cayuga Historic Reservation has not been disestablished by subsequent developments. *Id.* ¶ 3.

At first blush, it seems challenging to reconcile that, on the one hand, the Cayugas possess a reservation that has never been disestablished, and on the other, the reality that up until recently the Nation did not hold modern legal title to any of that reservation land. However, in drafting IGRA Congress chose to use expansive definitional language in subsection (A); *i.e.,* it deliberately chose to include "*all* lands within the limits of *any* Indian reservation." Applying that unrestricted language to the factual landscape of this case, the Property qualifies as "Indian lands." Accordingly, this argument will be rejected.

b. Within such tribe's jurisdiction

The other component of the Village's jurisdictional argument rests on the section of IGRA that lays out a so-called "jurisdictional" requirement for Class II gaming. The contested subsection of the Act provides that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands *within such tribe's jurisdiction*." 25 U.S.C. § 2710(b)(1) (emphasis added).

Union Springs contends that the Nation does not exercise any tribal "jurisdiction" over the repurchased Parcel because the Tribe does not enjoy any "sovereignty" over repurchased fee land after *Sherrill* and *Union Springs II*. The Village draws a series of contrasts between historical quotes about the unrestricted nature of tribal sovereignty over reservation land and the Supreme Court's alleged restriction of that sovereignty in *Sherrill* to argue that the Cayugas stand in the shoes of an ordinary landowner when it comes to their jurisdictional authority over the Property today. Defs.' Mem. at 34-35.

For instance, the Village cites to *McClanahan v. State Tax Comm'n of Arizona,* a pre-*Sherrill* opinion in which the Supreme Court observed that Indian reservations were long understood to be "distinct political communities, having territorial boundaries within which their authority is exclusive" and where, consequently, *"state law could have no role to play*." 411 U.S. 164, 168 (1973) (emphasis added). According to the Village, language like this shows that the Nation's assertion of

tribal "jurisdiction" over the Property did not survive the Supreme Court's holding in *Sherrill,* which rejected the Oneidas' attempt to revive tribal sovereignty over repurchased fee lands.

The Nation responds that rhetoric about the historical nature of tribal sovereignty over reservation land can only take you so far when trying to decide what Congress meant when it wrote this "within such tribe's jurisdiction" phrase into IGRA. The Nation also contends that these general quotes about unrestricted tribal sovereignty certainly do not explain how, if at all, IGRA's jurisdictional requirement is impacted by *Sherrill*'s holding.

To illustrate the point, the Cayugas quote language helpful to their own arguments. In *Solem v. Bartlett,* a pre-IGRA, pre-*Sherrill* case, the Supreme Court set out the general principle that "[o]nce a block of land is set aside for an Indian Reservation and *no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. 463, 470 (1984) (emphasis added).

Beyond a citation to *Solem,* the Cayugas offer other good reasons to reject the Village's all-or-nothing conception of modern tribal authority, as least insofar as it applies to IGRA's "jurisdiction" requirement. For instance, the Nation points out that by the time Congress passed IGRA in 1988, it was well understood that contemporary tribal authority over reservation land varied widely between tribes and across geographic boundaries. After all, Congress had by then explicitly author-

ized certain states to exercise civil and criminal regulatory authority over tribal activities on reservation land. *See* Pls.' Response at 25-28.

As an example, in 1953 Congress enacted "Public Law 280," which expressly granted six states broad criminal and limited civil jurisdiction on reservations. 18 U.S.C. § 1162; 28 U.S.C. § 1360(a). And as the Tribe correctly explains, these jurisdictional grants were expanded to include additional states in subsequent years. Pls.' Response at 26.

In fact, it was the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians,* which invalidated California's attempt to regulate tribal bingo under Public Law 280, that finally spurred Congress to take action to regulate the field of tribal gaming by enacting IGRA the following year. *Artichoke Joe's,* 216 F. Supp. 2d at 1091-92 (explaining that *"Cabazon* left something of a regulatory vacuum that made the issue of Indian gaming regulation more pressing").

In other words, tribal "jurisdiction" and "sovereign authority" are no longer treated as necessarily binary, yes-or-no concepts. Nevertheless, Union Springs insists "[t]here is no space between *Sherrill*'s total preclusion of sovereignty over the fee lands and IGRA's requirement that the tribe exercise some quantum of governmental power over the [Property]." Defs.' Response at 26. In the Village's view, *Sherrill* held that the Cayugas were barred "from exercising *any* sovereignty over the fee lands in question." *Id.* at 27 (emphasis in original). According to Union Springs, "[t]he decades-long jurisdictional clashes over the right to govern

fee lands inside ancient (former) reservations were supposed to be put to rest by *Sherrill,* with restoration of sovereign authority over those fee lands occurring only by the land being taken into trust." *Id.*

To be sure, *Sherrill* is a case that "dramatically altered the legal landscape" of tribal land-use litigation. *Cayuga Indian Nation of N.Y. v. Pataki,* 413 F.3d 266, 273 (2d Cir. 2005). But *Sherrill*'s holding is more limited than the Village believes it to be. In *Sherrill,* the Supreme Court held that a tribe could not "revive" its ancient sovereignty to evade state and local taxation on discrete parcels of historic reservation land repurchased from the open market. 544 U.S. at 203. More generally, then, *Sherrill* has been understood to hold "that equitable doctrines, such as laches, acquiescence, and impossibility can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations." *Pataki,* 413 F.3d at 273.

However, *Sherrill's* advice to the Oneidas about the IRA's land-into-trust process was not a holding in the case. *Cf. United States v. Warren*, 338 F.3d 258, 266 n.5 (3d Cir. 2003) (explaining general distinction between *ratio decidendi* and *obiter dicta*). And while the Court clearly hoped that identifying the land-into-trust process as the "proper avenue" for restoring full sovereignty would stem the tide of tribal land-use litigation, *Sherrill* certainly did not go on to hold that this process was the exclusive means for establishing Class II IGRA "jurisdiction"

on historic reservation land reacquired in fee. 544 U.S. at 220.

To the contrary, *Sherrill* said nothing about IGRA. Nor, for that matter, did *Union Springs II*, which relied on *Sherrill's* guidance about equitable doctrines to conclude that the Cayugas could not invoke tribal sovereignty to completely avoid the application of the Village's state and local laws over the reacquired Parcel. 390 F. Supp. 2d at 206.

The Village's belief that its expansive reading of *Sherrill* has since been explicitly adopted by the Second Circuit is also incorrect. Union Springs relies on language in *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016), to argue that lands subject to *Sherrill* can never satisfy this tribal "jurisdictional" requirement imposed by IGRA's text. Defs.' Response at 26.

But that case is also distinguishable from this one. In *Upstate Citizens,* a group of plaintiffs challenged the DOI's decision to take land into trust for the benefit of the Oneidas by alleging that the tribe's operation of the Turning Stone Casino Resort on that land caused, or would cause, various forms of tangible and intangible harm. *Upstate Citizens for Equality, Inc.,* 841 F.3d at 560. The Second Circuit cited *Sherrill* for the proposition that "[t]he Supreme Court has already rejected the [Oneidas'] claim that it may exercise *tribal jurisdiction* over the Turning Stone land without the Department first taking the land into trust on the Tribe's behalf." *Id.* at 566 (emphasis added).

However, as the Nation points out, this description of *Sherrill*'s holding came in passing, and is

part of an Article III standing analysis that might well be dicta. Pls.' Mem. at 29. More importantly, though, the *Upstate Citizens* panel recognized that the Oneidas were actively conducting Class III gaming activities at Turning Stone, an entirely different type of gaming than the gaming at Lakeside Entertainment.

Notably, Class III gaming is "the most heavily regulated and most controversial form of gambling under IGRA." *Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 715 (9th Cir. 2003). The Act subjects Class III gaming to a more demanding regulatory regime with slightly different jurisdictional language. *See* 25 U.S.C. § 2710(d)(1)(A)(I); *see also Michigan v. Bay Mills Indian Cmty.* 572 U.S. 782, 785 (2014) (recognizing Class III gaming as "the most closely regulated"). Besides, even *Upstate Citizens* recognized that tribal governance is not an all-or-nothing state of affairs, since states "retain some civil and criminal authority" on federal land even after it is taken into trust. 841 F.3d at 571.

This dispute over IGRA's jurisdictional language boils down to the Village's mistaken insistence that the Nation is "not a self-governing body except on paper." Defs.' Mem. at 38 n.11. But whether Union Springs likes it or not, the Cayugas remain a federally recognized Indian tribe. Federal recognition "institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary." 1 *Cohen's Handbook of Federal Indian Law* § 3.02 (2019).

