

02-6111(L)

02-6130(con), 02-6140(con), 02-6200(con), 02-6211(con), 02-6219(con),
02-6301(con), 02-6131(xap), 02-6151(xap) & 02-6309(xap)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CAYUGA INDIAN NATION OF NEW YORK,
Plaintiff-Appellee-Cross-Appellant,

SENECA-CAYUGA TRIBE OF OKLAHOMA,
Plaintiff-Intervenor-Appellee-Cross-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee,

v.

GEORGE E. PATAKI, as Governor of the State of New York, et al.,
CAYUGA COUNTY and SENECA COUNTY,
MILLER BREWING COMPANY, et al.,
Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**UNITED STATES' PETITION FOR PANEL REHEARING AND
PETITION FOR REHEARING EN BANC**

KELLY A. JOHNSON
Acting Assistant Attorney General

ROGER R. MARTELLA, JR.
TODD S. KIM
Attorneys, U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026
(202) 514-2762

The United States petitions for panel rehearing and rehearing en banc in this suit to compensate successors of the ancient Cayuga Nation fairly for the State of New York's unlawful acquisition of the Cayuga Reservation in violation of the Nonintercourse Act (NIA). The Supreme Court's Oneida decisions established that "Congress' clear policy" embodied in the NIA was that no "entity should purchase Indian land without the acquiescence of the Federal Government," with those who violate this rule subject to suits for damages to vindicate unextinguished tribal property rights. County of Oneida v. Oneida Indian Nation (Oneida II), 470 U.S. 226, 232–50 (1985); see Oneida Indian Nation v. County of Oneida (Oneida I), 414 U.S. 661, 666–82 (1974). Based on these decisions, many tribes have pursued land claims in lengthy and hard-fought federal litigation. The district court here awarded two tribal plaintiffs and the United States, as plaintiff-intervenor, about \$248 million in damages to be paid by the State as full compensation for the lost Reservation.

With one judge dissenting, a panel of this Court reversed, holding that laches bars these claims altogether. That holding conflicts with this Court's decision in Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982). The majority concluded that this decision had been effectively overruled by the Supreme Court's intervening decision in City of Sherrill v. Oneida Indian Nation, 125 S. Ct. 1478 (2005), which held that equitable considerations barred a tribe from asserting tax immunity regarding ancient reservation land reacquired on the open market. The majority's conclusion is incorrect. The Court in Sherrill expressly did not disturb its rulings in the Oneida cases involving damages claims like those at issue here, and it expressed approval of the district court's approach of allowing damages against the wrongdoer but not dispossession of innocent residents. The majority's application

