OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1065 & 83-1240

TITLE COUNTY OF ONEIDA, NEW YORK, ET AL., Petitioners v. ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.; and NEW YORK, Petitioner v. ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

PLACE Washington, D. C.

DATE October 1, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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COUNTY OF ONEIDA, NEW YORK, ET AL., :

Petitioners :

v. : No. 83-1065

ONEIDA INDIAN NATION OF NEW YORK :

STATE, ETC., ET AL.,; and :

- -:

NEW YORK :

Petitioner :

v. : No. 83-1240

ONEIDA INDIAN NATION OF NEW YORK :

STATE, ETC., ET AL. :

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Washington, D.C.

Monday, October 1, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 o'clock p.m.

APPEARANCES:

ALLAN van GESTEL, ESQ., Boston, Massachusetts, on behalf of Petitioners.

APPEARANCES: (Continued)

PETER H. SCHIFF, ESQ., Deputy Solicitor General of New York, Albany, New York, on behalf of Petitioner.

MS. ARLINDA F. LOCKLEAR, Washington, D. C., on behalf of Respondents.

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., Amicus Curiae.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in County of Oneida v. Oneida Indian Nation and New York State in the related case.

Mr. van Gestel, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALLAN van GESTEL, ESQ.

ON BEHALF OF THE PETITIONERS

MR. van GESTEL: Mr. Chief Justice, and may it please the Court:

This case is a test case, having been so designated by the plaintiffs, having been so treated by the courts below. As is in many cases before this Court, the decision will reach far beyond the boundaries of this case. In this case in particular, it will reach much beyond the boundaries.

The 1974 opinion in this case has already spawned a vast number of Indian land claims. A number of cases are pending throughout eastern states and southern states, citing the 1974 jurisdictional opinion as if it were an opinion on the merits of the issues. That case, indeed, has already been cited 162 times since 1974.

This case has some history in it, and I checked to see how many opinions were rendered by the

Supreme Court of the United States between 1790 and 1795, the date on which the transaction in issue occurred here, and there were only 16.

What is involved here is a purchase of land by the State of New York from the Oneida Indian Nation in 1795. The claim, filed about 175 years later, is that the State of New York failed to comply with the restrictions and limitations contained in the second Indian Trade and Interccurse Act, the Trade and Intercourse Act of 1793, and the claim is that as a result, the Oneida Indians, rather than the Counties of Madison and Oneida and the others who live in the claim area, the 100,000 acres involved, presently own that land.

Own is a word that is important because the Oneida Indians are, as this Court has recognized, an institution with a degree and element of sovereignty in it, so that owning the land by the Oneida Indians is quite a bit different than owning it by someone else.

The Trade and Intercourse Acts were first passed in 1790 by the very first Congress of the United States. A principal question to be decided in this case is what was the intent of that Congress in passing the first Trade and Interccurse Acts.

QUESTION: Mr. van Gestel.

MR. van GESTEL: Yesa, sir.

QUESTION: To get back for a moment to the point you adverted to earlier, this is a case about ownership and not about sovereignty as such, I take it here.

MR. van GESTEL: No, Your Honor. What I meant to suggest was that when ownership is in an Indian tribe as opposed to an individual Indian or another individual, you have to deal with the elements of sovereignty that are inherent in being an Indian tribe. You cannot avoid it. So this really is a case that implicates the sovereignty of the Indian nation. If they own the land, they are sovereigns over it to at least a degree as permitted by the current law.

QUESTION: Wouldn't there have to be a reservation embracing the land?

MR. van GESTEL: No, there would not have to be a reservation. As I read the cases of this Court, simply land owned by an Indian tribe or nation is land that is subject to the sovereign rights and powers of that Indian nation. It does not have to be a reservation created, let's say, by the Congress of the United States.

I think then we do then turn to the issue of whether the first Congress or the Congress in 1793 which

passed the second Trade and Intercourse Act, intended that there would be a private right of action available under that statute. And in so doing, we look to the recent work of this Court, starting principally in 1975 with Cort v. Ash and the cases that have flown therefrom.

We have a situation here in which there is a statute which is comprehensive. It deals with the subject of regulating and managing the affairs with the Indian tribes and nations. It draws its power, its basis from the commerce clause of the Constitution of the United States.

If we look at the kind of analysis that this Court has suggested is appropriate on the issue of whether there is or is not a private right of action, it seems to me the cases of this Court in recent years indicate that no private right of action should be determined to exist here.

I would initially hearken back, we have cited in our brief to the words of James Madison, who was the man who introduced the 1793 statute. There he said at the time, misunderstandings, quarrels and wars with Indians had originated from the circumstance of persons having obtained through fraud and other improper means possession of lands belonging to Indians. This

consideration rendered it highly important that this whole business should be under the absolute and sole direction of public authority.

Turning to the statutory language, which is where we should first go to determine whether there is a private right of action, you will find that there is no mention in the statute whatsoever of creating a private right. You will also find, however, that there are remedies and provisions provided in the statute that deal with instances in which it is violated. It is principally a criminal statute. There are provisions for criminal fines. There are provisions for jail. And there are also provisions that permit the President of the United States to call out the military to move the settlers off the land. But there is no reference to a private right of action by an Indian tribe.

This should not be surprising because Indian tribes were not admitted into the courts. They were not expected to have any right to go to court in 1793. Indeed, it wasn't until the twentieth century when Indian tribes first began to be able to come into the courts. Prior to that time there were a few special legislative acts allowing Indian tribes access to the Court, but certainly in 1793 they were not in the courts.

QUESTION: Mr. van Gestel, this is not an argument on the merits, I take it, as to whether if they could get into -- if the tribe could get into court they could properly assert this as an affirmative claim or as a defense.

MR. van GESTEL: This is an argument, Justice Rehnquist, on the issue of the intent of the Congress in 1793, and it seems to me the intent of the Congress, among other things, in addition to what its plain language said, has to be drawn from Congress' understanding of what was happening at the time.

One of the difficulties in these Indian cases is to enable us to put ourselves in the position of the drafters of these statutes at that time, and I think the intent of Congress has to be drawn, among other things, from their knowledge of whether Indian tribes were in court, were permitted to be in court.

QUESTION: But is it the intent of Congress as to whether the Indians should have a right of action under this particular statute or the intent of Congress as to how the merits of the statute should be interpreted if the tribe were to be able to get into court in some way?

MR. van GESTEL: In my reading of the cases of this Court since 1975, it is the intent of Congress as

to whether the Indians should have a right of action under the particular statute. It isn't that Congress failed to provide remedies, but the remedies it provided were remedies for the government to enforce, and it is quite understandable why they did that.

What this statute was designed to do was to regulate what was occurring on the frontier, probably the least regulatable area in American history. You have a situation in which there are settlers many, many miles from a government which was weak and almost nonexistent. To attempt to regulate those people and what they were doing other than by having some control in the central government was near impossible. To suggest that the Congress in 1793 assumed that that regulation could be affected by lawsuits between the Indians and the settlers on the frontier is to me astounding.

QUESTION: Well, let me ask you this question. Supposing that this action had been brought in the Supreme Court of Oneida County or in the state court system and -- so that there was no question that New York would entertain that sort of a cause of action, your argument then that you are now making wouldn't address the situation where the action were brought in the state court, would it?

MR. van GESTEL: If the action were brought in state court and it were, as to use your words in the '74 opinion, a garden variety ejectment action, presumably it would be subject to the state law, including the defenses that would be available in a state court.

QUESTION: Such as the statute of limitations?

MR. van GESTEL: Such as the statute of limitations, such as adverse possession, the various kinds of things that are said at least by the lower courts not to apply when we are dealing with a Trade and Intercourse Act case in the federal system.

QUESTION: Well, I think that is an important issue in your case, but why would it be resolved any differently in state court if the state court in deciding the case is subject to the overall limitations of federal law.

MR. van GESTEL: Perhaps I misunderstand your question. If you are saying in 1970 when this case was brought, what would be the result in the state court in New York, I suspect it wouldn't last more than a week on a motion to dismiss on statute of limitations grounds.

QUESTION: Well, but supposing there is an appeal then taken, perhaps in the New York Court of Appeals or ultimately to this Court, and the Indian

tribe or plaintiff says, look, this nonintercourse act of 1791 and the supplemental -- or 1793, the supplemental act -- say that this land shouldn't have been taken away from us the way it was, that we shouldn't have been allowed to deed it away without the attendant things specified in the statute, and therefore we are entitled to possession. And that's a federal question.

MR. van GESTEL: The federal question, I think what you would come to then, Your Honor, is whether a right of action was intended under that statute.

QUESTION: Well, can't New York give a right of action under that statute when you are talking about a real property question?

MR. van GESTEL: I don't think New York could give a right of action under the 1793 Federal Trade and Interccurse Act. New York under its common law could provide a common law claim.

