

FROM SOVEREIGNTY TO SUPERFUND: THE ONONDAGA NATION'S LEGAL BATTLE
FOR LAND RIGHTS, ENVIRONMENTAL JUSTICE, AND THE REMEDIATION OF
ONONDAGA LAKE

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ONONDAGA LAKE: THE REMEDIATION OF A POLLUTED URBAN LAKE

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ABSTRACT

John Muir famously wrote, “When we try to pick out anything by itself, we find it hitched to everything in the Universe” (1988: 110). Such has been the case with Onondaga Lake that only through laws, legal entities, and the public functioning as a system, that the most polluted lake in the country has begun to regenerate. Cutting across the disciplines of history, environmental law and policy, environmental justice, and Federal Indian law, this research demonstrates how government efforts, community involvement, and Native American interests have been integrated into each stage of the remediation process to bring back this cultural and natural resource. The research addresses how the Onondaga Nation lost control of their territory as a result of interactions (some legitimate and some not) with state and federal governments and private citizens acting without authority. It illustrates how this loss, in combination with growing populations and industry, led to the degradation of the environment. Finally, it focuses on the legal actions taken by various stakeholders to address the Lake, specifically the Onondaga Nation’s land rights action and the impact of the Lake’s being named a Superfund site.

BIOGRAPHICAL SKETCH

Emily Bergeron attended the University of Florida and graduated with a degree in Business Administration, followed by a Juris Doctorate. She then joined the law firm of Miles & Stockbridge in Baltimore, Maryland where she was involved in the litigation of environmental law and land use issues, insurance coverage, toxic mold, and products liability actions. She later returned to the University of Florida to complete a Masters degree in Historic Preservation and Architectural Studies where her research addressed the use of preservation and community land trusts for affordable housing. Her doctoral studies were completed in City and Regional Planning at Cornell University with minors in Archaeology and American Indian Studies.

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INTRODUCTION

EVERYTHING IS CONNECTED

In 1995, after a 70-year absence, biologists reintroduced wolves into Yellowstone National Park. Natural predators, the wolves were expected to cull elk herds, however, their return has led to the rebound of an entire ecosystem (Monibot, 2013). The wolves' absence had led to a dramatic increase in the number of elk, which reduced the vegetation. Restoring the apex predators to the ecosystem, forced the elk to change their behavior to avoid areas where they were easily hunted. With fewer grazers, trees, shrubs, and grasses began to reappear in valleys and gorges; bare valleys became forests. Birds and beavers returned, the latter creating habitats for ducks, otters, fish, reptiles, and amphibians. The wolves killed off coyote, and the numbers of rabbits and rodents rose. Bears returned to feed on carrion and the berries growing on the revived shrubs. The wolves' return even changed the direction of the river. With less erosion due to regenerated vegetation, banks stabilized and the watercourse adapted. The Yellowstone wolves' story illustrates the environment's interconnectedness, how the artificial disruption of one element can have enormous, unintended consequences, and how the restoration of a missing element led to a positive ripple effect, a trophic cascade.¹

These wolves are an example of a system of interrelated natural elements adding up to a unified whole. No component can be completely understood separately from the system in which it exists. The American conservation ethic has deep roots in this concept. Gifford

¹ In the mid-1990s ecologists Soulé and Noss (1998) combined theories of extinction dynamics, island biogeography, metapopulation theory, natural disturbance ecology, top-down regulation by large carnivores, and landscape-scale ecological restoration to create an approach to protected area design called "rewilding" (Foreman, 2004). This conservation concept is based on the principle that large predators are critical to maintaining an ecosystem's integrity and encouraging biodiversity. When they are missing, the entire environment suffers. Scientific journalist George Monibot (2013) also frequently discusses the increasing evidence supporting this concept.

Pinchot, often regarded as the father of American conservation and a Muir contemporary, promoted the responsible use of natural resources for the greatest good for the greatest number. More pragmatic than Muir, Pinchot noted: “From birth to death, natural resources, transformed for human use . . . Upon them we depend for every material necessity, comfort, convenience, and protection in our lives. Without abundant resources prosperity is out of reach” (Pinchot, 1998: 505).² Nineteenth century geologist John Wesley Powell expanded on this idea, defining a watershed as “that area of land, a bounded hydrologic system, within which all living things are inextricably linked by their common water course and where, as humans settled, simple logic demanded that they become part of a community” (Zelland, 2011: 102).

This understanding of an interconnected environment also surfaces in philosophies and conventions associated with identity, homeland, economic wealth, and spiritual connections (Sutton, 1985: 4). Theorists posit that religions have evolved and operate “to help people create successful adaptations to their diverse environmental niches” (Taylor, 2005: xvi). Buddhism, for example, teaches that all life is interrelated and that nothing exists in isolation or independent of other life. Hindus perceive of the universe as the “body of God” and pray for peace between all its elements (Taylor, 2005: 762). Islam’s “fitra” speaks to the harmony of humankind with nature (Taylor, 2005: 879). Even some aspects of Christianity employ an “ecological motif” that draws a connection between God, men, and the natural world (Santmire, 1985).

Native Americans have long been perceived as possessing an immediate relationship with the physical environment, incorporating closeness to the earth into daily life and defining themselves by the land and the sacred places that bound and shape their world. There is unity

² Pinchot did add the phrase “in the long run,” recognizing the long-term impacts of actions on the environment (Pinchot, 1998: 505).

between their physical and spiritual universes: their origin myths, oral traditions, and cosmologies connect all animate and inanimate beings, past and present.³ In many Native American traditions every tree, stream, hill, and animal is equal and in possession of a spirit. The Haudenosaunee recognize this relationship in their Thanksgiving Address. Every gathering begins and ends with the Ohén:ton Karihwatéhkwen, or “Words Before All Else,” a recitation demonstrating how the tribe understands and sees the world.⁴ The address begins:

Today we have gathered and we see that the cycles of life continue. We have been given the duty to live in balance and harmony with each other and all living things. So now, we bring our minds together as one as we give greetings and thanks to each other as People. Now our minds are one. (Stokes, 1993: 5)

This Address acknowledges the continuing cycles of life and the duty to maintain balance and harmony between all living things. It acknowledges everything from the earth and waters, plants and animals, and birds and sky world (*Covenant Chain* part 1.1). Humans are established as only one part of the natural world, located on the same plane as all living things and owing duties to all other things in the world.

Conflicting values have led to divergent treatment of land and animals as dictated by each culture’s higher power. White maintains, “Human ecology is deeply conditioned by beliefs about our nature and destiny—that is, by religion” (White, 1967: 1205). The western concept of nature is generally to view human actors as the central players, with nature as a subservient and

³ This is not intended to evoke any romantic notion of an “Ecological Indian” (Krech, 1991: 17). Numerous critics of this concept exist. There has been an acknowledgement that environmental abuse was prevalent before the advent of Christianity (See e.g. Tuan, 1968; Tuan, 1974). It is recognized that there is a difference between the all-or-nothing concept of a virgin environment and a conservation ethic acknowledging a difference between preserving everything untouched and practicing conservation whereby people sustainably and responsibly exploit resources (Hann et al. 2003: S82).

⁴ The Thanksgiving Address dates back over 1000 years ago with the Peacemaker and the creation of the Great Law of Peace and is based in the belief that constant communication and appreciation of all living things should align the hearts and minds of people and Nature (Stokes, 1993).

pliant backdrop (Plater, 1994: 1000). In Christianity, the destruction of animism makes it possible to exploit nature with an indifference to the feelings of natural objects, giving man the monopoly on spirit in the world (White, 1967: 1205). The anthropocentric nature of Christianity and its philosophy towards the environment are often defined by the Genesis concept of man's dominion over nature (Genesis 1: 28, *King James Bible*). Christianity, however, is not devoid of individuals who hold environmental ideals that are sympathetic towards the natural world. Muir's (1913) interpretation of Genesis, for example, suggests that men are intended to be "plain members and citizens" of nature—not tyrannical masters nor benign, managerial stewards.

The increasingly secular culture of the United States shows a philosophical adoption of the concept of being part of a greater system. Aldo Leopold, for example, scolded those who could not see the entire environment for its worth, stating in his lesser known *Round River*:

Conservation is a state of harmony between men and land. By land is meant all of the things on, over, or in the earth. Harmony with land is like harmony with a friend; you cannot cherish his right hand and chop off his left... The land is one organism. Its parts, like our own parts, compete with each other and co-operate with each other. The competitions are as much a part of the inner workings as the co-operations. (Leopold, 1993: 145)

Rachel Carson's widely popular 1962 work *Silent Spring* also moved towards a more holistic idea of man as a constituent part of nature, not just as an ethical concept, but as a practical, utilitarian one as well. In 1989, Roderick Nash proposed an "ethical extension" of the rights of people to the logical next step of a constitutional amendment in which nonhuman life could not be deprived of life, liberty, or habitat without due process of law. Wendell Berry (2015), the prophet of rural America, noted of the natural environment that, "We can, to be sure, see parts and so believe in them. There has always been a higher seeing that informs us that parts, in themselves, are of no worth. Genesis is right: 'It is not good that man should be alone'" (3).

Ample evidence exists demonstrating that no religion or philosophy can save any group

from all blame.⁵ As, Moncrief (1970) notes, the creation of environmental stress has never been unique to Christian cultures; rather, multiple factors contribute to the destruction of the environment. Indeed, all cultures, despite their perceived philosophies of man's place in the bigger picture, are guilty of atrocities against the environment. Despite White's suggestion that human ecology is conditioned by beliefs, evidence suggests that "Though certainly ideas influence behavior, obviously they do not determine it" (Callicott, 1990: 190). Krech, for example, considered whether Native Americans historically over-hunted white-tailed deer and beaver. He notes that post-contact, though they continued to be sources of subsistence, the commercialization of deer and beaver hides led these species to become overexploited commodities (Krech, 1999). This type of natural resource exploitation for the sake of economic development has become common. The rapidly growing problem of hydraulic fracturing, or "fracking," has led to discussions on the difficulty of balancing environmental protection where big money is at stake. Exploratory wells have been drilled on several Native American reservations. Drinking water problems already exist in a Wyoming community surrounded by wells on the Wind River Reservation in Wyoming (Berry, 2012). Reports released by the EPA have shown extremely high rates of benzene contamination on the Reservation at sites the

⁵ White's (1967) ties the lack of environmental concern to the Judeo-Christian values established in Genesis. The Christian West surpassed its contemporaries in technology, using their mechanical progress to exploit nature for human benefit and based their success in part on the denouncement of pagan animism, allowing adherents to disregard feelings towards nature (1205). Soon after White's publication, critics argued White's interpretation of the Old Testament was oversimplified and under-inclusive by conferring unique rights *and* responsibilities on man. Passmore (1974) argued belief in man's dominion over nature should not be interpreted as despotic, but could be seen as defining a role as a steward of God's creation (3-40, 111-18). He agreed with White that the *Bible* asserts nature is not sacred. Welbourne refuted both (1975) denying that the *Bible* treats nature as "unsacrosanct raw material" (Attfield, 1983: 373). Many passages exist in the Old and New Testaments that support the significance (though not the sacredness) of nature. God finds "everything that he had made . . . very good" (Genesis 1: 31); the valleys are watered for the sake of the wild beasts (Psalm 104: 10f); the uninhabited wilderness is rained upon to support the plants (Job 38: 26F)—thus demonstrating a Christian belief in the value of nature beyond sustaining mankind (Attfield, 1983: 373).

Shoshone approved for hydraulic fracturing, forcing residents to drink bottled water and use only cold water in showers and baths for fear of vaporizing toxic chemicals (EPA: 2012). From tribal government approved toxic waste sites to mountain top removal, the “practical and utilitarian” use of land for economic gain has become commonplace in all cultures. In spite of religious beliefs and environmental idealism, economics, individualism, and the politics of self-promotion have led to the land grabs and environmental degradation that are the source of litigation today.

This failure to recognize or appreciate the interrelated aspects of nature or the long-term consequences of actions has led to significant environmental repercussions. Paleoecologists have traced such behavior back 11,000 to 12,000 years ago when mega fauna disappeared during the Pleistocene Overkill.⁶ According to ecologist John Terborgh, North America’s ecosystem remains “profoundly altered” by this early extinction (1999: 39). Jared Diamond addresses the cataclysmic effects of significant environmental changes in his popular work *Collapse*, detailing the larger implications of deforestation, soil problems, water management, overhunting, overfishing, nonnative species invasions, and overpopulation to name a few (Diamond, 2005). The Greenland Morse, Easter Island, the Polynesians of Pitcairn Island, the Anasazi of the American Southwest, and the Mayans in Central America—each opened a Pandora’s box of environmental abuse and neglect. Diamond cautions readers of similar fates if man does not make changes to his understanding of his place and impact. Consider the number of later term consequences society is just now realizing—mercury in the oceans, climate change, earthquakes caused by hydraulic fracturing, and the mass die-off of honeybee colonies.

