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Indian Law - Access to the Federal Courts - County of Oneida, New York v. Oneida Indian Nation of New York State

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INDIAN LAW—Access to the Federal Courts. *County of Oneida, New York v. Oneida Indian Nation of New York State,* 105 S.Ct. 1245 (1985).

From time immemorial until shortly after the American Revolution, the Oneida Indian Nation owned much of what is now central New York State.[1] In 1793, Congress passed the Trade and Intercourse Act which provided that all persons trading with Indian tribes must first obtain a license.[2] Two years later, New York State purchased 100,000 acres of land from the Oneida Indians.[3]

In 1970, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band brought suit against Madison and Oneida Counties of New York in United States District Court.[4] The Oneidas claimed that the 1795 conveyance did not comply with the 1793 Trade and Intercourse Act because no duly licensed official was present at the transaction. They sought damages for the wrongful use and occupation of land conveyed to New York State in 1795.[5]

The district court dismissed the action. The United States Court of Appeals for the Second Circuit affirmed this decision, holding that the action was basically in ejectment and was subject to dismissal for want of federal jurisdiction.[6] In 1974, the United States Supreme Court granted certiorari and reversed and remanded the decision. The Supreme Court held that the Oneidas' claim for possession did not preclude federal jurisdiction under 28 U.S.C. Sections 1331 and 1362.[7] In its explanation, the Court stated that, "[g]iven the nature and source of possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws or treaties of the United States within the meaning of both Sections 1331 and 1362."[8]

On remand, the district court entered judgment for the Indians and subsequently awarded damages.[9] The court of appeals affirmed the judg-

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1. Oneida Indian Nation v. Oneida County, 464 F.2d 916 (2nd Cir. 1972), *rev'd,* 414 U.S. 661 (1974). In 1788, New York entered into a treaty with the Indians which conveyed most of this property to the state. The Oneida Nation retained 300,000 acres of this land.
2. Trade and Intercourse Act, ch. 19 §§ 1-15, 1 Stat. 329 (1793) (repealed 1796).
3. Oneida Indian Nation v. Oneida County, 434 F.Supp. 520, 530 (N.D.N.Y. 1974), *aff'd,* 719 F.2d. 525 (2d Cir. 1983), *modified,* 105 S.Ct. 1245 (1985).
4. Oneida County v. Oneida Indian Nation, 105 S.Ct. 1245 (1985) [hereinafter *Oneida II*].
5. *Id.* at 1249. The Oneidas sought damages for the years 1968 and 1969.
6. Oneida Indian Nation v. County of Oneida, 464 F.2d 916 (2d Cir. 1972).
7. Under 28 U.S.C. § 1331 (1982), district courts have original federal jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States." According to 28 U.S.C. § 1362 (1982), district courts have original jurisdiction of all civil actions brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.
8. Oneida Indian Nation v. Oneida County, 414 U.S. 661, 667 (1974) [hereinafter *Oneida I*].
9. Oneida Indian Nation v. Oneida County, 434 F.Supp. 527, 548 (N.D.N.Y. 1974), *aff'd,* 719 F.2d 525 (2d Cir. 1983).

ment on the issues of liability and indemnification but remanded for further proceedings on the damage award.[10] The counties and New York State petitioned for review.[11] The Supreme Court again granted certiorari and affirmed judgment for the Oneida Indians.[12] Prior to the Oneida decision, courts did not uniformly recognize Indians' right to sue in federal court to vindicate their tribal property rights. The Oneida Court held that the Oneidas have a federal common law right of action for a violation of their possessory rights.[13]

BACKGROUND

The 1793 Trade and Intercourse Act

Congress passed the first Trade and Intercourse Act in 1790. The Act specified that purchases of Indian land were illegal unless an authorized federal government official was present.[14] The main purpose of the statute was to prevent further acquisition of Indian land by white settlers.[15]

When the 1790 Trade and Intercourse Act was due to expire, President George Washington urged Congress to enact further legislation to check outrages committed by whites and reprisals by Indians.[16] In 1793, Congress passed another Trade and Intercourse Act to protect Indian rights. The Act of 1793 provided criminal, but not civil, sanctions for those who violated its provisions.[17]

President Washington later urged further congressional action since there were still hostilities between whites and Indians. Congress accordingly enacted the 1796 Trade and Intercourse Act.[18] The Act established a geographic boundary between whites and Indians.[19] The purpose of this provision was to assure Indians that the government intended to uphold treaties. This was the first time Indian country was designated in statutory law.[20] However, the 1796 Act did not establish remedies for violations of the government official requirement.