QUESTION: And doesn't New York give anyone a right to come into court and say we are now dispossessed of Black Acre; we are entitled by law to Black Acre; therefore, give us Black Acre.

QUESTION: By federal law.

MR. van GESTEL: I don't know whether by federal law, Justice White. It seems to me before you

implicate the federal law, you would end up dealing with the state law, and I have no difficulty, and I would not argue here with these claims being brought in a State Court.

The essence, as I understand it, of the 1974 decision here is that they are inappropriate in a state court. Indeed, the District Court judge, Judge Port, dismissed this action, and the Second Circuit Court of Appeals affirmed that dismissal on the grounds that the case should be litigated in the state court system, this court first.

QUESTION: Well, I won't pursue you further. My own personal reaction is that the -- your statute of limitations and your arguments on the merits are probably going to get you -- on the merits of the effect of the statute, are going to get you further than the private right of action.

MR. van GESTEL: Well, it seems to me that the private right of action is an important issue, and I really don't mean to back down from it in any sense.

QUESTION: But you've only got limited time.

MR. van GESTEL: I appreciate that, too, Mr. Justice White.

I will pass, at the suggestion of Justice Rehnquist, to the statute of limitations issue because

you do have a situation whereby if it is to be determined that there is a right of action, and if this case can be brought, then you must decide, well, can it be brought 175 years after the cause of action accrued?

In this instance, since we are dealing with a federal statute, we must first look to see if there is a federal statute of limitations, and there is none. Under that circumstance, the law seems fairly clear that the appropriate thing to do is to borrow the most nearly appropriate state statute of limitations. That is something that this Court has recognized, indeed as recently as June of this year, in the opinion of Burnett v. Gratton. In that case the state statute of limitations in the State of Maryland was borrowed in connection with an action brought under the civil rights statutes. It seems equally appropriate here to borrow the nearest appropriate New York State statute of limitations, and there is no statute of limitations in the State of New York that is longer than 20 years, so that any statute that you borrowed would certainly long since have barred this action.

QUESTION: Mr. van Gestel, what bearing, if any, does Section 2415 of Title 28 of the U.S. Code have on this claim asserted by the Indian tribes?

MR. van GESTEL: I, Justice O'Connor, I think

it has no bearing whatsoever. That is a statute that relates to actions brought by the United States government for money damages on behalf of Indians. It is not a statute that is designed to deal with claims by Indians themselves.

QUESTION: Well, the lawyer for the United States doesn't deal with it.

MR. van GESTEL: I realize that, Your Honor, and respectfully --

QUESTION: So your "whatsoever" is a little strong, isn't it?

MR. van GESTEL: Well, my "whatsoever" comes from a reading of the statutory history and the discussion by those in Congress at the time of the enactment of that statute. I would also point out that it seems to me that that is a statute that was created only relatively recently under this Court's decision in Stewart v. Keyes to create and bring back into being a cause that had long since abated as a result of the statute is something that would violate the Fifth Amendment.

So I really do not think that you can do anything with 2415 that relates to this particular case.

QUESTION: Except to conclude that if the

United States isn't barred, neither are the Indians.

MR. van GESTEL: Correct, which is a conclusion that I think is inappropriate. It is a conclusion I think that flows from the theory that the Indians must have precisely the same rights as the United States. In Indian law in particular that is a situation that does not obtain. In many, many instances, the Indians do not have the same rights as their guardian, as the United States.

In trust law it is a common principle that the guardian has rights that the ward does not have.

QUESTION: Well, under the 1982 amendments, the Secretary of the Interior, under this federal statute of limitations, notifies the Indians of -- the Indian tribes of the claims it intends to allow and extends the statute another year, presumably to let Indian tribes file their own claims.

QUESTION: It's another section.

QUESTION: So isn't there some effect here?

MR. van GESTEL: I don't think so, respectfully, Your Honor. I think what you have in part is yet another effort by the federal government to bring an end to these Indian claims, not dissimilar from that that occurred when the Indian Claims Commission was formed in 1946. It is an effort to ferret out and find

out what claims are availble, to give those Indians who feel they have a claim an opportunity to present them to the federal government for action.

But again, it is a money damages statute by the federal government, not by Indians.

QUESTION: What would happen if the United States were bringing this action and it was an action for quiet title? Would there be any statute of limitations?

MR. van GESTEL: I would assume that probably there would not be a statute of limitations against the United States.

QUESTION: Well, that would -- that's just under the section. That's just under the statute, isn't it? I mean, isn't that conclusion compelled by the statute or not, no statute of limitations?

MR. van GESTEL: You are talking now about 2415, Your Honor, or about some other section?

QUESTION: 2415.

MR. van GESTEL: Under 2415, until the time runs out which is contained therein, the United States could bring an action.

QUESTION: Yes.

When does the time run out?

MR. van GESTEL: If my memory serves me, it

runs out at the end of this year.

QUESTION: Uh-huh.

MR. van GESTEL: I think it is December 31, 1984, if I recall correctly.

QUESTION: Do you think that the case of Ewert v. Bluejacket indicates that state statute of limitations don't apply to Indian claims?

MR. van GESTEL: I think Ewert v. Bluejacket suggests that state statutes do not apply, Justice O'Connor. I am not suggesting that the state statute applies; I am suggesting that the principle in federal law that when there is no federal statute, the federal courts borrow the state statute and make it part of the federal law is what applies. I don't think that was the issue at all in Ewert v. Bluejacket.

I would suggest one other thing while I am talking about the issue of the statute of limitations, and that is the issue of abatement that we have raised.

The Indian Trade and Intercourse Act is not a single statute that has been in existence since 1790 down to the present date. Indeed, when you examine it you will see that it is a series of separate, specifically limited statutes in the early years, 1790, 1793, 1796, '99 and 1802. It wasn't until 1834 that it became a single statute. And with the expiration of

each statute, any claims that may have existed, assuming you find there to be a right of action under it, would abate under the law as it applied at that time.

Now, I think another thing that we have to discuss and have to consider in dealing with this kind of case, another defense, is a defense of ratification. The law, it would seem, suggests -- and have in mind that the concern here is that the State of New York, when it purchased the land in 1795, did not do it in the presence of a federal commissioner. That is the deficiency, and the sole deficiency. The State of New York a couple of years later, in 1798, purchased some additional land in the presence of a federal commissioner, and nobody has any concern or argues that that was in any way inappropriate.

Cases have determined that ratification of thse kinds of transactions can occur after the transactions themselves have occurred. That is, if the federal government takes certain steps that demonstrate that there is a knowledge of the transaction and there is an implicit ratification, then that is sufficient to satisfy the requirements of the Indian Trade and Intercourse Act.

We have set forth in our brief a number of instances in which that ratification applies. In

particular, the next two purchases by the State of New York from the Oneida Indians, in adjacent land, were purchases that were made in the presence of the appropriate federal commissioner. They were purchases that were appropriate in every respect under the statute.

Those purchases made reference back to the 1795 purchase. They described it as a purchase. They did the kinds of things that the subsequent cases have suggested as sufficient to retroactively ratify.

But in addition to that, we have had 175 years, approximately, of history, of the federal government acting with regard to the land in issue here as if that land was owned by the people who live on it today. The federal government has taken land and built post offices, it has built federal highways, it has taxed people, it has done everything that you would expect it to do to in effect say to those citizens, yes, this is your land and you own it.

QUESTION: May I ask, Mr. van Gestel, is -- the land here that is in dispute in this case is owned by counties. Do they stand in the shoes of the State of New York, or were there intervening transfers of ownership?

MR. van GESTEL: Justice Stevens, I do not

believe that they do. The land, you are correct, the land in this particular case that is involved is owned by the Counties of Madison and Oneida. They are separate entities. Indeed, they have brought --

QUESTION: Did they acquire it directly from the State of New York?

MR. van GESTEL: They acquired it -- they were created in part out of this land. They didn't exist at the time, but they were created out of it, and their title would come from the State of New York, just as would the title of everyone else in that area.

QUESTION: But there has been no intervening ownership in private hands. So this is really, is it more or less the same as if we were dealing with the State of New York itself?

The reason I ask is because in the Ewert case it was the original transferee who was held not to be barred.

MR. van GESTEL: I cannot as I stand here say that some of the county land didn't come from somewhere else. There may have been a taking to build a county highway or something like that. But principally the land came from the State of New York. However, I don't think the counties are part of the State of New York in the sense that the state and the counties are one.

QUESTION: You think you have the same, just as strong a position as if you were a private, innocent purchaser through good faith, a third party purchaser?

MR. van GESTEL: Yes, I do, Your Honor, and I would remind the Court --

QUESTION: This case is then, on that basis, the case is quite different from the Ewert case.

MR. van GESTEL: Yes. And I would remind the Court that what Judge Port determined and the Second Circuit affirmed was that the transaction was invalid, the purchase in 1795 was invalid. That's the entire 100,000 acres of land in question.