After centuries of ignoring the long-term and global effects of their actions, people are

⁶ Man was responsible for the catastrophic decline in population of more than 50 species of mammals in North America, including, but not limited to mammoths, mastodons, horses, giant ground sloths, lions, and saber-tooth cats (Soulè & Noss, 1998: 19).

becoming increasingly aware of environmental issues. For example, more Americans are accepting the idea that human actions have led to climate change. A Yale Project on Climate Change Communication Report indicates that the majority of people in 43 states believe global warming is the result of human behaviors. Only in three states do more people say the phenomenon does not exist or is naturally caused (four states were split evenly) (Yale Project on Climate Change Communication, 2015).

Unfortunately, understanding of and concern for environmental quality still rank comparatively low on Americans' list of worries. In Gallup's annual environmental survey,⁷ half of those polled rated the overall quality of the environment as "excellent" or "good" in 2015, the most positive views since the question was first asked in 2001 (Riffkin, 2015).⁸ Those finding environmental conditions "poor" have risen from six percent to nine percent since 2001, with the highest percentage of dissatisfaction at 16 percent in 2009 (Riffkin, 2015). Thirty-one percent of Americans were worried "a great deal" about the quality of the environment in 2014, the lowest percentage since the polling company began measuring these indicators in 2001. Fears usually correspond with issues that are considered proximate threats—drinking water, lakes and rivers, and air pollution. Anxiety over each of these elements was at record lows in 2010 and 2011, and have remained close to these levels (all below 50 percent of those polled worrying about the problem a great deal) (Jones, 2015).

The highest level of concern for the environment occurred in 2007, when 43 percent worried a great deal (Rifkin, 2014). This was the same year that former vice-president Al Gore

⁷ The Gallup polls on the environment are part of the organization's Social Series. Gallup administers various surveys to monitor views on various social, economic, and political subjects during the same month each year (Gallup, 2015).

⁸ Opinions on environmental quality did drop in 2003 to a low of 39 percent in 2009, not rising until the first years of the Obama administration (Riffkin, 2015).

and the Intergovernmental Panel on Climate Change (IPCC) were awarded the Nobel Peace Prize for their dramatic statements regarding the importance of addressing man-made climate change. This was also the year that the federal government and multinational conglomerate Honeywell International signed a Consent Decree pursuant to the United States law governing Superfund sites to perform remedial actions for the cleanup of the bottom of Onondaga Lake, the most polluted lake in America.

Onondaga Lake, an urban waterbody in Syracuse, New York, was once a central part of the Onondaga Nation's vast territory. Through a series of illegal land deals and treaties, the Nation lost control of the Lake and surrounding lands to New York State. From this point on, entities focused on industry and progress disregarded the long-term impacts of their actions on a critical element of the environment. The Lake was lowered; wetlands were covered with fill; and creeks were re-channelized, dammed, and dredged. Poor sewer systems allowed municipal waste to flow into Onondaga Lake through its tributaries. Salt extraction led to turbid-water creating mudboils. Commercial establishments allowed oil and gasoline to wash into the water and industries filled it with mercury, benzene, and toluene. Hills of waste piled up along the shoreline, garbage littered the banks of tributaries, and pipelines pumping brine for industrial cooling purposes leaked salty water into the fresh creeks causing massive fish kills.

After over a century of municipal waste, agricultural runoff, and industrial contamination, what was once a valuable natural and cultural resource had become a malodorous eyesore. Fishing was banned, though fish populations had declined so significantly that there was not much of a fishery left. Swimming was banned, though as residents often complained of floats of garbage and sewage drifting across the top of the water as well as algal blooms there was little desire for such recreation. One observer recalled riding past the lake in the backseat of his

parents' car in the 1950s, having to roll up the windows because of the noxious smells coming from the water (Chantary, 2012). Wildlife populations declined. Native plants disappeared. Industry left Syracuse and its population followed.

Onondaga earned the distinctive moniker of America's most polluted lake in the 1970s (Allen, 2005: 9). In the 1980s, a force was introduced that would reshape the environment of Onondaga Lake: stronger environmental laws. The enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and 1989 amendments to the Clean Water Act ("CWA") mandated that governments respond to the previous century's contamination. The implementation of these laws, both the successes and failures, also served as a catalyst for community actions. Onondaga County was held accountable for its failure to meet legally mandated water quality standards and Onondaga Lake was designated a Superfund site under CERCLA. Additionally, the Onondaga Nation filed a land rights action to gain a more substantial role in the environmental decision-making process. These laws and legal actions provided direction to the remediation of the Onondaga watershed, each addressing one aspect of the cleanup. Problems with enforcement encouraged community engagement and the creation of relationships between parties who might never have tried to reach any understanding or recognized their shared values. Like Monibot's wolves, with law serving as a driving force, people reconnected with and reshaped the environment.

For Onondaga Lake, gradual change came as a result of improved federal environmental laws. These laws have led to environmental remediation, but have also led to litigation, required community efforts, and spurred the application of innovative green solutions. The process for remediating Onondaga Lake has been long, complicated, and oftentimes politically charged. It has required the participation and cooperation of federal, state, local, and tribal governments, any

one of which by itself has been associated with frustrating notions of efficiency or success. It has also showcased the power of community participation and cooperation between stakeholders.

Unfortunately, the connections between laws, governments, individuals, and the environment are often lost on lawmakers, an unfortunate circumstance when nature can be so profoundly impacted by the choices of governments. From chemical wastes buried in fields to lead contamination in drinking water, there is incredible subject matter diversity in environmental regulation. Yet, despite the law's best efforts to break apart the interrelated elements of the environment into distinct parts—water, air, and species—nature has a way of not allowing this separation. For example, the protection of aquatic endangered species cannot exist separately from the regulation of wetlands that they live in. The environment does not obey legal or political boundaries. The boundaries are not only crossed by ecological entities, but also by individuals and products of commerce and culture. Matters can further be complicated by the complex nature of the relationship between the United States government and American Indian tribes. Finally, the political climate and the communities it impacts unavoidably influence law, which is intended to reflect the values of society. Values are incorporated into legal systems, which in turn affect which plants and animals are desirable and which ones are not, where roads will go, what dams will be built, and what can and cannot be dumped. With these determinations the environment changes. Onondaga Lake's remediation clearly reflects these principles.

Statement of Significance

Pamela Matson of Stanford University noted at a meeting of the American Association for the Advancement of Science “In the past, the research, management and policy communities have tended to think about environmental problems like air pollution, water pollution, over-fishing or climate change in isolation from each other... Today and in the future, we will have to

discuss their interacting effects. Solving . . . problems will require working in an integrative way across multiple sectors and with multiple stakeholders” (Shwartz, 2000). Matson’s own research recognizes that a “holistic” approach requires not just looking at the environment itself in total (i.e. no longer considering water pollution, air pollution, climate change, etc. in isolation of one another). Instead, a multidisciplinary, multiparty process must address a comprehensive approach to the environment as a whole.

Many disciplines have attempted to combine social and natural science as a means of explaining and attempting to resolve problems, recognizing the need to cross disciplines (Archer, 1995). Unfortunately, those creating and implementing the law have not been as willing as academics to abandon reductionist views despite recognition of the complexity of environmental issues. Ironically, the environmental movement began with the efforts of a diverse group of conservationists, business leaders, and politicians seeking to preserve and manage land and valuable natural resources. The laws passed in the decades that followed would not foster an integrated approach to environmental management in that they were “fragmented and unrelated as to defy overall description” (Fiksel, et al., 2009: 8717). Federal laws that address singular issues such as air, water, land, and biota fail to create meaningful connections between various aspects of the environment. Further, these laws rarely address issues other than conservation, though environmental justice considerations occasionally surface as a minor aspect of implementation. Finally, laws often fall short in linking the actions of federal agencies, states, local governments, with other stakeholders.

This study seeks to cut across and integrate disciplines, examining history, Federal Indian law, environmental law and policy, and environmental justice to see how the interrelated nature of these subjects have influenced the remediation of Onondaga Lake. Looking at how

politicians and the public approached the remediation holistically may help stakeholders in similar undertakings to understand the broader context of their efforts. This work clarifies the relationship that the past has to the present, demonstrating how the state's actions centuries ago stripping the Haudenosaunee of their territory spiraled into the creation of an environmental disaster. It shows the relationship between events, individuals, and outcomes. The intention of the work is to record and evaluate the missteps of individuals, governments (and their agencies), and organizations working at odds with one another as well as the collective accomplishments of the same that have accompanied the rise and fall of this culturally and environmentally significant site. Further, this comprehensive investigation aids in understanding the culture in which these events have occurred. For example, how the nature of state and Indian relations, relationships between Native Americans and surrounding communities, and even state and federal relations impacted how and when land was taken. Additionally, individual and industrial disregard for the environment in favor of economic gain served to support the legal system's centuries-long indifference towards pollution and allowed for apathy regarding the struggles of the Onondaga Nation. This research demonstrates how various government efforts, community efforts, and Native American interests must be integrated at each stage of a remediation process.

According to Barkan, et al., "legal research is the process of identifying and retrieving the law-related information necessary to support legal decision-making" (2009: 1). Those investigating legal issues generally examine the steps involved in a cause of action by considering the facts of the case at hand, investigating the relevant legal principles, and proposing a conclusion based on the application of the law to the facts. Barkan contends that beyond this limited examination, legal research requires that "legal decisions cannot be made out of their economic, social, historical, or political contexts" (Barkan et al., 2009: 2). Historians are

often called upon in litigation for their expertise in reviewing the historical record as it relates to the events and issues at trial (Jones, 2015: 89). Natural resource litigation, for example, often requires uncovering what a place was like before development, urbanization, irrigation, pollution, etc. (Stevens, 2015: 82). This historical research results in the construction of a narrative whose intention is to give context to and an explanation of events leading up to a specific event or events requiring legal action. Creating this narrative mandates an extensive review of archival materials and the legal record. Jones suggests that a “tension” exists between the research goals of historians and litigators; the former wish to “understand and describe” the past, the latter to use the documentary record to support an argument (Jones, 2015: 91). Outside the confines of the courtroom, absent the constraint of time, budget, or rules of evidence, legal research such as that conducted for this work may encompass the inclinations of both academics and practitioners to help policymakers and stakeholders make decisions that take into account the reasons why things are the way they are today.

Research Methods: Analysis of the Documentary Record

This research was approached using the same methodology an attorney would employ to prepare for court. The “data” analyzed in this type of research requires understanding the historical context of a case, examining the relevant statutes and legal precedent, and analyzing the course of litigation. In considering the large-scale environmental remediation of Onondaga Lake, this study first undertook a basic historical analysis, using records and accounts as a means to discover what happened in the past (Marshall & Rossman, 1998). Additionally, the case study required an exploration of the legal processes employed. It considered, among other things, historical texts, first-person accounts, newspaper reports, maps, court cases, laws, legislative documents, government reports, court records, and reports of non-governmental organizations.

This documentation was obtained from sources including, but not limited to, archives, databases, and government and industry clearinghouses for environmental documents.

Research began in 2010 with informal interviews with Joseph Heath and Thane Joyal, counsel to the Onondaga Nation. This discussion addressed issues surrounding the Onondaga Nation's land rights action, the Nation's interest in the remediation of Onondaga Lake, the increasing problems associated with mud boils, and other sources of pollutants to the Lake and Creek. Discussions regarding these issues and their evolution continued at weekly meetings on the Onondaga Reservation at the Firekeepers Restaurant for several months with Thane Joyal, Meredith Perreault of the Onondaga Environmental Institute, Jeanne Shenandoah of the Onondaga Nation, and representatives from the Neighbors of the Onondaga Nation.⁹

Discussions at the Firekeepers were broad, addressing the persistent and increasing problems with Onondaga Creek and various groups' efforts to address them, progress and concerns with the Lake remediation process, the Nation's struggles in the land rights action, and educational outreach programs regarding local environmental issues and Native land rights. The individuals in attendance representing differing, but overlapping interests, indicated the necessity of a broad and inclusive approach to the remediation process. These conversations, providing a community voice to the research, helped to shape the direction of the research based on what the individuals directly involved in the remediation efforts deemed as important aspects of the process. It also informed the necessity of addressing the case study from multiple legal and historical perspectives. The direction of this research was further supported by conversations with Dr. Robert Venables, a historian and expert for the Onondaga Nation, and a meeting with Chief

⁹ The Neighbors of the Onondaga Nation assert that the organization is "a grassroots organization of Central New Yorkers which recognizes and supports the sovereignty of the traditional government of the Onondaga Nation. A program of the Syracuse Peace Council, NOON supports the right of native peoples to reclaim land, and advocates for fair settlement of any claims which are filed" (NOON, 2012).

