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Dale T. White

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INDIAN COUNTRY IN THE NORTHEAST

Dale T. White*

I. INTRODUCTION

The Bureau of Indian Affairs publishes a map of Indian lands in the United States, and as most would expect, it shows the vast majority of Indian lands west of the Mississippi River. The Indian lands in the Northeast consist of small dots on the map, comprising no more than a dozen or so in total. The lands of the Iroquois Confederacy Six Nations in upstate New York are shown as small dots spread across the State. In New England, Indian reservations are shown as a handful of pinpoints scattered across the States of Maine, Massachusetts, Rhode Island, and Connecticut. The land base is miniscule compared to the Navajo, Crow, Fort Berthold, and Wind River Indian Reservations in the West, reservations that contain millions of acres of land. The Navajo Indian Reservation, it has been said, is larger in area than some states. Therefore, in a comparative sense, there is not much "Indian Country" in the Northeast.

Nevertheless, Indian Country exists in the Northeast. It exists in the form of lands owned and occupied by federally recognized tribes in New York and the New England States of Maine, Massachusetts, Rhode Island, and Connecticut. This paper will provide a brief overview of those lands.¹ Section II of this paper provides an overview of the Indian reservations in New York State. Section III discusses the reservations established in federal Land Claim Settlement Acts in New England. Section IV discusses other Indian Country in the Northeast consisting of lands tribes are seeking to re-acquire in land claim actions and lands that tribes have acquired (or are seeking to acquire) under the "fee to trust" process. This activity has generated some controversy and litigation in New England and in New York.

The first question obviously is what exactly is meant by "Indian Country"? That term is defined in the 1948 Indian Country Statute, the Act of June 25, 1948, codified at 18 U.S.C. § 1151, as

- (a) all land within the limits of any *Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-

* Dale T. White is General Counsel for the St. Regis Mohawk Tribe. The views and opinions in this paper are Mr. White's and do not necessarily reflect the views of the St. Regis Mohawk Tribe.

1. This paper is limited to the discussion of Indian Country of federally recognized tribes in the Northeast. There are Indian tribes and groups in the Northeast that are not federally recognized that have reservation lands, for example, the Shinnecock and Poospatuck Tribes in New York, the Schaghticoke and Eastern Pequot Tribes in Connecticut, and the Abenaki Tribe in Vermont. This paper does not address the issue of whether the land of these tribes constitutes Indian Country.

way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.²

Indian Country in the Northeast consists primarily of lands in subcategory (a), Indian reservations.³ There are no Indian allotments in the Northeast since the 1887 General Allotment Act and other specific congressional allotment statutes did not generally extend east of the Mississippi.⁴ The issue of dependent Indian communities has been litigated in isolated cases but is not a significant component of Indian Country in the Northeast.⁵

Indian reservations are located in five of the nine Northeast states: New York, and the New England States of Maine, Massachusetts, Rhode Island, and Connecticut. In the State of New York, Indian Country consists of the reservation lands of the Iroquois Confederacy tribes (Seneca, Tuscarora, Cayuga, Oneida, Onondaga, and Mohawk) created by treaties with the United States shortly after the Revolutionary War. In the New England States of Maine, Massachusetts, Rhode Island, and Connecticut, Indian Country consists of the “initial” federal reservations for tribes that were established in federal Land Claim Settlement Acts enacted between 1978 and 1994 that resolved the tribes’ claims for lands illegally taken in violation of the Trade and Nonintercourse Act.⁶

Indian Country in the Northeast also consists of (or at least potentially consists of) two other categories of lands: (a) lands that tribes in New York are seeking to recover in land claim lawsuits that have been pending for decades; and (b) lands that tribes in New York and New England have acquired (or are seeking to acquire) in trust either under specific land claim settlement act provisions or under the “fee to trust” process under 25 U.S.C. § 465 (2006).

II. INDIAN RESERVATIONS IN NEW YORK STATE

The Indian reservations in New York are remnants of the vast territory once occupied by the Six Nations of the powerful Iroquois Confederacy.⁷ At one time, before European contact, the Iroquois tribes in New York occupied all of the present-day New York State (and in fact areas well beyond). According to Felix Cohen, the Iroquois’ “territory at one time extended from the hills of New England to the Mississippi River

2. 18 U.S.C. § 1151 (2006) (emphasis added).

3. See generally *id.*

4. Felix S. Cohen, *Handbook of Federal Indian Law*, 206–08 (William S. Hein Co. 1988).

5. See *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996); *U.S. v. Levesque*, 681 F.2d 75 (1st Cir. 1982).

6. The Trade and Nonintercourse Act of 1790 provides that “[n]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.” Pub. L. No. 1-33, 1 Stat. 137, 138 (1845) (quoting the codified text at 25 U.S.C. § 177 (2006)).

7. See Cohen, *supra* n. 4, at 416–21 (explaining the extent of the Iroquois Confederacy lands); Helen M. Upton, *The Everett Report in Historical Perspective, Indians of New York 7–15* (N.Y. State Bicentennial Commn. 1980).

and from upper Canada into North Carolina.”⁸

Beginning shortly after the Revolutionary War, the newly formed United States began dealing with the Six Nations through treaty-making—its stated goals were to secure peace with the tribes, secure the support of the tribes and obtain concessions from the tribes with respect to lands.⁹ This was accomplished in several early treaties—the Treaty of Fort Stanwix of 1784, the Treaty of Fort Harmar of 1789, and the Treaty of Canandaigua of 1794.¹⁰ In a separate treaty, the 1796 Treaty with the Seven Nations, the United States negotiated a reservation for the St. Regis Mohawk Tribe.¹¹

Under these treaties, the United States promised that the Tribes would be secure in their defined territories. The Fort Stanwix Treaty established a western boundary of the Six Nations and representative of the Six Nations relinquished claims to lands beyond that line. In exchange, the United States promised that “they [Six Nations] shall be secured in the peaceful possession of the lands they inhabit east and north”¹² Under the Treaty of Canandaigua, the United States promised that it would “acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them”¹³

Soon thereafter, the federal government broke its promises and the door was opened for New York State and private land speculators to gain control over tribal lands. Literally within years of the Treaty of Canandaigua of 1794, and Congress’s enactment of the first Trade and Nonintercourse Act of 1790 (meant to protect tribal lands from unauthorized sales), vast areas of the ancestral lands of the Six Nations and the Mohawk Tribe were sold to New York State and private individuals through “treaties” with New York and private parties.

