California Western Law Review

Volume 22 | Number 2 Article 8

1986

Implications of Summa Corporation on the Property Rights of the Eastern American Indians

Paul E. Lacy

NOTE

Implications of *Summa Corporation* on the Property Rights of the Eastern American Indians

INTRODUCTION

In the past two decades, various tribes of American Indians have attempted to assert their claims to vast expanses of property in the eastern United States.[1] These cases have received conflicting treatment in the lower federal courts. The United States Supreme Court has, thus far, avoided settling the conflicts.[2] *Summa Corporation v. California ex rel. State Lands Commission*[3] gives guidance to the denouement of the problem in the context of a different federal statute.

The property which the Indians claim was alienated in violation of the federal Non-Intercourse Act,[4] is currently in the possession of non-Indians. Indians attempted to release much of it in the nineteenth century through private sales and treaties with various states. Most likely, such transactions were conducted by relatively unsophisticated and impoverished peoples who primarily focused upon the momentary income, and relied heavily upon the honesty and good faith of the white man. Today, more learned, the Indians realize the vast wealth which had been wrested from them.

The problem, for the courts, has been to assess the property rights of a class of people protected by federal statute, the Non-Intercourse Act, and to weigh those rights against the rights of the current owners of the fee. This Note develops the parallels between the Indians' claims and the determination of the property rights disputed in *Summa Corp.*, to show that the United States Supreme Court has already effectively settled the legal controversy to the benefit of the Indians. However, to pronounce such a decision would be catastrophic to the individuals currently holding title to the land. It would effectively rescind the fee title currently held by

1. This Note does not purport to be an exhaustive history of Indian property rights. That subject is thoroughly treated by the pre-eminent authority: F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.).

2. *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir.), *cert. denied*, 452 U.S. 968 (1980).

3. Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984).

4. *See infra* notes 51-54 and accompanying text.

the non-Indians, and return possession to the Indians. Further, such actions would not be isolated happenings, but could involve vast tracts of land.[5] Thus the final determination may result more from the realm of sociological jurisprudence, than from strict legal analysis.

The first part of this Note presents the factual situation, litigation, and resolution of rights by the United States Supreme Court in *Summa Corp.* Part II examines the history of eastern American Indian claims and their current status. Part III develops the relationship between those claims and *Summa Corp.* Finally, Part IV presents the rationale for the expected course of the United States Supreme Court with respect to the Indians' rights, and briefly discusses the implications of the predicted United States Supreme Court decision.

I. *Summa Corp.*

A. The Facts and History of the Litigation

The decision in *Summa Corp.* well represents the stance of the United States Supreme Court. The case was decided under an unanimous opinion written by Justice Rehnquist[6] and, therefore, provides excellent guidelines for future decisions by the Court.

The case concerns a controversy over the existence of the state's interest in certain tidelands[7] under the public trust doctrine.[8] The lands involved are part of what was originally a tract of approxi-

---

5. *See infra* notes 171-74 and accompanying text.

6. However, Justice Marshall did not participate in either the consideration or decision of this case. *Summa Corp.*, 466 U.S. at 209.

7. *Id.* at 200.

8. The public trust doctrine is amply explained in Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971), as follows:

> Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [Citations omitted.] The public has the same rights in and to tidelands.
>
> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citation omitted.] There is a growing public recognition that one of the most important public uses of the tidelands–a use encompassed within the tidelands trust–is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

Id.

mately 14,000 acres called Rancho Ballona.[9] It is located in the Marina del Rey section of Los Angeles,[10] and its western boundary is the Pacific Ocean.[11] Within the tract is the Ballona Lagoon which is separated from the ocean by motor-driven tide control gates.[12]

The City of Los Angeles filed suit in 1965 seeking to quiet title to the property in themselves and asking for declaratory relief.[13] The State of California was listed as a nominal defendant, although actually the city and the state were on the same side of the litigation.[14] The city asserted that it had a superior claim to the property under the public trust doctrine.[15] This doctrine establishes the right of the state to an easement in tidelands for the public purpose.[16] The city claimed to be the successor in interest to that easement.[17]

The defendant, Summa Corporation, derives its title from an 1839 grant of the property to Mexican landowners by the Mexican Governor of California.[18] Mexico lost its rights to southern California through the Mexican War. However, the Treaty of Guadalupe Hidalgo,[19] which was made pursuant to the completion of the Mexican War, promised to recognize the Mexican land titles. In order to implement this promise, Congress passed an Act in 1851 which required hearings and the issuance of federal patents to establish and settle all claims to the land ceded from Mexico.[20] The Mexican owners of Rancho Ballona complied and eventually were granted a patent to the land in 1873.[21] The defendant, Summa Corporation, asserted the superiority of the federal patent.[22] It claimed that even if California did have an easement in the tidelands under the public trust doctrine, such rights were extinguished by the patent, which made no reservation of such rights.[23] Summa Corporation also as-

9. *Summa Corp.*, 466 U.S. at 202 n.2.