The Nation therefore retains at least some degree of "inherent sovereign authority" over the land in its possession. *Michigan,* 572 U.S. at 788; *see also Citizens Against Casino Gambling in Erie County v. Stevens,* 945 F. Supp. 2d 391, 403 (W.D.N.Y. 2013) (rejecting contention that *Sherrill* "signals a *carte blanche* rejection of the long established relationship between 'Indian country' and tribal jurisdiction").

Although *Sherrill* subjected discrete parcels of historic reservation land that a tribe has belatedly repurchased in fee to local regulatory authority and *Union Springs II* applied that holding to the Cayugas' attempt to invoke tribal sovereignty as a way to avoid the application of any local regulatory authority over the Property, it remains an open question whether otherwise applicable local laws that regulate tribal gaming activity on this kind of repurchased fee land are preempted by IGRA.

Upon review of IGRA's text in light of the parties' arguments on this question, the Court concludes that an Indian tribe seeking to conduct Class II gaming under IGRA is not required to exercise some minimum quantum of *exclusive* governmental authority before it can satisfy the "within such tribe's jurisdiction" requirement imposed in § 2710(b)(1).

Rather, this jurisdictional component is satisfied so long as a tribe may exercise *some* jurisdictional authority over the land in question, and even concurrent jurisdiction with state and local authorities satisfies this test. *Cf. Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 701-02 (1st Cir. 1994)

(concluding that IGRA's "jurisdictional" language is best understood as an "integral aspect of retained sovereignty," which includes "the power of Indians to make and enforce their own substantive law in internal matters").

Because there is no reasonable dispute that the Nation exercises some degree of concurrent jurisdiction over the Property, this requirement is satisfied as a matter of law. *See* Pls.' Response at 30. This is especially so where, as here, the parties agree that the Nation is a federally recognized Indian tribe in possession of a reservation that has never been disestablished. JSF ¶¶ 1-3. Accordingly, IGRA's broad preemptive effect means that Union Springs cannot rely on local laws and ordinances to regulate the Tribe's Class II gaming activity at Lakeside Entertainment.

2. Criminal Enforcement

In Count Two, the Nation alleges that IGRA also precludes the Village's criminal enforcement actions. Am. Compl. ¶¶ 86-91. The Nation asserts that any criminal proceedings with respect to Lakeside Entertainment would be unlawful regardless of whether or not the Nation's activities are actually authorized by IGRA. *Id.* ¶ 87.

Under 18 U.S.C. § 1166, "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe . . . has consented to the transfer to the State of criminal

jurisdiction with respect to gambling on the lands of the Indian tribe." In other words, "Section 1166 makes a State's gambling laws applicable 'in Indian country' as federal law, then gives the Federal Government 'exclusive jurisdiction over criminal prosecutions' for violation those laws." *Michigan,* 572 U.S. at 793 n.5 (citations omitted).[10]

Union Springs contends that the State of New York retains "concurrent prosecutorial jurisdiction in Indian Country within the state," and asserts that "[t]he state's jurisdiction extends to enforcing local laws that license the operation of games of chance by authorized charitable organizations." Defs.' Mem. at 39 (citation and internal quotation marks omitted). In other words, "[t]his express authorization for enforcement of local anti-gaming laws such as the Village Gaming Ordinance renders Section 1166 inapplicable." *Id.*

This argument must be rejected. In support of its argument, Union Springs cites 25 U.S.C. § 232, which gives the State of New York "jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State."

But Congress passed § 232 in 1948, forty years before it enacted § 1166. As the Nation points out,

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[10] "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a).

a "later-enacted, more specific, comprehensive statute that targets the specific subject matter at issue in the case controls the construction of a more general statute when there is a potential conflict." *Nutritional Health All. v. Food & Drug Admin.,* 318 F.3d 92, 102 (2d Cir. 2003). As the Nation also points out, the opinion cited by the Village in support of this argument says only that Congress did not intend to surrender existing federal jurisdiction at the time it enacted § 232 in 1948. *See United States v. Cook,* 922 F.3d 1026, 1033 (2d Cir. 1991).

Because *Cook* does not resolve whether § 232 trumps § 1166's broad grant of exclusive federal authority over criminal matters in Indian country, the general rule that a later-enacted, comprehensive statute on the same subject matter controls any potential conflict here. *Cf. Sycuan Band of Mission Indians v. Roache,* 788 F. Supp. 1498, 1505 (S.D. Cal. 1992) ("The court must assume that when Congress chose to use the words 'exclusive jurisdiction [in § 1166],' Congress meant exactly that."), *aff'd,* 54 F.3d 535 (9th Cir. 1994). Accordingly, a straightforward application of § 1166 precludes Union Springs from undertaking any criminal enforcement proceedings with respect to the Tribe's Class II gaming activity at Lakeside Entertainment.

C. Sovereign Immunity

Preemption aside, Count Three asserts that the Nation's sovereign immunity is an independent bar to the Village's civil and criminal enforcement

efforts. Am. Compl. ¶¶ 92-96. According to the Nation, "[a]ny court proceedings to punish or restrict gaming at Lakeside Entertainment (including but not limited to proceedings to enforce the Orders to Remedy Violations) would violate the Nation's sovereign immunity." *Id* ¶ 94.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan*, 572 U.S. at 788 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Although tribes remain "subject to plenary control by Congress," they are also "separate sovereigns pre-existing the Constitution." *Id.* (citation omitted). Accordingly, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Id.*

"Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978)). As the Supreme Court has explained, this immunity is "a necessary corollary to Indian sovereignty and self-governance." *Id.* (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)).

Union Springs argues that the "immovable property exception" to foreign sovereign immunity should be applied in this case. Defs.' Mem. at 40. Under that exception, "a foreign state that owns real property outside of its jurisdiction" must "follow the same rules as everyone else." *Id.* According

to the Village, the Cayugas' "voluntarily subjected themselves to the regulatory and taxing jurisdiction of the Village" by repurchasing the Property from the open market. *Id.* at 41.

"At common law, . . . sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign." *Upper Skagit Indian Tribe v. Lundgren,* 138 S. Ct. 1649, 1653 (2018); *see also Schooner Exchange v. McFaddon,* 7 Cranch 116, 145 (1812) ("A prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual.").

Upon review, this argument must also be rejected. As the Nation convincingly demonstrates in its own briefing, "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." *Upper Skagit Indian Tribe,* 138 S. Ct. at 1654. And despite the fact that the Village supports this argument by citing to the *dissenters* in *Upper Skagit,* the Supreme Court majority in that case explicitly declined to decide whether the so-called "immovable property" exception might otherwise limit the broad scope of tribal sovereign immunity. *Id.*

Thus, under this "avowedly broad principle" of "settled law," courts must "dismiss[] any suit against a tribe absent congressional authorization (or a waiver)." *Cayuga Indian Nation of N.Y. v. Seneca County, N.Y.,* 761 F.3d 218, 220 (2d Cir. 2014) (cleaned up). This remains true "even when a suit arises from off-reservation commercial activi-

ty." *Michigan,* 572 U.S. at 785. And it remains true whether the suit involves the tribe or the tribe's property. *Cayuga Indian Nation of N.Y.,* 761 F.3d at 221. Accordingly, tribal sovereign immunity bars the Village from proceeding against the Tribe in this case, too.

Nevertheless, Union Springs argues that it may proceed directly against individual tribal officials "under a theory analogous to *Ex parte Young." Gingras v. Think Finance, Inc.,* 922 F.3d 112, 120 (2d Cir. 2019). As the Nation explains, though, *Gingras* is inapplicable because it involved "conduct outside of Indian lands." *Id.* at 121. Thus, the general rule still applies in this case: Union Springs "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities." *Chayoon v. Chao,* 355 F.3d 141, 143 (2d Cir. 2004). Accordingly the Nation is entitled to summary judgment on Count Three.

V. CONCLUSION

The Nation has established that Lakeside Entertainment meets the requirements for Class II gaming under IGRA. The Tribe is therefore entitled to invoke IGRA's "extraordinary preemptive power." *Gaming Corp. of Am. v. Dorsey & Whitney,* 88 F.3d 536, 545 (8th Cir. 1996). Accordingly, the Village will be enjoined from enforcing the Games of Chance Ordinance against the Nation's activities at the Property.