Today, as set forth below, New York State Reservations have been reduced considerably from the early treaties with the United States.

A. *Seneca Nation Reservations*

The Seneca Indians are the “westernmost . . . of the Six Nations” and, for this reason, are referred to the “Keepers of the Western Door.”¹⁴ At one time, the Seneca Indian territory covered virtually all of present-day western New York.¹⁵ In the early treaties with the new federal government referred to above, the Seneca’s territory was identified and guaranteed in the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794. The Treaty of Canandaigua described the Seneca Nation’s territory as a large tract of land in western New York.

Following that, however, the Senecas entered into a number of treaties with New

8. Cohen, *supra* n. 4, at 417.

9. *Id.* at 418–19.

10. *Id.*

11. *Id.* at 416–21.

12. 7 Stat. 15, 16 (1861).

13. *Id.* at 44, 45.

14. *Seneca Nation of Indians v. N.Y.*, 382 F.3d 245, 249 (2d Cir. 2004).

15. See *Citizens against Casino Gambling in Erie Co. v. Hogen*, 2008 WL 2746566 at *9 (W.D.N.Y. July 8, 2008).

York State and private parties that drastically reduced their landholdings. In the 1797 Treaty of Big Tree, the Seneca Indians sold large areas of their western New York lands (approximately 4,030,325 acres) and reserved approximately 200,000 acres for 11 reservations: Tonawanda, Canawagus, Big Tree, Little Beard's Town, Squawky Hill, Gardeau, Caneadea, Cattaraugus, Alleghany, Buffalo Creek, and Oil Spring. In 1823, the Seneca Nation ceded 16,720 acres of its Gardeau Reservation.¹⁶ Three years later, in 1826, over 87,000 acres was sold from eight of the Seneca Reservations: all of the lands of the Canawagus, Big Tree, Little Beard's Town, Squawky Hill, Caneadea Reservations, portions of Cattaraugus, Tonawanda, and Buffalo Creek Reservations. In 1842, the Senecas sold the remainder of the Buffalo Creek Reservation.¹⁷

Today Seneca Nation territory consists of three separate reservations: the Cattaraugus Indian Reservation consisting of approximately 21,618 acres in Cattaraugus, Erie, and Chautauqua Counties; the Alleghany Indian Reservation originally containing 30,469 acres of land in Cattaraugus County, of which some 10,000 acres were inundated by the Kinzua Reservoir when the Army Corps of Engineers built the Kinzua Dam in 1964; and the Oil Springs Reservation containing 640 acres, including access to Cuba Lake, on the border of Allegany and Cattaraugus Counties.¹⁸

B. *Tonawanda Seneca Band Reservation*

The Tonawanda Seneca Band are Seneca Indians that separated from the larger Seneca Nation to form their own separate federally recognized tribe.¹⁹ They occupy the Tonawanda Indian Reservation that consists of 7,549 acres in Niagara, Erie, and Genesee Counties just east of Buffalo.²⁰

These lands were reserved to the Tonawanda Nation under the 1797 Treaty of Big Tree (see discussion above regarding Seneca Nation).²¹

C. *Onondaga Nation*

The Onondaga Nation is located in central New York State just south of Syracuse, N.Y. and contains the capital or "central Council Fire" of the Iroquois Confederacy.²² As part of the Six Nation Confederacy, the Onondaga Nation was also a party to the above-reference Fort Stanwix and Canandaigua Treaties. The Treaties recognized the Onondaga's rights to a large tract of land in central New York in the vicinity of Syracuse, New York.²³

The State of New York entered into "treaties" with the Onondagas in 1788, 1890,

16. *Id.* at **9-11.

17. *Id.* at *11.

18. EPA, *Seneca Nation of Indians*, www.epa.gov/region02/nations/sni.htm (accessed Apr. 30, 2009).

19. Cohen, *supra* n. 4, at 421.

20. EPA, *Tonawanda Band of Senecas*, <http://www.epa.gov/region02/nations/tonow.htm> (accessed Apr. 30, 2009).

21. Cohen, *supra* n. 4, at 421.

22. Pl.'s Amend. Compl. at 3, *Onondaga Nation v. N.Y.*, No. 05-CV-314 (filed Aug. 1, 2005) (available at http://www.onondaganation.org/medifiles/pdfs/lgl_complaint2.pdf) [hereinafter Onondaga Complaint].

23. *Id.* at 6-12.

1793, 1795, 1817 and 1822 purporting to convey most of the Nation's land.²⁴

Today, the Onondaga Nation's Reservation consists of this tract of 7,300 acres.²⁵

D. *Oneida Indian Nation Reservation*

The Oneida Indian Nation, located in Central New York, entered into a treaty with the State of New York in 1788 wherein the State purchased a majority of the Nation's lands and the Nation was left with a 300,000-acre reservation.²⁶ In the Treaty of Canandaigua, the United States acknowledged and recognized this land to be reserved to the Nation: "the lands reserved to the Oneida . . . to be their property; and the United States will never claim the same, nor disturb them"²⁷

However, as with other New York Tribes, between 1795 and 1846, representatives purporting to represent the Oneida Nation signed a succession of treaties with New York State (over 30 transactions) conveying all but a few hundred acres of its ancestral homeland.²⁸ Today, the Oneida lands consist of 32 acres of land reserved as part of lands in a 1788 treaty with New York.²⁹