10. City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 291, 644 P.2d 792, 794, 182 Cal. Rptr. 599, 601 (1982). This decision is the pronouncement of the Supreme Court of California which led to *Summa Corp.*

11. *Id.* at 295, 644 P.2d at 795, 182 Cal. Rptr. at 602.

12. *Id.* at 294, 644 P.2d at 794, 182 Cal. Rptr. at 601.

13. City of Los Angeles v. Venice Peninsula Properties, 117 Cal. App. 3d 335, 339, 172 Cal. Rptr. 619, 622 (1981).

14. *Id.* at 340, 172 Cal. Rptr. at 622.

15. *Id.*

16. *See supra* note 8.

17. *Summa Corp.*, 466 U.S. at 200. It's rationale was that California "had acquired an interest in the lagoon . . . upon its admission to the Union, . . . and that it had granted this interest to the City of Los Angeles." *Id.*

18. *Id.* at 202.

19. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, May 30, 1848, United States–Mexico, 9 Stat. 922.

20. Act of Mar. 3, 1851, 9 Stat. 631, 633.

21. *Summa Corp.*, 466 U.S. at 204.

22. *Id.* at 200.

23. *Id.* Summa Corporation asserted two other theories: first, that the land had

serted that the patent was derived from Mexican title, and that Mexico had no similar public trust doctrine and, thus, the property was never held subject to an easement in the tidelands.[24]

The Los Angeles County Superior Court rendered judgment for the state and the city.[25] That court held that there existed a public trust easement, and it was not necessary that the owners of the fee be compensated for any use pursuant to that easement.[26] The court held this to be true even though Summa Corporation would be the holder of nothing but the naked fee.

On appeal, the California Court of Appeal for the Second District reversed the decision of the superior court.[27] It limited the scope of the public trust doctrine. The appellate court reasoned that the state's public trust easement only applied to those lands to which California acquired title upon admission as a state.[28] That court held that the Rancho Ballona was not subject to an easement since the state never acquired title.[29] The claim of title was based in the Mexican land grant followed by the federal patent and, thus, title never devolved to California. The court held that even if the Mexican grant had included an easement in the tidelands, such easement was extinguished by the patent proceedings.[30]

The Supreme Court of California vacated the decision of the appellate court, holding that the land was subject to a public trust easement.[31] That court held that the Mexican government had reserved an easement similar to the public trust doctrine concerning tidelands.[32] Further, they stated that the tidelands easement passed to the United States government even though the fee title did not.[33] Finally, the Supreme Court of California concluded that the tidelands held in public trust are not "a normal incident of title",[34] and the issuance of a federal patent did not transfer the easement to the private citizens, patent grantees.[35]

---

never been tideland; and second, that Mexican law did not recognize the existence of any such public trust in tidelands. *Id.*

24. *Id.*

25. *Venice*, 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982).

26. *Venice*, 117 Cal. App. 3d 335, 340, 172 Cal. Rptr. 619, 622 (1981).

27. *Id.* at 347, 172 Cal. Rptr. at 626.

28. *Id.* at 345, 172 Cal. Rptr. at 625.

29. *Id.*

30. *Id.* This was the holding of the United States Supreme Court as well. *Summa Corp.*, 466 U.S. at 200-01.

31. "It follows from what we have said that the federal government retained an interest in the tidelands in question when it issued the patent to defendants' predecessors, and that this interest was acquired by California upon its admission to statehood." *Venice*, 31 Cal. 3d at 302, 644 P.2d at 801, 182 Cal. Rptr. at 608.

32. *Id.* at 297, 644 P.2d at 797-98, 182 Cal. Rptr. at 604-05.

33. *Id.* at 298-99, 644 P.2d at 798, 182 Cal. Rptr. at 604-05.

34. *Id.* at 302, 644 P.2d at 801, 182 Cal. Rptr. at 608.

35. *Id.*

The United States Supreme Court granted certiorari, basing its jurisdiction upon "the need to determine whether the provisions of the 1851 Act operate to preclude California from now asserting its public trust easement."[36] The United States Supreme Court reversed the decision of the Supreme Court of California.[37] It held that *all* claims to the land, existing at the time of the Treaty of Guadalupe Hidalgo, were settled by the patent hearing pursuant to the Act of 1851.[38]

B. The United States Supreme Court's Analysis of Summa Corp.

The basis for the decision of the United States Supreme Court was that the Mexican landowners were a protected class of people.[39] This status was granted them by the Treaty of Guadalupe Hidalgo,[40] the purpose of which was "to protect the property rights of Mexican landowners."[41] The Court stated that these protections were to be accomplished by the provisions of the Act of March 3, 1851.[42] This Act established the patent procedures which would grant title to the Mexican landowners.[43]