Further, the Court agrees with the Nation that the "use variance" requirement imposed by the Village is also preempted by IGRA. *See* Pls.' Response at 31-37. Union Springs argues that "the zoning standards enacted by the Village do not permit [a bingo hall] in the applicable zoning district" where the Property is situated. Defs.' Response at 16. But as the Nation points out, that explanation amounts to an indirect regulation of the Nation's Class II gaming activity at the Parcel. *See* Pls.' Mem. at 31-37.

In sum, the Village will be enjoined from the direct (via the Games of Chance Ordinance or similar means) or indirect (via the use variance or similar means) regulation of the Tribe's Class II gaming activity at Lakeside Entertainment. *Roach v. Morse,* 440 F.3d 53, 56 (2d Cir. 2006) (Sotomayor, J.) ("To obtain a permanent injunction, a plaintiff must succeed on the merits and show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." (cleaned up)).

Therefore, it is

ORDERED that

1. The Nation's motion for summary judgment is GRANTED;

2. The Village's motion for summary judgment is DENIED;

3. The Village of Union Springs' 1958 Games of Chance Ordinance and all other state and local laws prohibiting gambling are preempted by the Indian Gaming Regulatory Act as applied to the

nation's Class II gaming activities at Lakeside Entertainment;

4. The 1958 Games of Chance Ordinance cannot lawfully serve as a basis for denying the Nation a certificate of Occupancy to Lakeside Entertainment;

5. Federal law prohibits defendants from taking any steps to restrict, interfere with, punish, prosecute, or otherwise penalize actions taken by the Nation, its officers, its employees, or its other representatives in furtherance of Class II gaming activities at the Property;

6. The Nation enjoys tribal sovereign immunity from any suit by defendants to enforce the Ordinance;

7. Defendants are enjoined from taking any steps to restrict, interfere with, punish, prosecute, or otherwise penalize actions taken by the Nation, its officers, its employees, or its other representatives in furtherance of Class II gaming activities at Lakeside Entertainment, including but not limited to the enforcement of the 1958 Union Springs Games of Chance Ordinance or other local and state laws concerning gambling, whether independently through a civil or criminal action, or through civil or criminal enforcement of the Village of Union Springs's zoning law, or through a civil or criminal action to enforce the Order to Remedy Violations dated July 9, 2013 or the Order to Remedy Violations dated December 30, 2013; and

8. The Clerk of the Court is directed to enter a judgment accordingly and close the file.

IT IS SO ORDERED.

[ILLEGIBLE]
United States District Judge

Dated: March 24, 2020
Utica, New York.

APPENDIX D - 1789 STATE TREATY WITH THE CAYUGAS, FEBRUARY 25, 1789

STATE TREATY WITH THE CAYUGAS, 1789.

At a treaty held in the City of Albany in the State of New York, by his excellency George Clinton, Esquire, Governor of the said State, the Honorable Pierre Van Cortlandt, Esquire Lieutenant Governor of the said State, Ezra L'Hommidieu, Abram Ten Broeck, John Hathorn, Samuel Jones, Peter Gansevoort Junr., and Egbert Benson, Esquires, commissioners authorized for that purpose by and on behalf of the people of the State of New York with several of the Sachems—Chiefs and Warriors of the Tribe or Nation of Indians called the Cayugas, for and on behalf of the said Nation, it is on the twenty-fifth day of February, in the year of our Lord one thousand seven hundred and eighty-nine, covenanted and concluded as follows:

First. The Cayugas do cede and grant all their lands to the People of the State of New York forever.

Secondly. The Cayugas shall of the ceded lands hold to themselves and to their posterity forever, for their own use and cultivation but not to be sold, leased or in any other manner aliened or disposed of to others, All that tract of land beginning at the Cayuga Salt Spring on the Seneca River and running thence southerly to intersect the middle of a line to be drawn from the outlet of Cayuga to the outlet of Waskongh Lake and from the said place of intersection southerly the general course of the

eastern bank of the Cayuga Lake, thence westerly to intersect a line running on the west side of the Cayuga Lake at the mean distance of three miles from the western branch thereof; and from the said point of intersection along the said line so running on the west side of the Cayuga Lake to the Seneca River, thence down the said river to the Cayuga Lake, thence through the said Lake to the outlet thereof, thence farther down the said river to the place of beginning, so as to comprehend within the limits aforesaid and exclusive of the water of Cayuga Lake the quantity one hundred square miles; also the place in the Seneca River at or near a place called Skayes, where the Cayugas have heretofore taken eel, and a competent piece of land on the southern side of the river at the said place sufficient for the said Cayugas to land and encamp on and to cure their eel, excepted nevertheless out the said lands or reserved one mile square at the Cayuga Ferry.

Third. The Cayugas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands and of fishing in all the waters within the same.

Fourthly. In consideration of the said Cession and Grant, the People of the State of New York do at this present treaty pay to the Cayugas five hundred dollars in Silver (the receipt whereof the Cayugas do hereby acknowledge) and the people of the State of New York shall pay to the Cayugas on the first day of June next at Fort Schuyler, formerly called Fort Stanwix, the further sum of one thousand six hundred and twenty-five dollars; and

also the people of the State of New York shall annually pay to the Cayugas and their posterity forever on the first day of June in every year thereafter at Fort Schuyler aforesaid, five hundred dollars in silver. But if the Cayugas or their posterity shall at any time hereafter elect that the whole or any part of the said annual payment of five hundred dollars shall be paid in clothing or provisions and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Cayugas or their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a further consideration to the Cayugas the people of the State of New York shall grant to their adopted child Peter Ryckman, whom they have expressed a desire should reside near them to assist them, and as a benevolence from them the Cayugas to him, and in return for services rendered by him to their Nation, the said tract of one mile square at the Cayuga Ferry, excepted out of the said lands reserved to the Cayugas for their own use and cultivation. That of a tract beginning on the west bank of the Seneca Lake, thence running due west (passing one chain north of an house lately erected and now in the occupation of the said Peter Ryckman) to the line of partition between this State of New York and the Commonwealth of Massachusetts of the lands ceded to each other, thence due south along the said line of partition, thence due east to the Seneca Lake, thence northerly along the bank of

the said lake to the place of beginning, so as to contain sixteen thousand acres. The people of the State of New York shall grant three hundred and twenty acres to a white person married to a daughter of a Cayuga named Thanoewas, including the present settlement of the said person on the south of Casionk Creek, and that the people of the State of New York shall grant the residue of the said tract of sixteen thousand acres to the said Peter Ryckman.

Fifthly. The people of the State of New York may at all times hereafter in such manner and by such means as they shall deem proper prevent any persons except the Cayugas and their adopted brethren the Pawnesse from residing or settling on the lands to be held by the Cayugas and their posterity for their own use and cultivation, and if any persons shall without the consent of the people of the State New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, the Cayugas and their posterity shall forthwith give notice of such intrusion to the Governor of the said State for the time being. And further the Cayugas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders and apprehending not only such intruders, but also all felons and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice. Notwithstanding the said reservation herein above specified, to the Cayugas, it is declared to be the intent

of the parties that the Cayuga called the Fish Carrier, shall have a mile square of the said reserved lands for the separate use of himself and for the separate use of his family forever.

In testimony whereof as well the Sachems, Chiefs, Warriors, Governesses and other of the Cayugas in behalf of their tribe or Nation as the said Governor and other Commissioners in behalf of the people of the State of New York have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

PIERE VAN CORTLANDT,
EZRA L'HOMMEDIEU,
ABM. TEN BROECK,
JOHN HATHORN,
SAMUEL JONES,
PETER GANSVOORT, JUNR.,
EGBT. BENSON
JOGHHIGNEY
AGOTTYONGOS
HAONGHYENTHA
TOWAKAMETHA
YOWEANSE
KANIGHSAYENDE
KAWEUNESSON
SWATTEAA
KAGHNAWIYO
KAJO, ONKUKEAGH

KANOGHTSIYATHA
TEYOWEANDAGKONGH

N.B. The above four signed by their Chief Steel Trap.

TEWETHUHASE
AHAGUENDYAK
TYOTYEANENTHA
TEYGAWAKHONGH

N.B. The above four persons signed by Steel Trap as their deputy.

THANKAGHTYAGON
TEKENEAGHAGE
HANANJAC
GOGHGE
KOWAYADOWAYADOWEAGHSLA
THAHONGHLYE
ATTWOANEAMNI
JADENON
NEGGONDE
KANISTAGIA (his mark a steel trap);
GEO. CLINTON.