Irving Powless of the Onondaga Nation.

These meetings were followed by historical research aimed at creating a narrative of how the Onondaga Lake problem was created, starting from Onondaga Nation's tenancy, continuing through the decision for remediation, the selection of remedial processes, and the implementation of cleanup efforts. Research began with a review of documents compiled by the Onondaga Nation's counsel in preparation for the land rights action. Documentation included early settlers accounts, treaties, speeches, and records of organizations and government agencies. The information focused primarily on land claims and matters of sovereignty.

A broader examination of the Nation and the Lake's history required research in archives of the Onondaga Historical Association ("OHA"). Here, files addressing the Haudenosaunee in general and the Onondaga Nation specifically, Onondaga Lake, Onondaga Creek, and the history of Syracuse infrastructure and industry were considered. This investigation supplied letters, newspaper articles, photographs, proceedings from meetings and conferences, records for organizations and government agencies, and speeches regarding the history of the Onondaga Nation and its relationship to the evolving surrounding community and environment, the use of Onondaga Lake and Creek, and community efforts to address the watershed. The New York State Library archives were consulted for documents relating to the Haudenosaunee's historic relationship with New York State and federal governments.

In addition to this archival research, online databases such as the archives of the *New York Times*, *The Post-Standard*, and newspapers from Syracuse, New York were consulted. *The Post-Standard* has been in continuous publication since it was founded as *The Onondaga Standard* in September 1829. These sources provided a constant reference for indicators of social change both in attitudes towards the Haudenosaunee and the environment.

In addressing the Onondaga land rights action, the Clean Water Act Administrative Complaint and subsequent Title VI claim, and the Superfund process, research was directed towards obtaining the relevant statutes, case law, court pleadings, legal memoranda, and government created or sponsored reports. Some of these documents, particularly those relating to the land rights action, were obtained from the Onondaga Nation's counsel. The information pertaining to the Onondaga land rights action included several hundred pleadings filed with the District Court for the Northern District of New York, the Court of Appeals, and the Supreme Court of the United States.

The information not obtained from counsel was retrieved in part using the electronic public access server PACER, a database of case and docket information of federal appellate, district, and bankruptcy courts provided by the federal judiciary. Court documents were also found on the websites of the Onondaga Nation, the Atlantic States Legal Foundation, the Neighbors of the Onondaga Nation, the Partnership for Onondaga Creek, the Onondaga Lake Partnership, Onondaga County, the New York State Department of Environmental Conservation, and the United States Environmental Protection Agency—all organizations involved in various aspects of the legal actions which brought about remedial efforts at the Creek and Lake. The New York DEC provided access to all official documents relating to remediation including, but not limited to the Record of Decision and amendments, scientific reports, engineering reports, cultural resource surveys, environmental assessments, maps, assessments of proposed and used remedial technologies, and monitoring data. As writing commenced, the Onondaga Nation's land rights action and the remediation of Onondaga Creek and Lake were simultaneous. This necessitated monitoring government websites and document repository sites for updates relating to the progress of the various legal actions and remedial efforts through the period leading up to

the completion of the dredging process on Onondaga Lake. The resulting product of this research is a comprehensive narrative of the history and current status of this urban lake.

Précis of the Chapters

The following research presents how Onondaga Lake first came to be called the most polluted lake in the country and the battles (some won and some lost) that have been fought to bring back this cultural and natural resource. Chapters one through ten address the history of the Lake. This history considers how, through a series of unfortunate events, the Onondaga Nation lost control of their territory as a result of a series of interactions between representatives of the Nation (some legitimate and some not), the state and federal governments, and private citizens acting with no authority whatsoever. It follows how this loss, in combination with growing populations and industry, led to the degradation of the environment, particularly Onondaga Lake. This history informs how it is that matters of indigenous rights, environmental sovereignty, and environmental law and policy were applied in the context of the remediation of Onondaga Lake as well as how issues of environmental justice would overshadow the cleanup efforts. Chapters 11 through 14 explain how the Onondaga Nation through its land rights action, attempted to address a history of federal and state governments' willful blindness towards their own laws and Indian sovereignty and the environmental abuse of culturally and spiritually significant lands and waters. Finally, chapters 15 and 16 examine how Onondaga Lake's remediation as a federal Superfund site, although imperfect, integrated government, corporate, and community efforts to meet the requirements of environmental law and moved towards environmental recovery.

The story of Onondaga Lake is a hopeful reference for other sites showing the potential to at least begin reversing centuries of ignoring the environment as a whole. Those interested in the Lake have seen the pieces of an intricate puzzle slowly come together. The remediation,

albeit a slow process, has demonstrated notable progress. Water quality has improved substantially. Wildlife populations are slowly returning. People are coming back to the water for recreation and pleasure. The cleanup of the environment has led to community engagement and creation of relationships between parties who might never have tried to reach any understanding or recognized their shared values. People have reconnected with the environment.

This research illustrates the conflicts between different societies and the struggles between man and nature. It reveals the process of recovery, which though to those fighting for the Lake may seem to move at a glacial pace, has in decades made improvements on what took more than a century to despoil. Finally, it considers what remains to be accomplished to repair the system, the natural and the societal. As Muir stated, “The battle we have fought, and are still fighting... is a part of the eternal conflict between right and wrong, and we cannot expect to see the end of it . . . So we must count on watching and striving... and should always be glad to find anything so surely good and noble to strive for” (Muir, 1896). Though conflicts between stakeholders have been continual throughout the history of the Lake, what makes this process all the more interesting is that it has occurred in the context of and because of yet another intricate system—the law.

CHAPTER 1

THE SHAPING OF THE ONONDAGA WORLD

The story of Onondaga Lake began more than 12,000 years ago when the Wisconsin Glacier etched the surface of the region, leaving moraines, meltwater channels, drumlins, artesian springs, and U-shaped valleys (Effler, 1996: 36). Along with creating Onondaga Lake, the retreating ice sheet, which spread over much of New York, left behind the Great Lakes and the Finger Lakes. Onondaga Lake stretches nearly five miles in length with an average breadth of one and a half miles from the mouth of Onondaga Creek to its outlet in the Seneca River; in places its depth abruptly increases to over 100 feet (Hand, 1889: 152). Its periphery is alternatively sandy, marshy and very shallow. A series of tributaries feed the lake: Onondaga Creek, Ninemile Creek, Ley Creek, Bloody Brook, and Harbor Brook (and eventually the Metropolitan Syracuse Sewage Treatment Plant). Subterranean springs (freshwater), unusually located in close proximity to salt springs, also flow into the lake (Hand, 1889: 153). Its outlet flows into the Seneca River, combining with the Oneida River to form the Oswego River, and empty into Lake Ontario. The water finally reaches the Atlantic Ocean by way of the St. Lawrence River (Hilleboe, 1951: 12).

The area's climate is somewhat humid with harsh storms originating from weather passing through the Great Lakes basin. Lake Ontario moderates the temperature extremes, but creates frequent cloudiness, particularly in winter. Lake-effect snow from the cold air originating in the west and northwest crosses Onondaga Lake, resulting in significant differences in snow levels between northern and southern Onondaga County (Effler, 1996). These fluctuating levels of precipitation have frequently led to flooding of tributaries to Onondaga Lake

during melt periods.

When the glaciers receded, paleoindian hunter-gatherers adapted their movements to a landscape in environmental transition, possibly following megafauna and later migrating herds of caribou and elk (LCMM, October 10, 2011: 6).¹⁰ An early Archaic culture, which existed up to 3550 BC, was composed of highly mobile hunter-gathers (LCMM, October 10, 2011: 7). By the Late Archaic period, through 1550 BC, the landscape became more hospitable and predictable, covered with rich deciduous forests and a more stable four-season climate. Archaeological evidence supports a substantial fishing culture in central New York during this period, though inhabitants continued to follow the seasonal migration of herds. The Transitional Period (1550-1050 BC) was marked by an increased reliance on plant materials, aquatic resources, and larger mammals (LCMM, October 10, 2011: 8).

The population began to flourish around 1300 BC with the development of agriculture and village life. Material culture from the Early and Middle Woodland periods (1050 BC-850 AD) reflects an increased interaction between the people of northern and central New York and those to the west (in Ohio and north and west of the Great Lakes region). Evidence of trade includes shell beads from the Atlantic coast, soapstone items from Pennsylvania, copper from the Great Lakes, and ritual items from the Ohio Valley mound builders indicates that the group reached long distances (Richter 1992: 14). There was a heavy use of aquatic resources during this time period, including fish and freshwater muscels, and wild rice beds were common (LCCM, October 10, 2011: 9). In the Late Woodland period (850-1600AD) people became more sedentary with an horticultural subsistence base, cultivating maize, beans, and squash (Richter 1992: 15). Hunting and fishing remained important to the economy (LCCM, October

¹⁰ The first appearance of man in the region is believed to have occurred sometime after the retreat of the last Pleistocene glacier around 8000 BC (Effler, 1996: 5).

10, 2011: 10). The later became the work of women, older children, and older men as the reliance on this form of subsistence decreased (LCCM, October 10, 2011: 9).

During the 14th century, a distinct Haudenosaunee culture emerged. The Onondaga Nation are believed to have descended from the Owasco, who had inhabited the area around Onondaga Lake as far back as the twelfth century (LCCM, October 10, 2011: 11). Early Onondaga located residences and villages on rivers, lakes, or near springs (Morgan, 1962: 313). Sites near the lake affiliated with the Nation were predominantly to the south of the lake along its tributaries. Material evidence and historical accounts point to fishing villages situated at the mouth of the lakes and rivers. For example, the Kaneeda fishing village was located at the outlet of Onondaga Creek and the Lake (LCCM, October 10, 2011: 11).

Pre-Contact

A common, romanticized concept exists that prior to European arrival North America was a pristine wilderness. It is not surprising that European settlers thought this considering the poor sanitation and resulting illness that plagued their countries. The site of a "new world" that had not yet suffered the ills of the typical European city was undoubtedly refreshing, but the myth of a primeval, untouched wilderness has long since been dismissed. The Native American relationship with the land is far more complex than this: respectful and often mutually beneficial, but never unobtrusive.

Europeans generally "ignore[d] the unmarked borders, or the traditional restrictions about when to gather or not gather food, or how a huge harvest might be shared" (Savage, 2012). Native American practices like hunting and fishing, horticulture, modifying forests, creating grasslands, and domesticating animals all impacted soils, microclimates, hydrology, and plant and wildlife populations (Warren, 2003: 8). Development of the built environment was also

substantial. Although Native North American settlements did not reach the scale of their counterparts farther south (such as Tenochtitlan, Quito, or Cuzco) there were substantial developments (Warren, 2003: 14). Mound-Builders demonstrated a great proficiency for moving massive swaths of earth, creating a variety of raised and sunken landforms (Warren, 2003: 15). Southwestern Pueblo settlements featured multistoried buildings with systems of connecting rooftops, interior passageways, water storage, agricultural processing spaces, work terraces, public plazas, and religious chambers (Nabokov and Easton, 1989: 348). Settlements along the Northwest Coast had banked “main streets” running along the fronts of large wooden structures. These settlements ranged in size from smaller communities of fewer than a dozen houses to massive autonomous towns (Nabokov and Easton, 1989: 229). Earth lodges, grass houses, and teepees dotted the Great Plains (Nabokov and Easton, 1989: 122). Those who settled in the Eastern woodland regions used structural frames and lashed coverings to construct both temporary settlements and more permanent (sometimes palisades) villages (Nabokov and Easton, 1989: 52). To assume that such massive populations could live in a place without impact is unrealistic, and potentially dehumanizing (Warren, 2003). The idea of a "virgin wilderness" prior to the arrival of European settlers in New York is, therefore, irrational. The Haudenosaunee Confederacy, or “People of the Longhouse,” that traditionally occupied present-day central and upstate New York carved out settlements varying in size and permanence. Their actions reshaped the landscape through horticultural practices, hunting, and fishing, and exploiting the region's other natural resources like salt.

New York was the Haudenosaunee Confederacy’s hereditary territory, the center of their power, and the seat of their council-fires” (Morgan, 1962: 40). This territory stretched "from the great lakes on the north, as far south as to what is now the middle line of North Carolina, and

extended from the Atlantic Ocean to the Mississippi River (New York State Indian Commissioners, 1883: 8). Through conquest, their control extended in every direction, from New England to the Mississippi, the St. Lawrence to Tennessee (Morgan, 1962: 40).