The patent which was issued for the Rancho Ballona did not expressly reserve any public trust interest such as a tidelands easement. The state argued that "as a 'practice' it did not participate in confirmation proceedings under the 1851 Act,"[44] and thus retained its property interest. The Court, however, denied the validity of that statement, indicating that the state had participated in a similar proceeding involving a ranch near the Rancho Ballona.[45] The Court phrased the issue before it as "whether a property interest so substantially in derogation of the fee . . . can survive the patent proceedings conducted pursuant to the statute implementing the Treaty of Guadalupe Hidalgo."[46]

The United States Supreme Court concluded that such a claim must be timely asserted by the state in order to survive the patent proceedings.[47] Therefore, *Summa Corp.* represents the principle

36. *Summa Corp.*, 466 U.S. at 201 n.1.
37. *Id.* at 200. The Supreme Court adopted the reasoning of the California Court of Appeal. *Venice*, 117 Cal. App. 3d at 340, 172 Cal. Rptr. at 622.
38. *Summa Corp.*, 466 U.S. at 200-01.
39. *Id.* at 202.
40. 9 Stat. 922.
41. *Summa Corp.*, 466 U.S. at 202.
42. 9 Stat. 631.
43. *Id.*
44. *Summa Corp.*, 466 U.S. at 204 n.3.
45. *Id.*
46. *Id.* at 205.
47. *Id.* at 207.

that the real property rights of a class of people protected by treaty and federal statute are paramount to the belated claims of the state.

II. The Real Property Rights of the Eastern American Indians

It would not be proper to begin such a discussion without understanding the nature of the Indians' title. Indian title to land is a unique entity in the law. It is *not* the fee simple title most common to property.[48] In fact, the fee is said to lie in the United States.[49] Indian title is the right to possession of the land.[50] Therefore, all of the cases claim only that possession has been wrongfully withheld from the tribe.

The titles claimed derive from two primary sources. First, the Indians may claim the land because they had aboriginal title, recognized by the federal government and never extinguished. Second, the land may have been granted by the federal government as a partial replacement for their aboriginal lands. The differing sources of "Indian title" have not played a major role in the litigation.

A. The Non-Intercourse Act[51]

The rights of Indians have been a concern of Congress since the First Congress passed the original version of the Trade and Intercourse Act.[52] This initial enactment expressly required congressional authorization for any dealings with Indians. This authority has been interpreted as: 1) participation by authorized officials of the federal government in transactions other than land, and 2) congressional ratification of dealings in property of Indian tribes.[53] The land claims of the Indian tribes are based upon the proscriptions of a particular section of the Trade and Intercourse Act. That section is called the Non-Intercourse Act. The Non-Intercourse Act reached its final form in 1834, and is currently codified in Title 25 of the United States Code.[54] Although the Non-Intercourse Act

48. Oneida Indian Nation of N.Y. v. New York, 691 F.2d 1070, 1075 (2d Cir. 1982).
49. *Id.*
50. *Id.*
51. 25 U.S.C. § 177 (1982).
52. Trade and Intercourse Act of 1790, 1 Stat. 137.
53. *See infra* notes 109-19 and accompanying text.
54. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable

is a simple paragraph which succinctly presents the limitations on land transactions with the Indian tribes, its application has become quite complex.

The litigation involving claims under the Non-Intercourse Act has primarily centered in the eastern United States. This may be due, in part, to the westward displacement of the Indian tribes by a more powerful and sophisticated government. By removing the Indians from their aboriginal lands, the government controlled any and all subsequent title to land. The discussion in this Note will concern the litigation of the Indian tribes in the eastern United States, where their claims are more closely tied to their aboriginal lands.

The first limitation which has been placed upon the Non-Intercourse Act by judicial interpretation is the necessity of tribal status. The original Non-Intercourse Act expressly stated that it was applicable to "any Indians, or any nation or tribe of Indians within the United States."[55] Some sections of the current Trade and Intercourse Act still contain provisions for individual Indians,[56] but the Non-Intercourse Act does not.

Given the necessity for tribal status under the Non-Intercourse Act, the problem becomes one of definition: What constitutes a "tribe"? Federal recognition of a tribe or nation of Indians has been held sufficient,[57] but such recognition is not necessary.

In *Passamaquoddy v. Morton*,[58] a tribe, not federally recognized, was held to have standing to sue, by the First Circuit Court of Appeals, affirming the judgment of the District Court of the Northern District of Maine. In that case, the Indians claimed title to 23,000 acres granted them by treaty in 1794.[59] The dispute alleged that "Maine and Massachusetts have sold, leased for 999 years, given easements on, or permitted flooding of approximately 6,000 [of those] acres."[60] The defense raised against the Passamaquoddies

---

to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177 (1982).

55. 1 Stat. 137, 138.

56. The Trade and Intercourse Act governs many transactions with Indians other than just the alienation of real property.

57. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

58. *Id.*

59. *Id.* at 372.

60. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 652 (D. Me. 1975).

was that they were not a federally recognized tribe.[61] Their contacts with, and assistance from the State of Maine were extensive,[62] whereas the federal government was only minimally involved,[63] and had, on several occasions, rejected requests for monies.[64] The circuit court held that even absent a "trust relationship" with the federal government, there could be standing to bring suit.[65] The court said that in order to remove the protection afforded tribes, Congress would have to do so in "plain and unambiguous" language.[66] Here, there was no question that the Passamaquoddies were a tribe within the ordinary meaning of the word.[67]

The First Circuit addressed the issue of defining tribal status four years later, in *Mashpee Tribe v. New Seabury Corp.*[68] There the court adopted tests developed by the District Court of Massachusetts[69] and held that the Mashpees had no standing as a tribe.[70]

Mashpee involved a loosely and intermittently organized group of Indians who had not received federal recognition.[71] The history of the Mashpees is presented in great detail by the district court.[72] In 1685 the Plymouth Colony granted certain lands to the Mashpees, this grant forming the basis for their claims.[73] After the Revolutionary War, there was much intermarriage which "had a disintegrating effect" and guardians were appointed by the General Court.[74] In 1834, the General Court created the Mashpee District, virtually self-governing.[75] A system of allotments[76] was developed which precluded sale or transfer.[77] In 1869, the General Court granted citizenship and removed the restraints on alienation of the land.[78] In 1870, the common land was transferred to the newly formed Town of Mashpee.[79] The Mashpees cite these last two acts

61. *Id.* at 656.
62. *Id.* at 652. "[T]he State of Maine has enacted comprehensive legislation which has had a pervasive effect upon all aspects of Passamaquoddy tribal life." *Id.*
63. *Id.*
64. *Passamaquoddy*, 528 F.2d at 375.
65. *Id.*
66. *Id.* at 380.
67. *Id.* at 378.
68. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).
69. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978).
70. *Mashpee*, 592 F.2d at 594.
71. *Id.* at 581.
72. *Mashpee*, 447 F. Supp. at 943-47.
73. *Id.* at 944.
74. *Id.* at 945.
75. *Id.*
76. *Id.*
77. *Id.* "The lands . . . shall have all the incidents of estates in fee, *except* the right of transfer, conveyance or devise to other than a [qualifying Mashpee]. . . ." *Id.* (quoting the 1842 Act of the General Court) (emphasis added).
78. *Id.* at 946.
79. *Id.*

as violations of the Non-Intercourse Act, and ask for rescission of sales of the lands made in order to build highways in the 1950's.[80]

In order to determine whether the Mashpees constituted a tribe, the district court posed a series of questions to the jury.[81] The circuit court affirmed these questions as relating to significant times in the history of the Mashpees, and thus affecting a determination of their tribal existence.[82] The questions posed, concerned an evaluation of tribal status at the following times: 1) the date when the first Non-Intercourse Act was enacted; 2) "[t]he date the District of Mashpee was established;" 3) the date of the land allotment; 4) the date citizenship was granted and restraints on alienation lifted; 5) the date of incorporation of the Town of Mashpee; and 6) the date the suit was filed.[83] Finally, the district court asked the jury to determine, having found the tribe to exist at any of the above times, whether the tribe continuously existed from that date until the time the suit was filed.[84]

The district court, in its charges to the jury, presented guidelines for defining "tribe".[85] The circuit court summarized these instructions as requiring recognized leadership, with a method of succession to provide continuity, and with tribal status being terminated only by "knowing and willing and voluntary" abandonment by the tribe itself.[86] The circuit court expressly tried to limit the scope of the holding, and thus its precedential value, by stating that all of these parameters were tested *only* for compliance with the criteria used by the opposing party.[87]

Differing assertions have been made attempting to limit the geographical scope of the Non-Intercourse Act. These were fully developed in a line of cases involving the Mohegan Tribe of Indians.[88]

The property dispute concerned 2500 acres of land in Connecticut.[89] The Mohegans claimed the land as part of their aboriginal territory.[90] Further, the Mohegans claimed that they were in possession of the land at the time of the first Trade and Intercourse Act in 1790,[91] and that their current claims were still valid since no

80. *Id.*
81. *Id.* at 943.
82. *Mashpee*, 592 F.2d 575, 579-80.
83. *Id.* at 579.
84. *Id.* at 580.
85. *Id.* at 582-84, 586.
86. *Id.* at 587.
87. *Id.*
88. Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1981); Mohegan Tribe v. Connecticut, 528 F. Supp. 1359 (D. Conn. 1982); Mohegan Tribe v. Connecticut, 483 F. Supp. 597 (D. Conn. 1980).
89. *Mohegan*, 638 F.2d at 614.
90. *Mohegan*, 528 F. Supp. at 1361.
91. *Mohegan*, 483 F. Supp. at 598.

treaty was ever made with them.[92] At the time of the suit, the land was owned by the State of Connecticut.[93]

Connecticut filed a preliminary motion to dismiss based on the claim that the Non-Intercourse Act was inapplicable to Connecticut.[94] This claim was denied by the United States District Court for the District of Connecticut,[95] and that denial was affirmed by the United States Court of Appeals, Second Circuit.[96] Connecticut presented two alternative rationales to explain the geographical inapplicability of the Non-Intercourse Act. Both were amply discussed and denied by the courts.