Sealed and delivered in the presence of The words (quantity of) (in the Seneca River at or near a place) (thereafter) (the) and (a) being first interlined, and the words (of a) and (fifthly, the people of the State of New York may at all times hereafter in such manner and by such means as they may deem prevent any persons) being first wrote on Razures—Before sealing and delivery hereof, it was for the greater cer-

tainty declared to be the intent of the parties that this grant and cession is only of the lands eastward of the partition line above mentioned between this State of New York and the Commonwealth of Massachusetts, and that with respect to such part of their as is to the westward of the said partition line the right and property of the Cayugas to be the same as if this grant and cession had not been made, and the Cayuga Salt Spring and the land to the extent of one mile around the same to remain for the common use and benefit of the people of the State of New York and of the Cayugas and their posterity forever. And the land to be reserved at the fishing place near Skayes shall be of the extent of one mile on each side of the river, the above reservation of land on the southern side of the river only notwithstanding.

SAML. KIRKLAND,
Miss'y.
JOHN I. BLEECKER,
GERARD BANCKER,
ONEYANHA,
KAKIKTOTEN,
QUEDEL AG WITONTONG WAS,
SKENONDONGH,
HAGHYCANDE,
WY A DE AGH KALONGWEA *alias* LEWIS COOK,
TOWAWIAGHHALEFE *alias* Daniel,
GILBERT LIVINGSTON,
JOHN TAYLER,
PH: V. CORTLANDT.

APPENDIX E - 1795 STATE TREATY OF CAYUGA FERRY, JULY 27, 1795

At a Treaty held at the Cayuga Ferry in the State of New York by Philip Schuyler, John Cantine, David Brooks and John Richardson Agents authorized for that purpose by and on behalf of the People of the State of New York with the tribe or nation of Indians called the Cayugas, it is on this twenty seventh day of July one thousand seven hundred and ninety five covenanted concluded and agreed upon as follows,

WHEREAS there was reserved to the Cayuga Nation by the articles of agreement made at Albany on the twenty fifth day of February one thousand seven hundred and eighty-eight and confirmed by subsequent articles made at Fort Stanwix on the twenty second day of June one thousand seven hundred and ninety sundry lands in the said Articles particularly specified and described

Now Know all Men that in order to render the said reservations more productive of annual income to the said Cayuga nation, (it is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell and they do by these presents sell to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation) in and by the hereinbefore mentioned articles of Agreement that is to say as well the Lands bordering on and adjacent to the Cayuga Lake Commonly called the Cayuga reservation as

the Lands at Secawyace and elsewhere heretofore or now appertaining to the said Nation (except the Lands hereinafter particularly excepted and still to be reserved to the said Nation or the individual Sachem Fish Carrier) to have and to hold the same to the People of the State of New York and to their Successors forever,—

Secondly it is Covenanted and agreed by and on the part of the People of the State of New York that for the Lands now sold as specified in the preceding first Article the State of New York shall pay and do now pay to the said Cayuga Nation in presence of the witnesses who have Subscribed their names hereunto the sum of Eighteen hundred Dollars and do further promise and engage to pay to the said Cayuga Nation in manner hereinafter specified the further sum of Eighteen hundred Dollars on the first day of June next ensuing the date hereof and annually forever thereafter on the first day of June in each year the sum of Eighteen hundred Dollars.

Thirdly that as well the said Eighteen hundred Dollars to be paid as mentioned in the Second Article as the five hundred Dollars to which the said Cayuga Nation are annually entitled by virtue of the Treaty and articles of agreement first above mentioned shall in future be annually paid on the first day of June in each year forever hereafter at Canadaghque in the County of Ontario to the Agent for Indian affairs under the United States for the time being residing within this State and in case no such Agent shall be appointed on the part of the United States then by such person as the Governor of the State of New York shall thereunto

appoint to be by the said Agent or person so to be appointed paid to the said Cayuga Nation taking their receipt therefor on the back of the Counterpart of this instrument in the possession of the said Indians in the words following to wit "We the Cayuga Nation do acknowledge to have received from the People of the State of New York the sum of two thousand and three hundred Dollars in full for the several Annuities within mentioned as Witness our hands at Canadaghque this day of 179_" which money shall be paid in the presence of at least one of the Magistrates of the County of Ontario and in the presence of at least two more reputable Inhabitants of the said County and which Magistrate and other persons in whose presence the same shall be paid shall subscribe their names as witnesses to the said Receipt and the said Agent or other person so to be appointed shall also take a duplicate receipt for the said Money witnessed by the said Witnesses and which duplicate shall as soon as Conveniently may be be acknowledged and recorded in the records of the said County of Ontario and the Original duplicate transmitted to the Governor of this State for the time being.

Fourthly the People of the State of New York reserve to the Cayuga Nation and to their posterity forever for their own use and Occupation but not to be Sold Leased or in any other manner aliened or disposed of to others unless by the express Consent of the Legislature of the said State A Certain Tract of Land part of the reservation aforesaid of two miles square at such place as the same shall be run

out and marked by a Surveyor appointed by the said Agents on the part of the People of this State together with such of the said Indians as shall attend for that purpose and also one other piece of land of one mile square part of the reservation aforesaid and the Mine within the same if any there be under the same restrictions and to be run out and marked in manner aforesaid, and also one other piece of Land one mile square at Cannogai for the use of an Indian Sachem of the said Nation called Fish Carrier and for the use of his posterity forever under the restrictions aforesaid which said last piece of land shall be leased by the People of the State of New York for such term and on such Conditions as the Legislature thereof shall direct and the money annually arising therefrom shall be paid unto the said Fish Carrier or his posterity at Canadaghque by the said Agent or by such person as the Governor of this State shall thereunto appoint and unto such person as shall produce a Certain Writing Subscribed by the said Agents and Sealed with their Seals taking and recording the receipts therefor in the manner aforesaid—

Fifthly the People of the State of New York may in such manner as they shall deem proper prevent any persons except the Cayugas from residing or settling on the Lands so to be held by the Cayugas and their posterity for their own use and Cultivation and if any person shall without the Consent of the People of the State of New York come to reside or settle on the said Lands or any other of the Lands so reserved as aforesaid the Cayugas and their posterity shall forthwith give notice of such intru-

sion to the Governor of the said State for the time being And further the Cayugas and their posterity forever shall at the request of the Governor of the said State be aiding to the People of the State of New York in removing all such intruders and in apprehending not only such intruders but also Felons and other offenders who may happen to be on the said reserved Lands to the end that such intruders, felons and other offenders may be brought to Justice

In Testimony whereof as well the Sachems, Chief Warriors and others of the said Cayugas in behalf of their tribe or Nation as the said Agents on behalf of the People of the State of New York have hereunto interchangeably set their hands and affixed their Seals the day and year first above written,

PH: SCHUYLER [L.S.]
JOHN CANTINE [L.S.]
D BROOKS [L.S.]
JOHN RICHARDSON [L.S.]
OJAGEGHTI or FISH CARRIER (his X mark) [L.S.]
DSINONTAWERHON (his X mark) [L.S.]
TEKAEYON by THAWEYAGENRAT (his X mark) [L.S.]
SAGOYEGHWATHA (his X mark) [L.S.]

OGONGHSANIYONDE or HANGING FACE
(his X mark) [L.S.]

ONGWEGHKOWA
(his X mark) [L.S.]

THWEYA GEARAT
(his X mark) [L.S.]

KAYENTATIRHON
(his X mark) [L.S.]

THORONGHYONGO
(his X mark) [L.S.]

SAGOYATENGHHAWE
(his X mark) [L.S.]

SHAGHNEGHTATI
(his X mark) [L.S.]

SHONEGHSOWANE
(his X mark) [L.S.]

SHATENGHHARIA
(his X mark) [L.S.]

KANEATAGONRA
(his X mark) [L.S.]

AIJANATE
(his X mark) [L.S.]

KANAGHTOGEA
(his X mark) [L.S.]