E. *Tuscarora Nation Reservation*

The Tuscarora Nation is located in western New York, about 10 minutes outside of Niagara Falls. In the early 1700s, the Tuscarora moved from their ancestral territory in North Carolina and were invited to live on the lands of the Oneida Nation.³⁰ The Nation joined the Iroquois Confederacy in 1712 and became the sixth member.³¹

The Tuscarora Indian Reservation consists of approximately 5,700 acres of land in three tracts. One parcel containing 1,808 acres was granted to them by the Seneca Nation. Another tract is land that was a gift from the Holland Land Company to the Tuscarora Nation consisting of 1,280 acres. The remaining reservation land was conveyed to the Tribe by an individual named Henry Dearborn that was subsequently conveyed to the United States to be held in trust.³²

F. *St. Regis Mohawk Indian Reservation*

The St. Regis Mohawk Tribe is located in northern New York State on the Canadian border—the reservation straddles the St. Lawrence River.³³ The Mohawks of "Akwasasne" (the Mohawk name for their territory) have inhabited this area since at

24. *Id.*

25. EPA, *Onondaga Indian Nation*, <http://www.epa.gov/region02/nations/onond.htm> (accessed Apr. 30, 2009).

26. *Oneida Indian Nation v. N.Y.*, 194 F. Supp. 2d 104, 112–13 (N.D.N.Y. 2002) [hereinafter *Oneida I*].

27. 7 Stat. at 45.

28. *Oneida I*, 194 F. Supp. 2d at 112–13.

29. *U.S. v. Boylan*, 265 Fed. 165, 165–66 (2d Cir. 1920).

30. Cohen, *supra* n. 4, at 423 n. 79.

31. *See Fed. Power Commn. v. Tuscarora Indian Nation*, 362 U.S. 99, 121 n.18 (1960); *see also* Cohen, *supra* n. 4, at 423 n. 79.

32. EPA, *Tuscarora Nation*, <http://www.epa.gov/region02/nations/tusca.htm> (accessed Apr. 30, 2009).

33. *See generally Canadian St. Regis Band of Mohawk Indians v. N.Y.*, 278 F. Supp. 2d 313 (N.D.N.Y. 2003).

least the middle 1700's, having moved north away from non-Indian incursions into their territory in the Mohawk Valley

The St. Regis Mohawks entered into a separate treaty with the United States—the 1796 Treaty with the Seven Nations.

The 1796 Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55, recognized as the Mohawk reservation a six mile square tract (some 24,900 acres), along with two one-mile squares, and land along the Grasse River. Between 1816 and 1825, the State purported to acquire specific tracts of reservation land from the Mohawks. Initially, the Tribe simply leased the lands to local non-Indians. But the State soon sought to purchase the land outright and through five separate transactions that took place between 1816 and 1825, the State and local land speculators managed to purchase approximately 10,000 acres of the land guaranteed by the 1796 Treaty.³⁴

After these purchases, the Tribe was left with title to 14,000 acres of land, which constitutes its current reservation.³⁵

G. Cayuga Nation

The Cayuga were also signatories to the 1784 Treaty of Fort Stanwix wherein the United States acknowledged the lands reserved to the Cayugas. A large area was reserved to the Cayugas in that Treaty.³⁶

As a result of three treaties entered into with New York State, the Cayuga Nation has lost all of these lands. In 1789, the Cayugas executed with New York State that sold all of its lands except a 100 square mile tract on Cayuga Lake, a few acres on Seneca River and one mile square at Cayuga Ferry. In 1795, the Cayugas then entered into another treaty with New York selling all but a three square mile tract. In 1807, they sold to New York all their remaining lands.³⁷

Today, the Cayuga Nation has no recognized Indian reservation.

III. RESERVATIONS OF TRIBES IN NEW ENGLAND CREATED BY SETTLEMENT ACTS

The Indian reservations in New England have a different historical background than that of the reservations in New York State. Tribes in New England, because of their pre-Constitutional history and treaties with the British and other European nations, do not have treaties with the United States to secure recognize reservations of their lands. Tribes in this area have, however, lived together within their tribal communities on their ancestral lands, in local communities and in some cases on state-recognized reservation lands.

As a result, the tribes in New England existed without federal recognition for many years. This began to change, however, in the 1960s when legal services lawyers in Maine unearthed a legal theory based on the 1790 Trade and Nonintercourse Act under which they would seek to recover lands, illegally conveyed without federal approval, for

34. See generally *id.*

35. EPA, *St. Regis Mohawk Indian Nation*, <http://www.epa.gov/region02/nations/srm.htm> (accessed Apr. 30, 2009).

36. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005).

37. *Id.* at 269.

tribes in Maine.³⁸ This theory soon took hold and, beginning in the 1970s, the Maine tribes and others throughout New England (and New York) filed federal court actions seeking recovery of lands lost by unauthorized land sales.

This culminated in land claim settlement acts beginning with the 1978 Rhode Island Settlement Act. Between 1978 and 1994, reservations were established for the Narragansett Tribe in Rhode Island; the Passamaquoddy, Penobscot, Maliseet and Micmac Tribes in Maine; the Aquinnah Wampanoag Tribe in Massachusetts; and the Mashantucket Pequot and Mohegan Tribes in Connecticut.