The fourth version of the Trade and Intercourse Act was passed in 1802. The new Act did not alter the remedies for illegal convey-

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10. Oneida Indian Nation v. Oneida County, 719 F.2d 525, 544 (2d Cir. 1983), *modified*, 105 S.Ct. 1245 (1985).

11. *Id.* at 527. On remand, the State of New York was brought into the proceeding because the counties filed third party complaints. The counties sought to be indemnified for any trespass damages that might be awarded against them.

12. *Oneida II*, 105 S.Ct. at 1262. The Supreme Court reversed the court of appeals' decision that the federal courts could exercise ancillary jurisdiction over the counties' cross-claim against the State of New York for indemnification.

13. *Id.*

14. Trade and Intercourse Act, ch. 33 §§ 1-7, 1 Stat. 137 (1790) (repealed 1793).

15. 1 F.F. PRUCHA, THE GREAT FATHER 90 (1984).

16. *Id.* at 91.

17. Trade and Intercourse Act, ch. 19 §§ 1-15, 1 Stat. 329 (1793) (repealed 1796).

18. Trade and Interocurse Act, ch. 30 §§ 1-22, 1 Stat. 469 (1796) (expired 1799).

19. *Id.*

20. PRUCHA, *supra* note 15, at 93; Trade and Intercourse Act, ch. 46 §§ 1-21, 1 Stat. 743 (1799) (expired 1802).

ances of tribal lands,[21] but a subsequent amendment to the Act[22] provided that:

> [I]n all trials about the right of property, in which Indians shall be party on one side and white persons on the other, the burden of proof shall rest upon the white person, in every case in which the Indian shall make out a presumption of title in himself from the fact of previous possession and ownership.[23]

The 1822 Trade and Intercourse Act was the basic law governing Indian relations until it was replaced in 1834 by a new codification of Indian policy.[24]

Implying A Cause of Action

Case law from 1823 to the present demonstrates that federal common law vindicates violations of tribal property rights. In *Johnson v. M'Intosh*,[25] for example, the Court considered the power of Indians to give and the ability of private individuals to receive an enforceable title. The Court invalidated two private purchases of Indian land made in 1773 and 1775 because they were made without the Crown's consent.

The Court reaffirmed *Johnson* in *Marsh v. Brooks*.[26] In *Marsh*, the plaintiff sought to recover land granted to his ancestor under an 1839 patent. Recovery was barred because the land in question was within the limits of a tract reserved by a treaty between the United States and the Sac and Fox Indians.[27] The Court in *Marsh* said that it "is not open to question" that "an action of ejectment could be maintained [in the federal courts] on an Indian right to occupancy and use. . . ."[28]

Nearly a century later, *Creek Nation v. United States*[29] established that, as a general legal right, tribes may bring legal proceedings on their own behalf. Tribes are not necessarily barred from bringing their own actions simply because the United States also has a right to sue.[30]

In 1966, Congress enacted 28 U.S.C. Section 1362 which extended federal jurisdiction to all civil actions brought by Indian tribes. In 1968, Commanche Indians brought suit against Skelly Oil Co., which leased Commanche tribal land, for impairing their royalties.[31] The United States Supreme Court stated that Indians could bring suit on their own behalf to vindicate their rights, declaring:

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21. Trade and Intercourse Act, ch. 13 §§ 1-22, 2 Stat. 139 (1802) (amended 1822).
22. Trade and Intercourse Act, ch. 58 §§ 1-6, 3 Stat. 682 (1822).
23. *Id.*
24. Trade and Intercourse Act, ch. 161 §§ 1-30, 4 Stat. 682 (1822).
25. 21 U.S. (8 Wheat.) 543 (1823).
26. 49 U.S. (8 How.) 223 (1850).
27. *Id.* at 234.
28. *Id.* at 232.
29. 318 U.S. 629 (1943).
30. *Id.* at 640.
31. Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968).