Delivered in the presence of the word (thereunto) being first interlined between the sixteenth and seventeenth lines and the words (at least)

between the nineteenth and twentieth lines and the words (part of the reservation aforesaid and the mine within the same if any there be under the same restrictions and to be run out and marked in manner aforesaid and also one other piece of Land of one mile square) between the twenty sixth and twenty seventh lines

ISRAEL CHAPIN
JAMES DEAN
Interpreter,

JASPER PARRISH
Interpreter,

HENRY AARON HILL,
AARON HILL JU'R
BEN: LEDYARD,
JOHN HARRIS
WILLIAM WESTON,
JNO. B. SCHUYLER,
RENSSELAER WESTERLO,

STATE OF NEW YORK ss:

Be it remembered that on the twenty sixth day of March in the year one thousand seven hundred and ninety six, personally appeared before me Egbert Benson one of the Judges of the Supreme Court of the said State Israel Chapin one of the Subscribing Witnesses to the within Articles of Agreement who being duly sworn deposed that he saw Philip Schuyler, John Cantine, David Brooks and John Richardson the Agents therein named and the

Sixteen Indians whose names are subscribed as parties thereto execute the same that he saw the other nine persons also subscribe as witnesses and I having inspected it and not finding therein any Erasures or interlineations other than such as are noted to have been made before Execution do allow it to be recorded

EGB'T BENSON—

The preceding Instrument is a true Copy of the Original Compared therewith this 29th day of March 1796 By Me—

LEWIS A: SCOTT
Secretary

APPENDIX F - 1807 STATE TREATY, MAY 30, 1807

To all People to whom these presents shall come Greeting ; Know Ye that on the twenty seventh day of July in the year One thousand seven hundred and Ninety five The People of the State of New York did reserve to the Cayuga Nation of Indians, and to their own use and occupation but not to be sold leased or in any other manner aliened or disposed of to others unless by the express consent of the Legislature of the said State a certain Tract of Land part of the reservation theretofore reserved to them of Two Miles Square at such place as the same shall be run out and marked by a Surveyor appointed by agents on the part of the people of this State together with such of the said Indians as shall attend for that purpose. And also one other piece of land of one mile square part of the reservation aforesaid and the mine within the same if any there be under the same restrictions and to be run out and marked in manner aforesaid. And

WHEREAS The said two tracts of land have been laid out and surveyed in manner aforesaid and occupied by the said Cayuga Nation. And

WHEREAS The said Cayuga Nation of Indians have signified their desire to remove from the said lands and to dispose of their Interest therein to the people of this State for the sum of four thousand eight hundred dollars which sum the Legislature have agreed to pay the said Cayuga Nation for their interest in the said two Reservations of Land.

Now know ye that the said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars to them in hand by the People of the State of New York at Canadarqua have sold and released and by these presents Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said two tracts of Land laid out and Surveyed as aforesaid on the east side of Cayuga Lake commonly called the Cayuga Reservations the said tract being two miles square and the other Tract being One mile square—which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

In Witness whereof the Chief Sachems and Warriors of the said Cayuga Nation have hereunto set their hands and Seals this thirtieth day of May in the year of our Lord One thousand eight hundred and Seven

TA-KI-HA-YO
(his X mark) [L.S.]

CHE-NON-DA-YO
(his X mark) [L.S.]

SO-YO-YES
(his X mark) [L.S.]

TAH-NO-HAI-AN-DOS
(his X mark) [L.S.]

DOU-THO-WA-TOE
(his X mark) [L.S.]

HO-WAU-NAN-DA
(his X mark) [L.S.]

SO-GO-YO-WA-TAU
(his X mark) [L.S.]

O-STAR-HAU-GOE
(his X mark) [L.S.]

HO-JAW-GA-TA
(his X mark) [L.S.]

Sealed and Delivered in the presence of

RED JACKET,
LITTLE BILLY,
COFFEE HOUSE
W JOHNSON
JOHN JOHNSTON—
THOMAR BEALS—

Recorded December 10, 1818 and agrees with the Original Compared with the Original by

ARCH'D CAMPBELL
Dep. Secretary

APPENDIX G - 1794 TREATY OF CANANDAIGUA, NOVEMBER 11, 1794

1794 TREATY OF CANANDAIGUA, NOVEMBER 11, 1794

Preamble of the Canandaigua Treaty

A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations:

The President of the United States having determined to hold a conference with the Six Nations of Indians for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the sachems and warriors of the Six Nations in general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations . . . .

ARTICLE 1. Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE 2. The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or

either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 3. The land of the Seneca Nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps; the line runs westerly along the lake, as far as Oyongwongyeh Creek, at Johnson's Landing Place, about four miles eastward, from the fort of Niagara; then southerly, up that creek to its main fork, continuing the same straight course, to that river; (this line, from the mouth of Oyongwongyeh Creek, to the river Niagara, above Fort Schlosser, being the eastern boundry of a strip of land, extending from the same line to Niagara River, which the Seneca Nation ceded to the King of Great Britain, at the treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the Niagara River to Lake Erie, to the northwest corner of a triangular piece of land, which the United States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning, on the Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to

be the property of the Seneca Nation; and the United States will never claim the same, nor disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the right to purchase.

ARTICLE 4. The United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and engaged never to claim the same, not disturb them, or any of the Six Nations, or their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; now, the Six Nations, and each of them, hereby engage that they will never claim any other lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE 5. The Seneca Nation, all others of the Six Nations concurring cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road for the purposes of traveling and transportation. And the Six Nations and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of ves-

sels and boats, and liberty to land their cargoes, where necessary, for their safety.

ARTICLE 6. In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among them, a quantity of goods, of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed to them by an article ratified by the President, on the twenty-third day of April, 1792, making in the whole four thousand five hundred dollars; which shall be expended yearly, forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils, suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent, appointed by the President, for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE 7. Lest the firm peace and friendship now established should be interrupted by the mis-

conduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve or peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for that purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity, stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes or families of Indians, elsewhere resident.

IN WITNESS WHEREOF, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereunto set their hands and seals.

Done at Canandaigua, in the State of New York, in the eleventh day of November, in the year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING

Witnesses
Interpreters
Israel Chapin Horatio Jones
Wm. Shepard Jun'r Joseph Smith
James Smedley Jasper Parrish
John Wickham Henry Abeele
Augustus Porter
James H. Garnsey
Wm. Ewing
Israel Chapin, Jun'r

(Signed by fifty-nine Sachems and War Chiefs of the Six Nations.)

CANANDAIGUA, NEW YORK — NOVEMBER 11, 1797

Native American Name English Translation
Handsome Lake
Capt. Key
Woods On Fire
Fish Carrier
Farmer's Brother or Nicholas Kusick
Red Jacket
Two Skies Of A Length
Broken Axe
Open The Way or Handsome Lake
Heap Of Dogs
Half Town or Jake Stroud
Stinking Fish
Capt. Prantup or Cornplanter
Green Grasshopper or Big Sky or Little Billy

APPENDIX H - 1838 TREATY OF BUFFALO CREEK, JANUARY 16, 1838

1838 TREATY OF BUFFALO CREEK, JANUARY 15, 1838

Articles of a treaty made and concluded at Buffalo Creek in the State of New York, the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, head men and warriors of the several tribes of New York Indians assembled in council witnesseth:

WHEREAS, the six nations of New York Indians not long after the close of the war of the Revolution, became convinced from the rapid increase of the white settlements around, that the time was not far distant when their true interest must lead them to seek a new home among their red brethren in the West: And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home there, by gift or purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force,

and their annuities be paid as heretofore: And whereas, with the approbation of the President of the United States, purchases were made by the New York Indians from the Menomonie and Winnebago Indians of certain lands at Green Bay in the Territory of Wisconsin, which after much difficulty and contention with those Indians concerning the extent of that purchase, the whole subject was finally settled by a treaty between the United States and the Menomonie Indians, concluded in February, 1831, to which the New York Indians gave their assent on the seventeenth day of October 1832: And whereas, by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years, or such reasonable time as the President should prescribe: And whereas, the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favour of emigration, preferred to remove at once to the Indian territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians. And they therefore applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian territory. And whereas, the President being anxious to promote the peace, prosperity and happiness of his red children, and being determined 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, by bringing them to see and feel, by his justice and liberality, that it is their true policy and for their interest to do so without delay.

Therefore, taking into consideration the foregoing premises, the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, head men and warriors are hereto subscribed, and those who may hereafter give their assent to this treaty in writing, within such time as the President shall appoint.

GENERAL PROVISIONS.

ARTICLE 1.

The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside: beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence

on said parallel line, northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

ARTICLE 2.

In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, 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, which said country is described as follows, to wit: Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands to the place of beginning to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes

or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York, and the same is to be divided equally among them, according to their respective numbers, as mentioned in a schedule hereunto annexed.

ARTICLE 3.

It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

ARTICLE 4.

Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

ARTICLE 5.

The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

ARTICLE 6.

It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

ARTICLE 7.