The Confederacy initially included the Onondaga, Mohawk, Oneida, Cayuga, and the Seneca; the Tuscarora joined later. Each nation held different responsibilities based on their geographic location (see Figure 1). The Seneca, located near what is now Rochester, New York along the Genesee River Valley, were the keepers of the Western door, controlling trade and traffic at that edge of the Iroquois territory. The Mohawk, the “keepers of the eastern door,” occupied territory stretching from the Catskills to the Adirondack Mountains. They were the first to encounter white traders, missionaries, and settlers (Grand Council, 2002: 13). To the west of the Mohawk, the Oneida occupied what now is Oneonta, New York. The Cayugas, now in central New York, lived near the Montezuma Swamp and along the Finger Lakes (Grand Council, 2002: 14). The Tuscarora, originally from North Carolina, were driven from their territory by the English during the second decade of the 18th century; the Seneca gave them their current territory located near Niagara Falls. The Onondaga, or People of Hills, lived in the heart of the territory at the center of New York State just south of Syracuse. The Onondaga were the Nation’s “firekeepers,” serving as host of the Grand Council of the Six Nations and keepers of the central fire. The Onondaga also claim the only chief who belongs to all the Haudenosaunee, the Tadodaho.

The exact date of the founding of the Haudenosaunee Confederacy is unknown and subject to dispute. Some argue there may have been alliances between individual nations prior to the formation of the Confederacy (Fenton, 1961). Venables asserts that the Confederacy was potentially formed as early as 1142 (2011: 3). Others argue it was established sometime between

the middle of the fifteenth and middle of the sixteenth centuries (Upton, 1980: 1). Still others maintain that it could not possibly have existed prior to the late sixteenth century (Trigger, 1978: 344). While some have claimed that membership offered little more than an agreement to end existing blood feuds and to cease raiding one another (Trigger, 1978: 344), a more plausible reasoning for the formation of the Confederacy was establishing economic and military cooperation and a continued peace between the former warring nations (Venables, 2011: 4). The Confederacy's model of government was admired and imitated due to its success. According to Chadwick, "the laws of the Six Nations were anciently simple" (1897: 55). "Immorality," punishable with great severity, was rare and was kept so by what Chadwick refers to as "public opinion" that restrained any tendency towards crime.

The Peacemaker mythology explains how the Haudenosaunee formed the Confederacy from five warring Nations (See, eg. Shannon, 2008; Lyons, 1992; and Eisenstadt, 2005). Whatever the exact date of the founding of the Confederacy, it began when the Creator sent a Huron man referred to as Deganawidah, the Peacemaker, across Lake Ontario to spread a message of peace, a way of being, and a method of governance to alter the climate of war in the region (Shannon, 2008: 28). When he was searching for the warring leaders, he first arrived among the Mohawk. When he landed, he requested an audience with the "fiercest human being in the land," hoping to "persuade men who had been dedicated to a life of revenge and blood feuds to abandon that path and bring peace to the land" (Lyons, 1992: 34). He came across Hiawatha, who had lost his daughters and was inconsolable (Shannon, 2008: 28).¹¹ The Peacemaker gave Hiawatha three strings of beads. In reciting words of condolence, the first

¹¹ According to Eisenstadt, Hiawatha wandered into a forest when he came across the supernatural being Deganawidah (Eisenstadt, 2005: 791). Here the Peacemaker offered him wampum strings and spoke the words of condolence.

string dried Hiawatha's tears so he could see, the second cleared his throat so he could speak, and the third opened his ears so he could hear. Deganawidah and Hiawatha set out to create a peaceful union to restore the spiritual power of the warring nations and bring strength and harmony to the group (Eisenstadt, 2005: 792).

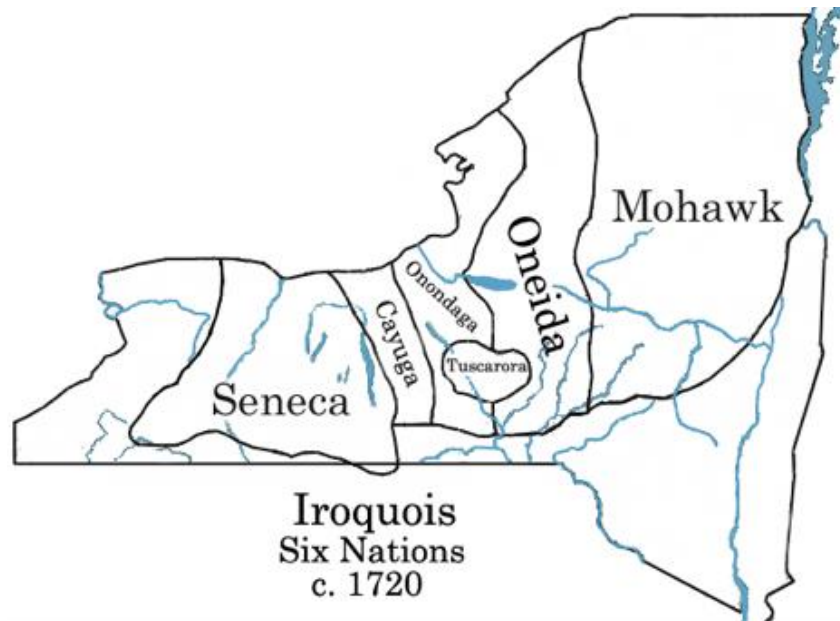


Figure 1. "Iroquois Six Nations Map c. 1720" (Nonenmacher, 2003) (PD)

Deganawidah and Hiawatha made their way to the Onondaga, turning attention towards the conversion of Tadadah, the "most feared and respected" of the Onondaga who stubbornly refused to accept their ideals, wishing to retain all of his power for himself (Lyons, 1992: 36). Tadadah harbored so much rage that his hair had become a mass of snakes (Eisenstadt, 2005: 791). Deganawidah gathered representatives from the other Nations and organized a meeting at the northern end of Onondaga Lake, where Tadadah kindled a council fire and received the group (Lyons, 1992: 36). The Onondaga Nation's account indicates that there were 49 other

leaders present who conveyed that Tadadaho would be "consigned to oblivion" absent consent. Tadadaho therefore agreed to join the other Nations as the fiftieth chief (Onondaga Nation, "Birth of a Nation," 2014). The Nation describes this agreement as combing the snakes from Tadadaho's hair, as he embraced the Great Law of Peace (Lyons, 1992: 36). Uprooting a massive white pine tree and throwing all of their weapons into the hole, the Five Nations marked the new union (Onondaga Nation, "Birth of a Nation," 2014). The Peacemaker placed an eagle at the top of the replanted tree to remind the Haudenosaunee of dangers to this peace. Deganawidah traveled among the Haudenosaunee for many years to disseminate his message of "peace, unity, and the power of the good mind" (SixNations.org, 2010).

The Hiawatha Wampum Belt marked the creation of the Confederacy (see Figure 2). This belt includes an image of the Covenant Chain woven down its center, with the chain's links running horizontally through rectangular patterns of beads representing the different nations. There are two sets of double rectangular patterns on either side of the belt converging in the center with the Onondaga. Venables intimates these were likely intended to signify the formation of the five original Nations of the Haudenosaunee Confederacy (2011: 3). The belt indicated a unity between nations, but demonstrated an independence between each Nation and later from European Nations seeking to treat with them (Venables, 2011: 3).

The Peacemaker's principals were adapted as the Great Law of Peace, the founding constitution of the Haudenosaunee Confederacy, creating a system of quiet succession of leadership, accountability to future life, and responsibility towards the seventh generation (Lyons, 1992: 33). The Law dictated mutual protection from outside invasions, restricted wars of conquest, and defined the rights of conquered nations or individuals (Lyons, 1992: 37). It established a political structure that replaced warrior leaders with a council of elders whose

mission was to maintain peace within the Confederacy, but encouraged individual nations to maintain their own laws and customs (similar to the U.S. concept of states' rights) (Lyons, 1992: 39). Duties were assigned to the various leaders of the Nations: women were selected as Clan Mothers, and clans were established to unite the Nations and form a social order.

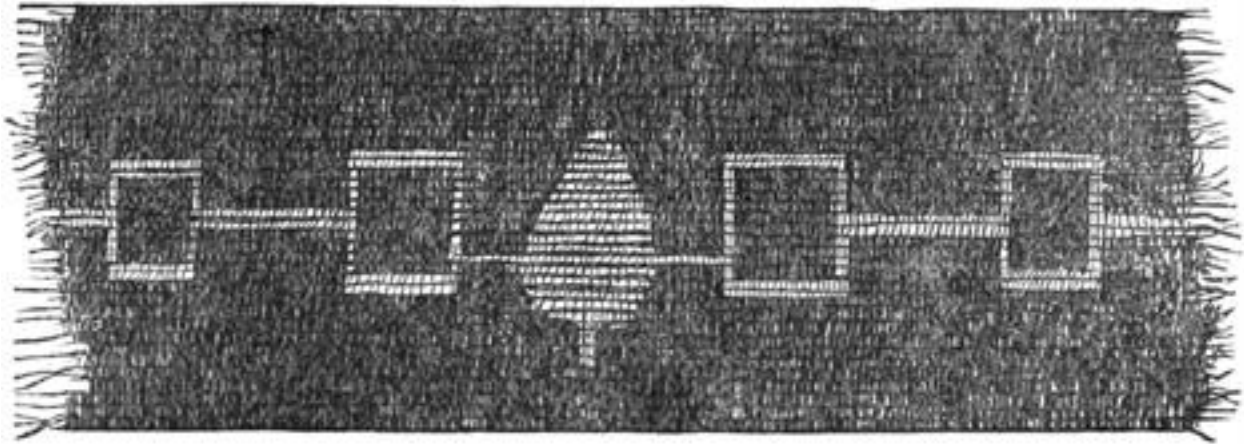


Figure 2. Tadodaho Wampum Belt commemorating the creation of the Haudenosaunee Confederacy. (*Popular Science Monthly*, 1886: 299). (PD-US).

The political structure of the Six Nations made corruption by outsiders difficult, but not impossible. Rival chiefs led villages throughout the Six Nations, advising but not commanding the people (Taylor, 2006: 19). They did not represent the entire village, but a particular clan (Wolf, Bear, Turtle) based on the matrilineal line. Chiefs who succumbed to European influence lost respect and influence and faced the possibility of removal from their positions by the matrons of the clan, the women responsible for choosing the chiefs who represented the village at counsel. This political structure maintained a delicate balance between individual autonomy and communal obligation (Shannon, 2008: 27). Relations between the Six Nations and outside polities were intended to be managed much in the same way (Shannon, 2008: 27). Further, the communal ethic stretched into close living among families in the longhouses and extended to

work outside the home (hunting, fishing, and planting and tending fields) (Shannon, 2008: 24). Today these six separate nations still live under the Great Law of Peace.

Haudenosaunee Utilization of Natural Resources

The political and economic success of the Haudenosaunee, as well as their system of beliefs are closely tied to the environment. These elements are rooted in the idea that the Great Spirit created man, all useful plants, animals, and other beneficial products of the earth; an Evil Spirit brother created monsters, poisonous reptiles, and noxious plants (Morgan, 1962: 156). Spirits are also recognized in natural forces such as thunder, wind, and objects of sustenance like the Three Sisters—Corn, Beans and Squash (Morgan, 1962: 161). Festivals, ceremonies, and feasts observe seasonal changes, natural events, and occasions such as plantings, growth, and harvests. At these assemblies the Haudenosaunee give thanks, both specifically (i.e. to the maple tree), and more generally to nature and its provisions. The Nations' Thanksgiving Address, used in ceremonies and political meetings, also incorporates an environmental ethic (Morgan, 1962: 203).

Environment determines economy as well as social institutions because individuals must adopt systems suitable to their surroundings. Just as the harsh environment of Arctic life was sustained by fish, whales, and seals, or existence was defined by the barren plateaus and sterile highlands of the Colorado River Valley cut by fast-flowing, but abundant rivers, so too did Haudenosaunee life revolve around the Eastern forest region's mild climate, abundant rainfall, and ample fish and game (Stites, 1904). By the time the Dutch arrived in New York, the Haudenosaunee had become a major power. Their strength of number and politics were enhanced by their perfect geographic location that gave them easy access to other nations via waterways and control of the fur trade (Upton, 1980: 1). Their advantageous physical location

meant they were protected from outside attacks by mountain and lake barriers, although not imprisoned by them. They controlled the best possible highways, both on land and by water, leading them into the outside world for trade or war (Morgan, 1962: 47). Their system of trails and forest highways, which connected the nations of the Confederacy, intersected at various points by cross trails and along the banks of rivers and lakes (Morgan, 1962: 47).¹²

The Onondaga's thoughtful choice of environment, was enhanced by the thoughtful cultivation of natural resources for many generations (Savage, 2012). This careful interaction may have caused arriving Europeans to mistakenly assume that places like Onondaga fisheries and extensive fields of corn were natural (rather than cultivated) resources (Savage, 2012). The Haudenosaunee, however, sculpted their environment. They built large, palisaded, based site selection on defensive strategies and resource availability, and utilized resources in a respectful, but highly productive manner. Early accounts of the region paint a picture of a landscape that was abundant in natural resources and an obvious target for future interlopers.