A. *Narragansett Indian Reservation*

The Narragansett Tribe's ancestral home lands are located in the area around Charlestown, R.I.³⁹ In 1975 the Tribe brought an action in federal court against the State and private land owners, pursuant to the Trade and Nonintercourse Act to recover 3,200 acres of its ancestral lands.⁴⁰ After several years of negotiations, the parties settled the land claims in 1978, pursuant to an agreement that was ratified by Congress and implemented in Federal Settlement Act.⁴¹ The settlement conveyed to the Tribe's Corporation 1,800 acres of land as the Tribe's initial reservation in the Charlestown area. In exchange, the Tribe agreed to the extinguishment of its aboriginal land claims throughout the State.⁴²

The settlement was made contingent upon federal recognition of the Tribe by the Department of Interior. In 1983, the Secretary formally acknowledged the Narragansett Indian Tribe as a federally recognized Tribe under regulations promulgated by the Department of the Interior.⁴³

Following recognition, the Tribe applied to have the 1,800 acres of Settlement Lands taken into trust pursuant to the regulations implementing Section 5 of the IRA. In 1988, the Secretary accepted the Settlement Lands in trust, subject to the provision of the Settlement Act⁴⁴ formally creating the Narragansett Indian Reservation.⁴⁵

Today, the Narragansett Tribe reservation consists of 1,943 acres of land—the 1,800 land originally part of the Settlement Act and lands acquired subsequently within a certain designated area called the “settlement lands.”⁴⁶

B. *Maine Tribe Reservations*

There are four federally recognized tribes in the State of Maine: the

38. *Iroquois Land Claims* 24–25 (Christopher Vecsey & William A. Starna eds., Syracuse U. Press 1988); Stephen Brimley, *Native American Sovereignty in Maine*, Me. Policy Rev. 12 (Fall/Winter 2004).

39. *R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 689–90 (1st Cir. 1994).

40. See generally *Narragansett Tribe of Indians v. So. R.I. Land Dev. Corp.*, 418 F. Supp 798 (D.R.I. 1976).

41. Pub.L. No. 95-395, § 2, 92 Stat. 813 (1978) (codified at 25 U.S.C. §§ 1701–16 (2006)).

42. *Id.*

43. 25 U.S.C. § 1707(c).

44. *Id.* at § 1708(a).

45. *Carcieri v. Kempthorne*, 497 F.3d 15, 23 (1st Cir. 2007), *rev'd*, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

46. EPA, *EPA Tribal Program in New England Portal: Narragansett Indian Tribe*, <http://www.epa.gov/region1/govt/tribes/narragansett.html> (accessed May 1, 2009).

Passamaquoddy Tribe, the Penobscot Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmac Indians. These four tribes survived the invasion of European colonists and the establishment of the new United States on small pockets of their ancestral territory. The State of Maine recognized their existence as tribes, but they had no formal treaty relationship with the United States.

In 1970s, the Passamaquoddy Tribe brought a landmark case, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*,⁴⁷ that ultimately persuaded the Secretary of the Interior to file a land claim action on behalf of the Passamaquoddy Tribe to recover over 23,000 acres of land unlawfully granted to the Commonwealth of Massachusetts through a treaty of 1974. The lawsuit was filed by the United States against the State of Maine (as successor to the Commonwealth of Massachusetts) seeking to recover lands unlawfully conveyed in violation of the Trade and Nonintercourse Act on behalf of the Passamaquoddy Tribe and the Penobscot Tribe.

The lawsuit caused a great deal of concern within the State by its residents whose title was clouded by the federal action. After years of intense negotiations, the Tribes and the State reached a settlement in 1979, which was ratified by the Maine State Legislature.⁴⁸

In 1980, Congress provided its ratification of the settlement when it enacted the Maine Indian Claims Settlement.⁴⁹ The Act established a trust fund of \$26.8 million, set aside for each of two Tribes (Passamaquoddy and the Penobscot Tribes) and \$900,000 for the Houlton Band of Maliseet Indians to use for land acquisition. Under the settlement, each tribe has the right to acquire up to 150,000 acres that can be taken into trust by the Secretary. Any lands acquired beyond that will be held as fee simple lands subject to state and local governmental laws.⁵⁰

Since 1980, the Passamaquoddy Indian Tribe has acquired over 100,000 acres in trust. The largest acquisition is the Indian Township Reservation located in the town of Princeton, Maine, lying close to the Canadian border. This Reservation contains approximately 108,900 acres held in trust by the United States. The other acquisition is the Pleasant Point Reservation located in the easternmost part of the State, in the town of Perry, Maine. This is a small Reservation consisting of about 330 acres.⁵¹

The Penobscot Nation owns approximately 123,000 acres in numerous parcels throughout the state that include trust and fee simple lands. Pursuant to the 1980 Settlement Act, the Secretary has taken into trust 55,139 acres located on the Nation's Indian Island Reservation on the Penobscot River. The remaining lands of the Tribe are held in fee title.⁵²

The Houlton Band has purchased and placed into trust approximately 800 acres in

47. 528 F.2d 370 (1st Cir. 1975).

48. Brimley, *supra* n. 38, at 15–17.

49. 25 U.S.C. § 1721 (2006).

50. *Id.* at § 1724(a)–(j) (2006).

51. EPA, *EPA Tribal Program in New England Portal: Passamaquoddy Indian Township*, www.epa.gov/region1/govt/tribes/passamaquoddyindiantownship.html (accessed Apr. 30, 2009).

52. EPA, *EPA Tribal Program in New England Portal: Penobscot Indian Nation*, www.epa.gov/region1/govt/tribes/penobscotindiannation.html (accessed Apr. 30, 2009).

the Town of Houlton, Maine.⁵³

The fourth federally recognized Tribe in Maine, the Aroostook Band of Micmacs, is not mentioned in 1980 Maine Indian Claims Settlement Act although the Act purports to settle the claims of all tribes in the State. In 1991 Congress enacted the Aroostook Band of Micmacs Settlement Act that granted to the Band \$900,000 to acquire 5,000 acres of land that could be taken into trust as its reservation. Today the Aroostook Band owns approximately 1,350 acres of land in northern Maine. The tribe is in the process of acquiring 658 acres of land from the U.S. Air Force, Department of Defense, in Limestone, Maine.⁵⁴

C. *Mashantucket Pequot Indian Reservation*

The Mashantucket Pequot Indians historically inhabited the area of what is today southeastern Connecticut. As with other tribes in the region, it suffered greatly at the hands of the European colonists and many Pequot Indians were killed in warfare. Nevertheless, members of the Pequot tribe survived and remained in the area, living in southeast Connecticut.