It is expressly understood and agreed, that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe, or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

ARTICLE 8.

It is stipulated and agreed that the accounts of the Commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

SPECIAL PROVISIONS FOR THE ST. REGIS.

ARTICLE 9.

It is agreed with the American party of the St. Regis Indians, that the United States will pay to the said tribe, on their removal west, or at such time as the President shall appoint, the sum of five thousand dollars, as a remuneration for monies laid out by the said tribe, and for services rendered by their chiefs and agents in securing the title to the Green Bay lands, and in removal to the same, the same to be aportioned out to the several claimants by the chiefs of the said party and a United States' Commissioner, as may be deemed by them equitable and just. It is further agreed, that the following reservation of land shall be made to the Rev. Eleazor Williams, of said tribe, which he claims in his own right, and in that of his wife, which he is to hold in fee simple, by patent from the President, with full power and authority to sell and dispose of the same, to wit: beginning at a point in the west bank of Fox River thirteen chains above the old milldam at the rapids of the Little Kockalin; thence north fifty-two degrees and thirty minutes west, two hundred and forty chains; thence north thirty-seven degrees and thirty minutes east, two hundred chains, thence south fifty-two degrees and thirty minutes east, two hundred and forty chains to the bank of Fox river; thence up along the bank of Fox river to the place of beginning.

SPECIAL PROVISIONS FOR THE SENECAS.

ARTICLE 10.

It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians, and to extend so far west, as to include one half-section (three hundred and twenty acres) of land for each soul of the Senecas, Cayugas and Onandagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the

same, to be disposed of as follows: the sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which is to be paid to them at their new homes, annually, and the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said apprisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

ARTICLE 11.

The United States will set apart for the Cayugas, on their removing to their new homes at the west, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

SPECIAL PROVISIONS FOR THE ONONDAGAS RESIDING ON THE SENECA RESERVATIONS.

ARTICLE 12.

The United States agree to set apart for the Onondagas, residing on the Seneca reservations, two thousand five hundred dollars, on their removing west, and to invest the same in safe stocks, the income of which shall be paid to them annually at their new homes. And the United States further agree to pay to the said Onondagas, on their removal to their new homes in the west, two thousand dollars, to be disposed of as the chiefs shall deem equitable and just.

SPECIAL PROVISIONS FOR THE ONEIDAS RESIDING IN THE STATE OF NEW YORK.

ARTICLE 13.

The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs of the Orchard party residing there, for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they 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.

SPECIAL PROVISIONS FOR THE TUSCARORAS.

ARTICLE 14.

The Tuscarora nation agree to accept the country set apart for them in the Indian territory, and to remove there within five years, and continue to reside there. It is further agreed that the Tuscaroras shall have their lands in the Indian country, at the forks of the Neasha river, which shall be so laid off as to secure a sufficient quantity of timber for the accommodation of the nation. But if on examination they are not satisfied with this location, they are to have their lands at such place as the President of the United States shall designate. The United States will pay to the Tuscarora nation, on their settling at the West, three thousand dollars, to be disposed of as the chiefs shall deem most equitable and just. Whereas the said nation owns, in fee simple, five thousand acres of land, lying in Niagara county, in the State of New York which was conveyed to the said nation by Henry Dearborn and they wish to sell and convey the same before they remove West: Now therefore, in order to have the same done in a legal and proper way, they hereby convey the same to the United States and to be held in trust for them, and they authorize the President to sell and convey the same, and the money which shall be received for the said lands, exclusive of the improvements, the President shall invest in safe stocks for their benefit, the income from which shall be paid to the nation, at their new homes, annually; and the money which shall be received

for improvements on said lands shall be paid to the owners of the improvements when the lands are sold. The President shall cause the said lands to be surveyed, and the improvements shall be appraised by such persons as the nation shall appoint; and said lands shall also be appraised, and shall not be sold at a less price than the appraisal, without the consent of James Cusick, William Mountpleasant and William Chew, or the survivor, or survivor of them; and the expenses incurred by the United States in relation to this trust are to be deducted from the moneys received before investment.

And whereas, at the making of this treaty, Thomas L. Ogden and Joseph Fellows, the assignees of the State of Massachusetts, have purchased of the Tuscarora nation of Indians, in the presence and with the approbation of the commissioner appointed on the part of the United States to hold said treaty or convention, all the right, title, interest, and claim of the Tuscarora nation to certain lands, by a deed of conveyance, a duplicate of which is hereunto annexed: And whereas, the consideration money for said lands has been secured to the said nation to their satisfaction, by Thomas L. Ogden and Joseph Fellows; therefore the United States hereby assent to the said sale and conveyance and sanction the same.

ARTICLE 15.

The United States hereby agree that they will appropriate the sum of four hundred thousand dollars, to be applied from time to time, under the

direction of the President of the United States, in such proportions, as may be most for the interest of the said Indians, parties to this treaty, for the following purposes, to wit: To aid them in removing to their homes, and supporting themselves the first year after their removal; to encourage and assist them in education, and in being taught to cultivate their lands; in erecting mills and other necessary houses; in purchasing domestic animals, and farming utensils and acquiring a knowledge of the mechanic arts.

In testimony whereof, the commissioner and the chiefs, head men, and people, whose names are hereto annexed, being duly authorized, have hereunto set their hands, and affixed their respective seals, at the time and place above mentioned.

R. H. Gillet, Commissioner.

Senecas:

Little Johnson,
Daniel Twoguns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,
Job Pierce,
John Gordon,

Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jameson,
George Big Deer,
Samuel Gordon,
Thompson S. Harris,
George Jimeson,
Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones,
George White, by his agent White Seneca,
Walter Thompson, by his agent Daniel Twoguns,
Long John,
John Bark,
George Lindsay,
Jacob Bennet,
John Bennet,
Seneca White,
Maris Pierce,
David White,
James Shongo,
William Cass,
Samuel Wilson,
John Seneca.

Tuscaroras:
Nicholas Cusick,
William Chew,
William Mt. Pleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.

Oneidas residing in the State of New York, for themselves and their parties:
Baptiste Powlis,
Jonathan Jordan.

Oneidas at Green Bay:
John Anthony,
Honjoit Smith,
Henry Jordan,
Thomas King.

St. Regis:
Eleazer Williams, chief and agent.

Oneidas residing on the Seneca Reservation:
Silversmith, (For himself and in behalf of his nation.)
William Jacket,
Button George.

Principal Onondaga Warriors, in behalf of themselves and the Onondaga Warriors:
William John,
Noah Silversmith.

Cayugas:
King William,
James Young,
Jack Wheelbarrow,
Joseph Isaac, For themselves and in behalf of the nation.

Principal Cayuga Warriors, in behalf of themselves and the Cayuga Warriors:
John Crow,
Snow Darkness,
Jacob G. Seneca,
Ghastly Darkness,
Thomas Crow,
Peter Wilson,
Jonathan White,
Harvey Rowe,
David Crow,
George Wheeler,
Simon Isaac,
Joseph Peter,
Jacob Jackson.

Witnesses:
James Stryker, Sub-agent, Six Nations, New York Indians.
Nathaniel T. Strong, United States' Interpreter, New York agency.
H. B. Potter.
Orlando Allen.
H. P. Wilcox.
Charles H. Allen.
Horatio Jones.
Spencer H. Cone.

W. W. Jones.
J. F. Schermerhorn.
Josiah Trowbridge.
(To the Indian names are subjoined a mark and seal.)

SCHEDULE A.

CENSUS OF THE NEW YORK INDIANS AS TAKEN IN 1837.
Number residing on the Seneca reservations.

Senecas 2,309
Onondagas 194
Cayugas 130
2,633
Onondagas, at Onondaga 300
Tuscaroras 273
St. Regis, in New York 350
Oneidas, at Green Bay 600
Oneidas, in New York 620
Stockbridges 217
Munsees 132
Brothertowns 360

The above was made before the execution of the treaty.

R. H. Gillet, Commissioner.

SCHEDULE B.

The following is the disposition agreed to be made of the sum of three thousand dollars provided in

this treaty for the Tuscaroras, by the chiefs, and assented to by the commissioner, and is to form a part of the treaty: To Jonathan Printess, ninety-three dollars. To William Chew, one hundred and fifteen dollars. To John Patterson, forty-six dollars. To William Mountpleasant, one hundred and seventy-one dollars.

To James Cusick, one hundred and twenty-five dollars.

To David Peter, fifty dollars.

The rest and residue thereof is to be paid to the nation.

The above was agreed to before the execution of the treaty.