Site Selection, Village Construction, and Natural Resources

Jesuit missionary Joseph-François Lafitau spoke of the judicious site selection criteria for defensive purposes:

They locate them as far as possible, in the centre of some good land on some little hillock which gives them a view of the surrounding country, for fear of being surprised, and on the bank of some stream which, if it is possible, winds around the spot, and forms, as it were, a natural moat in addition to the fortifications which art can add to a site already well defended by nature. (Stites, 1904: 78)

Initially, villages with lingering fears of possible invasions were relatively compact and stockaded, but as the Confederacy consolidated its power and subjugated surrounding nations,

¹² These well-worn trails were eventually re-used, as noted by Morgan: "This route of travel was so judiciously selected, that after the country was surveyed, the turnpikes were laid out upon the Indian highway, with slight variations, through the whole length of the State" (Morgan, 1962: 47).

the need for palisades decreased. Early accounts of the Haudenosaunee territory describe large fortified villages, often several acres in extent, containing many dwellings, some of which were more than one hundred feet in length (Sullivan & Cook, 1887: 459). Stretching for five or six miles around the villages, were orchards and fields of ripening maize (Sullivan & Cook, 1887: 459; Schoolcraft, 1954: 340). Fertile valleys separated the rolling hills and open tracts of alluvial land favorable to horticultural practices. They yielded sufficient crops for village residents as well as enough to supply neighboring villages (O'Callaghan & Morgan, 1849: 12). Development and horticulture entailed the cleaning of sites, which required burning fields and preparation for sowing (Jesuit Relations XIII, 265, XXIII, 55).

The large valleys, divided by high ridges, supported the local flora. Even the limestone and slate cliffs were home to numerous plants and trees (Beauchamp, 1908: 37). Temperate summers allowed for productive growing seasons. Woodlands provided fuel for heat during long, cold winters, was used for cooking, and provided habitat for game. Hemlock, maple, pine, and oak covered the temperate forests. Additionally, trees such as ash, elm, fir, spruce, and cedar, often used in the construction of dwellings, were plentiful (Schoolcraft, 1854).

Diverse and abundant wild plant life provided the Haudenosaunee with a plentiful food supply beyond corn, beans, and squash. Numerous nut-bearing trees—hickory, pignut, butternut, chestnut, walnut, and oak—abounded in the forests as did sugar maples, crab apples, medicinal roots, wild beans, grapes, and cranberries. Jesuits in Onondaga County described a region teeming with wild grapes, plums and other fruits, forests full of chestnut and walnut trees, sunflowers used for oil, and many other strange edibles. A large variety of ferns, horsetails, mosses, cattails, pondweeds, arrowgrass were apparent as well as grasses, lilies, violets, moccasin flowers (Beauchamp, 1908: 38).

Naturalist John Bartram also spoke extensively of the region's bounty, detailing the plants used for food: a large type of sassafras, tulip trees, sugar maples, squashes, other gourds, pumpkins, watermelons, ginseng root, samphire, and maiden hair ferns used for medical teas. He also found hemp used for cloth, ropes, and nets (Beauchamp, 1908: 34). A plant called *cicuta maculate*, which was used as a poison also caught his eye, as did water lilies, wild rice, chara (or "feather beds") evening promise, bladderwort, purple gerardia, pawpaws, *aralia spinosa* (or Hercules' club), and nettle trees (Beauchamp, 1908: 35). The salt marshes provided a habitat for marine plants. The sphagnum swamps supported rare orchids and northern plants. The rivers and streams grew notable aquatic plants.

Waterways were teeming with diverse aquatic resources as a large water supply connected the entire Haudenosaunee territory. Streams crisscrossed the state all around the Six Nations settlements.¹³ European accounts of fish in the region depicted the abundance of these resources, which played a primary role in the Onondaga economy (Recht, 1995). A 1654 account by Jesuit Father LeMoyne noted "Onondaga lake (sic) abounds with fish—with salmon trout and other fish" (Beauchamp, 1908: 44). One year later, a Father Chaumonot stated: "the eel is so abundant there in the autumn that some take with a harpoon as many as a thousand in a single night" (Beauchamp, 1908: 44). The Jesuits were genuinely astounded by the adeptness

¹³ The Haudenosaunee territory was particularly rich in water resources. Waterways connected the Six Nations to the Eastern seaboard and the interior. The Mohawk River to Lake Champlain created a north to south corridor. The Allegheny flowed south, joining the Monongahela to form the Ohio, the Mississippi's major eastern tributary. Erie and Ontario Lakes provided access to the Great Lakes territory, and the Susquehanna River flowed into the Chesapeake Bay (Shannon, 2008: 19). Beauchamp (1908) spoke of water in the Onondaga region that flowed freely throughout the country. Surface waters ran northward; springs were located along the sides of valleys though there was a lack of artesian wells for consumption (20). Onondaga Creek flowed north starting from the Tully flats, entering the hills (and passing Cardiff—the grave of the stone giant). Another branch joined the creek from the west at South Onondaga Valley. Beauchamp (1908) noted that numerous stone quarries, moraines, and terraces surround the valleys and hills providing grand views (27).

with which the Haudenosaunee were able to acquire so many fish by managing dykes and weirs to efficiently catch salmon and eels using the same technologies and spearing them at night by the light of torches mounted at the end of their boats. An epicurean traveling through the region, Francis Adrian Vanderkemp, noted the variety, quantity, and quality of the fish in the Onondaga County region commenting:

Never did I see yet a country where all kind of fish was so abundant and good. It may be equaled; it cannot be excelled. I tasted within a short time of more than a dozen different species, the one contending with the other for the pre-eminence, the least of these affording a palatable food. Salmon, pike, pickerel, eat fish, if well prepare, boiled or stewed, resembling the delicious Turbot, Otzwego Bass, an Epicurean morsel, yellow perch, sun fish, tziob (chub), three species of trout, river lobster, turtle, sword fish, and a green colored fish of an exquisite taste, white fish, etc. (Beauchamp, 1908: 45)

As early as 1908, Beauchamp commented on how changes on the Lake were impacting aquatic resources. Drainage and development altered the character of the waterbody and the surrounding habitats. Though the lowering of the Lake and the infill of its south end did a great deal to improve human health, it also substantially impacted the flora and fauna (Beauchamp, 1908: 30). Waning populations of brook trout from overfishing and lack of proper food due to the altered habitat became noticeable in the early 20th century as well (Beauchamp, 1908: 48). The whitefish “of excellent flavor” that the Lake was noted for throughout New York, which fed on small crustaceans living in Lake weeds, had disappeared by Beauchamp’s writing (Beauchamp, 1908: 49). The naturalist attributed this to changes in the water from industrial contamination, the decrease in food sources, and overfishing. As the new century began, long before such action was ever taken, Beauchamp called for restocking streams and enacting protective laws to address the overexploitation of resources and pollution (Beauchamp, 1903: 50).

In addition to aquatic resources, the region supported an equally diverse population of animals. Prior to 1800, there are accounts of deer by the hundreds within sight of residences, as

well as bear, wild cats, and wolves on Onondaga Lake's shore. Wild animals were present "in droves" and "poisonous snakes were avoided only with great care" (Smith, 1904: 209). Morgan (1962) detailed the types of game used for food and harvested for pelts: mouse, deer, bear, beaver and other smaller animals. Beauchamp's (1908) accounts, however, were by far the most detailed. Reptiles existing in the territory included species of soft-shells, snapping, and spotted turtles, and some tortoises. Snakes including black, milk, ring, grass, water, brown, ribbon, and rattle slithered across the region. They were likely consuming bullfrogs (although rare), marsh frogs (which Beauchamp said had "suffered much of late from the growth of French tastes"), wood frogs, tree toads, and lizards of the yellow-bellied, violet, colored, red-backed, salamanders, and dogfish varieties (Beauchamp, 1908: 52). Numerous types of mollusks were present both on land and in the water, including snails, slugs, and clams-some invasive European species were among them (Beauchamp, 1908: 42). Raccoons, wolverine, skunk, fisher (a type of black cat), otter, sable, weasels, minks, wolves, deer, panthers, wild cats, squirrels, chipmunks, woodchuck, beaver, muskrats, elk, moose, and rabbit crossed the territory (Beauchamp, 1908: 52-55). A variety of birds populated Onondaga as well.¹⁴

Although abundant resources were found in the flora and fauna, the mineral deposits, specifically the Salt Springs at Onondaga, were the major cause of rapid growth. Brine springs at the southern end of Onondaga (or "Salt Lake") followed the lakeshore for nearly nine miles, extending from the Town of Salina, through Geddes and from Liverpool to the mouth of Ninemile Creek (Kappel, 2000: 1). Clark (1849) noted that "when the sun shone the water was

¹⁴ Beauchamp's extensive list included thrushes, chickadees, nuthatches, creeper, wrens, larks, warblers, swallows, cedar birds, vireos, butcher birds, finches, snowbirds, cardinals, blackbirds, orioles, crows, blue jays, kingbirds, whippoorwills, nighthawks, hummingbirds, kingfishers, woodpeckers, owls, hawks, eagles, passenger pigeons (rare at the time, now extinct), partridges, quail (although rare), plovers, snipes, herons, geese, ducks, cormorants, gulls, white pelican, swan, and guillemot (Beauchamp, 1908: 55). Morgan also mentioned fowl: cranes, dove, loons, and turkey (1962).

evaporated from the surface of the mud, leaving it covered with crystalized salt” (V2: 8). The Haudenosaunee were aware of and used them. Early state geological reports noted: “The different tribes were in the habit of visiting those springs, and were in the habit of manufacturing salt by evaporation, placing the water in earthen pots” (NYS Legislature, 1917: 11). Father Simone Le Moyne noted of the springs “we made Salt from it as natural as that from the sea” (O’Callaghan, 1849: 42). The Salt Springs eventually led to a booming economy and rapid growth in Syracuse. Local residents noted a parallel between the California gold rush and the salt craze that attracted men of wealth. By the mid-eighteenth century, both the English and the Onondaga were producing salt using a boiling process (Kappel, 2000: 1).

That European settlers spoke so highly of the environment and resources of the region would soon impede the prosperity of the Haudenosaunee and the Onondaga. Unconcerned with respecting the environment, and uninhibited about taking land, the seventeenth century invasion and theft of Haudenosaunee territory tore through what would become New York State. What was left behind in the wake would be a decimated land base for the once powerful Confederacy and an environment overburdened, overdeveloped, and unrecognizable.

CHAPTER 2

EUROPEAN ARRIVAL'S IMPACT ON THE ONONDAGA AND THE ENVIRONMENT

The Contact Period began at the start of the seventeenth century (1600-1750 AD), with the arrival of fur traders and Jesuit missionaries to the region (LCCM, October 10, 2011: 13). At a 1710 Council at Onondaga, Peter Schuyler¹⁵ noted the foundation of the relationship between the Confederacy and the colonists was economic, with both groups recognizing the “Advantages they received by Trading with them” (Venables, 2011: 17). Colonizing powers were keenly aware of the importance of an alliance with the Haudenosaunee for trade and for protection from each other and other Indian Nations (Richter, 1992: 135).

The advantageous location of Haudenosaunee made them a desirable ally, being located in the “most strategic position in northeastern North America” (Taylor, 2006: 4). The Onondaga were the most centrally located of the tribes and the safest from invasion being surrounded on the west by the Cayuga and Seneca and to the east by the Oneida and Mohawk, though threats still existed from the Hurons and French to the north and the Susquehannocks to the south (Blau & Campisi, 1978: 491). The various Nations’ settlements along waterways from the Appalachian Mountains in New York through French Canada, and from the eastern Atlantic coast to the Great Lakes to the west allowed for the easy transport of people and supplies and the mountains’ easy defense (Taylor, 2006: 6).

The first evidence of European knowledge of the Haudenosaunee exists in communications between Basque fishermen and the Algonquian society living to the north. In a language developed between the two cultures, the Basque identify the Haudenosaunee as the

¹⁵ Schuyler was the first mayor of Albany, New York, a member of the executive council and three-time governor of the Province of New York.