Now, the private landowners were not parties to the litigation and therefore in theory I suppose they could raise defenses later on, but once this case deciding that that purchase was invalid has gone all the way through the system, their chances to raise defenses are greatly diminished.

I think in sum, on the issue of ratification, the action by the federal government cannot be ignored, and that action really is 175 years of treating these people, these counties, as if this were their land.

I would conclude my remarks regarding the Indians by suggesting to this Court that when you have a moment to reflect on this case and you think for a

moment about the result of finding for the Indians in this case, it seems to me that you must come to the conclusion that this is a political issue. A finding for the Indians means in effect that 100,000 acres of land falls under the sovereignty of an Indian tribe. It means that it has always been their land. It means that 175 years of citizens living on that land have been trespassers, have been living under a law that had no place, that is, the laws of the State of New York and the laws of the United States, and it means that the people who are there today who have abided by the laws of the United States and the laws of the State of New York are left in the middle.

It is an issue, while it doesn't fall within the particular framework of political question, as that is a word of art, it is a political issue certainly. I don't --

QUESTION: Mr. van Gestel, on page 4 of the state's brief, they mention two judgments, one against Madison of $9,060, and against Oneida of $7,634.

Is that the amount of money involved?

MR. van GESTEL: That is the dollar amount, yes, Justice Brennan.

The court -- it was about 872 acres is the land. That land, as you might assume, is principally

county highways, so the appraisal of the value of a county high, something 50 yards wide and a mile and a half long, results in these very low numbers.

But it isn't the dollar value which is the impact of the determination.

QUESTION: But there is no issue as to dollar value?

MR. van GESTEL: No, there is no issue as to dollar value.

QUESTION: Well, what is the impact to which you refer, the broader scope?

MR. van GESTEL: The broader scope, Your Honor, is that if it is determined that there is a right of action under the Trade and Intercourse Act, or if it is determined that there is no statute of limitations bar or there cannot be retroactive ratification or this is not a political question, then in this particular area you have the next shoe dropping, the next suit for the balance of the 100,000 acres against the private landowners.

QUESTION: Most of which is in private ownership.

MR. van GESTEL: Essentially all of which is in private ownership.

QUESTION: So it would be valued like if you

were condemning the land or something.

MR. van GESTEL: Well, that is an issue that we debated in the lower court, Your Honor, but nevertheless, when you take the value back 175 years and apply interest, you have a situation that is wholly unmanageable. You also have title to the land. You have a situation which I don't think is good for our system. You may have several thousand people told that they have to leave their land. I am not sure they will do it.

QUESTION: But all of this could be cured by Congress.

MR. van GESTEL: All of this could be cured by Congress, yes, Justice Blackmun.

I would like just ever so briefly in the time that I have left -- I'm sorry.

QUESTION: How do you think it could be cured by Congress without paying out a lot of money?

MR. van GESTEL: The Congress may well have to pay out some money, Your Honor.

QUESTION: Well, some money, or at least as much as what is involved in these suits.

MR. van GESTEL: I'm not so sure of that. The Congress can ratify this transaction, and indeed, I remind the Court --

QUESTION: Do you think it would?

MR. van GESTEL: I, regrettably, it hasn't --

QUESTION: Without paying money?

MR. van GESTEL: It hasn't done so thus far, but --

QUESTION: The judgment of the Court says the Indians own the land and the Congress says, sorry, but we don't care what a court says, you don't own it.

MR. van GESTEL: That, I'm not sure --

QUESTION: That sounds very logical, in other words, sensible.

MR. van GESTEL: It doesn't sound very nice, either, but I am not sure it is the basis to hold the private landowners hostage.

Don't forget that in 1951 the same Oneida Indians brought their claim before the Indian Claims Commission provided by Congress and were successful, successful to the point of winning a liability judgment, and then determined for tactical reasons not to go forward and collect the money that they could have collected at that time.

Well, let me say very briefly --

QUESTION: Tactical reasons that they would have ratified or something?

MR. van GESTEL: The tactical reason being

that they felt they would lose the ability --

QUESTION: To bring this suit.

MR. van GESTEL: To bring this suit, yes.

Let me turn now from the Indians, if I may, to the State of New York, who is my other opponent in this case, and just say ever so briefly in the time that is left that if the Court feels that it is appropriate to permit the Indians' claim to go forward, it certainly ought to be flexible enough and ought to be creative enough to find an ability for the innocent people to collect from the guilty one.

The State of New York was the one who participated in this transaction, not the landowners today, not the counties which didn't exist, so that any sense of equity would suggest that there ought to be a way to recover from the state.

QUESTION: They agree with you on the merits.

MR. van GESTEL: They do agree on the merits, and I think we should win on the merits, Your Honor, but nevertheless, assuming we do not, we then face the Eleventh Amendment, and I suggest that under the analysis set forth in our brief, what the State of New York did was they waived their Eleventh Amendment rights when the State of New York ratified the United States Constitution in September of 1788, which included, among

other things, the commerce clause which placed --

QUESTION: But isn't there a -- isn't there a state ground for their being immune, too, or not?

MR. van GESTEL: I'm unaware of a state ground, Your Honor.

QUESTION: You mean there isn't one they now claim anyway.

MR. van GESTEL: None that I'm aware of, and it seems to me that once the State of New York agreed that all management of affairs with Indians fell in with the federal government, therefore they were in a position in which they waived their rights.

QUESTION: May I just ask one question on the Eleventh Amendment?

Supposing we held the Eleventh Amendment denies you access to the federal court here? Couldn't you sue them in state court?

MR. van GESTEL: I doubt it, I doubt it. You would have to find a way under -- New York has a Court of Claims statute, and they have a Court of Claims Act in some respects similar to the Federal Court of Claims, but not in all respects.

QUESTION: You mean if you lose this case on the merits, you couldn't bring an independent suit in the state court for -- against the state?

MR. van GESTEL: We certainly would try, but I'm not at all confident that --

QUESTION: But what would be the defense?

MR. van GESTEL: I suppose the defense, among other things, would be a sovereign immunity type defense.

QUESTION: Well that's what I was asking you before. Isn't there some sensible state ground for the state to escape the reach of your action?

MR. van GESTEL: There is already litigation pending against the state, thus far not successful.

Thank you.

CHIEF JUSTICE BURGER: Mr. Schiff.

ORAL ARGUMENT OF PETER H. SCHIFF, ESQ.

ON BEHALF OF PETITIONER

MR. SCHIFF: Mr. Chief Justice, may it please the Court:

As indicated, we of course do fully support the arguments of the counties that the court below erred in holding the counties liable to the Indians on the basis of the alleged violation of the 1793 Trade and Intercourse Act. So in that sense we would certainly hope that the Court never reaches the Eleventh Amendment argument which I am about to make because it will be totally unnecessary if you hold for us on the first

argument.

But we do believe that the courts below also erred in holding the states liable for indemnification in this federal proceeding. The state has not waived its immunity except in a very limited sense. There is a provision, as we point out in our brief, for recovery when there is a failure of title of land from the state, but the recovery there is only for the purchase or acquisition price, and without interest, so that -- and that recovery would be in the Court of Claims in New York.

We don't think that there is any other recovery, but if there were, that would have to be determined in the New York Courts. And of course, the law is clear that even if there were any waiver for suits within a state court, that would not permit suits in the federal court.

The court below seems to have decided against the state on the indemnification ground for what appear to be two separate bases. One, they made a finding that thre was ancillary jurisdiction because the claims of the counties against the state allegedly rose out of he same core of facts as the Indians' claim against the counties. And secondly, the court found that the state, by making the purchases from the Indians under the

treaty in 1795, had allegedly waived its immunity.

The counties in their brief indicated that they took the view that these two positions were interdependent. In other words, I think the counties conceded that unless there was a finding of waiver within the meaning of the various Eleventh Amendment cases, that they could not prevail.

I think that the decision below may have gone even further and may have -- and seems to have read ancillary jurisdiction as not necessarily depending on there being an Eleventh Amendment waiver of immunity.

We think that on that latter point, this Court's decision in the Pennhurst case last term pretty well decided, I think, that for the purpose of ancillary jurisdiction just like appendant jurisdiction, that there has to be a separate basis for jurisdiction, and that where there is a defense of sovereign immunity by the state, ancillary jurisdiction would not attach.

So I will not dwell on that but will turn on the question of whether under this Court's precedents there was a waiver of immunity with respect to the counties. In that sense, I think it is important, and there may not be any difference. We do not believe that there has been any waiver or there would be any waiver even with respect to the relationship with the Indians,

but that issue does not necessarily come into play here because there is no suit against the state by the Indians.

But looking at that overall question, we think that this Court's decision in Edelman v. Jordan is really quite dispositive. As we understand that case, there would be no waiver unless in the very first instance the suit under which waiver is being sought provides for a -- suits that in terms includes actions against a state.