First, Connecticut attempted to limit the scope of the Non-Intercourse Act to Indian tribes situated in "Indian Country." "Indian Country" was defined in the 1834 Act as that land west of the Mississippi River which was not part of any state.[97] Although some sections of the Trade and Intercourse Act were expressly limited to Indian Country, the district court reasoned that since there were specific references to Indian Country in some sections, Congress intended to limit only certain sections to Indian Country.[98] The court concluded, the sections which did not refer to Indian Country were applicable generally.[99] This reasoning was subsequently supported by the court of appeals.[100]

Connecticut also asserted that Congress intended the Non-Intercourse Act to be inapplicable to Indians surrounded by settlements.[101] This constraint had been expressly stated in earlier versions of the Trade and Intercourse Act,[102] but was excluded from the 1834 Act and is not a part of the current version.[103] The district court reasoned that the "surrounded by settlements" exception pertained only to transactions with individual Indians.[104] Although the court of appeals disagreed with this analysis,[105] it arrived at the same result[106] by holding that the " 'surrounded by settlements' exception was not meant to apply to land transactions at

92. *Id.*
93. *Id.* at 597.
94. *Id.* at 598.
95. *Id.* at 608.
96. 638 F.2d at 628.
97. 4 Stat. 729.
98. *Mohegan*, 483 F. Supp. at 600.
99. *Id.*
100. *Mohegan*, 638 F.2d at 620.
101. *Id.* at 618.
102. *Id.*
103. *Id.*
104. *Mohegan*, 483 F. Supp. at 599 n.9.
105. *Mohegan*, 638 F.2d at 626.
106. *Id.* at 627.

all."[107]

The Non-Intercourse Act does *not* prohibit transfer of lands by Indian tribes; nor does it nullify such transactions. For such transactions to successfully extinguish Indian title, however, the federal government must consent to such transactions.[108] Arguably, the most direct method of federal consent is congressional ratification of a treaty with the particular tribe.

In the recent case of *Catawba Indian Tribe of South Carolina v. State of South Carolina*,[109] South Carolina asserted that legislative history indicated congressional intent to ratify a treaty between the Catawbas and the state, [110] even though the legislation, as enacted, did not expressly state such a proposition.[111] The Catawbas claimed Indian title to 144,000 acres granted them by treaties in 1760 and 1763.[112] In 1840, the Treaty of Nation Ford was entered into by the Catawbas and the state, and purported to transfer its 144,000 acres to the state.[113] At the time, the federal government was not involved.[114] However, in 1959 Congress enacted the Catawba Indian Tribe Division of Assets Act,[115] and it was upon this legislation that the State based its claim of federal involvement.[116]

The United States District Court for the District of South Carolina granted summary judgment to the state.[117] However, the decision was reversed by the United States Court of Appeals for the Fourth Circuit and remanded to the district court.[118] The Fourth Circuit, held, *inter alia*, that the Catawba Indian Tribe Division of Assets Act did not ratify the 1840 Treaty of Nation Ford.[119]

B. Other Affirmative Defenses

There are several other affirmative defenses which have been asserted against the Indians' claims to land. These defenses do not concern application of the Non-Intercourse Act directly. Rather, they question the right to bring suit, either due to the status of the parties or due to the lapse of time since the right of action arose.

---

107. *Id.*
108. Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 669-70 (1974).
109. 718 F.2d 1291 (4th Cir. 1983).
110. *Id.* at 1294.
111. *Id.* at 1294 n.6.
112. *Id.* at 1294.
113. *Id.*
114. *Id.*
115. 25 U.S.C. §§ 931-38 (1982).
116. Catawba Indian Tribe of S.C. v. South Carolina, 718 F.2d 1291, 1294 (4th Cir. 1983).
117. *Id.* at 1291.
118. *Id.* at 1301.
119. *Id.* at 1297.

The initial question concerns the existence of federal jurisdiction over the parties and the issues. When the United States was the plaintiff suing on behalf of the Indian tribe there was little problem with jurisdiction over the parties.[120] Federal jurisdiction over the parties has been found to exist for an Indian tribe as plaintiff if the case *could* have been brought originally by the United States on behalf of the tribe. This was one of the issues decided by the United States District Court for the District of Rhode Island in *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*[121] There, the tribe claimed land in the possession of Rhode Island and private individuals and businesses.[122] The tribe, as plaintiff, sought the court's declaration that the United States was not an indispensable party to the action[123] as defined by the Federal Rules of Civil Procedure.[124] The court acknowledged that a judgment on the merits for defendants would still leave a cloud on their title,[125] since the United States would not be bound by the decision[126] and, thus, could bring an action later. The court reasoned, however, that to declare the United States an indispensable party "would effectively deny plaintiff any remedy."[127]

The issue of federal subject matter jurisdiction over Indians' claims to land under the Non-Intercourse Act was effectively laid to rest by the United States Supreme Court in *Oneida*.[128] There the United States Supreme Court said "that the controversy stated in the complaint arises under the federal law."[129] The United States Supreme Court reached that decision without deciding the case on the merits.