In 1976, the Pequot Tribe filed a federal lawsuit asserting that its ancestral lands in southeastern Connecticut were lost in violation of the Trade and Nonintercourse Act.⁵⁵ In 1983, the Pequot Tribe negotiated a settlement of the action with the State and individual parties whereby the Pequots agreed to extinguish all of their land claims in the State in exchange for a settlement fund of \$900,000 and a certain amount of land that would be used by the Tribe as its initial reservation. The State of Connecticut contributed 20 acres of land for settlement and the Tribe purchased other lands for its reservation.⁵⁶

In 1983, Congress enacted the Connecticut Indian Land Claims Settlement⁵⁷ that ratified the settlement. Under the Settlement Act, the Pequots have the ability to acquire lands to be taken into trust within a designated area.⁵⁸

Today, the Pequots reservation consists of approximately 1,085 acres of trust lands.⁵⁹

D. *Aquinnah Wampanoag Indian Reservation*

The Wampanoag Indians were the indigenous inhabitants of what is now the State of Massachusetts. Today there are two federally recognized Wampanoag tribes in Massachusetts: the Aquinnah Wampanoag Tribe and the Mashpee Wampanoag Tribe

53. EPA, *EPA Tribal Program in New England Portal: Houlton Band of Maliseet Indians*, www.epa.gov/region1/govt/tribes/houltonmaliseet.html (accessed Apr. 30, 2009).

54. EPA, *EPA Tribal Program in New England Portal: Aroostook Band of Micmacs*, www.epa.gov/region1/govt/tribes/aroostockmicmacs.html (accessed Apr. 30, 2009).

55. 25 U.S.C. 1751 (2006) (noting a pending case at the time in the District of Connecticut, *Western Pequot Tribe of Indians v. Holdridge Enterprises, Inc.*).

56. 25 U.S.C. § 1752(3)–(4) (2006).

57. Pub. L. No. 98-134, 97 Stat. 851 (1983) (codified at 25 U.S.C. §§ 1751–1760 (2006)).

58. 25 U.S.C. § 1754 (2006).

59. EPA, *Tribal Program in New England Portal: Mashantucket Pequot Tribe*, www.epa.gov/region1/govt/tribes/mashantucket.html (accessed Apr. 30, 2009).

that obtained federal recognition in 2007.

The Aquinnah Wampanoag Tribe filed a federal court action in 1974 seeking recovery of the lands that were taken from them in violation of the Trade and Nonintercourse Act.⁶⁰ In 1987, Congress enacted the Massachusetts Indian Land Claims Settlement⁶¹ that ratified the settlement that the Aquinnah Wampanoag had negotiated with the State.

The Settlement Act did three things. It provided federal recognition of the Aquinnah Wampanoag Tribe, it settled the Tribe's Trade and Nonintercourse Act claim against the State and provided a land acquisition fund for the Tribe of \$2,125,000.

To date, the Tribe has acquired approximately 485 acres of land in the Gay Head area.⁶²

E. Mohegan Indian Reservation

The Mohegan Indian Tribe's history is similar to that of the Pequots. The Mohegan historically inhabited the area of what is today southeastern Connecticut.⁶³ Despite encroachments on their territory, members of the Mohegan Tribe survived and remained in the area, living in southeast Connecticut around the Town of Montville. In 1977, the Mohegan Tribe filed a suit against the State of Connecticut to recover some 2,500 acres of land in the Town of Montville.⁶⁴

After a lengthy court battle and negotiations, the Tribe negotiated a settlement with the State of Connecticut and local towns. In 1994, the Tribe and the State entered into a settlement agreement whereby the Tribe agreed to extinguish its land claims within the State and the State agreed to convey certain lands and settlement monies to the Tribe.

The Settlement Agreement, along with an agreement between the Tribe and the Town of Montville were then ratified by Congress in 1994 in the Mohegan Nation (Connecticut) Land Claims Settlement.⁶⁵ Under the Settlement Act, the Mohegan Tribes has the ability to acquire lands to be taken into trust within a designated area.

Today, the Mohegan Indian reservation consists of approximately 507 acres of trust lands.⁶⁶

IV. OTHER INDIAN COUNTRY IN THE NORTHEAST—LAND CLAIM AREAS AND TRUST ACQUISITIONS

There are two other categories of land that qualify as "Indian Country" in the Northeast. One category is the land that tribes in New York State are seeking to recover

60. *Wampanoag Tribe of Gay Head (Aquinnah) v. Mass. Commn. against Discrimination*, 63 F. Supp. 2d 119, 121 (D. Mass. 1999).

61. Pub.L. No. 100-95, 101 Stat. 704 (1987) (codified at 25 U.S.C. §§ 1771(a)-(i) (2006)).

62. Wampanoag Tribe of Gay Head, *History and Culture: Tribal Lands*, www.wampanoagtribe.net/Pages/Wampanoag_WebDocs/history_culture (accessed May 1, 2009).

63. *See generally Mohegan Tribe v. Conn.*, 638 F.2d 612 (2d Cir. 1980), *modified*, *Mohegan Tribe v. Conn.*, 638 F.2d 612 (2d Cir. 1981).

64. *Mohegan Tribe v. Conn.*, 528 F. Supp. 1359, 1361 (D. Conn. 1982).

65. Pub. L. No. 103-377, 108 Stat. 3501 (1994) (codified at 25 U.S.C. §§ 1775-1775h (2006)).

66. EPA, *Tribal Program in New England Portal: Mohegan Nation*, <http://www.epa.gov/region1/gov/tribes/mohegannation.html> (accessed May 1, 2009).

in their longstanding federal land claim actions—this is land that they claim was part of a treaty reservation and wrongly conveyed in violation of the Trade and Nonintercourse Act. If the tribes recover title to this land, it will become part of their existing reservations.