Now, whatever can be said about this particular case, there is no statute which in terms provides for suits against anyone, let alone the state, and the argument is going to be made, of course, that there is either an implied common law right of action or that it is implied under the Trade and Intercourse Act, with which we don't agree.

But there is no argument that there is any statutory provision for a suit against anyone. And the county does argue that that should make no difference if the Court implies a cause of action against it or against them, then in turn the Court should imply that there is a, in terms of the possibility of a suit against the state.

Now, it seems to us that that would undermine

what appears to be the logic behind the Edelman test which, taking into account that Congress does not lightly impute waivers to the state, or even the possibility that the state might waive its sovereign immunity, where there is no specific provision in terms for suits that might include the state, the state, by actig under a statute, would have no idea that it might be liable for suit because no one else was specifically liable for suit.

So that in this case the absence of any express provision for suit makes the test in Edelman totally inapplicable, and the state could not have waived its immunity.

QUESTION: You don't mean that the test in Edelman is inapplicable. You mean that it comes out against the county.

MR. SCHIFF: Yes, I stand corrected, the test in Edelman is applicable, but it doesn't help the counties. I should say the counties do not meet the threshold test in Edelman that there was a suit -- statute that literally provided for a suit against the state.

QUESTION: Well, you say it doesn't help the county, but does it help you?

MR. SCHIFF: Oh, I think so because if you

don't show that --

QUESTION: Well, that -- better --

MR. SCHIFF: If --

QUESTION: That's the bottom line.

MR. SCHIFF: Well, if you don't meet that threshold test, as I understand it, it simply isn't any -- waiver could not have taken place.

There is an additional argument made that, well, that test shouldn't apply in this case because what happened here happened in 1795, and that the Trade and Intercourse Act preceded the adoption of the Eleventh Amendment, which probably became effective in 1795 as well, and with little debate. I don't think that makes any difference. The fact is that this Court has explained on numerous occasions the state's immunity from suits by its own citizens. In this case, it would be the county, does not actually literally stem from the Eleventh Amendment, but it really inheres in the provisions of the Constitution in Article 3, which was recently reiterated in the Pennhurst case as well. But it was -- that was firsst played out I think in Hans v. Louisiana.

If you will recall, the Eleventh Amendment arose because of the case of Chisholm v. Georgia, which involved a suit by a citizen of South Carolina right

after the beginning of the Republic, against the State of Georgia, and the citizen of South Carolina relied upon the provision in the Constitution which provided for suits against a state and citizens of another state, and this Court agreed that that provided jurisdiction against the contention of the states, including particularly Georgia, that that provision of the Constitution was not intended to be reciprocal but was only intended to provide for a one way street of suits against a state by citizens of another state.

Very soon after that, almost immediately after the Chisholm decision, the Eleventh Amendment was passed by the Congress and ratified by the states because the Congress simply didn't agree with that interpretation. But significantly, the Eleventh Amendment and the Chisholm case didn't deal at all with a suit by a citizen of one state against its own state, and I think that there was never any question but that sovereign immunity existed at that time. And it would be strange indeed to think that the Congress which passed the Eleventh Amendment in 1793, 1795, had any thought that in passing the Trade and Intercourse Act that the states were not immune from suits by their own citizens.

So again, there is no basis for finding a waiver of immunity here.

Finally, the other part of the waiver argument below was that this accusation was allegedly a proprietary act. I do not believe that that can be, the acquisition of this land by treaty in any sense properly could be viewed as proprietary, even if the state did sell it for more than it originally purchased it for, substantially more.

But as our reply brief points out, there was a substantial amount of state legislation afterwards which at least delayed the payments, and we don't know whether the payments for this land were actually ever made.

QUESTION: Did you raise some state law defense to state liability in this?

MR. SCHIFF: I'm sorry.

QUESTION: Did you raise any state grounds for being immune from liability over it?

MR. SCHIFF: Well, we have -- we contend that the only liability could be under the Real Property Act --

QUESTION: Well, this is --

MR. SCHIFF: Which would not be in the federal court.

QUESTION: The county has claimed over against the state in this case.

MR. SCHIFF: That's right.

QUESTION: And did you assert any defense to that claim over based on the state law, did you in this case?

MR. SCHIFF: Well, we also argue that --

QUESTION: Well, did you or not? That's a yes or no.

MR. SCHIFF: Well, I think we raised a defense that the law that was applied below, Justice White, was applied incorrectly.

QUESTION: What did you raise, what did you raise in the trial court? What was your pleadings?

MR. SCHIFF: I think we claimed sovereign immunity essentially.

QUESTION: On Eleventh Amendment grounds, but on state ground, too?

MR. SCHIFF: Well, the argument in state is --

QUESTION: I would think if you had claimed the state ground, that federal -- the court would have decided the case on -- never would have needed to reach the Eleventh Amendment.

MR. SCHIFF: Well, as far as I read it, there was an argument before Judge Port, and we argued the real property law. That is not a total bar. The real property law would permit recovery of the amounts paid, but it doesn't -- so we have argued, one of our grounds

for the cert petition, that the state law was totally misapplied below, and as a matter of fact, it was really quite ignored by the courts below. It is impossible to tell from reading the district judge's opinion what he decided.

QUESTION: Well, what --

MR. SCHIFF: And the --

QUESTION: What business would we have reaching the Eleventh, a federal constitutional issue if the case could go off on a state ground?

MR. SCHIFF: Well, I think that there is a threshold jurisdictional question, but that might be appropriate as well. We don't say that that wouldn't be, but I don't think you ever reach that because that we think that the Eleventh and the sovereign immunity question has to be reached first because whatever remedy there really is here should be in a state court.

Finally, I think I would like to point out on the overall claim about the Indians, where we do agree with the counties, that arguments will be made here and have been made in the brief that there is a -- what difference does it make? If the United States can bring this action, why shouldn't the Indians be allowed to seek recovery?

We are thoroughly convinced that Judge Meskill

was quite correct below that there is a vast difference between having a series of seriatim actions, individual actions, which is sort of exemplified by this case. This case involves 872 acres and only the income for two years, where the potential liability goes back 190 years, 175 years, depending on how you look at it, and a great deal of -- much more acreage.

This private, these actions are picking and choosing. We think that the federal government, which has the authority under the 1793 act to take general action, that that remedy provided nearly 200 years ago should be the one that this Court provides for this action.

We ask for a reversal.

Thank you very much.

CHIEF JUSTICE BURGER: Ms. Locklear?

ORAL ARGUMENT OF MS. ARLINDA F. LOCKLEAR

ON BEHALF OF RESPONDENTS

MS. LOCKLEAR: Mr. Chief Justice, and may it please the Court:

The events that gave rise to this litigation occurred during this countrys' very infancy. During the Revolutionary War, the Oneida Indian Nation fought as this country's steadfast ally. As a result of that alliance, the Oneida Nations villages were burned, and

the Oneidas were forced to vacate their lands.

At the conclusion of the Revolutionary War, the United States, as a show of faith and appreciation for the service of its ally, guaranteed the Oneidas the continued possession of its lands. That guarantee appears in three federal treaties over a period of ten years: First, the 1784 Treaty of Fort Stanwix, second, the 1789 Treaty of Fort Harmar, and third, the 1794 Treaty of Canandaigua. The Treaty of Canandaigua, the last of those three, still remains in force and effect between the parties. In fact, the Oneidas today continue to receive annuity payments under the Treaty of Canandaigua.

Despite these treaty guarantees, on September 15, 1795, the State of New York purported to purchase approximately 100,000 acres of the treaty guaranteed lands. There is no doubt in this case that that purchase was in violation of the 1793 Indian Trade and Intercourse Act. The parties here do not dispute that fact. Neither can there be any doubt that that transaction was concluded by the state with foreknowledge that it was acting in violation of federal law.

The unrefuted evidence in this case establishes clearly that Governor Jay had been directly

informed by then Secretary of War Pickering that in the opinion of the United States Attorney General at that time, Mr. Bradford, that the 1793 Indian Trade and Intercourse Act applied to state purchases of Indian land, and where the state purported to act without the consent of the federal government, applied to void those transactions.

QUESTION: The advice of the Attorney General doesn't make the law, does it?

MS. LOCKLEAR: No, Your Honor, it does not, but what it does do is indicate --

QUESTION: I know that -- I know some Attorneys General would like it that way.

MS. LOCKLEAR: What it does do in this case, Justice White, is indicate that the state was acting not in ignorance of the law but had been put on notice that at least in the view of --

QUESTION: Well, they could just have -- could just honestly have disagreed with the Attorney General. They weren't ignorant at all. They might have said we have the better view of the law.

MS. LOCKLEAR: Had that been the case, one might have expected a response, but Governor Jay did not respond. Rather, Governor --

QUESTION: Well, he may have thought it was a

frivolous fight.