Hilokoa, or “killer people” (Snow, 2007). The first recorded contact was in the Baie de Gaspé at the tip of the peninsula of Quebec on July 16, 1534 (Trigger, 1978: 434). European fishermen had started exploring further south (out of French Canada) to earn money through the fur trade along the Gulf of the Saint Lawrence (Trigger, 1978: 346). Jacques Cartier was forced to take shelter while sailing north with furs when he met a group of individuals traveling down the Saint Lawrence River to fish. He returned a year later and sailed up the river to a palisaded Haudenosaunee village at Hochelaga on Montreal Island (Trigger, 1978: 436). Eventually, many fur traders came down the St. Lawrence to deal with the Haudenosaunee (Snow, 2007).

Increasing numbers of French, Dutch, and English came to claim their stake in this already occupied land. Sixteenth and seventeenth century Haudenosaunee life revolved around village communities, including about ten towns and numerous smaller hamlets with populations ranging from 100-2000 inhabitants with a density of around 200 individuals per acre (Shannon, 2003: 25). The Five Nations’ population was substantial, numbering approximately 21,000 (Eisenstadt, 2005: 792). Despite these large numbers, European acquisition of lands, both legal and illegal, became increasingly prevalent. The complexity and sheer number of purchases forced colonizing governments to formalize the process. For example, British colonies began to formulate a policy on Indian affairs as early as 1675 as the country’s goal of colonization led them to amass substantial acreage (Upton, 1980: 8). Initially, though grants to Indian lands were subject to the approval of the Crown, individuals freely purchased whatever they wished. The 1675 Indian policy recognized the need for a town clerk to record land transactions (Upton, 1980: 8). In 1696, the governor of the Province of New York established an Indian commission, but reserved his right to grant and tax lands. The lack of restrictions placed on the governor’s authority here led to an abuse of the process that drew the attention of a government facing

conflicting interests: the need to maintain a relationship with the Native Americans to prevent frontier attacks versus the irresistible desire to grab as much land as possible (Upton, 1980: 9).

With varying degrees of disregard for existing Haudenosaunee settlements, early settlers felled trees, cleared large swaths of land, and built villages and connecting roads. Despite their improvements, settlers "suffered much from fever and ague, and other diseases common to newly cleared lands and swampy regions" (NY Church of the Most Holy Rosary, 1916: 9). Colonists generally overlooked these health problems due to the expansive natural resources. The large quantity of natural food resources, however, did not prevent settlers from frequently suffering from malnourishment while waiting for agricultural pursuits to materialize (NY Church of the Most Holy Rosary, 1916: 12). During this time, the Haudenosaunee never entered into a treaty ceding collective rights to access, use and enjoyment of waterways, or rights to hunt, fix, trap, or gather (King, 2007: 463). Skirmishes between the tribes persisted as each group attempted to secure trade goods (Trigger, 1978: 346).¹⁶

The French, English, and Dutch all sought to forge trade relationships with the Haudenosaunee. The French first attempted to curry favor with the Confederacy, providing the tribes with numerous gifts and constantly deprecating the English (O'Callaghan, 1856, 7: 954). Further, the English and Dutch each negotiated treaties with the Haudenosaunee addressing matters from sovereignty to land transactions. These treaties, as opposed any relationships established with the French, have remained important. Throughout these interactions, New York's original occupants intended to preserve their position as separate but coexistent with the colonists (and later the Americans). Having witnessed New England's domination over the region's Algonquian Indians, they did not desire the same fate (Taylor, 2006: 7). Fortunately for

¹⁶ Trigger attributes the formation of the Confederacy in part to such skirmishes (Trigger, 1978: 346).

the Confederacy, early settlers from Europe living in what would become New York were often driven more by profit than the New Englanders, who saw a necessity to impose their religious views.¹⁷ European nations took opportunities to speak ill of each other in hopes of gaining the allegiance of the Native Americans (Richter, 1992: 135). The already successful Haudenosaunee were initially able to direct the power struggle for control of the territory, establishing varying degrees of alliance with the Dutch, the French, and the English.

The Dutch

After escaping the control of the Hapsburg Empire in 1581, the Dutch sought markets and trade routes to ensure economic survival (Gehring & Starna, 2009: 3). They arrived in the Hudson Valley at the start of the seventeenth century. Trade competition had already resulted in exorbitantly priced goods and controversy, necessitating the formation of the Dutch East India Company in 1602. The Dutch, recognizing the potential of the abundant natural resources, immediately developed a trade relationship with the Haudenosaunee (Gehring & Starna, 2009: 18). This was marked in 1613 with the first European treaty, the Two Row Wampum Treaty or Kaswenta. This formalized the idea of the Dutch and Haudenosaunee as “Brothers,” as opposed to “Father” and “Son” (Onondaga Nation, 2014).¹⁸ Both sides concurred with the principles of “friendship, peace, and forever” in an agreement memorialized by the Haudenosaunee in the Two-Row (Onondaga Nation, 2014). According to the Onondaga, the interaction was marked with three silver chains as iron would rust and break over time, but silver could be renewed and

¹⁷ This is not to suggest that the region was devoid of individuals and institutions with religious ambitions. French Jesuits were prevalent in the region and other religious orders attempted to insert themselves into the Haudenosaunee culture as well. In New York, however, commerce took center stage.

¹⁸ The Dutch initially came to the Haudenosaunee with a proposal of a paternalistic relationship, asserting “We think that in the future when we meet, it would be out idea that you would refer to us as a father and we will refer to you as son” - but the Haudenosaunee had a different notion that “from this day forward, we will refer to each other as brothers” (Schein, 2000: 21).

polished. This is referred to as the Silver Covenant Chain (Onondaga Nation, 2014). Scholars have alternatively asserted that the first evidence of the “covenant chain” began as a fiber rope in this 1613 treaty. The rope evolved to an “iron chain” in the alliance between the Dutch and Mohawks in 1643 and was renewed again with the English in 1665 when they took over the colony from the Dutch. They affirmed a silver chain in the Albany Committee of Safety during a council meeting in 1775 (Venables, 2008).

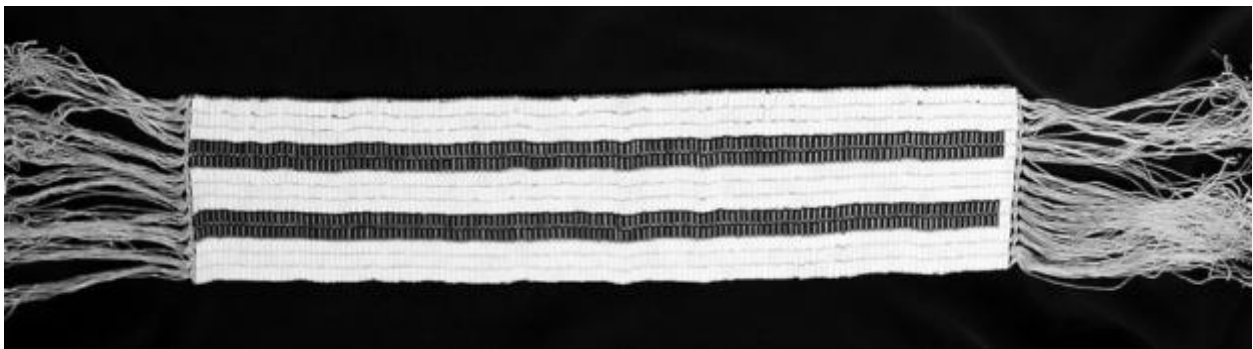


Figure 3. Two-Row Wampum Belt (Nativemeida, 2015).

The Haudenosaunee created a wampum belt to mark the agreement (see Figure 3). The Two-Row is a belt of alternating rows of white and purple wampum shells running the length of the belt: three white rows starting at the outside and alternating with two rows of purple. The interior purple rows symbolize two vessels, one a Dutch ship, the other an Iroquois canoe, traveling side-by-side along the river of life together, but never touching. As the two traveled together, they might help each other, but neither will steer the other’s boat. The three white rows were meant to convey peace, good mind, and strength—leading to clear communication, work towards common interests, and strength from these things (Grand Council, 2012). The resulting agreement articulated the idea of sovereignty—two distinct socio-economic nations (Schein, 2000: 21). The Haudenosaunee understood that the Two Row agreement would last forever: “as

long as the grass is green, as long as the water flows downhill, and as long as the sun rises in the East and sets in the West” (Powless, 2000: 22). The precepts of this treaty served as the basis for subsequent treaties. Similar terms would be reinforced in subsequent meetings and negotiations with the French, British, and American governments (King, 2007: 461).

Two factors made the Dutch relationship with the Haudenosaunee successful: the primarily financial motivations behind Dutch settlement and the more equitable treatment of the Five Nations than offered by other countries.¹⁹ Charles Henry Hall, a prominent Episcopal clergyman and proponent of civic and social reform went so far as to say of the Dutch arrival, “There was a manifest Providence in the fact that the Dutch, rather than the English, first came . . . into friendly relations with the [Haudenosaunee]” creating a “lasting friendship” (1882: 15). Hall’s romanticized notions of friendship, however, failed to recognize that Dutch attitudes regarding Native Americans were also clouded by trade elsewhere,²⁰ intentions regarding land, and difficulty understanding the Native American political structure and culture (Romney, 2015).

The benefits of a good trade relationship overshadowed any friction between nations and the Dutch order was institutionalized by a series of laws codifying how to work with the Indians. For example, by Dutch law every settler could choose his lands, but each was required first to extinguish Indian title. This was pursuant to Rule 26 of the “Freedoms and Exemptions Granted by the West India Company to all Patrons, Masters or Private Persons who will plant colonies in New Netherlands.” Adopted on June 7, 1629, the law stated: “Whosoever shall settle any colony out of the limits of Manhattan Island shall be obliged to satisfy the Indians for the lands they

¹⁹ Beyond what would become New York State, the Dutch also traded in the Connecticut and Delaware River Valleys and other points along the coast of North America (Romney, 2015).

²⁰ For example, Dutch traders referred to their North American trading partners as “wilden” or savages as opposed to “Indianen,” their title for most South American tribes (Romney, 2015).

shall settle upon” (Hall, 1882: 34).

Although arguably the Haudenosaunee had been somewhat disadvantaged by their inland location as it was not ideal for trading with the arriving European settlers, their situation improved substantially when the Dutch came to what became Albany (Eisenstadt, 2005: 792). Their focus was on trade over expansion into the interior; the estimated population of Dutch settlement was under 1,000, with only about 100 living near Fort Orange by 1638 (Upton, 1930: 7). With the Dutch only a day’s trip from Mohawk territory, the Five Nations had access to supplies of cloth, metal tools, and eventually firearms, which gave them an advantage in conflicts with neighboring nations throughout the seventeenth century.²¹ Even when Dutch rule ended in 1664, Dutch influence did not. The relationship with the Dutch had precluded advances by the French; Albany essentially remained a Dutch town by virtue of its population after its transfer to England; and the English would adopt notions of the Two-Row (Trigger, 1978: 431).

The French

To the degree that the Haudenosaunee relationship with the Dutch was propitious, feelings towards the French were at best ambivalent, leading to skirmishes between the Confederacy and the French military.²² Exploiting the French and their European rivals for an advantage in trading, members of the Confederacy acted in the manner best suited their political and economic interests (Trigger, 1978: 430). In the long run, allegiances fell with the English for economic reasons and as a result of the ill-will towards the French resulting from the actions

²¹ They conquered the Huron, the Petun, and the Eire among other nations, incorporating captives into their population. In a time when disease was rapidly diminishing their numbers, these people proved an important addition (Eisenstadt, 2005: 793).

²² Though the French attempted to cultivate a relationship with the Haudenosaunee, they were never as successful as the Dutch whose relationship with the Five Nations was too strong because they consistently undersold French traders, checking their advances (Hall, 1882: 42).

of Samuel de Champlain.

Champlain's first contact was during a 1603 expedition to Canada when he began to forge a relationship with the Algonquian-speaking people along the north shore of the Saint Lawrence River (Hurlbut, 1885). He explored extensively along the Saint Lawrence, established a small French holding in Quebec, and developed trade relations and alliances with the Wendat from Lake Huron, the Montagnais, and the Algonkin for the purposes of protection, trade, and exploration (Hurlbut, 1885: 11). Ongoing struggles between the Algonkin tribes to the north and the Haudenosaunee led the former to propose that in consideration of their assistance that Champlain aid them in their fight against their enemies. He consented, leading expeditions against the Haudenosaunee from 1609 through 1615, passing through Onondaga territory in 1615 on an expedition to the center of Huron territory (Clark, Vol. I, 1849: 253).²³ At Lake Huron, Champlain agreed to help raid the Haudenosaunee territory, entering into a conflict that had existed in the region long before his arrival. Champlain's assault failed and he was wounded by an arrow to his leg (Hurlbut, 1885: 15). Onondaga-French relations were clearly strained after Champlain's raid. Numerous French expeditions against the Haudenosaunee, such as Frontenac's assault or the overly assertive attempts of the Jesuits to convert the tribes, prevented them from ever gaining the Five Nations' favor. France's failure to establish strong trade or political alliances all but ensured that country's failure to maintain a stronghold outside of its Canadian territory (Hall, 1882: 46).

