**No. 120, Original**

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NEW JERSEY,

*Plaintiff*,

v.

STATE OF NEW YORK,

*Defendant.*

## PETITION FOR REHEARING OF MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF OF *AMICUS CURIAE* WESTERN MOHEGAN TRIBE & NATION OF NEW YORK, *PRO* SE, IN SUPPORT OF NEITHER PARTY

Western Mohegan Tribe & Nation of New York, *pro se*
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## PETITION

Pursuant to Rule 44 petitioner asks for a rehearing of its motion which was denied on December 1, 1997. The grounds for the rehearing consist in the following intervening circumstances of substantial or controlling effect or other substantial grounds not previously presented but now presented.

Granville, New York

December 8, 1997

Western Mohegan Tribe & Nation of New York, *pro se*

By:

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## GROUNDS

Subsequent to December 1, 1997 it has come to light that the Compact between the State of New York and the State of New Jersey (June 28, 1834, 4 Stat. 708) relative to Ellis Island is null and void. This requires a fundamental re-thinking of the basic premise underlying both the *lis* and the Special Master's Report in the Ellis Island case, No. 120 Original *State of New Jersey v. State of New York.* And that, in turn, requires a re-thinking of the validity of the petitioner's motion for a fresh original action as between itself and the United States, New Jersey and New York—relative to the complex of *jus gentium, jus privatum* and *jus publicum* rights and obligations in the entire Hudson River drainage basin.

The said Compact of 1834 and the consequent Ellis Island *lis* and Special Master's Report are all premised upon the assumption (Special Master's Report, p. 4) that:

> *The 3-acre island now called Ellis was purchased from the Indians by the Dutch in 1630 to reward Michael Paauw (Paw) for shipping goods to the emerging colony. Variously known as [Kioshk or] Gull Island to the [Mohegan] Indians . . .*

In the Ellis Island case the New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council has identified (*Amici* Brief, pp. 5, 6, 7) *Arnold v. Mundy*, 6 NJL 1 (1821) as being a secondary and influential precedent. Actually, the said precedent, when read in light of the challenge of the Western Mohegan Tribe & Nation of New York to the validity of the Mohegan deed to the Michael Paaw in 1630, acquires the greater status of an original and authoritative precedent.

For, in addition to standing for the points taken from it by the said *Amici*, the said *Arnold v. Mundi*, 6 NJL 1, 84 (1821)

also stands for the principle that: "*The soil is none of his; it is the natives' by the* jus gentium, *the law of nations.*" The said *jus gentium* is anterior and superior to the *jus privatum* rights and *jus publicum* obligations identified (pp. 10, 11) by the said *Amici.* In consequence, the natives' interest asserted by the Western Mohegan Tribe & Nation of New York, being based upon the *jus gentium*, is *prima facie* superior to all rights of "property" and "jurisdiction" that otherwise may vest or exist, including all rights that vest or exist by contract or compact under the Compact of 1834.

As the Supreme Court of Pennsylvania held in *Weiser v. Moody*, 2 Yeates 127, 128 (1796):

> *It was the European usage, for the sovereign to bestow charters on their subjects of such territory . . . But the more solid and equitable title must rest on the foundation of fair purchases from the original tenants.*

Applying the principle in *Arnold v. Mundy* to the Ellis Island case, if the Compact of 1834 was made "*under full knowledge*" of the invalidity of the 1630 Mohegan deed, then the 1834 grant by New York to New Jersey was final. In that event, the grant "*would enure for the benefit of the grantee, when the lands afterwards came to be purchased from the Indians.*" But if New York was misled as to the validity of the 1630 Indian purchase, then, by operation of law, the 1834 grant to New Jersey would be null and void, on grounds of being induced by deception or mistake.

Thus, in *Strother v. Cathey*, Morgan 1 NC 162, 168 (1807) a North Carolina Court held where a state grant was made in 1787, followed by a 1791 purchase from the Indians and a subsequent state grant of the same land in 1803, that the first grant was absolutely void.