MS. LOCKLEAR: That's possible, Your Honor, that's entirely possible. We do not have any historic evidence on that point, but the point remains that Governor Jay acted not out of ignorance of the statute and at least its interpretation by the United States, but acted with knowledge of the interpretation of Attorney General Bradford.

QUESTION: Well --

MS. LOCKLEAR: Finally, it is --

QUESTION: Go ahead.

MS. LOCKLEAR: Pardon me.

QUESTION: Go ahead. I'm sorry.

MS. LOCKLEAR: Third, it is also important in this case that none of the parties disputes that the United States could achieve essentially the same relief that the Oneida parties are seeking today.

QUESTION: But the United States didn't seek to obtain that relief, did it?

MS. LOCKLEAR: No, Your Honor, they did not.

QUESTION: So what is the point?

MS. LOCKLEAR: So then the question is a very narrow one before this Court, and that is only whether the Oneidas can seek to set aside an admittedly void transaction of the United States --

QUESTION: One hundred seventy-five years later.

MS. LOCKLEAR: Yes, Oneida Indian Nation.

What I will deal with my remarks this afternoon will be, first of all, the existence of a cause of action, very briefly, the statute of limitations defense asserted by the Petitioners today, and the defense of implied ratification asserted by the Petitioners.

First, the cause of action issue. It seems to me it is appropriate at this point to make two simple observations, and then I will conclude my remarks on this point. One is that we cannot construe the Indian Trade and Intercourse Act in a vacuum. At the time, Congress was acting against a background of clearly established federal law principles. Two of those important principles were at the time, first, that the Indian tribes had acknowledged under principles of international law exclusive rights to occupancy to their land, and secondly, that those exclusive rights of occupancy could be extinguished only by act of the sovereign.

Against that background, the first Congress passed the Indian Trade and Interccurse Act, and in the words of this Court in its 1974 decision, the

non-intercourse act provision of that statute simply codified what was or came to be the accepted principle that Indian title could be extinguished only with the consent of the United States. The non-intercourse act provision must be construed, then, as against that background, not as creating a wholly new substantive area of law or a wholly new right of the Indian tribes, but in recognizing pre-existing rights and providing for the further protection of them.

Secondly, it is important to --

QUESTION: Do you rely on any particular case, Ms. Locklear, for establishing the federal common law right of action that you assert?

MS. LOCKLEAR: Yes, Justice O'Connor. Primarily we rely for that proposition on the case Johnson v. M'Intosh. What occurred in that case was it was essentially a property dispute between two non-Indian claimants. One of the claimants was a successor in interest to an Indian tribe.

What the Court did in that case was look to these principles of international law to ascertain, first of all, what the Indian tribes' right of occupancy were to that land, and secondly, whether or not those rights could be conveyed to the non-Indian claimant in the suit without the consent of the general government.

The Court held in that decision that it could not.

Now, we rely on those two principles as forming the basic elements of a federal common law cause of action in this case.

QUESTION: But we really don't have a case involving a suit by an Indian tribe, I suppose, on this cause of action.

MS. LOCKLEAR: There are no -- there are no suits arising at that time by Indian tribes asserting the precise cause of action we have here, but we think that the principles in Johnson v. M'Intosh clearly apply to this situation. Were there any spaces left in the development of the federal common law at that time, we think they were adequately filled by the enactment of the 1790 Indian Trade and Intercourse Act which did, in fact, on its face, purport to establish a special protection for Indian tribes, and did in fact codify the principle that Indian land could not be lost without the consent of the federal government.

We think that clearly between the two, the principles of Johnson v. M'Intosh, and Congress with subsequent enactments of the Indian Trade and Intercourse Act, that there is a cause of action.

Now, I will turn my attention to the statute

of limitations issue in an effort to respond to some of the Court's inquiries in that regard.

First of all, it is the position of the Respondents in this case that 28 U.S.C. Section 2415 certainly does apply, both with respect to the monetary damages aspect of these claims and the title aspect.

QUESTION: I thought 2415 only applied by its terms to an action brought by the United States.

MS. LOCKIEAR: Yes, Your Honor, by its terms it does, but I refer the Court to 2415 Subsecton (a). The words "Indian tribe" do not appear in that subsection, but as Justice O'Connor observed earlier, it is clear from the language there that Congress intended there to be a statute of limitations governing money claims brought by tribes as well as the United States. That implication is clear from the following.

The statute first of all sets up a procedure by which the Secretary of the Interior can ascertain which money damages claims should be brought by the United States. Those lists are to be published. A second list is to be published which rejects certain claims by the Secretary as unmeritorious. Finally, subsection (a) provides that with respect to the rejected claims, the suit must be brought within a year thereafter or be forever barred.

It is clear from both the legislative history and the statute framework itself that within that year period of time the only suits that would be filed would certainly not be by the Secretary of the Interior but by the tribes themselves.

QUESTION: Well, but the Secretary of the Interior, after he publishes, might be persuaded to change his mind by the Indians. Perhaps that is the purpose of publication.

MS. LOCKLEAR: That's possible.

QUESTION: I mean, I don't think you -- certainly you are arguing very much by implication and not by what the statute says on its face.

MS. LOCKLEAR: That statutory language, however, is informed by the legislative history which makes clear that the one year grace period was a period provided for tribes themselves within which to act. For instance, there is much discussion in the legislative history of getting appropriate notice to the tribes involved so that the tribes will know what steps have been taken.

QUESTION: Well, legislative history isn't quite the same thing as the statute, statutory language that Congress chose.

MS. LOCKLEAR: No, Your Honor, that is

correct, but I think between the two it is clear that in the 1982 amendment to Section 2415, there is evidence that Congress intended or believed that the statute of limitations governing money damages claims applied then as it had applied for the prior five amendments to that statute to tribal suits themselves.

Now, what we have, if Congress on the one hand establishes a parallel track between the United States and tribal claims on trespass damages, we then refer to subsection (c) which says that no statute of limitations shall bar title suits brought by the United States on behalf of Indian tribes.

QUESTION: But that assumes that the cause of action was subsisting as of that time. What if the cause of action had earlier been barred?

MS. LOCKLEAR: We agree, Justice Rehnquist, it does assume that the cause of action existed, and we also point to that as some evidence that the cause of action did in fact exist. There are, however, prior acts of Congress which indicate in even stronger terms that such causes of action did exist. For instance, 28 U.S.C. Section 1362, which in its legislative history refers to a case brought by a tribe which was in fact an Indian Trade and Intercourse Act claim.

QUESTION: But 1362 is just a grant of

jurisdiction, isn't it?

MS. LOCKLEAR: That's correct, Your Honor.

QUESTION: The fact that legislative history might refer to a case, I would think that it would be the jurisdictional aspect, not the merits, that would be of interest in the case.

MS. LOCKLEAR: That's correct, Your Honor, but we point to both Secton 1362 and Section 2415 as not giving rise to the cause of action itself but simply evidencing Congress' assumption that the cause of action existed.

I think the legislative history of both statutes is relevant for that purpose.

QUESTION: Well, but the cause of action once existed, but that doesn't evidence Congress -- any particular Congress' view that the thing might not have been barred at that time.

MS. LOCKLEAR: That's correct, Your Honor. That's why I return to the literal language of Section 2415 which on its face, Section 2415, subsection (c) on its face states that no such claims brought by the United States shall be --

QUESTION: That's not quite an accurate reading of that subsection.

QUESTION: It certainly isn't.

QUESTION: It says nothing herein contained shall bar a statute.

QUESTION: Yes.

QUESTION: It doesn't say there's no statute of limitations.

MS. LOCKLEAR: That's true, Your Honor. It has been accepted by all the parties in this case, however, as meaning that result. I think even the Petitioners --

QUESTION: Yes, but don't you first have the burden of demonstrating that the action had not been barred prior to 1966?

QUESTION: Yes.

MS. LOCKLEAR: Yes, Your Honor.

QUESTION: Because if it was barred in 1966, that statute doesn't revive any already barred claims, does it?

MS. LOCKLEAR: We accept that burden, Your Honor. We point to the 1982 amendment of that statute, however, as evidence of what Congress thought it had been doing all along with the prior amendments of Section 2415.

QUESTION: Yes, but maybe Congress was wrong in thinking that. I mean, it seems to me you have the burden of showing what the law, not what Congress

thought the law was.

QUESTION: And that's just the view of one Congress.

MS. LOCKLEAR: The point here, Your Honor, is that Section 2415 -- all parties here essentially admit or acknowledge that the inquiry here is whether the Congress has applied a statute, a federal statute of limitations. If it has not, then the Petitioners argue we should look to state law to see what may be an applicable state statute.

QUESTION: I understand they argue that, but it seems to me you must look to state law before 1966 first of all, and I think you rely on the Ewert case, and that's all you've got for the prior period, isn't that right?