Attempts at peace between the French and the Haudenosaunee began in the mid-seventeenth century. The Jesuits made their way to Onondaga to foster a relationship with the Haudenosaunee, first sending Father Simon Le Moyne in the summer of 1654 (Trigger, 1978:

²³ Champlain is sometimes cited as the first white man in the Onondaga region (Clark, V.I, 1849: 253-55).

431).²⁴ LeMoyne accomplished little in Christianizing the Onondaga. Other Jesuits traveled south from Quebec, often writing about Onondaga Lake, the salt springs, and the surrounding environment (Thwaites, 1899: 153). A group accompanied by Frenchmen intent on constructing the Fort Sainte Marie de Genentaha also noted the salt, forests, and freshwater near the lake “Gannontaha” (Thwaites, 1899: 95).

The Jesuits only remained at Onondaga temporarily, building the mission of Sainte Marie near Onondaga Lake (Gannentaha) only a short distance from the principal Onondaga Village. Their occupation at the mission was short-lived and the site was abandoned in 1658. The novelty of the abundant natural resources soon wore off, and accounts began to focus on the unhealthful nature of the environment. The low-lying, swampy area they had built on was a breeding ground for mosquitoes. The religious men, lacking the abilities of the Haudenosaunee, had little food to subsist on other than boiled corn; they were "without bread, without wine, with no other sauce than appetite" (Thwaites, 1899: 181). The Onondaga provided them with food, but the good relations between the Nation and the French were fleeting.

Struggles persisted and tensions mounted as the French led raids with varying degrees of success against the Haudenosaunee (Trigger, 1978: 431). This culminated in the 1696 assault led by Louis de Buade de Frontenac against the Onondaga and Oneida. Frontenac, appointed governor of New France in 1672, had a turbulent tenure arguing with Canadian civil officials, jailed dissenting colonists, and quarreled with the Catholics (Eisenstadt, 2005: 607). His aim to expand France's reach into the Ohio Valley put him squarely at odds with Haudenosaunee

²⁴ The Jesuits (although not the only religious order in the region at the time) began to monopolize the work of the missions by the 1630s being better organized and funded than other orders. These Catholics played a substantial role in increasing the French presence among the Haudenosaunee as well as other Native American nations and represented the majority of the permanent population of Europeans in New France by 1629 (Trudel, 1973).

interests. In 1689, coinciding with King William's War, he began to lead a series of affronts on New York and New England. In 1696, he led 2,000 French troops, Canadian militia, and Indian allies against the Onondaga (Eisenstadt, 2005: 608).

The terrain proved an obstacle (Street, 1849: 326). A 77-year-old Frontenac arrived with his men, cannons, and mortars at a village that was already consumed by flames (Fenton, 1998: 267). The Onondaga had allegedly preemptively set fire to the palisade and their bark houses, "depriv[ing] the French troops of the glory of a siege," but leaving them to destroy the Nation's fields and stores of food (Fenton, 1998: 267). The Nation gathered what they could carry and took to the woods where the French were unable to follow (Colby, 1915). The Peace of Rijswijk ended the war the following year, bringing a close to hostilities in North America between the French and the Algonquins on one side and the English and the Haudenosaunee on the other (Eisenstadt, 2005: 608). In 1698, the Governor of New York informed Frontenac that, with the aid of the English, "he would arm every man in his province to aid the Iroquois if the French made good their threat to invade once more the land of the Five Nations" (Colby, 1915).

As French relations with the Haudenosaunee continued to falter, the English, having acquired all Dutch interests in New York in 1664, further cultivated their relationship with the Indians.²⁵ Infighting between the Five Nations persisted, some supporting the English, others the French, still maintaining neutrality. Most individuals arguing over sides had no authority (because they were not chiefs) and stayed away from such politics (Eisenstadt, 2005: 793). Neutrality won the day. The Five Nations, likely recognizing the potential hazards of being caught between the two warring European powers, negotiated simultaneous treaties with the

²⁵ In 1763, the Dutch undertook a brief, but unsuccessful attempt to "reconquest" New York (Eisenstadt, 2005: 793). The English strengthened their presence to return to power in 1764, working to reinvigorate trade and enhance relationships with anti-French factions of the Haudenosaunee (Eisenstadt, 2005: 793).

French in Montreal and the English in Albany in 1701 (Eisenstadt, 2005: 793). The “Great Peace of Montreal” with the French, who maintained intractable political alliances with enemies of the Five Nations, put an end to the war between the Confederacy and the French-allied Indians, adopting a policy of “aggressive neutrality” in exchange for France’s promise to mediate disputes between the former Indian enemies (Eisenstadt, 2005: 793). The agreement brokered between the Haudenosaunee and the English offered the Indians from French invasion (NY Church of the Most Holy Rosary, 1916: 5). The Haudenosaunee reaffirmed (or polished) the Covenant Chain relationship with the English at a meeting in Albany (Eisenstadt, 2005: 793). These negotiations at the very least demonstrated the Haudenosaunee’s position as a completely sovereign entity, separate from both the English and the French, despite each country’s claim to their loyalty.²⁶

With the outbreak of the War of the Spanish Succession (1701-1714) (known as Queen Anne’s War (1702-1713) in North America), the English and French sought Haudenosuane neutrality so as not to interfere with trade. The British, however, relied on their relationship with the Five Nations. The French and English ended Queen Anne’s War with the 1713 Treaty of Utrecht, which claimed to give the English sovereignty over the Five Nations (NY Church of the Most Holy Rosary, 1916: 5). Article Fifteen of the treaty recognized the “special political connections” between Great Britain and the Five Nations and addressed the inland extension of British trade with other Native Peoples in North America (Miquelon, 2010: 459). The Treaty, unclear regarding England’s actual authority over the Haudenosaunee, describes the Confederacy as trading partners and allies “subject to the power of Great Britain,” the last sentence also calls

²⁶ The neutrality of the Confederacy was not necessarily reflected in the behavior of individual Nations as was evidenced by the roles played by the various Nations during the French and Indian War (1754-1763), during which the Mohawk sided with the British, the Onondaga and Seneca with the French.

for a commission to determine allegiances (Miquelon, 2010: 459). With this treaty, the English gained dominance in New York. Because the French and Dutch ceased to be a threat to the British, the Haudenosaunee Confederacy could no longer use its relationships with these countries to broker for power. The Crown then took over all management of Indian affairs, particularly land purchases (Upton, 1980: 2).

The English

The English had not arrived at Onondaga at the start of the 18th century motivated by accounts of the region's valuable natural resources. They met the Onondaga, not with promises of salvation, but with hopes of economic exchange. As British settlements grew in number and size, exploitation of natural resources increased as well. Salt was of particular value to the settlers, and the English consistently listed the springs as an important natural resource, a source of turmoil between the occupying English and the distant French. Though the Onondaga had previously utilized the salt springs to trade salt in Albany and Montreal, they had never over-exploited the resource for commercial purposes though.

Much of British-Indian relations during this time was overseen by Sir William Johnson. Johnson, an Irish immigrant, was one of the most well-known and well-regarded British colonists. Known to be charming, cunning, and ambitious, he gained the support of the Mohawk and royal governors alike from the time of his arrival in the late 1730s and brokered these relationships into an appointment as the King's superintendent for Indian affairs (Taylor, 2006: 4). He was appointed to manage Indian affairs first in 1746, again in 1755, and commissioned in 1756 (O'Callaghan, 1856: 839). His assessment of Indian relations was that that "he found the Indian interest in so visible a decline that no person had interest enough to obtain a Treaty with the 6 Nations... yet... by his personal interest and unweaned endeavors... [secured] the fidelity

of the remaining Indians and to animate many of them to proceed against the Enemy” (O’Callaghan, 1856: 839). In an often-overlooked transaction, in 1751 Sir William Johnson attempted to prevent the French from building a fort on Onondaga Lake. He asked the Onondaga to “grant him this lake, with the land for two miles around, and he would make them a handsome present” (Bruce, Vol. 1, 1896: 131). The Nation signed a deed in exchange for £350. The English government declined to reimburse him despite his acting in the public interest, but granted him the tract instead (O’Callaghan, 1856, 840). When Johnson died on July 11, 1774 his will granted all of his property, including the Onondaga Lake acquisition, to his son.²⁷ The grant states “I also devise and bequeath to my said Son John Johnson all my right and title to the Salt Lake at Onondaga & the lands around it Two Miles in depth, for whom I have a firm Deed, & it is also Recorded in the Minutes of Council at New York” (Venables, 2012). Conflicting with Johnson’s will is the account given by British government representative in Johnson’s memorial, which claims:

The Memorial of Sr William Johnson Bart . . . states that he “never [took] any step to procure such grant being unwilling to engage in land affairs less the malicious might have a color to draw ill nature inferences... [making him] less able to serve the Publick. (O’Callaghan, Vol. 7, 1856: 840)

Venables (2012) argues that even if Johnson had a valid claim, it was nullified during the American Revolution. New York passed a “Confiscation Act” in 1779 granting the state the right to seize property owned by prominent Loyalists, effectively ending any claim Johnson may have asserted to the Lake and the surrounding land.

In 1753, growing conflicts between the English and the French over Haudenosaunee-controlled land influenced the Nations’ relations with the former. The British presence in North

²⁷ Sir William Johnson died after collapsing in July 1774 in Johnstown, New York while speaking at a council with the Haudenosaunee in his home in the Mohawk River Valley (Venables, November 19, 2012).

America at the time far exceeded that of the French (Walton, 2009: 27). Despite this, the English recognized that a strategic alliance with the Haudenosaunee was critical to a successful outcome, leading the country to try and smooth over any ill will that had resulted from fraudulent land dealings (Venables, 2011: 21). French expansion into the Ohio River sparked old rivalries. In 1756, the British formally declared war, though fighting had broken out in North America two years earlier (Eisenstadt, 2005: 605). The fighting stretched from Virginia through Nova Scotia, beginning with a dispute over control of the junction of the Allegheny and Monongahela rivers.

Hundreds of colonists in New York enlisted in provincial and regular regiments. Laborers and craftsmen joined expeditions to construct fortifications, roads, and ships (Eisenstadt, 2005: 606). While the Haudenosaunee initially remained neutral, as the British began to amass victories the Six Nations' role as allies to the Crown increased (Eisenstadt, 2005: 607). The French and Indian War lasted from 1754 to 1763. In the 1763 Treaty of Paris, the British received Canada from France and Florida from Spain (which had allied France in the fight) (Cowley, 1996). With the defeat of the French, the Six Nations further lost the ability to leverage relationships with the English or French, though trade and political allegiances remained important weapons against other Indian nations (U.S. Census, 1995: xi).

England's pursuit of an economic relationship with the Haudenosaunee continued (Bruce, Vol. 1, 1896: 126). Foreshadowing problems after the Revolutionary War, however, the Confederacy complained that despite promises made by the English, "we feel ourselves very much wronged and ill-treated by your people in trade, and frequently ill-used, without cause" (Bruce, Vol. 1, 1896: 127). It was requested that Johnson better control the colonists in his charge, particularly with regard to interfering with hunting and fishing (Bruce, Vol. 1, 1896: 127). Johnson, appointed as Commissary of Trade in the Spring of 1766, attempted to repair

relations by restricting traders' interactions with the Indians; however, land troubles and frequent acts of violence by "lawless settlers" hindered his efforts (Bruce, Vol. 1, 1896: 130).

Increasing dissatisfaction with Britain's Indian policies led to an American Indian War for Independence, starting with the April 1763 siege at Fort Detroit (NPS, 2015). Pontiac's Rebellion persisted until 1764, spreading both east and south. Smaller skirmishes continued through 1765. Fearful of a pan-Indian union west of colonial lands, King George III issued a royal proclamation in October 1763 to calm unrest (NPS, 2015). This 1763 Proclamation addressed colonial expansion, the management of the remaining French colonies, and the establishment of government.