> We agree that the federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official do not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights.[32]

Thus, as the *Oneida* Court observed, many decisions implicitly recognize that Indians have a federal common law right to sue in federal court to enforce their rights to land.[33] Yet this common law right has been denied in the past. For instance, in *Jeager v. United States,*[34] the claims court stated that "[i]n all the cases . . . in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring suit."[35] In *Oneida,* the Court addressed the issue of whether Indians may bring a common law suit in federal court to enforce their possessory rights in land.

THE PRINCIPAL CASE

New York State, Madison County and Oneida County first argued that the Oneida Indians had no right of action for the violation of the 1793 Trade and Intercourse Act.[36] In rebutting this assertion, the Court examined the history of the federal common law in relation to Indian tribes.

Initially, the Court noted that the United States Constitution grants the federal government sole authority to supervise relations with Indians.[37] Because the federal government has sole authority, it has been recognized that "federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law."[38] However, the Court has observed that "a tribal right of occupancy, to be protected, need not be based upon a treaty, statute, or other formal government action."[39] The Court decided that federal common law applied in the *Oneida* case, saying:

> There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.[40]

The state and counties next argued that the Trade and Intercourse Acts preempted any common law cause of action.[41] The court found this

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32. *Id.* at 372.
33. *Oneida II,* 105 S.Ct. at 1252.
34. 27 Cl. Ct. 278 (1892).
35. *Id.* at 285.
36. *Oneida II,* 105 S.Ct. at 1251.
37. *Id.*
38. *Oneida I,* 414 U.S. at 670.
39. United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 343 (1941).
40. *Oneida I,* 414 U.S. at 674.
41. *Oneida II,* 105 S.Ct. at 1252.

argument "unpersuasive."[42] Citing its decision in *Milwaukee v. Illinois*,[43] the Court first stated that utilizing federal common law is appropriate when Congress has not "spoken to a particular issue."[44] The Court pointed out that the 1793 Trade and Intercourse Act did not provide remedies for unlawful conveyances of Indian land. Therefore, federal common law applied.[45]

The Court then decided that borrowing New York's statute of limitations would be inconsistent with underlying federal policy.[46] The New York statute of limitations applies only to transactions occurring after September 13, 1952.[47] The Court noted that, since the transaction in the instant case occurred prior to this date, the New York statute is inapplicable.[48]

28 U.S.C. Section 2415[49] supports the Court's position that state statutes of limitations should not apply to Indian land claims.[50] Section 2415 also shows that no federal statute of limitations applies. Section 2415 specifies the time limit within which the United States, on behalf of Indian tribes, must commence suit for contract and tort claims. The statute stipulates that a cause of action occurring prior to the date of enactment accrued on that date. Congress later extended the time within which the United States could bring actions on behalf of Indian tribes. The Court reviewed the legislative history and concluded that Congress had no intention of applying Section 2415 to suits brought by Indian tribes. Therefore, the Oneidas' right to sue was not subject to any federal or state statute of limitations.[51]

In contrast to the original statute, the 1982 amendment to 28 U.S.C. Section 2415 imposes a period of limitations on certain tort and contract claims brought by individual Indians and Indian tribes. Section 5(c) of the 1982 amendment requires the Secretary of the Interior to publish a notice in the Federal Register identifying all claims accruing to any group of Indians on or before July 18, 1966. All claims listed are barred unless a complaint is filed within one year after the date of publication.[52] The Court interpreted 28 U.S.C. Section 2415 as amended in 1982 to mean that "so long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live."[53] The Court concluded that 28 U.S.C. Section 2415, as amended in 1982, thus "presumes the existence of an Indian right of action not otherwise subject to any statute of limitations."[54]

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42. *Id.* at 1253.
43. 451 U.S. 304 (1981).
44. *Oneida II*, 105 S.Ct. at 1253.
45. *Id.* at 1254.
46. *Id.* at 1255.
47. 25 U.S.C. § 233 (1982).
48. *Oneida II*, 105 S.Ct. at 1255.
49. 28 U.S.C. § 2415 (1982).
50. *Oneida II*, 105 S.Ct. at 1256.
51. *Id.*
52. 28 U.S.C. § 2415 (1966) (amended 1982).
53. *Oneida II*, 105 S.Ct. at 1256.
54. *Id.*