MS. LOCKLEAR: No, Your Honor, there are other indications as well. Even before the 1982 amendment to Section 2415, it had been construed by the Ninth Circuit to apply to claims brought by tribes as well as claims brought by the United States.

QUESTION: I understand, but we are not bound by the Ninth Circuit.

QUESTION: No, we sure aren't.

MS. LOCKLEAR: Apart from the merits of the Ninth Circuit's analysis, however, we do rely on the

Congress' interpretation in the 1982 amendment as some evidence of what Congress intended to do in the earlier sections as well, so that as of 1970 --

QUESTION: In other words, you rely on the 1982 statute to tell us what the 1966 statute meant.

MS. LOCKLEAR: It can shed some light, Your Honor, particularly in light of the fact that Congress apparently in the 1970, the applicable version in 1970 of the statute was assuming that such causes of action existed. Otherwise, the need for the statute would not have arisen.

QUESTION: But you must acknowledge the possibility that the assumption was erroneous.

MS. LOCKLEAR: Yes, Your Honor, but I think that the Congress' assumption on that point is some evidence of what the law in fact was. And I think we can also point to similar statutes involving restraints on alienation of allotted Indian lands where this Court has indicated that once Congress ascertains how title is to be extinguished in that respect, state law generally should not apply to broaden the means of extinguishment.

The cases such as Bunch v. Cole, in addition to Ewert v. Bluejacket --

QUESTION: But that's talking about state law

operating after Congress has spoken.

I think what Justice Stevens has in mind is that state law might have operated well before Congress spoke in 1982, so I don't think those allotment cases are necessarily analogous.

MS. LOCKLEAR: Well, I am referring, Your Honor, to Congress' having spoken as of 1793. If a cause of action in fact arose under the 1793 statute, then we think it is appropriate to look at that to determine what had happened as of 1970. If Congress decided, determined that as of 1793 Indian title could be extinguished by one means and on means only, and that is through the consent of the Congress, then that could be a sufficient basis in 1970 to determine that a state law statute of limitations does not apply.

QUESTION: But that doesn't speak to the -- certainly you are not suggesting that one can simply read the 1790 act and infer from that that no state statute of limitation or any borrowed state statute of limitation would apply.

MS. LOCKLEAR: No, Your Honor, it is done by reference back to the 1793 Indian Trade and Intercourse Act itself. The language of that statute is pretty clear in that it says that there is one means, and one means only, by which Indian title can be extinguished.

So the question now is as of 1970 when this suit is filed, has there -- has the Congress acknowledged another means, that is by application of a state statute of limitations.

QUESTION: Well, do you really think that the only fair reading of the 1793 statute is that it absolutely by its terms precludes the application of statutes of limitation?

MS. LOCKLEAR: Not absolutely by its terms, Your Honor, but that is a fair implication from the literal language of the statute.

QUESTION: Well, a great deal of your case seems to depend on implication on implication on implication.

MS. LOCKLEAR: Well, in a moment, Your Honor, I will address the implied ratification argument of the Petitioners --

(Laughter)

MS. LOCKLEAR: But to respond to -- to respond further to the argument on the statute of limitations, what we thiunk we have here embodied in the 1793 act, which is what we rely on for our cause of action, is a strong policy statement by the Congress that Indian title can be acquired through only one means.

QUESTION: Yes, but you don't need Section

2415 or anything else then. You just need the Trade and Interccurse Act.

MS. ICCKIEAR: Exactly, Ycur Honor. We rely on Sectien 2415 --

QUESTION: Unless Congress says something besides the Trade and Interccurse Act, there is no statute of limitations, there just isn't any.

MS. LOCKLEAR: That's correct, Ycur Honor. We rely --

QUESTION: Yes, but didn't Ccngress say something else in the Rules of Decision Act which was enacted at about the same time?

MS. LOCKLEAR: Pardon me? I am sorry.

QUESTION: Didn't Congress say something rather express about when there is no federal rule of law, you look to state law.

MS. ICCKIEAR: Yes, Ycur Hcncr.

QUESTION: In the Rules of Decision Act, which was enacted way back in the time you are talking abcut.

MS. ICCKIEAR: Yes, Ycur Hcncr, that is true, but I think what we have got tc keep in mind here is the body of law on the general issue that we are dealing with. We are dealing with, as this Court observed in its '74 cpinicn in this case, a very uniquely federal interest, and that is the preservation of Indian land.

It is not the usual rule in Indian law that a state statute of limitations or other state defense will be adopted to apply to bar Indian property rights. It runs contrary to a number of rules of construction relating to the proper means of construing treaties, for instance, the proper means for resolving ambiguities, and --

QUESTION: Yes, but those are rules you get to after you get over the statute of limitations bar and you get to the merits.

MS. LOCKLEAR: Well, we think those are rules that would apply in the first instance to the Indian Trade and Intercourse Act of 1793.

QUESTION: Fine.

MS. LOCKLEAR: To determine by what means Indian title can be extinguished.

And in our view, the state statute of limitations has not been one that Congress has accepted as an appropriate means to extinguish Indian title, and that is the effect of the application of a statute of limitations.

What we would have in effect would be a system that would be virtually unadministerable by the United States if that were the case. We would have a system where 50 different statutes of limitations would apply

to bar claims by Indian tribes depending on the happenstance of the location of those lands.

Now, there are approximately 300 Indian tribes in this country with trust lands so that each one would have a different federal interest in that land depending on the fortuity of where that land was located.

QUESTION: Yes, but I imagine most of them have statutes that are shorter than 175 years.

MS. LOCKLEAR: Considerably, Your Honor.

QUESTION: So I think the uniformity problem may not be very serious.

MS. LOCKLEAR: But there is considerable variance among them, and it is that variance that the Congress --

QUESTION: Which Congress expressly said they wanted in the statute of limitations area in 1983 litigation. There used to be all sorts of federal claims having this very problem in them.

MS. LOCKLEAR: Yes, Your Honor, that is true, but it is also true --

QUESTION: And I agree with you it is not a very wise solution, but Congress seems to be happy with it.

MS. LOCKLEAR: It is also true, Your Honor, that in the unique context of Indian property rights,

that where Congress has intended to apply a state statute of limitations, it has generally done so expressly. In the context of Indian allotments, for instance, there are some provisions made that were the subject, I believe, of this Court's opinion in United States v. Clark, some reference to them, where the state jurisdiction and in some respects state law was made applicable to the condemnation of Indian allottees.

There are other instances where Congress, by express provision, has applied state law to govern either acquisition of or litigation relating to Indian property rights. That makes it all the more significant that in this respect, in the important respect of tribal property rights and the basic statute that protects those rights, Congress has not done so.

In fact, when Congress has expressly dealt with the issue of statute of limitations, it has either done so only with respect to the United States and treated tribes similarly, or been silent on the matter. So that is a strong indication, given the peculiarity of Indian property rights, that state statutes of limitations do not apply.

QUESTION: I have no found anything in the papers, voluminous papers filed here, which would indicate what is the long range, overall consequence if

your position is correct. It isn't the $16,000 of course.

How many millions of dollars are involved here? Does anyone know? Has anyone made any estimates?

MS. LOCKLEAR: There is -- there has been no overall estimate made of that figure, to my knowledge.

QUESTION: Well, someone must have thought about it.

MS. LOCKLEAR: Well, I gather the Petitioners have.

QUESTION: During the twelve years of litigation?

MS. LOCKLEAR: Yes, Your Honor, there has been some attention paid to that, but I would caution the Court that many of the statements describing those consequences by the Petitioner are both speculative and based on hyperbole.

QUESTION: But there is still -- at least there is the remainder of the 100,000, isn't there?

MS. LOCKLEAR: Apart from some question as to whether or not the Oneida have split their cause of action, there is some question as to the remaining 100,000 acres, yes, Your Honor.

QUESTION: You say there is some question --

you say the claim could be made about the rest of the 100,000 acres.

MS. LOCKLEAR: Yes, Your Honor, subject to a possible defense by the Petitioners of having split our cause of action.

QUESTION: And I suppose there would be an argument about any other, any other land that allegedly was acquired contrary to the Trade and Intercourse Act.

MS. LOCKLEAR: Yes, Your Honor.

The point that we have to keep in mind in dealing with the so-called consequences of this is that the consequences are in a real world context, and they are not in a context of sheer speculation. That context includes a number of congressional settlements of prior cases, and also Congress' expressed and continued interest in oversight of these cases.

Now, the Congress has asserted authority in itself, if need be, to act to resolve these problems, as has been pointed out earlier. Congress has reserved that point up to this point with respect to this claim because it did not perceive that the consequences were so severe as the Petitioners have suggested.

In fact, Congress has the -- many of the members who spoke in opposition to certain bills which would have that effect have stated that the general view

of Congress is to prefer a negotiated settlement among the parties which would resolve forever these claims.

That is the real world context of these cases.

