

THE LEGAL ARGUMENTS IN THE SENECA-CAYUGA TRIBE BINGO HALL CONSTRUCTION CASE

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Rob [Odawi Porter] asked me to describe the arguments in the pending Seneca-Cayuga Tribe case and not to evaluate the arguments; I was pleased to accommodate him on that. It allows me not have to make a decision about the various issues and keep it very short.

As many of you know, the Seneca-Cayuga Tribe of Oklahoma brought a lawsuit in federal court against the Town of Aurelius and some other defendants. That lawsuit, as much as any lawsuit that I know of that has been decided in the past, presents the issue that we are confronted with today and that is: What is the right of people to return, and what kind of jurisdictional controls can they have over the land once they return?

For those of you who are not aware, the lawsuit was brought by the Tribe in Oklahoma and I will refer to the Seneca-Cayugas as the Tribe throughout this talk. The Tribe brought the lawsuit, seeking to prevent the Town from enforcing various local zoning laws, land use laws, and other local laws against the Tribe with respect to 229 acres that were purchased within the Cayuga Indian claim area in New York. Specifically, they were trying to prevent the defendants from enforcing those laws with respect to their efforts to build a bingo facility on that 229 acres. The Tribe moved for what is called a preliminary injunction. For those of you who are not lawyers, that simply means that they tried to get the court at the beginning of the lawsuit to prevent the defendants from enforcing these various local laws during the construction of this facility. New York State joined the lawsuit as a defendant, and with the Town and State made its own request to the court for a preliminary injunction to prevent the building of the facility until completion of the lawsuit. Now you see why it is good I do not have to determine who is going to win this because we have two preliminary injunctions; one asking that the State not enforce its laws, the other asking that the Tribe be enjoined from proceeding with the facility.

As I said, there are many issues in the case, but the one issue that we are concerned with here today focuses on whether the Seneca-Cayuga Tribe can exercise any jurisdictional rights over land in New York that was part of the historic Cayuga Indian Nation Land. I will try

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to describe, as simply as possible, the Tribe's arguments and then the arguments by the State and the municipalities.

The Tribe argues that it can exercise jurisdiction over land within the state and much of the argument turns on what is called a successor in interest. It is claiming that the Seneca-Cayuga Tribe is a successor in interest to whatever interests the historical Cayuga Indian Nation had. They claim that they are descendants of the Cayuga Indian Nation and whatever interests that Nation has in the land, they have.

What support do they have for this argument that they are a successor in interest? They rely heavily on two sources. The first source is the Cayuga Land Claim Case itself.¹ As you heard mentioned today, Judge McCurn of the federal court here in Syracuse has ruled on the Cayuga Land Claim. He found that the land was illegally taken and that the State has to pay damages to the Cayuga Indian Nation. The Seneca-Cayuga Tribe was a part of that lawsuit and they claim that what was decided was that they are a successor to whatever interests the Cayuga Nation of New York had.

The second source they rely very heavily on is a letter that was issued by the Department of Interior. That letter dated August 20th, 2003, from the Secretary of the Department of Interior, stated that the Department had concluded that the Tribe from Oklahoma had political connections with the Cayuga Indian Nation and that the connections are clear. In fact, annuities were paid at one point to the Cayuga Nation and some of those went to the Cayugas who had moved west. The Tribe also argues that this is a political determination that the Executive Branch can make; and the courts cannot second-guess their finding.

Having concluded that they are a successor in interest, the Tribe then argues that they have all the tribal rights that are conferred by the Treaty of Canandaigua, including free use and enjoyment of any land within the land claim. In addition, they argue that they have an inherent sovereign interest that has never been taken away from them and, therefore, they can exercise jurisdictional rights over land within the claim area in New York State. They also argue that two tribes may exercise jurisdiction within one claim area; and, interestingly, they rely on the Town of Sherrill.² There, as you may have heard today, one of the Oneida Indian Nations, the New York group, acquired land in the Town of Sherrill and are operating a business there. In the Town of Sherrill case itself, the court held that they could do it even though they

1. *See Cayuga Indian Nation of N.Y. v. Pataki*, 188 F. Supp. 2d 223 (2002).