The state and counties argued that the 1796 Trade and Intercourse Act repealed the 1793 Trade and Intercourse Act. The Court rejected this contention, concluding that the 1793 and 1796 Trade and Intercourse Acts simply codified the principle that the federal government's consent was necessary to extinguish aboriginal title.[55] Finding no meritorious defense, the *Oneida* Court held that Indians have a federal common law right of action to enforce their possessory rights in land.

ANALYSIS

While no statute expressly provides the Oneidas with a cause of action, the United States Constitution suggests that actions involving tribal property rights should be settled in the federal courts. Article 1, section 8, clause 3, gives Congress power to "regulate Commerce, with foreign Nations, and among the several States, and with the Indian tribes." Inferring that this cause of action should be settled in federal court is appropriate.

Case law also establishes that the federal court is the proper forum for Indian land claims. In *Johnson v. M'Intosh,*[56] the Court said:

> The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the Crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it.[57]

While the parties in *Johnson* were non-Indians, the decision indicates that suits involving Indian land rights were litigated in the federal courts early in this country's history.

The 1793 Trade and Intercourse Act did not provide a remedy for violations of the requirement that a government official supervise conveyances of Indian land.[58] Therefore, the question is whether or not a private right of action can be implied from the 1793 Trade and Intercourse Act.

In *Cort v. Ash,*[59] the Supreme Court set forth criteria for determining when private rights of action may be implied from federal statutes. The first factor is whether or not the the plaintiff is "one of the class for whose *especial* benefit the statute was enacted."[60] This question concerns "not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries."[61] Indians are the intend-

55. *Id.* at 1257.
56. 21 U.S. (8 Wheat.) 570 (1823).
57. *Id.* at 579.
58. *See supra* text accompanying note 17.
59. 422 U.S. 66 (1975).
60. *Id.* at 78 (emphasis in original).
61. California v. Sierra Club, 451 U.S. 287, 295 (1981).

ed beneficiaries of the 1793 Trade and Intercourse Act. The Act's main function was to regulate trade with Indians. The legislative history also suggests that the 1793 Trade and Intercourse Act was for the special benefit of Indians.[62]

The second factor in determining whether remedies may be implied from a statute is whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one."[63] Section 8 of the 1793 Trade and Intercourse Act did not state that a tribe could maintain a private right of action.[64] This may imply that Congress did not intend to confer a private right of action. In *Land v. Santa Rosa*,[65] however, the Court allowed Pueblo Indians to pursue an action to enjoin the Secretary of Interior and the Commissioner of the General Land Office from disposing of land to which the Indians claimed title, even though the applicable federal statute did not specify that Indians could bring suit. Thus, legislation does not have to state explicitly that Congress granted a right of action. The Court properly allowed the Oneida Indians to litigate this matter in federal court.

The third question in the *Cort* analysis is whether implying a remedy is "consistent with the underlying purposes of the legislative scheme. . . ."[66] Guidelines set forth in *Mobil Oil Corp. v. Higginbotham*[67] are instructive in determining when it is appropriate to supplement federal statutory remedies. Courts may fill in statutory gaps left by Congress's silence.[68] The Trade and Intercourse Acts specified that Indian titles could be extinguished only with the consent of the United States.[69] The purpose of the Acts was to protect Indians from alienation of tribal lands. Given this purpose, it is reasonable to imply a remedy even in the face of congressional silence.

The final question set out by *Cort* is whether the cause of action is "traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law."[70] The United States Constitution and case law support the contention that state law traditionally has not been utilized to resolve violations of Indian property rights. Since Indian property rights are not an area of state concern, federal court is the proper forum in which to vindicate the violation of these rights.[71]

The Oneidas meet each element of the test outlined in *Cort*. Therefore, the *Oneida* Court correctly held that a private right of action could be implied from the 1793 Trade and Intercourse Act.