QUESTION: Do you agree with the suggestion of the Solicitor General that even if you were right on the statute of limitations question, that it doesn't apply, that laches would be applicable here to the action for damages for trespass, or that the courts would have other equitable powers to reduce the damages relief?

MS. LOCKLEAR: Not quite, Your Honor. Insofar as the context of this case is concerned, we do not believe that a laches or any equity remedies or offsets are available. What we have here are counties who should stand in the shoes of the state, who acquired most of the land directly from the state as the original wrongdoer, so that the laches defense is not available.

Now, whether --

QUESTION: Is that the reason you filed an action for damages rather than the judgment, to get away from laches?

MS. LOCKLEAR: No, Your Honor, the primary reason the action was filed as one for damages is because it was seen as a test case by the parties at the time, to establish --

QUESTION: And you didn't want laches.

MS. LOCKLEAR: Pardon me?

QUESTION: You didn't want to have to face up to laches.

MS. LOCKLEAR: We did not want to have to face laches, this is true.

But the laches issue I think is one that is appropriately reserved for the appropriate case, and that is one between an Indian tribal claimant and true private individuals who assert good faith occupancy of the land. The counties in this case are neither private individuals nor can they assert good faith occupancy of the land.

In fact, their occupancy has -- the good faith of their occupancy is the one issue that remains yet for determination by the District Court in this case.

QUESTION: Ms. Locklear, could I ask you a question about laches?

As I read the Ewert case, if the state statute of limitations has run, then the burden is on the Plaintiff in a case such as this to disprove laches.

MS. LOCKLEAR: Yes, Your Honor.

QUESTION: And I think you have the burden of showing an absence of laches, if the Ewert case applies.

So I am not sure you can escape it that easily.

MS. LOCKLEAR: We don't purport to on that basis only, Your Honor. If the Court will examine the trial record in this case, you will find that there was extensive testimony given in the original trial on liability as to what steps the Oneidas had taken during the so-called 195 years, or 75 I think is the phrase that the Petitioners used -- to reach a resolution of these claims. There is a clear record of continued activity on the part of the Oneidas to take whatever steps were available to them at the time to resolve this matter. There was no evidence offered to refute any of that evidenc at the trial of liability. So to that extent, our evidence on laches, if we should reach that point, stands unrefuted by the petitioners. And in fact, the District Court held, based on that evidence, that laches could not apply because the Oneidas for variety of reasons were subject to a number of circumstances that precluded them from actually proceeding with the lawsuit itself, although they had taken other steps.

QUESTION: And then going back to Justice O'Connor's question, you are not just slightly at odds with the government, you are 180 degrees apart from them

on this question.

MS. LOCKLEAR: With respect to this case, we are 180 degrees apart.

With respect to any future litigation that may arise as between Oneida parties or any other tribal claimant and private defendants, that is an issue that is yet unresolved. It may be entirely appropriate for the Court under those circumstances to look to equity factors.

In fact, we believe the Court did that --

QUESTION: Can the Court do that if it is an action at law?

MS. LOCKLEAR: I think the Court can, Your Honor. Under the Federal Rules of Civil Procedure, of course, we no longer honor that distinction, and because this is a peculiar case where the remedy is generally shaped by developing federal common law, it may be appropriate for the Court to look to equity factors. And in fact, I think that is exactly what happened here. The District Court in this case held erroneously, we argued in the Second Circuit, but unsuccessfully, that the counties here did occupy the land in good faith, and as a result of that, awarded the counties an offset against the trespass damages for their good faith occupancy. So to that extent, this very judgment that

is before the Court takes these equity considerations into account.

Now, as to what these equity considerations may mean in future litigation between different parties is an issue that is really not before the Court in this context.

If I may in my few remaining moments, I would like to address the Petitioner's argument of implied ratification. Here we really are dealing with an issue of double implication, if anything.

We must begin with some determination as to the appropriate standard to be applied in ascertaining whether or not a particular act extinguished Indian title. This Court in United States v. Santa Fe Railroad laid down the appropriate rule, in our opinion. That rule is that Indian title can be extinguished only by the plain and unambiguous act of Congress.

Even the Petitioners do not assert that the facts they rely on constitute plain and unambiguous ratification of the 1795 transaction.

So assuming for the moment that the Petitioners are correct as to the proper standard to apply, they still have not met the burden of proof in that regard. Even if we apply the so-called explicit ratification, explicit acknowledgement and implicit

ratification standard that the Petitioners seek, we find their evidence lacking.

Essentially, what happened is this. In 1798 another transaction occurred between the Oneida Nation and the State of New York. As part of that transaction, Governor Jay did request and did receive the presence and approval of a federal commission. That transaction was then submitted to the United States Senate for its formal ratification, and by two-thirds vote that document was ratified. The document was then published by the President as a binding treaty.

That is what ratification means. That is not what occurred in 1795.

CHIEF JUSTICE BURGER: You are now using Mr. Kneedler's time.

MS. LOCKLEAR: I see that I am, Your Honor. Thank you.

CHIEF JUSTICE BURGER: Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,
AS AMICUS CURIAE

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court:

The Petitioners have suggested in this case that it is a -- that it presents questions or issues of broad importance affecting numerous eastern land

claims. One cannot ignore, and we do not ignore the eastern land claims tha have been brought. But in this case, the issues that Plaintiffs have brought to this Court are limited, and principally the ones that I will address now are the application of the statute of limitations in this setting and also, to a lesser extent, the existence of a cause of action.

QUESTION: Are you going to say in your argument why you think the statute of limitations claim is limited?

MR. KNEEDLER: I didn't mean to imply that the claim is limited; all I meant is that the issues are confined. The number of issues in this case are confined to a few. I didn't mean to suggest that --

QUESTION: I see what you men.

MR. KNEEDLER: In fact, the point I would like to make with respect to the statute of limitations issue is that the arguments that are being advanced here go far beyond eastern land claims, and they go far beyond old claims as opposed to new ones.

What the Petitioners are arguing for with respect to the application of state statutes of limitation would be a radical departure from what has been the accepted norm in the area with respect to Indian law for the entire existence of this nation, and

it could cause considerable disruption in the administration of Indian affairs.

Now, it is true that this case presents a claim that is 175 years old, but the problem that a state statute of limitations should be barred as the applicable rule in a suit by Indians, if applied to the everyday administration of Indian affairs, could be quite chaotic for the Secretary of the Interior.

QUESTION: Why would that be so? The government would have to bring a suit, that's all --

MR. KNEEDLER: Well, but the --

QUESTION: They'd all be barred.

MR. KNEEDLER: One of the difficulties is that the -- as --

QUESTION: It is unusual to hear the suggestion that getting rid of a great mass of litigation would cause chaos.

MR. KNEEDLER: What the effect would be would be to create pressure for the United States to sue in perhaps a shorter period of time to resolve the claim in its own mind in a shorter period of time than Congress has intended to allow the United States to have in assessing a claim.

QUESTION: Well, Congress had to get around telling the Department of Interior to get with it,

didn't they?

MR. KNEEDLER: Well, that's right, but one of the -- but it's important that in the background of the extensions of the statutes of limitation, one of the things Congress focused on each time it extended the statute of limitations was the vast number of claims that the Interior Department had to deal with, specifically, in that case, the claims that predated 1966. But this is by no means unique to the older claims. All the time in the daily administration of the Interior Department's programs, there are Indian claims that arise. Congress specified in 2415 that the United States ordinarily is to have six years within which to bring an Indian claim.

Now, if othere was a one year statute of limitations on a particular claim, the Interior Department would be required effectively to decide witin a year as to whether the claim had merit.

QUESTION: Well, I don't think anyone is contending that after Congress prescribed particular limitations, end up in 1982, that state statutes apply. I think it is to the period before Congress started prescribing that these arguments are address.

MR. KNEEDLER: Well, but I had understood Petitioners to be arguing that the 2415 and the Indian

Claims Limitation Act of 1982 have nothing to do with claims brought by tribes, and we think that that is clearly wrong both because, as Ms. Locklear pointed out, that the text and legislative history of the act shows that Congress intended it to apply to Indian claims, but also that it is the appropriate source of a statute of limitations.

QUESTION: Well, where does the text of the act show that it was intended to apply to claims by Indian tribes?

MR. KNEEDLER: Well, specifically with respect to the procedures that Ms. Locklear referred to before with respect to furnishing the tribes, this is the procedure for the older damage claims, with respect to furnishing the tribes with the information about their claims and giving them one year within which to assess it, and then the Indian Claims Limitation Act says that any cause of action not brought within a year shall be barred, not just a cause of action by the United States, and this isn't just in 2415. There was a supplemental statute that amended 2415 called the Indian Claims Limitations Act which specifically says any cause of action, not just a cause of action by the United States, shall be barred if not brought within one year of the time the information was furnished to the tribe.

QUESTION: Well, what is the relevance of those statutes relating to 2415 and the 1982 amendments to the 1970 lawsuit brought before they were enacted?