R. H. Gillet, Commissioner.

SCHEDULE C.

Schedule applicable to the Onondagas and Cayugas residing on the Seneca reservations. It is agreed that the following disposition shall be made of the amount set apart to be divided by the chiefs of those nations, in the preceding parts of this treaty, any thing therein to the contrary notwithstanding.

To William King, one thousand five hundred dollars.

Joseph Isaacs, seven hundred dollars.

Jack Wheelbarrow, three hundred dollars.

Silversmith, one thousand dollars.

William Jacket, five hundred dollars.

Buton George, five hundred dollars.

The above was agreed to before the treaty was finally executed.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under the authority of the United States of America, at Buffalo Creek in the county of Erie, and State of New York, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and representing and acting for the said nation, on the one part, and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva, in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said Indians in and to the lands within the State of New York remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said chiefs and head men, on behalf of the Seneca nation did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Seneca nation of, in and to the several tracts, pieces, or parcels of land mentioned, and described in the instrument of writing next

hereinafter set forth, and at the price or sum therein specified, as the consideration, or purchase money for such sale and release; which instrument being read and explained to the said parties and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the chiefs and head men of the Seneca nation of Indians, duly assembled in council, and acting for and on behalf of the said Seneca nation, of the first part, and Thomas Ludlow Ogden, of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said chiefs and head men of the Seneca nation of Indians, in consideration of the sum of two hundred and two thousand dollars to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that certain tract, or parcel of land situate, lying and being in the county of Erie and State of New York commonly called and known by the name of Buffalo Creek reservation, containing, by estimation forty-nine thousand nine hundred and twenty acres be the contents thereof more or less. Also, all that certain other tract, or parcel of

land, situate, lying and being in the counties of Erie, Chatauque, and Cattaraugus in said State commonly called and known by the name of Cattaraugus reservation, containing by estimation twenty-one thousand six hundred and eighty acres, be the contents thereof more or less. Also, all that certain other tract, or parcel of land, situate, lying and being in the said county of Cattaraugus, in said State, commonly called and known by the name of the Allegany reservation, containing by estimation thirty thousand four hundred and sixty-nine acres, be the contents more or less. And also, all that certain other tract or parcel of land, situate, lying and being partly in said county of Erie and partly in the county of Genesee, in said State, commonly called and known by the name of the Tonawando reservation, and containing by estimation twelve thousand, eight hundred acres, be the same more or less; as the said several tracts of land have been heretofore reserved and are held and occupied by the said Seneca nation of Indians, or by individuals thereof, together with all and singular the rights, privileges, hereditaments and appurtenances to each and every of the said tracts or parcels of land belonging or appertaining; and all the estate, right, title, interest, claim, and demand of the said party of the first part, and of the said Seneca nation of Indians, of, in, and to the same, and to each and every part and parcel thereof: to have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, their heirs and assigns, to their proper use and behoof

forever, as joint tenants, and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Seneca nation of Indians, and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, interchangeably set their hands and seals the day and year first above written.

Little Johnson,
Daniel Two Guns,
Captain Pollard,
James Stevenson,
Captain Strong,
Captain Snow,
Blue Eyes,
Levi Halftown,
Billy Shanks,
White Seneca,
George Bennet,
John Pierce,
John Gordon,
Jim Jonas,
William Johnson,
Reuben Pierce,
Morris Halftown,
Jacob Jimeson,
Samuel Gordon,
Thompson S. Harris,
George Jemison,

Nathaniel T. Strong,
Tall Peter,
Tommy Jimmy,
John Tall Chief,
George Fox,
Jabez Stevenson,
William Jones.

I have attended a treaty of the Seneca Nation of Indians, held at Buffalo Creek, in the county of Erie, in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed, in my presence, by the chiefs of the Seneca Nation, being fairly and properly understood by them. I do, therefore, certify and approve the same.

R. H. Gillet, Commissioner.

Jan. 15, 1838.

At a treaty held under and by the authority of the United States of America, at Buffalo Creek, in the county of Erie, and State of New York, between the sachems, chiefs and warriors of the Tuscarora nation of Indians, duly assembled in council and representing and acting for the said nation, on the one part and Thomas Ludlow Ogden of the city of New York and Joseph Fellows of Geneva in the county of Ontario, on the other part, concerning the purchase of the right and claim of the said nation of Indians in and to the lands within the State of New York, remaining in their occupation: Ransom H. Gillet, Esquire, a commissioner appointed by

the President of the United States to attend and hold the said treaty, and also Josiah Trowbridge, Esquire, the superintendent on behalf of the Commonwealth of Massachusetts, being severally present at the said treaty, the said sachems, chiefs and warriors, on behalf of the said Tuscarora nation, did agree to sell and release to the said Thomas Ludlow Ogden and Joseph Fellows, and they, the said Thomas Ludlow Ogden and Joseph Fellows did agree to purchase all the right, title and claim of the said Tuscarora nation of, in and to the tract, piece, or parcel of land mentioned and described in the instrument of writing next hereinafter set forth, and at the price, or sum therein specified, as the consideration or purchase money for such sale and release; which instrument being read and explained to the said parties, and mutually agreed to, was signed and sealed by the said contracting parties, and is in the words following:

This indenture, made this fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, between the sachems, chiefs, and warriors of the Tuscarora nation of Indians, duly assembled in council, and acting for and on behalf of the said Tuscarora nation of the first part, and Thomas Ludlow Ogden of the city of New York, and Joseph Fellows of Geneva, in the county of Ontario, of the second part witnesseth: That the said sachems, chiefs and warriors of the Tuscarora nation, in consideration of the sum of nine thousand six hundred dollars, to them in hand paid by the said Thomas Ludlow Ogden and Joseph Fellows,

the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell, release and confirm to the said Thomas Ludlow Ogden and Joseph Fellows, and to their heirs and assigns, all that tract or parcel of land situate, lying and being in the county of Niagara and State of New York, commonly called and known by the name of the Tuscarora reservation or Seneca grant, containing nineteen hundred and twenty acres, be the same more, or less, being the lands in their occupancy, and not included in the land conveyed to them by Henry Dearborn, together with all and singular the rights, the rights, privileges, heraditaments, and appurtenances to the said tract or parcel of land belonging, or appertaining, and all the estate, right, title, interest, claim and demand of the said party of the first part, and of the said Tuscarora nation of Indians of, in and to the same, and to every part and parcel thereof: To have and to hold all and singular the above described and released premises unto the said Thomas Ludlow Ogden and Joseph Fellows, and their heirs and assigns, to their proper use and behoof forever, as joint tenants and not as tenants in common.

In witness whereof, the parties to these presents have hereunto and to three other instruments of the same tenor and date, one to remain with the United States, one to remain with the State of Massachusetts, one to remain with the Tuscarora nation of Indians and one to remain with the said Thomas Ludlow Ogden and Joseph Fellows, inter-

changeably set their hands and seals, the day and year first above written.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Fox,
James Cusick,
John Patterson,
Samuel Jacobs,
James Anthony,
Peter Elm,
Daniel Peter.

Sealed and delivered in presence of—

James Stryker.
R. H. Gillet.
Charles H. Allen.
J. F. Schermerhorn.
Nathaniel T. Strong, U. S. interpreter.
H. B. Potter.
Orlando Allen.
(To the Indian names are subjoined a mark and seal.)

At the abovementioned treaty, held in my presence, as superintendent on the part of the Commonwealth of Massachusetts, and this day concluded, the foregoing instrument was agreed to by the contracting parties therein named, and was in my presence executed by them; and being approved by me, I do hereby certify and declare such my approbation thereof.

Witness my hand and seal, at Buffalo Creek, this 15th day of January, in the year 1838.

J. Trowbridge, Superintendent.

I have attended a treaty of the Tuscarora nation of Indians, held at Buffalo Creek, in the county of Erie in the State of New York, on the fifteenth day of January in the year of our Lord one thousand eight hundred and thirty-eight, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned and declared to be done to their full satisfaction. I do therefore certify and approve the same.

R. H. Gillet, Commissioner.
Feb. 13, 1838.

7 Stat., 561.

Supplemented article to the treaty concluded at Buffalo Creek, in the State of New York, on the 15th of January 1838, concluded between Ransom H. Gillet, commissioner on the part of the United States, and chiefs and head men of the St. Regis Indians, concluded on the 13th day of February 1838.

Supplemental article to the treaty concluded at Buffalo Creek in the State of New York, dated January 15, 1838.