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62. *See supra* text accompanying note 17.
63. *Cort*, 422 U.S. at 78.
64. Brief for the State of New York at 23, Oneida Indian Nation v. Oneida County, 105 S.Ct. 1245 (1985).
65. 249 U.S. 110 (1919).
66. *Cort*, 422 U.S. at 78.
67. 436 U.S. 618 (1978).
68. *Id.* at 625.
69. *See supra* text accompanying notes 14-24.
70. *Cort*, 422 U.S. at 78.
71. *See supra* text accompanying notes 25, 38.

The second aspect of the Court's holding, that the New York State statute of limitations did not apply to the Oneidas' suit, was also correct. This is because the application of the state statute would entirely bar the Oneidas' suit and deny the Indians access to any court.

The *Oneida* Court glossed over New York's interest in enforcing its statute of limitations and preventing the litigation of stale claims. The Oneidas did wait 175 years to bring an action for their claim. Indians, however, probably had very little opportunity to vindicate their rights in federal court in 1795.

> The frequency of offenses committed against Indians by frontier whites, among which outright murder was commonplace, was shocking. It was often a question of who was more aggressive, more hostile, more savage—the Indian or the white man. The murders and other aggressions of whites against Indians provided one of the great sources of friction between the two races. Lack of enforcement made a mockery of the statutes. The typical frontier community could not be brought to convict a man who injured or murderd an Indian, and confusion as to the status of the federal courts in the territories delayed effective action.[72]

Furthermore, the federal interests involved outweigh the state's interests. The federal courts have had much experience in litigating claims of this nature. Thus they can be presumed to have an expertise in dealing with them. Since similar suits might be brought by other Indian tribes, the federal government has a strong interest in seeing that there is uniformity in these types of decisions.

In *Heckman v. United States,*[73] the government sought to cancel a conveyance of land executed by Cherokee Indians. Government attorneys argued that the conveyance violated restrictions upon the power of alienation. The Court stated that the welfare of the Indians was "distinctly" an interest of the federal government.[74] Since only the federal government can extinguish title to Indian land, the federal government had a distinct interest in litigating the *Oneida* suit in federal court.

This interest is predicated on the 1793 Trade and Intercourse Act. New York argued that Congress repealed the 1793 Act by enacting the 1796 Trade and Intercourse Act.[75] If this were true, then the Oneidas' common law right of action is vitiated. However, New York's argument is spurious. *Bear Lake Irrigation Co. v. Garland*[76] established that legislation does not abate when subsequent acts on the same subject are "similar and almost identical."[77] Legislation is considered "repealed" only when

72. 1 F.F. PRUCHA, *supra* note 15, at 105.
73. 224 U.S. 413 (1912).
74. *Id.* at 437.
75. *Oneida II,* 105 S.Ct. at 1257.
76. 164 U.S. 1 (1869).
77. *Id.* at 11.

change in the legal system is effected by "overtly and explicitly abrogating provisions of prior statute law."[78]

The Trade and Intercourse Acts of 1790 to 1834 all required the presence of a government official to convey Indian land.[79] Even though the 1796 Trade and Intercourse Act replaced the 1793 Trade and Intercourse Act, the provision forbidding transfer of Indian land without the government's consent remained in effect. The 1796 Trade and Intercourse Act did not repeal the 1793 version and should therefore be construed as a continuation of the 1793 Trade and Intercourse Act. Since common law remedies did not abate, they were properly implied by the *Oneida* Court.

CONCLUSION

Early in its history, the United States established its interest in protecting Indian land rights. The *Oneida* Court reaffirms this principle by holding that the Oneida Indians have a common law right of action for the violation of the 1793 Trade and Intercourse Act. Because land claims of this nature may arise in the future, the federal courts do have a strong interest in promoting uniform decisions. Federal courts have traditionally litigated Indian land claims and are thus more expert in this type of litigation. Finally, Indian tribes should not be denied their day in court. This is only accomplished by allowing the Indians access to the federal court system.

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78. 1A C.D. SANDS, SUTHERLAND STATUTORY CONSTRUCTION 314 (rev. 4th ed. 1985).
79. *See supra* text accompanying notes 14-24.