MR. KNEEDLER: Well, I think what they are are the most recent manifestation of the accepted rule that has governed in Indian law.

This Court in a number of decisions, United States v. Minnesota being perhaps the leading one, but also most recently in United States v. Nevada and others, has held that the United States, when suing on behalf of Indians, that the usual rule that statutes of limitation and laches do not apply to such suits, apply when the United States sues on behalf of Indians. So it is clear that with respect to the United States bringing this suit that no statute of limitations or laches would apply.

QUESTION: But the United States didn't bring this suit.

MR. KNEEDLER: But I think that the background that the United States is not barred is important with respect to this because the United -- when the United States is litigating in the area of Indian affairs, it is typically bringing a cause of action with respect to property that it holds in trust for a beneficiary.

QUESTION: Is the United States litigating

here?

MR. KNEEDLER: The United States is not litigating here, but we do believe that the tribe has a right to bring its action, and in fact, one of the points I was making before, it is essential to carrying out the Secretary's trust responsibility to enable tribes to bring causes of action.

This one is quite old, but again, the principle applies to more recent claims. It is essential that tribes and individuals be able to bring actions on their own behalf.

QUESTION: When were they first permitted to do so?

MR. KNEEDLER: It goes back quite a period of time. Individual Indians --

QUESTION: How long? How long?

MR. KNEEDLER: -- have sued for 150 years to --

QUESTION: Tribes?

MR. KNEEDLER: Tribes, it depends -- tribes it typically depended on --

QUESTION: That's what we are asking about, tribes.

MR. KNEEDLER: Well, that's right, but for tribes, it typically depended on whether they were perceived as having the capacity to sue as a juristic

person, much like a labor union or some other asscciation. There was no considered Congressional judgment that tribes were going to be litigating abcut issues that were inappropriate for judicial resolution., It was simply that tribes were not organized, they were not corporations, and therefore didn't have the capacity to sue in that sense. But it is quite clear that Congress intended to confer legal rights on tribes in the treaties and by conferring property rights on them, and the normal incidence of a prcperty right is that a person can bring an action in ejectment.

QUESTION: Well, scmetimes they think the guarding shculd be bringing the action.

MR. KNEEDLER: But if one --

QUESTION: Prcvided there is a guardian.

MR. KNEEDLER: There is, but normally under accepted principles cf trust law, if the trustee dces not bring an action on behalf of the beneficiary, the beneficiary can bring the action himself, and cne cf the problems with applying a shorter limitations period --

QUESTION: Well, is it also true that he can't take the rights of the trustee, he can't exert those, can he?

MR. KNEEDLER: Not separately, but --

QUESTION: Isn't that what ycu are doing

here?

MR. KNEEDLER: No, these are -- the tribe has its own rights. These are --

QUESTION: What right does the tribe have to ignore the statute of limitations?

MR. KNEEDLER: It's not that the tribe is ignoring a statute that otherwise applies. Congress has not applied a statute --

QUESTION: But the U.S. could do it.

MR. KNEEDLER: The United States clearly would not be barred by a statute of limitations except where Congress has made it applicable.

QUESTION: So by coming in here and making this argument, you are going to give them that right.

MR. KNEEDLER: Yes, in effect, that's right.

QUESTION: How can you do that?

MR. KNEEDLER: Well, because Congress repeatedly has made the judgment, in our view, and I would like to, because it has specific relevance to this case, I would like to point out that the legislative -- the text in the legislative history of Section 233 of Title 25, which was enacted in 1950 to give New York jurisdiction over Indian affairs, and the Court discussed this provision in its 1974 opinion in this case, and Congress enacted a proviso to Section 233 that

says nothing in this statute shall be construed as making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to 1952.

QUESTION: But that's the same sort of provision that Justice Stevens quoted to your colleague, nothing in this proviso. That doesn't say that Congress was saying it could not have happened; it just wasn't to happen by virtue of that proviso.

MR. KNEEDLER: Well, what the legislative history shows of this, it shows that Congress understood what the prevailing rule was, that statutes of limitation did not apply, and if I could just read the two sentences of the person who was explaining this provision, he says, as it is now, the Indians, as we know, are wards of the government and therefore the statute of limitations does not run against them as it does in the ordinary case. This will preserve their rights so that the statute will not be running against them concerning those claims that might have arisen before the passage of this act.

Now, that is an expression of congressional intent which specifically applies to the very claim in this suit, a claim arising on the State of New York

prior to 1952.

QUESTION: What were you reading from, Mr. Kneedler? What were you reading from?

MR. KNEEDLER: I'm -- I weas -- this is on page 22 of my brief. It is from --

QUESTION: I mean, what source?

MR. KNEEDLER: It is from the Congressional Record, Volume 96, page 12040.

QUESTION: Is it a Congressman or the Committee report or who? Who were you quoting?

MR. KNEEDLER: It is the remarks of Representative Morris.

QUESTION: Who was one of the proponents of the bill?

MR. KNEEDLER: Yes, and it was his remarks that the Court quoted from in the 1974 Oneida opinion. In fact, this paragraph was between the two, the two portions of his remarks that the Court relied upon in Oneida, one in saying that the New York Indians should have a right to go into federal court.

If I could go back even further, and this also ties in to a question that Justice Rehnquist had in an earlier time about what would happen if the Oneidas went into state court, and in this regard, it is useful to look at the case of Seneca Nation v. Christy in 162 U.S.

and the underlying state court decisions.

The first aspect of the case that is important for this point is the fact that it was a cause of action to invalidate a transaction under the Trade and Intercourse Act by an Indian tribe. It failed for other reasons in state court, but the New York Court of Appeals and the lower court never suggested that an Indian tribe didn't have a right to invoke the Trade and Interccurse Act.

What the court, the State Court dismissed the claim for failure to comply with the state statute of limitations, and this Court declined to review it on the ground that there was no separate federal question involved, on the ground that the state had furnished the Indian tribe a special state statutory remedy, and that the tribe had to comply with the procedures under that special remedy, which was the application of the state statute of limitations.

But even the New York Court of Appeals was careful to point out the question is not whether an Indian title can be barred by adverse possession or by state statutes of limitation; the point is that the Plaintiff cannot invoke the special remedy given by statute without being bound by the conditions upon which it is given.

So this is a decision by the New York Court of Appeals itself in 1891 recognizing that to apply state law to wholly bar the claim would be inappropriate, but that stae law applied because the state had furnished a special remedy.

So we have a continuing understanding that Indian, that statutes of limitation do not apply to claims brought by Indians, and in fact, if one looks at the text of the Trade and Intercourse Acts from 1790 onward, they, too, furnish a compelling indication that Congress would not have intended state statutes of limitation to apply.

They say that no transaction or title or claim to Indian property shall be of any validity in law or equity, strongly suggesting that for a court to apply a statute of limitations or laches where Congress had not specified would be inconsistent with the purpose of voiding such transactions.

In fact, where Congress has intended to apply state statutes of limitation to Indian claims, it has done so expressly; for example, in 25 U.S.C. 347, which deals with claims for allotments, Congress has expressly applied state statutes of limitation.

And finally, under this Court's analysis in DelCostello of last term, it seems quite clear that the

appropriate analogy for the statute of limitations in this area is to refer to federal law, to which the trustee would be bound.

I would like to make two other points. One, we do believe the Congress can extinguish, Justice White, the title in this area simply by ratifying the transaction as it had the right to do in 1795.

And lastly --

QUESTION: No, I didn't -- I wasn't raising a question about it. I was just raising a question of whether it ever would.

MR. KNEEDLER: Well, Congress has shown a readiness to extinguish these claims when the parties come into agreement, and if there was going to be widespread disarrangement in New York State because of these claims, I think that Congress could be expected to act.

QUESTION: Could the Secretary ratify it?

MR. KNEEDLER: No. Under our reading, Congress would have to act.

With respect to the equitable claims in the case, we do not suggest at this point that laches would actually entirely bar the suit. Our analysis was directed at some considerations that should be taken into account in future claims against private

landowners, particularly, and in fact, if applied in this case, we think there is some chance that even the damage award that would be applied in this particular case would not be sustained.

One last point I would like to make, that in these cases, although Petitioners tend to paint with a broad brush with respect to eastern land claims, in fact, the process of resolving them has turned out to be fairly orderly. In many cases there is a specific basis on which the claim can be found to have been extinguished. In this case we have discussed in our brief the Treaty of Buffalo Creek and the subsequent litigation in New York Indians v. United States, which may provide a basis for finding that the claim was extinguished without resorting to statutes of limitation.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 2:33 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1065-COUNTY OF ONEIDA, NEW YORK, ET AL., PETITIONERS v. ONEIDA INDIAN NATION NEW YORK STATE, ETC., ET AL.; and #83-1240-NEW YORK, Petitioner v. ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)