The Oneidas brought the suit to recover fair rental value of certain properties in New York State.[130] The Oneidas claimed title from treaties in the late Eighteenth Century,[131] and asserted that cession of the land in 1795 to the state was without the United States consent,[132] a violation of the Non-Intercourse Act.[133] The district court dismissed the action, ruling that the action arose

120. *See* Narragansett Tribe v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 810 (D.R.I. 1976).
121. *Id.* at 798.
122. *Id.* at 802.
123. *Id.* at 809.
124. Fed. R. Civ. P. 19(b).
125. *Narragansett*, 418 F. Supp. at 811.
126. *Id.*
127. *Id.* at 812-13.
128. *Oneida*, 414 U.S. 661 (1974).
129. *Id.* at 678.
130. *Id.* at 661.
131. *Id.*
132. *Id.*
133. *Id.*

under state law.[134] This was affirmed by the court of appeals.[135] Certiorari was granted by the United States Supreme Court, which reversed the decisions below and remanded the case.[136] Certiorari was again granted by the United States Supreme Court.[137] Again, little guidance was given by the Supreme Court, because of the dissents and concurrences following Justice Powell's plurality opinion.[138] Once more, the case was remanded to the court of appeals.[139]

Another affirmative defense, which has been asserted in some of the litigation, is that the suit is barred by the state statute of limitations. In the recent Supreme Court decision in *Oneida*, the Court held this defense inapplicable.[140] The Court said that although a state statute of limitations can be applied if there is no federal statute of limitations, to do so for the Indians' claims "would be inconsistent with federal policy."[141]

The doctrine of laches has also been asserted as a bar to the Indians' claims, but it, too, is generally held inapplicable.[142] The doctrine of laches is defined as "neglect to assert [a] right or claim which, taken together with lapse of time and other circumstances causing prejudice to [the] adverse party, operates as [a] bar in [a] court of equity."[143] The courts have generally held this defense inapplicable.[144] The rationale is, that the doctrine of laches is inappli-

---

134. *Id.*
135. *Id.*
136. *Id.* at 662.
137. In fact, certiorari was granted in two cases involving the Oneida Indians. County of Oneida v. Oneida Indian Nation of N.Y., 719 F.2d 525, *cert. granted*, 465 U.S. 1099 (1984); New York v. Oneida Indian Nation of N.Y., 719 F.2d 525, *cert. granted*, 465 U.S. 1099 (1984).
138. County of Oneida v. Oneida Indian Nation of N.Y., 105 S. Ct. 1245 (1985). An excellent description of the diversity of opinions was given in the headnotes to the case in U.S. Law Week:

> POWELL, J., delivered the opinion of the Court, in which BLACKMUN and O'CONNOR, JJ., joined, in all but Part V of which BRENNAN and MARSHALL, JJ., joined, and in Part V of which BURGER, C.J., and WHITE and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined. STEVENS, J., filed a separate statement concurring in the judgment in part, and an opinion dissenting in part, in which BURGER, C.J., and WHITE and REHNQUIST, JJ., joined.

53 U.S.L.W. 4225, 4226 (U.S. 1985).
139. *Oneida*, 105 S. Ct. at 1262.
140. *Id.* at 1255. Although the lower federal courts had held this to be true, this only became settled law by the Supreme Court's latest *Oneida* decision. *See, e.g., Catawba*, 718 F.2d 1291, 1300 (4th Cir. 1983) ("The Nonintercourse Act and the supremacy clause preempt state law defenses, such as adverse possession or statutes of limitation, which might otherwise preclude the Tribe's suit.").
141. *Oneida*, 105 S. Ct. at 1255.
142. *See generally*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, at 508-09 (1982 ed.).
143. BLACK'S LAW DICTIONARY 787 (5th ed. 1979).
144. *Narragansett*, 418 F. Supp. 798.

cable to the United States as sovereign.[145] Thus, if the United States were the plaintiff, suing on behalf of the Indians, the defense could not be asserted.[146] However, if the defense could be asserted against the Indians as plaintiff, then "the government, as trustee for the Indians, [could] achieve a result more beneficial to the Indians than the Indians could, suing on their own behalf."[147] In reviewing the litigation, it becomes apparent that the Indians' title to the land is still an unsettled issue. Although various defenses have been found inapplicable, the merits of the Indians' claims are still primarily unresolved by the courts. It is this diverse treatment by the lower federal courts which begs for resolution by the United States Supreme Court.