The second category is the land that Tribes in New York and New England have added—and are seeking to add—to their reservations under specific provisions of Land Claim Settlement Acts and under Section 5 of the Indian Reorganization Act⁶⁷ “fee to trust” process. This includes the application of the most recently recognized tribe in the Northeast, the Mashpee Wampanoag Tribe in Massachusetts that is seeking to acquire lands for its initial reservation.

A. Land Claim Areas in New York State

Since the 1970s, tribes in New York State have been pursuing federal court litigation against New York State and local governments seeking recovery of lands illegally conveyed in violation of the Trade and Nonintercourse Act.⁶⁸

1. Oneida Indian Nation Claims

The Oneida Nation filed a federal court action in 1970 seeking to recover some 250,000 acres of land reserved in the 1794 Treaty of Canandaigua.⁶⁹ The Nation is asserting that the lands were reserved to it by the Treaty and that subsequent conveyances between 1795 and 1846, reducing the Oneida’s land to its present 32-acre reservation, are null and void.

The Oneida Nation’s action was one of the first Trade and Nonintercourse Act claims and has established a number of legal precedents for eastern land claim cases. In *Oneida Indian Nation of New York v. County of Oneida*⁷⁰ (“Oneida II”), the Supreme Court ruled that the Nation’s claim presents a viable federal question.⁷¹ In *County of Oneida v. Oneida Indian Nation*⁷² (“Oneida III”), the Court found, in the Nation’s test case, that the Trade and Nonintercourse Act was violated by one of the conveyances being challenged.⁷³

In recent years, however, after many years of settlement efforts, the Oneida Nation’s claims—and other tribe’s claims in New York—have suffered setbacks due, primarily, to the Supreme Court’s decision in *City of Sherrill v. Oneida Indian Nation of New York*,⁷⁴ a case involving lands purchased by the Oneida Indian Nation within its land claim area that the Nation argued were immune from local real property taxes. In *City of Sherrill*, the Supreme Court held that equitable doctrines and defenses such as laches, acquiescence, and impossibility barred the Nation’s claim. Immediately

67. 25 U.S.C. § 465 (2006).

68. *Iroquois Land Claims*, *supra* n. 38, at 24–25.

69. *Oneida Indian Nation of N.Y. v. Co. of Oneida*, No. 70-CV-35 (N.D.N.Y. filed 1970).

70. 414 U.S. 661 (1974) [hereinafter *Oneida II*].

71. *Id.* at 675–76.

72. 470 U.S. 226 (1985) [hereinafter *Oneida III*].

73. *Id.* at 229–30.

74. *See generally* 544 U.S. 197 (2005).

thereafter, defendants in other pending Indian land claims throughout the State seized on this holding and filed motions seeking summary dismissal of tribal land claim actions based upon equitable defenses.

The effect of *City of Sherrill* on New York land claim actions was first felt when the Second Circuit applied *Sherrill* to the Cayuga Nation's claims.⁷⁵ In *Cayuga*, the Second Circuit reversed its prior decision awarding the Nation over \$240 million in damages against the State based upon the equitable principles of laches.

With respect to the Oneida Nation's own land claim action, the State and counties predictably moved for dismissal as well based upon *Sherrill*. In 2007, the district court applied *Cayuga v. Pataki* and held that the Oneida's possessory land claim was barred by laches and that the Nation would be limited to money damages based upon a contract claim theory.⁷⁶ The Oneida Nation has appealed the ruling and the case is now before the Second Circuit.

2. Cayuga Nation Claims

In 1980, the Cayuga Nation filed a federal court action in which it seeks to recover approximately 64,000 acres of land that the Nation alleges was taken illegally under the Trade and Nonintercourse Act.⁷⁷ The Nation is arguing that conveyances made in 1795 and 1807 whereby the Nation lost all of its lands were null and void.

In prior decisions by the federal district court the court ruled that the 1795 and 1807 Treaties with the State of New York were not ratified as required under the Trade and Nonintercourse Act and that various defenses asserted by the State and other parties (laches, acquiescence and impossibility) could not bar the Nation's claims.

However, as noted above, after *City of Sherrill* was decided, the Second Circuit in *Cayuga v. Pataki*, reversed its prior decision awarding the Nation over \$240 million in damages against the State based upon the equitable principles of laches.⁷⁸

The Cayuga Nation's case has been remanded to the district court to determine the amount of damages.

3. St. Regis Mohawk Claims

The St. Regis Mohawk Tribe is seeking to recover approximately 12,000 acres of land illegally conveyed to the State of New York in violation of the Trade and Nonintercourse Act.⁷⁹ The Tribe is arguing that conveyances between 1816 and 1845 with New York State and private parties are null and void as violating the Trade and Nonintercourse Act.

In 2001, the federal district court ruled that a variety of defenses: sovereign immunity, failure to state a claim for relief, standing, laches, res judicata, and collateral

75. *Pataki*, 413 F.3d at 268.

76. *Oneida Indian Nation v. N. Y.*, 500 F. Supp. 2d 128, 133 (N.D.N.Y. 2007).

77. *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627, 629-630 (N.D.N.Y. 1981) (mem.).

78. *Pataki*, 413 F.3d at 278.

79. *See Canadian St. Regis Band of Mohawk Indians v. N.Y.*, 146 F. Supp. 2d 170, 174-175 (N.D.N.Y. 2001).

estoppel were not applicable and did not bar the Tribe's action.⁸⁰

After the *City of Sherrill* and *Cayuga v. Pataki* decisions, the State and the local parties moved for judgment on the pleading and the motion is currently pending.

4. Onondaga Nation Claims

The Onondaga Nation filed a federal court action in 2005 against the State of New York and other parties seeking to recover a large tract of land in central New York as its aboriginal territory. The Nation's Complaint identifies this area as a 40-mile swath of land running from the St. Lawrence River and edge of Lake Ontario in the north to the New York-Pennsylvania border in the south. The area encompasses all of the City of Syracuse, N.Y.⁸¹ The Nation contends that "treaties" entered into in 1788, 1790, 1793, 1795, 1817, and 1822 agreements with New York State were invalid since they were not ratified under the Trade and Nonintercourse Act of 1790.