Similarly, in *Thompson v. Johnson*, 6 Binney 68 (1813) the Pennsylvania Supreme Court held (per headnote), again, that grants:

> *for lands not purchased of the Indians, and which the proprietaries did not know at the time of granting, to be within the Indian limits, pass no rights.*

United States Supreme Court Justice Johnson in *Danforth v. Wear*, 9 Wheat. 673, 675 (1824) stated:

> *As to lands surveyed within the Indian boundary, this Court has never hesitated to consider all such surveys and grants as wholly void.*

This principle was applied by the Supreme Court of Tennessee in *Gillespie v. Cunningham*, 2 Tenn. 19, 23 (1840); and by the Mississippi High Court of Errors and Appeals in *Montgomery v. Ives*, 13 Smedes & M. 161, 175 (1849), in which last mentioned case the court held that the grant there in question:

> *had in itself no intrinsic validity, because the lands were not subject to be granted, until their* [Indian] *title was relinquished. On this part of the proclamation of 1763, the Supreme Court of the United States say, "This reservation is a suspension of the powers of the royal governor, within the territory reserved."* Fletcher v. Peck, *6 Cranch, 142. It is because of this suspension, which existed at the date of this grant, that we think it has no intrinsic validity. It is an established principle of our jurisprudence, that a grant of land on which the Indian title has not been extinguished, is void.* Danforth v. Wear, *9 Wheat. 676.*

This contemporary exposition of the law as understood *circa* 1834 bears directly upon the contractual intent of New York and New Jersey when the compact relative to Ellis Island

was signed. The point is that as at 1834 when the Compact was made it was conventional wisdom that a grant made of land for which the Indian purchase was invalid passed absolutely nothing.

What is more, and significantly more, is that the Court should not even consider attempting to achieve a resolution in willful blindness to the said Indian interest, for to do so arguably would be a crime contrary to *Convention for the Prevention and Punishment of the Crime of Genocide, 1948* as implemented by the *Genocide Convention Implementation Act of 1987 (the Proxmire Act).* P.L. 100-606. 100th Congress. 102 Stat. 3046.

The historical fact is that the consequence of the denial to the Cherokees of access to this Court in *Cherokee Nation v. Georgia*, 31 Peters 1 (1831), was the genocide of a substantial part of that native tribe and nation on the infamous Trail of Tears. the existence of which judicial notice may be taken. As the *Rutland Herald* editorialized on November 30, 1997 under the heading "Painful Observance":

> *. . . the story of what the European settlers did to the people on this continent when they arrived is distressing in the extreme. It is a sad reflection on the human character that history provides many parallels, and no exaggeration to say that one of them is the Nazi Holocaust that erased six million European Jews just over 50 years ago.*
>
> *The Holocaust occurred in a compressed period of time. The virtual annihilation of countless tribes and nations of Native Americans, by contrast, took some 300 years. But it was scarcely less purposeful, and arguably more successful. For there has been no widespread effort to restore what was taken from the*

*Indians. Nor has there been much attempt to atone for the horror's perpetrated upon them.*

*Simply put, the European newcomers declared war on those who were already here. Acquisitive pioneers desired their lands and the treasures and resources thereon, and they took them. Such thievery was made U.S. policy by the Indian Removal Act of 1830. It authorized the resettlement of 70,000 Southeastern Cherokees, Seminoles and others to Oklahoma in a forced migration—with death from starvation and freezing temperatures a constant companion. It was known as the Trail of Tears.*

*Where riches were not suspected—in Arizona, for example—the Indians were largely left alone. But when gold was found there in the 1860s, the tribes of that region were massacred and driven from their homes to a reservation in the eastern part of the territory.*

*It would be naive to claim that all the wrongs in a centuries-long warfare between settlers and natives were committed by one side. But the difference between usurper and usurped was stark, and so was the difference between their fates.*

*The descendants of one side celebrate Thanksgiving; the other, a Day of Mourning. It remains a wide gulf for us to bridge.*

The point is that if the Cherokees had cited the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut* to the Court, which they did not do, the genocide might not have occurred. The Western Mohegan Tribe & Nation of New York, in contrast with the Cherokees, has cited the *Order in Council (Great Britain) of*

*9 March 1704* in the matter of *Mohegan Indians v. Connecticut* to the Court. Perhaps the Court should now heal history's wound and America's spirit, in light of the law tragically not put before the Court previously.