The Mashpees were found not to have a cause of action because they had not been recognized as a tribe at critical periods throughout their history and the history of this county.[148] The Passamaquoddys were found to have a cause of action in spite of their lack of specific ties with the federal government.[149] The Mohegans survived dismissal of their suit, but the attack was an interpretation of the Trade and Intercourse Act making it inapplicable east of the Mississippi River.[150] The Schaghticoke Tribe has similarly thus far prevailed, but the decisions were not on the merits of the case, only on the availability of certain defenses.[151]

This list is by no means complete.[152] The decisions have run a long gamut. However, one aspect has been consistent, virtually without exception: that all of the courts have attempted to limit their holdings to the particular facts, the stated defenses, and *not* to tell all of these interested parties where they stand on the merits of their various claims. Decades have passed with no more than innuendo and judicial legerdemain to show for the efforts.

There was a glimmer of hope that the United States Supreme Court might finally assist these various parties. The Oneidas were granted certiorari in a combination of two separate cases.[153] Oral

145. Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 543 (N.D.N.Y. 1977).

146. *Id.*

147. *Id.*

148. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

149. *Passamaquoddy*, 528 F.2d 370.

150. *Mohegan*, 638 F.2d 612.

151. Schaghticoke Tribe of Indians v. Kent School Corp., Inc., 423 F. Supp. 780 (D. Conn. 1976).

152. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 9 (1982 ed.).

153. County of Oneida v. Oneida Indian Nation of N.Y., 719 F.2d 525, *cert. granted*, 465 U.S. 1099 (1984); New York v. Oneida Indian Nation of N.Y., 719 F.2d 525, *cert. granted*, 465 U.S. 1099 (1984).

argument was heard October 1, 1984.[154] However, the Oneidas are no strangers to the Supreme Court. They appeared there before, and the Court merely told them that their claim satisfied the well-pleaded complaint rule[155] and, thus, the action could not be dismissed; nothing more was said.[156] In fact, as oral argument indicated,[157] the Court settled but a single issue, applicable to a single tribe, in a single state.[158]

III. THE RELATIONSHIP BETWEEN *SUMMA CORP.* AND THE INDIANS' CLAIMS

This section will develop the parallels between the facts and analysis in *Summa Corp.* and the facts of the Indians' claims. From these parallels, then, the analysis which should be applied to the Indians' claims becomes apparent.

The initial similarity is in the field of law concerned. Both *Summa Corp.* and the Indians' claim involve determination of the rights and title to real property.

Another similarity is the basis of subject matter jurisdiction in the federal courts. *Summa Corp.* dealt with the interpretation of the Treaty of Guadalupe Hidalgo, and the interpretation of a federal statute, the Act of March 3, 1851, in implementing the goals of the Treaty of Guadalupe Hidalgo.[159] Federal jurisdiction over the Indians' claims is derived from interpretation of the proscriptions of the Non-Intercourse Act.[160] Therefore, both have federal jurisdiction because the action arises under federal statutes.

Further, established procedures exist to determine the property rights. The Act of March 3, 1851, decreed that a patent hearing must be held and a patent issued as a means of final resolution of the property rights of those deriving title from Mexican landowners.[161] The Non-Intercourse Act provided for transfer of property by an Indian tribe *only* if the federal government is involved.[162] Arguably, both of these statutes are clear-cut rules to be applied.

An examination of the purposes behind the two sets of federal statutes provides an additional analogy. In *Summa Corp.*, the United States Supreme Court stated that "[u]nder the terms of the

154. *Oneida*, 105 S. Ct. at 1245.
155. The well-pleaded complaint rule requires that the Indians' claim arise under federal law, and not merely in anticipation of a defense. *Oneida*, 414 U.S. at 666.
156. *Id.* at 685.
157. *Oneida*, 105 S. Ct. 1245 (1985).
158. *See supra* note 40 and accompanying text.
159. *See supra* note 51 and accompanying text.
160. 9 Stat. 631.
161. *See supra* note 54.
162. *Summa Corp.*, 466 U.S. at 202.

Treaty of Guadalupe Hidalgo the United States undertook to protect the property rights of Mexican landowners . . . ."[163] This situation directly parallels that of the Indians. The Indians, and their property, are treated as a class by themselves, being neither full-fledged citizens nor foreigners.[164] Special treatment by the federal government was originally designed to protect a race of peoples deemed more primitive than the conquering Europeans.[165] Those protections are maintained through the efforts of the Bureau of Indian Affairs, and are fully developed under the Trade and Intercourse Act.[166]

A final analogy can be drawn by consideration of the adverse party in the suits. In *Summa Corp.*, the United States Supreme Court held an individual's rights superior to those asserted by the state.[167] This is exactly the situation in much of the litigation concerning the Indians' property rights.[168] Often it is a claim by the Indians against the state.

IV. The Expected Course for the Indians' Claims, and the Implications of a Decision on the Merits

The analogies between the Indians' claims and *Summa Corp.* have just been discussed.[169] The two situations are anything but inapposite. The United States Supreme Court will, arguably, eventually grant certiorari to a case involving Indians' rights and reach a decision on the merits, in order to settle the conflicts in the lower federal courts.[170] This section will discuss the rationale the Indians can anticipate.