The Onondagas action seeks a declaration that the agreements were unapproved and invalid and seeks the return of all of the lands lost by the illegal sales. The State and local parties have moved for dismissal based upon *City of Sherrill* and *Cayuga Indian Nation v. Pataki*.

5. Seneca Nation Land Claims

The Seneca Nation and Tonawanda Band have also filed land claims action against New York seeking recovery of two areas of its former reservation lands taken unlawfully under the Trade and Intercourse Act.⁸² In 1985, they sought return of 50 acres of state-owned lands on Cuba Lake in Alleghany and Cattaraugus Counties. In 1993, they sought return of over 40 islands on the Niagara River containing over 19,000 acres that they claimed were illegally taken in an 1815 agreement with the State of New York.

Both cases have been resolved. In the Grand Island case, the Second Circuit, in 2004, affirmed the district court's finding that the Islands were not lands protected by the Trade and Intercourse Act.⁸³ The Cuba Lake action was settled out of court and the Nation has taken title to the lands in question.

B. Fee to Trust Applications

A final category of Indian Country in the Northeast is land that tribes in New York and New England are seeking to add to their reservations under the "fee to trust" process.⁸⁴ This is being done in two ways: under provisions of Settlement Acts that identify specific areas of land that tribes may add to their original reservations under the Section 5 process; or by making application directly under Section 5 of the IRA itself that provides a process for all tribes to acquire trust lands.

80. See *id.* at 174.

81. Onondaga Complaint, *Onondaga Nation v. N.Y.*, No. 05-CV-314 at 6-7.

82. E.g. *Seneca Nation v. N.Y.*, 93-CV-0688 (W.D.N.Y. filed 1993).

83. See *Seneca Nation*, 382 F.3d at 249.

84. The federal statute under which lands may be taken into trust is Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Regulations implementing Section 5 are at 25 .C.F.R. 151 (2009).

1. Trust Acquisition under Settlement Act Provisions

A common provision in congressionally approved land claim settlement acts between 1978 and 1994 permits the tribes to obtain lands to add to its initial reservation, without challenge by the State or local governments, so long as the lands are located within a pre-determined area or under certain other conditions.

For example, the Maine Settlement Act provides that

[t]he first 150,000 acres of land or natural resources acquired for the Passamaquoddy Tribe and the first 150,000 acres acquired for the Penobscot Nation *within the area described in the Maine Implementing Act* as eligible to be included within the Passamaquoddy Indian Territory and the Penobscot Indian Territory shall be held in trust by the United States for the benefit of the respective tribe or nation.⁸⁵

The Connecticut Settlement Act establishing the Mashantucket Pequot Indian Reservation provides a settlement trust fund of “[n]ot less than \$600,000 . . . for the acquisition by the Secretary of *private settlement lands*.”⁸⁶ Under the Settlement Agreement between the Pequot Tribe and the State, the parties agreed to a map showing the outline of the private settlement lands.

The Massachusetts Indian Land Claim Act for the Wampanoag Tribe authorizes the Secretary of Interior “to expend, at the request of the Wampanoag Tribal Council of Gay Head, Inc., \$2,125,000 to acquire *the private settlement lands*.”⁸⁷

The 1994 Mohegan Land Claim Settlement Act contains a very specific provision relating to acquisition of additional lands. Settlement lands were identified for future acquisition by the Tribe on Exhibits to a separate agreement with the State. The Settlement Act provides that

[s]ubject to the environmental requirements that apply to land acquisitions covered under part 151 of title 25, Code of Federal Regulations (or any subsequent similar regulation), the Secretary shall take such action as may be necessary to facilitate the conveyance to the United States of title to lands described in exhibits A and B of the State Agreement. Such lands shall be held by the United States in trust for the use and benefit of the Mohegan Tribe as the initial Indian reservation of the Mohegan Tribe.”⁸⁸

Under such settlement act provisions, New England tribes have obtained lands within their settlement areas with little controversy will undoubtedly continue to add lands to their initial reservations.

One New York Tribe, the Seneca Nation, also has a settlement act under which it is able to acquire lands to add to its reservation base as Indian Country.

This Act, the Seneca Nation Land Claim Settlement Act of 1990,⁸⁹ resolved a long-standing controversy between the Nation and persons residing within the City of Salamanca, New York who had entered into long terms leases (99 years) with the Nation, on Seneca tribal lands. Under the Settlement Act, the Nation has the ability to

85. 25 U.S.C. § 1724(d) (2006) (emphasis added).

86. *Id.* at § 1754(b) (emphasis added).

87. *Id.* at § 1771d(a) (emphasis added).

88. *Id.* at § 1775c(a).

89. Pub. L. No. 101-503, 104 Stat. 1292 (1990) (codified at 25 U.S.C. §§ 1774–1774h (2006)).

acquire new lands through a trust land application process.⁹⁰

The Seneca Settlement Act provides that that “[l]and within [the Seneca’s] aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation” with settlement act funds under a specific process wherein the Nation provides notification to the Secretary of the Interior and the State and local governments have an opportunity to comment.⁹¹ Under this process, unless the Secretary determines “that such lands should not be subject to the provisions of [the Trade and Nonintercourse Act] such lands shall be subject to the provisions of that Act and shall be held in restricted fee status by the Seneca Nation.”⁹²

The Seneca Nation’s acquisition of land under this provision has generated some controversy. The Nation recently sought to have lands taken into trust under the Settlement Act for a tribal casino in Buffalo, New York. An anti-gaming citizens group brought an action in federal court challenging the action,⁹³ and the U.S. District Court in Western New York ruled that the lands constituted “Indian Country” but not “Indian lands” upon which the Tribe could conduct gaming under the Indian Gaming Regulatory Act.⁹⁴

2. Trust Acquisition under Section 5 of the IRA

A final category of Indian Country lands are lands that tribes in the Northeast might acquire under Section 5 of the Indian Reorganization Act that provides a process for all tribes in general to acquire trust lands. Northeast tribes’ efforts to acquire land under this statutory provision have also generated controversy. In particular, efforts by the Narragansett Tribe and the Oneida Nation have resulted in federal court litigation.