The Special Master in the Ellis Island case held (Special Master's Report, p. 93):

> *Three, not two, sovereign entities are involved on Ellis Island. The United States, by deeds of 1808 from New York and 1904 from New Jersey, is owner of Ellis Island; New York, by Article Second of the Compact, retains sovereignty over the 1833 Island; and New Jersey under the Compact, particularly Article First, is sovereign over the waters around the Island.*

In so holding, the Special Master omitted to address the *jus gentium* concerning the Indian interest, and that omission renders irrelevant the view taken by him of the *jus privatum* rights and *jus publicum* obligations which he did consider. For, when addressed, the *jus gentium* establishes not only that the Compact of 1834 is, for the above reasons, null and void, but, in addition establishes that the *only* jurisdiction vested in the United States is the constitutional power of preemption, pending the exercise of which (or, alternatively, a constitutional amendment) the territory in dispute is presumptively reserved exclusively for Indian use and occupation. S. McSloy, "Back to the Future: Native American Sovereignty in the 21st Century," *New York University Review of Law & Social Change*, 20:2:1993 at 217-302.

In the alternative, the Compact of 1834, even if valid, internally contains a saving vis-à-vis the arguably unceded Indian interest now asserted by the Western Mohegan Tribe & Nation of New York. The Act implementing the Compact, 4 Stat. 708 (1834) (Appendix to Brief of Exceptions of New York to the Special Master's Report, p. 54) recites:

> Be it therefore enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, *That the consent of the United States is hereby given to the said agreement, and to each and every part and article thereof,* Provided, *That nothing therein contained shall be construed to impair or in any manner effect* [sic], *any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.*

As at 1834, when that statute was enacted, there was absolutely no pretense that the United States had anything more than a right of preemption under the *jus gentium* to purchase the land from the Indians: the recent invention of plenary jurisdiction of Congress relative to arguably unceded Indian territory did not arise until after the *Appropriations Act of 1871*, as fully explained in the other materials delivered by the Western Mohegan Tribe & Nation of New York. Therefore, it must be accepted that the legislative intent of the above-quoted enactment clause of 4 Stat. 708 (1834) was without prejudice to the United States' trust relationship in respect of the Indian interest.

The Western Mohegan Tribe & Nation of New York has to agree with the point taken by the other set of historical societies appearing as *Amici*, namely the New York Historical Society, Society for New York City History, Arthur M. Schlesinger, Jr., Richard C. Wade, and Kenneth T. Jackson. Their brief establishes (pp. 20, 28) that the Indian interest issue inextricably was involved in the great jurisdictional questions vexing the United States in the year 1834, and that, therefore, the Special Master's Report is incomplete in its treatment of the legal history, for which reason it is accurate to contend that the Court "*needs still further information.*"

The input of the Western Mohegan Tribe & Nation of New York can help the Court and the country to arrive at the whole truth, as contrasted with a version neglecting the perspective of native Americans as original, and still relevant partners in this destiny, health and integrity of the country.

The Western Mohegan Tribe & Nation of New York does not wish to relinquish its *jus gentium* position relative to Ellis Island. It wishes to continue to hold the right of Indian occupancy and Indian self-government along with the United States, in trust, for the purpose of implementing the *American Heritage Rivers Executive Order of 11 September 1997* relative to Mohegan ancestral homeland: the Hudson River drainage basin. That being the case, there should be nothing to preclude the resolution of the Ellis Island *lis*, and, indeed, all other potential Indian interest litigation relative to the Hudson River valley, by treaty dedicating the territory to the advancement of the legislative intent of the *American Heritage Rivers Executive Order of 11 September 1997.*

The *lis* between New Jersey and New York constitutes an argument over which State has the *jus privatum* and *jus publicum* when, by operation of law, the United States still holds those in trust for the Indians under the *jus gentium.* And, the Indians wish to make a treaty gifting their interest to all Americans, and thereby to regenerate the ecological health of the Hudson River drainage basin.

Granville, New York
December 8, 1997

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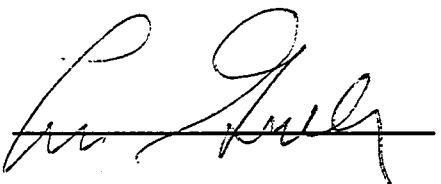
## CERTIFICATE

The petition herein is restricted to the grounds specified in Rule 44 and is presented in good faith and not for delay.

Granville, New York
December 8, 1997



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