2. *See Oneida Indian Nation v. City of Sherrill*, 145 F. Supp. 2d 226 (N.D.N.Y. 2001).

are only one of three Oneida communities. They cite that case for the proposition that it is possible for many tribes to exercise jurisdiction over one land base in the State.

Finally, the Tribe argues that the government's defense is based upon the cessation of Indian land, which is not at issue in this case. The Cayuga Indian Land Claim Case found that there was no cessation and, therefore, the only issue is whether this tribe is a successor in interest. As I said, much of their argument is based on a notion that the Seneca-Cayuga Tribe of Oklahoma has interest derived from the historical Cayuga Indian Nation.

The defendants, both the municipalities and the State itself, first argue that the land claim case, the Cayuga Land Claim Case, did not resolve the question of jurisdiction for anyone, for the Seneca-Cayugas of Oklahoma, or for even the Cayuga Indian Nation of New York. They read the case simply to mean that the land was illegally taken and that the Cayuga Indian Nation has the right to damages. They argue that the jurisdictional issue was never resolved in that case. The defendants argue that an Indian tribe can exercise jurisdiction in areas within Indian country only when it has been expressly granted rights to exercise sovereignty. The Tribe argues that it has sovereign rights, unless taken away. The defendants argue the Tribe does not have any sovereign rights unless granted. They also argue that there is no treaty or statute that gives the Seneca-Cayuga Tribe any jurisdictional rights in the State of New York.

With the respect to the successor-in-interest argument, the municipalities and the State have a series of arguments. First, they argue that the Seneca-Cayuga Tribe gave up whatever interests it had when it moved west. They argue that, because the Tribe settled in Ohio and later accepted reservations in Oklahoma, they surrendered both their aboriginal rights in any land in New York and any treaty rights in New York.

They also reject the reliance on the Department of Interior letter, a very fine argument. The Defendants' argument a very technical argument, but I think it is an important argument for both sides. The State and the municipalities argue that the Department of Interior recognized the Seneca-Cayuga Tribe's right to participate in division of damages that result from the illegal taking of that land. However, the DOI has not said anything about whether the Tribe from out west can exercise jurisdiction in New York. In fact, they point out that the DOI's recognition of the Tribal Charter and of the Tribe, which is approved by the BIA, refers only to the Tribe residing in Oklahoma. They further

argue that the United States opposed the Tribe when they tried to intervene in the Seneca Land Claim case, and further they reject the notion that a court cannot review it because the Bureau of Indian Affairs decided the case. There is considerable dispute over the question of whether the federal government has or has not recognized the Seneca-Cayuga Tribe's interest in the land in New York.

Finally, the State and the municipalities offer a test, a four-part test, for whether a tribe has status as a successor in interest. First, they argue a tribe has to show common ancestry. Second, they must show that they are descendents of a treaty-signatory. Third, the tribe must have continuous political and cultural connections with the signatory to the treaty. Fourth, the entity must prove that it was actually granted treaty rights. The State argues that these are all fact issues not legal issues, and, therefore, need to be explored through discovery, a process in lawsuits where parties can get more information from each other. The State argues that it is inappropriate at this point to grant a preliminary injunction in favor of the Tribe because there are factual issues that need to be resolved. Therefore, it is impossible to determine whether the Tribe is likely to succeed, which is one of the things that a judge has to do before he can grant a preliminary injunction.

In a nutshell, those are the arguments on both sides. Much turns on the notion of successor in interest, who determines who is a successor in interest, and the questions of fact. It is not surprising that, when Judge McCurn heard this, he decided not to decide right away. He has yet to rule on the plaintiff's preliminary injunction motion to allow them to proceed with the building of the facility. Nor has he ruled on the defendants' request that, pending the outcome of the lawsuit, the Tribe is precluded from building the facility. As I said at the outset, this case, probably better than any that I know of in Federal Indian Law, will have to address the question of what jurisdictional rights a tribe has after it leaves the area and then wants to return to tribal land that was protected by a treaty.

Thank you.