The Narragansett Tribe is using Section 5 to acquire lands outside of its private settlement area—a 31-acre parcel adjacent to the settlement lands for use to build low-income Indian Housing.⁹⁵ The State of Rhode Island filed an action challenging the Secretary’s decision.⁹⁶

In 2007, the First Circuit ruled in favor of the Secretary rejecting the State’s claims: (1) that the provisions of the IRA do not apply to tribes, such as the Narragansett Tribe that were not federally recognized on its date of enactment in 1934; (2) that the Tribe can only take lands into trust within the areas specified under its Settlement Act; (3) that Section 5 is unconstitutional; and (4) that the Secretary’s decision, for a variety of reasons, was arbitrary and capricious under the APA.⁹⁷

The State sought certiorari on three questions: (1) Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934; (2) whether an act of Congress that extinguishes aboriginal

90. 25 U.S.C. § 1774f(c).

91. *Id.*

92. *Id.* (footnote omitted).

93. *Citizens against Casino Gambling*, 2008 WL 2746566 at *1

94. *See id.* at **13–15.

95. *Carcieri*, 497 F.3d at 23–24.

96. *Carcieri v. Norton*, 290 F. Supp. 2d 167, 169 (D.R.I. 2003).

97. *See Carcieri v. Norton*, 398 F.3d 22, 44–45 (1st Cir. 2005).

title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there; and (3) whether providing land “for Indians” in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust. In February, 2008 the Court granted certiorari on questions 1 and 2 of the State’s petition.⁹⁸ The parties are currently briefing the case and argument should be heard this fall term. The Court’s decision will be significant for New England tribes and their ability to expand their reservations.

The Oneida Indian Nation is also seeking to acquire lands under Section 5 and in 2008 file an application to acquire approximately 17,370 acres of land within the Nation’s land claim area in Madison and Oneida Counties. This was done, in fact, in direct response to the Supreme Court’s decision in *City of Sherrill* wherein the Court stated that the “proper avenue” for the Nation to “reestablish sovereign authority” over its former reservation lands was to make application under Section 5 of the IRA.⁹⁹

On May 20, 2008, the Secretary approved the Nation’s application to take approximately 13,086 acres into trust.¹⁰⁰ The Record of Decision states that the Department’s final determination was reached based on [its] analysis . . . under Section 5 of the IRA (25 U.S.C. § 465) and the land acquisition regulations at 25 C.F.R. 151, and based on its review of the Draft EIS, Final EIS, administrative record, and comments received from the public, Federal agencies, State agencies, local governmental entities, and potentially affected Indian [tribes].¹⁰¹ At least five federal court actions have been filed challenging the Secretary’s decision.¹⁰² The actions challenge the Secretary’s decision on a variety of grounds including, but not limited to: (1) Section 5 is an unconstitutional delegation of authority of legislative authority to the Secretary; (2) Section 5 violates the Tenth Amendment to the Constitution; (3) Section 5 applies only to Tribes recognized in 1934; (4) the decision violates the due process rights of the affected State and local governments and landowners; and (5) the Secretary did not follow the criteria under 25 C.F.R. 151.

C. Trust Application of the Mashpee Wampanoag Tribe

One federally recognized tribe, the Mashpee Wampanoag Tribe, located in the Town of Mashpee Massachusetts, obtained federal recognition very recently—on February 15, 2007 and has no reservation lands. Currently, the Mashpee Tribe is in process of acquiring lands for its reservation under Section 5 through a trust application submitted to the Secretary of the Interior.

98. *Carcieri v. Kempthorne*, 128 S. Ct 1443 (2008).

99. *City of Sherrill*, 544 U.S. at 220–21.

100. See U.S. Dept. of Int., *Record of Decision: Oneida Indian Nation of New York Fee to Trust Request* (May 20, 2008) (available at [http://www.oneidanationtrust.com/downloadfiles/ROD/Final%20Oneida%20ROD%2005-20-08%20\(2\).pdf](http://www.oneidanationtrust.com/downloadfiles/ROD/Final%20Oneida%20ROD%2005-20-08%20(2).pdf)).

101. *Id.* at 7.

102. *N.Y. v. Kempthorne*, No. 08-644 (N.D.N.Y. filed June 19, 2008); *City of Oneida v. Kempthorne*, No. 08-648 (N.D.N.Y. filed June 19, 2008); *Town of Verona v. Kempthorne*, No. 08-647 (N.D.N.Y. filed June 19, 2008); *C. N.Y. Fair Bus. Assn. v. Kempthorne*, No. 08-660 (N.D.N.Y. filed June 21, 2008); *Niagara Mohawk Power Corp. v. Kempthorne*, No. 08-649 (N.D.N.Y. filed June 20, 2008).

V. CONCLUSION

Contrary to what some people might believe Indian Country does exist in the Northeast. In New York, it consists of relatively small reservations created by federal treaties in the late 1700s. In New England, it consists of Indian reservations established through federal land claim settlement acts.

Through provisions in land claim settlement acts and through Section 5 of the IRA, Northeast tribes are seeking to expand their reservations. The settlement acts of tribes in New England have a process for adding reservation lands within a defined settlement area. Tribes have also recently applied under Section 5 of the IRA to add trust lands to their reservations. Most notably two tribes, the Narragansett Tribe and the Oneida Indian Nation have applied under Section 5 and their applications are being challenged. The outcome of these challenges may tell a lot about the future of Indian Country in the Northeast. A decision favoring the State of Rhode Island in *Carciere* may limit the ability of New England tribes to expand their land bases. A decision in favor of New York State and others challenging the Oneida application may limit the ability of the New York tribes to recover their former reservation lands. But, of course, we will have to await the resolution of these cases.