The factual analogies between the Indians' claims and *Summa Corp.* should logically permit application of that decision to the property rights of the eastern American Indians. In *Summa Corp.*, federal statutes were held to be paramount to state derived property interests. This issue is identical to that presented by the Indians. *Summa Corp.* held that the rights of the state, not in possession of the property in issue, were extinguished by the federal patent hearing and subsequent issuance of a federal patent, and so could not be asserted at this late date. Therefore, the dictum is that the state's claim is barred by the doctrine of laches. This analysis is a weak

163. *See generally* F. Cohen, Handbook of Federal Indian Law, at 508-09 (1982 ed.).
164. *Id.*
165. *See generally*, F. Cohen, Handbook of Federal Indian Law (1982 ed).
166. *Summa Corp.*, 466 U.S. 198 (1984).
167. *See, e.g., supra* notes 89-107 and accompanying text concerning the Mohegans.
168. *See supra* notes 159-68 and accompanying text.
169. *See supra* notes 48-157 and accompanying text.
170. *See supra* note 137.

point in the application of *Summa Corp.* to the Indians' property claims. However, this dictum of *Summa Corp.* can be distinguished on the basis that the Indians are of a protected class, whereas the State of California in *Summa Corp.* was not. The United States Supreme Court has yet to decide this aspect of the relative merits of the Indians' belated claims. Unless the United States Supreme Court finds this difference to be determinative, its decision should be to uphold the Indians' rights to the land claimed under the Non-Intercourse Act.

The effects of that decision, however, could be felt by many thousands of people. The *Oneida*[171] case recently decided by the United States Supreme Court is, on its face, only affecting a relatively few acres.[172] However, a favorable decision could have opened the way for similar suits covering the western half of the State of New York.[173] The total acreage already litigated involves lands which total more area than the State of West Virginia.[174] For the current holders of the fee, the results could be catastrophic. If the Court finds that Indian title still exists, then the non-Indian holders of the fee would be left without title or right to possession of the land. However, that alone should not deter the United States Supreme Court from providing a resolution of the controversy. A final determination of the rights of all concerned parties is, arguably, preferable to the present situation of uncertain rights for the parties.

Historically, the Indians have not always been treated with kindness and compassion or even fairness and equality. A decision in their favor could possibly go far toward redressing those wrongs. The problem arises in the treatment of the current holders of the fee, under a decision in the Indians' favor. The cases litigated dealt with a right of action which arose one-hundred or even two-hundred years before. Thus, only the predecessors in title, possibly remote, could share any actual responsibility for the original alienation of the land from the Indians. The "lawsuit thus involves a nearly 200-year-old claim, brought by plaintiffs who were not injured, against defendants who did not commit the wrong."[175]

171. Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 9, County of Oneida v. Oneida Indian Nation of N.Y., 105 S. Ct. 1245 (1985) (involved 800-plus acres and $16,000) (copy on file in the offices of the California Western Law Review).

172. *Id.* at 12.

173. Comment, *Indian Land Claims Under the Nonintercourse Act*, 44 ALB. L. REV. 110, 112 n.14 (1979).

174. Brief of the County of Oneida, New York, and the County of Madison, New York, at 9, County of Oneida v. Oneida Indian Nation of N.Y., 105 S. Ct. 1245 (1985) (copy on file in the offices of the California Western Law Review).

175. *See supra* notes 120-57 and accompanying text.

Although the legal question may be resolved, that solution may not be equitable.

CONCLUSION

The Indians are now aware of their rights as a tribe and are attempting to assert those rights to recover land alienated in violation of the Non-Intercourse Act. The Indians' claims have been met by numerous affirmative defenses attacking both the great lapse of time since the right of action arose,[176] as well as the applicability of the Non-Intercourse Act itself. These defenses have received varying treatment by the lower federal courts, thus necessitating guidance from the United States Supreme Court.

Summa Corp. provides the answer to the, as yet unresolved, problem. *Summa Corp.* addressed the property rights of individuals taking title, through mesne conveyances, from Mexican landowners. The Mexican landowners' property rights were protected by the Treaty of Guadalupe Hidalgo and the Act of March 3, 1851. The United States Supreme Court upheld those rights as having already been settled by the issuance of a federal patent, against the claims of the State of California.

The Indians, protected by the Non-Intercourse Act, are asserting their rights to real property alienated in violation of that Act. *Summa Corp.* provides reassurance that the Indians should eventually prevail.

*Paul E. Lacy**

176. *See supra* notes 51-119 and accompanying text.

* I would like to thank my wife, Judith Murphie, for her continuous understanding, support and tolerance throughout both the authorship of this Note, and my tenure as Editor in Chief. Without her, none of this would have ever been possible. I would also like to thank my parents, Paul and Ellen Lacy, for their continued belief in my capabilities.