The undersigned chiefs and head men of the St. Regis Indians residing in the State of New York

having heard a copy of said treaty read by Ransom H. Gillet, the commissioner who concluded that treaty on that part of the United States, and he having fully and publicly explained the same, and believing the provisions of the said treaty to be very liberal on the part of the United States and calculated to be highly beneficial to the New York Indians, including the St. Regis, who are embraced in its provisions do hereby assent to every part of the said treaty and approve the same. And it is further agreed, that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove. The United States will, within one year after the ratification of this treaty, pay over to the American party of said Indians one thousand dollars, part of the sum of five thousand dollars mentioned in the special provisions for the St. Regis Indians, any thing in the article contained to the contrary notwithstanding.

Done at the council house at St. Regis, this thirteenth day of February in the year of our Lord one thousand eight hundred and thirty-eight. Witness our hands and seals.

R. H. Gillet, Commissioner.
Lover-taie-enve,
Louis-taio-rorio-te,
Michael Gaveault,
Lose-sori-sosane,
Louis-tioonsate,
Jok-ta-nen-shi-sa,

Ermoise-gana-saien-to,
Tomos-tataste,
Tier-te-gonotas-en,
Tier-sokoia-ni-saks,
Sa-satis-otsi-tsia-ta-gen,
Tier-sgane-kor-hapse-e,
Ennios-anas-ota-ka,
Louis-te-ganota-to-ro,
Wise-atia-taronne,
Tomas-outa-gosa,
Sose-te-gaomsshke,
Louis-orisake-wha,
Sosatis-atis-tsiaks,
Tier-anasaken-rat,
Louis-tar-oria-keshon,
Jasen-karato-on.

The foregoing was executed in our presence—

A. K. Williams, Agent on the part of New York for St.Regis Indians.
W. L. Gray, Interpreter.
Owen C. Donnelly.
Say Saree.
(To the Indian names are subjoined a mark and seal.)

We the undersigned chiefs of the Seneca tribe of New York Indians, residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract therewith, the same having been submitted to us

by Ransom H. Gillet, a Commissioner on the part of the United States, and fully and fairly explained by him, to our said tribe, in council assembled.

Dated Buffalo Creek September 28, 1838.

Captain Pollard,
Captain Strong,
White Seneca,
Blue Eyes,
George Bennett,
Job Pierce,
Tommy Jimmy,
William Johnson,
Reuben Pierce,
Morris Halftown,
Levi Halftown,
George Big Deer,
Jim Jonas,
George Jimeson,
Thomas Jimeson,
George Fox,
N. T. Strong,
Thompson S. Harris,
Samuel Gordon,
Jacob Jimeson,
John Gordon,
Tall Peter,
Billy Shanks,
James Stevenson,
Walter Thompson,
John Bennett,
John Seneca,
John General,

Major Jack Berry,
John Tall Chief,
Jabez Stevenson.
(To the Indian names are subjoined marks.)

The above signatures were freely and voluntarily given after the treaty and amendments had been fully and fairly explained in open council.

R. H. Gillet, Commissioner.

Witness:
H. A. S. Dearborn, Superintendent of Massachusetts.
James Stryker, U. S. Agent.
Little Johnson,
Samuel Wilson,
John Buck,
William Cass,
Long John,
Sky Carrier,
Charles Greybeard,
John Hutchinson,
Charles F. Pierce,
John Snow.
(To the Indian names are subjoined marks.)

These ten chiefs signed in my presence except the last John Snow.

H. A. S. Dearborn,
Superintendent of Massachusetts.

Signed in presence of –
Nathl. T. Strong, U. S. Interpreter.
James Stryker, U. S. Agent.
George Kenququide, by his attorneys.

N. T. Strong.
White Seneca.

The signature of George Kenququide was added by his attorneys in our presence.

R. H. Gillet,
James Stryker.

18th January 1839.

We the undersigned chiefs of the Oneida tribe of New York Indians do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 9th, 1838 at the Oneida Council House.

Executed in the presence of—
Timothy Jenkins.

First Christian Party:
Baptista Powlis,
Anthony Big Knife,
Peter Williams,
Jacob Powlis,
Anthony Anthony,
Peter Martin,
Cornelius Summer,
Isaac Wheelock,
Thomas Doxtater,

William Hill,
Baptiste Denny.

Orchard Party:
Jonathan Jordon,
Thomas Scanado,
Henry Jordon,
William Day.

Second Christian Party:
Abraham Denny,
Adam Thompson,
Peter Elm,
Lewis Denny,
Martin Denny.
(To the Indian names are subjoined marks.)

The above assent was voluntarily freely and fairly given in my presence, after being fully and fairly explained by me.

R. H. Gillet, Commissioner, &c.

We the undersigned sachems, chiefs and head men of the Tuscarora nation of Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, and to our contract connected therewith, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 14th, 1838.

Nicholas Cusick,
William Chew,
William Mountpleasant,
John Patterson,
Matthew Jack,
George L. Printup,
James Cusick,
Jonathan Printup,
Mark Jack,
Samuel Jacobs.

Executed in presence of—
J. S. Buckingham,
D. Judson,
Leceister S. Buckingham,
Orlando Allen.
(To the Indian names are subjoined marks.)

The above assent was freely and voluntarily given after being fully and fairly explained by me.

R. H. Gillet, Commissioner.

We the undersigned chiefs and head men of the tribe of Cayuga Indians residing in the State of New York do hereby give our free and voluntary assent to the foregoing treaty as amended by the resolution of the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet, a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled.

Dated August 30th, 1838.

Thomas Crow,
John Crow,
Ghastly Darkness,
Jacob G. Seneca.

Executed in presence of—
James Young.
(To the Indian names are subjoined marks.)

The above four signatures were freely given in our presence.

R H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.

We the undersigned sachems, chiefs and head men of the American party of the St. Regis Indians residing in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June 1838, the same having been submitted to us by Ransom H. Gillet a commissioner on the part of the United States, and fully and fairly explained by him to our said tribe in council assembled. The St. Regis Indians shall not be compelled to remove under the treaty or amendments.

Dated October 9th, 1838.

Lorenn-taie-enne,
Sase-sori-hogane,
Louis-taw-roniate,
Thomas-talsete,
Saro-sako-ha-gi-tha,

Louis-te-ka-nota-tiron,
Michael Gareault,
W. L. Gray, Int.
Louis-tio-on-sate,
Tier-ana-sa-ker-rat,
Tomas-ska-en-to-gane,
Tier-sa-ko-eni-saks,
Saro-tsio-her-is-en,
Sak-tho-te-ras-en,
Saro-saion-gese,
Louis-onia-rak-ete,
Louis-aion-gahes,
Sak-tha-nen-ris-hon,
Sa-ga-tis-ania-ta-ri-co,
Louis-sa-ka-na-tie,
Sa-ga-tis-asi-kgar-a-tha,
Simon-sa-he-rese,
Resis-tsis-kako,
Ennias-kar-igiio,
Sak-tsior-ak-gisen,
Tier-kaien-take-ron,
Kor-ari-hata-ko,
Tomas-te-gaki-gasen,
Saro-thar-on-ka-tha,
Ennias-anas-ota-ko,
Wishe-te-ka-nia-tasoken,
Tomas-tio-nata-kgente,
wishe-aten-en-rahes,
Tomas-ioha-hiio,
Ennias-kana-gaien-ton,
Louis-taro-nia-ke-thon,
Louis-ari-ga-ke-wha,

Sak-tsio-ri-te-ha,
Louis-te-ga-ti-rhon,
Tier-atsi-non-gis-aks.

The foregoing assent was signed in our presence.

R. H. Gillet, Commissioner.

Witnesses:
James B. Spencer.
Heman W. Tucker.
A. K. Williams, Agent St. Regis Indians.
Frs. Marcoux Dictre.
(To the Indian names are subjoined marks.)

We the undersigned, chiefs, head men and warriors of the Onondaga tribe of Indians residing on the Seneca reservations in the State of New York, do hereby give our free and voluntary assent to the foregoing treaty as amended by the Senate of the United States on the eleventh day of June, 1838, the same having been submitted to us, by Ransom H. Gillet, a commissioner on the part of the United States and fully and fairly explained by him to our said tribe in council assembled.

Dated August 31st, 1838.

Silversmith,
Noah Silversmith,
William Jacket.

(To the Indian names are subjoined marks.)

The above signatures were freely given in our presence.

R. H. Gillet, Commissioner.
H. A. S. Dearborn,
Superintendent of Massachusetts.