Controlling land speculators whose settlement activities were leading to frontier conflicts had become a major concern (Arnold, 2011). The Proclamation, noting the additional lands acquired via the Treaty of Paris, declared that in the interest of keeping peace with the Indians, no one should cross over the established boundaries either in the new territory or the colonies. The British and Haudenosaunee "agreed" on a line beyond which colonists could not settle, reserving the territory north of Florida and New Orleans, east of the Mississippi River, and west of the Eastern continental divide in the Appalachian Mountains for Native Americans (Royal Proclamation, 1763). This only served to complicate the process by merely requiring possession after purchase and approval by the Crown (Upton, 1980) (see Figure 4). It further prohibited private land contracts with the Indians. All purchases were to be made by British officials "at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie" (Royal Proclamation, 1763). Officials could not grant land absent royal approval. Unfortunately, speculators already had claims to lands on the Indian side of the line, colonists already settled

west of the boundary, and American Indians were living east of the boundary (NPS, 2015).



Figure 4. Proclamation Line of 1763 (Cg-realms, 2009).

It is important that the Royal Proclamation explicitly stated that Aboriginal title existed and continued to exist. It also supported that the land would remain that way until ceded by treaty. Arguably, the Proclamation is still in place in Canada, as incorporated into the section of the Charter of Rights and Freedoms guaranteeing nothing can terminate or diminish Aboriginal

rights as outlined by the Proclamation. American independence would render the agreement invalid in the United States.

Sir William Johnson continued his efforts to promote the equitable treatment of the Haudenosaunee, consistently maintaining the Nations existed as sovereign allies outside of New York's jurisdiction (Taylor, 2006: 34). Despite Johnson's best efforts, however, neither the English nor the colonists regularly interpreted English law in a manner favorable to the Confederacy. In an August 1765 communication between New York Attorney General John Tabor Kempe and Sir William Johnson, Kempe set forth that: "Wheresoever the King's Dominions extend, he is the Fountain of all Property in Lands, and to deny that Right in the Crown in any Place is in Effect denying his Right to rule there" (Taylor, 2006: 33). According to Kempe, Haudenosaunee territory lay squarely within the borders of New York, placing them under the King's dominion.

In 1766, Johnson and John Stuart, his counterpart in the Southern Department of Indian Affairs, petitioned the British Board of Trade to formalize the boundary lines established by the 1763 Proclamation (NPS, 2015). The government approved the request in 1768 and Sir William Johnson, began negotiations with the Haudenosaunee for Great Britain at Fort Stanwix (Marshall, 1967). The Crown negotiated this treaty with the Six Nations as well as the "Shawaneese, Delawares, Mingoies of Ohio & other Dependent tribes" (O'Callaghan, 1849: 587). The 1768 Treaty of Fort Stanwix created what would eventually be known as the Old Property Line (see Figure 5). The line was "fixed" to "prevent those intrusions & encroachments of which we had so long & loudly complained & to put a stop to the many fraudulent advantages which had so often taken of us in Land affairs, which Boundary appearing to us a wise and good measure" (O'Callaghan, 1849: 587). Indians living inside the property line were to be left alone,

and “The lands occupied . . . by any other Nation affected by this our cession may effectually remain to them & to their Posterity” (O’Callaghan, 1849: 589).

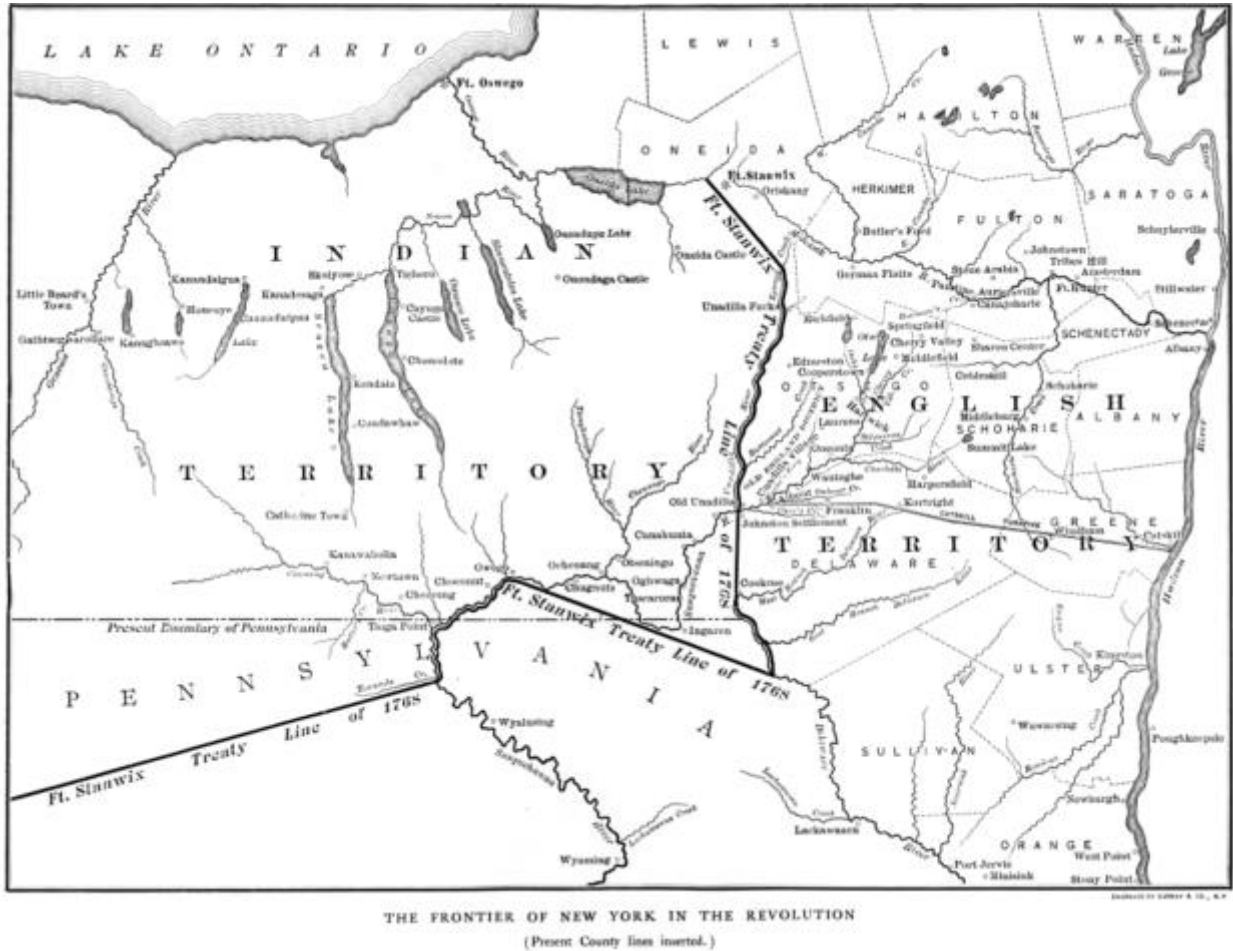


Figure 5. “Old Property Line” as established by the 1769 Treaty of Fort Stanwix (Halsey, 1901).

The 1768 line effectively separated the Haudenosaunee from their territory east of Fort Stanwix, creating New York's border at a line west of Fort Stanwix (Venables, 2011: 29). This Treaty was negotiated between Great Britain and the Confederacy rather than any one colony, a policy of centralization that lasted through the Articles of Confederation and later the U.S. Constitution (Venables, 2011: 31). In adjusting the earlier 1763 boundary line, this treaty sought

to bring an end to frontier violence (Billington, 1944). The Native Americans received gifts and cash amounting to £10,460 7s. 3d sterling; Great Britain gained an expanded territory (Taylor, 2006).

Ultimately, Haudenosaunee the exchanges with the settlers and governments of these three European countries produced very different results. The Nations' disregard for the French, preferring to negotiate instead with the Dutch and English, led to treaties whose interpretation has confounded legal entities into the twenty-first century. These early interchanges are what informed how the Haudenosaunee would be forced to proceed in imminent land transactions and in negotiating its sovereignty with Great Britain and the United States.

CHAPTER 3

ONONDAGA AND THE AMERICAN REVOLUTION

As Haudenosaunee and British relations evolved, both had the added burden of growing political unrest among the settlers. The Crown was faced with colonists rising up and land speculators and corrupt British officials had already illegally acquired Indian lands (U.S. Census, 1995: xi). By the time the first shots (or more accurately the first official military engagements) of the Revolutionary War were fired at Lexington on April 19, 1775, the colonists' desire for territory already presented a clear threat to what remained of Haudenosaunee holdings. Such unethical land deals combined with discriminatory treatment led individual members of the Six Nations to take sides during the conflict although the Confederacy officially remained neutral (Upton, 1980). The Oneida and Tuscarora joined the colonists, while the other four nations remained with the Crown. Regardless of the side chosen, all of the Nations suffered considerable losses after the war ended when faced with a new nation holding a great deal of debt and animosity towards the tribes that had sided with the British.

The Revolutionary War was brutal in many states, including New York, the nature of the conflict being a civil one. The choice of sides, including those made by Native Americans, reflected years of pent up hostilities. At the onset of the War, negotiations to ensure Haudenosaunee neutrality were considered paramount. The Patriots sought an alliance with, or at the very least neutrality from, the Six Nations (Bruce, Vol. 1, 1896: 134). In a 1775 Council at Albany invoking (and appropriating) the language of the Covenant Chain, the soon-to-be Americans reminded their neighbors that through "union and a friendship for one another [we] will become stronger (Venables, 2011: 32). The Haudenosaunee initially pledged their neutrality in the imminent conflict. Negotiations continued until the October 10, 1775 creation of the

Treaty of Fort Pitt in Pennsylvania between the Patriots and the Haudenosaunee. The agreement stipulated that the Six Nations would remain neutral in the conflict so long as the colonists ceased their constant violation of the 1768 Treaty of Fort Stanwix (Venables, November 19, 2012).

Although the Haudenosaunee Confederacy's government took steps to maintain its neutrality, independently the tribes took sides, some Nations having members fighting on both sides (Cohen, 1945: 418; see also, *McCandleas v. United States*, 25 F. 2d 71, 72, (1928)). New York attempted to restrict the illegal land acquisitions occurring across its borders, and in April 1777 its first constitution recognized that the safety of the state required maintaining peace with the Haudenosaunee. It further recognized that “frauds too often practiced towards the said Indians, in contracts made for their lands, have, in diverse instances, been productive of dangerous discontents and animosities” (New York State Indian Commissioners, 1883: 7). The state resolved, therefore, that no purchases or agreements for the sale of land made since October 14, 1775 or any thereafter would be binding or valid unless made under the authority of and with the consent of the State Legislature (New York State Indian Commissioners, 1883: 7).

Belligerent colonists regularly broke their part of the agreement. Changes in the law failed to prevent people from settling on Haudenosaunee lands or from attacking them outright (Venables, 2011: 33). In addition to crossing over previously negotiated settlement lines, the Patriots supported an embargo against British goods in October 1774 (Venables, November 19, 2012). This restriction violated the Covenant Chain agreement between England and the Haudenosaunee that had promoted trade between the two governments for over a century. Though the Confederacy—the government working by a consensus of the six member nations or council fire—remained neutral—a few short months after a series of meetings in Quebec, New

York, and England in November 1775, it became evident that the majority of the Six Nations favored allegiance with the King (Bruce, Vol. 1, 1896: 135). The end of neutrality disrupted the peace between the Six Nations as individuals and Nations chose sides. Fighting between the Nations of the Confederacy began on August 6, 1777, when the Seneca (siding with the Crown) and the Oneida (on the side of the Patriots) faced each other in the Battle of Oriskany (Upton, 1980: 14). The battle occurred east of the 1768 Property Line and resulted in a loss for the Patriots, although many later accounts list it as a United States' victory (Venables, November 19, 2012). Dewitt Clinton,²⁸ said of the Haudenosaunee's involvement in War, "They hung, like a scythe of death, upon the rear of our settlements, and their deeds are inscribed with the scalping Knife and tomahawk, in characters of blood" (Sullivan & Cook, 1887: 445).

As of late January 1779, though some individual members joined the American cause, the Onondaga were still not active in the conflict (Upton, 1980: 14). When a group of Onondaga traveled to Niagara that February to persuade other Nation members to return home they were stopped in route by colonists, leading them to fear their brethren had been taken prisoners (Bruce, Vol. 1, 1896: 140). When asked the purpose of this detainment, Colonel Van Schaick responded: "They were cut off not by mistake, but by design—I was ordered to do it—and it is done" (Bruce, Vol. 1, 1896: 140). By April 1779, a major campaign against the Haudenosaunee had begun.

On July 3, 1778 the Patriots faced the Loyalists and their Haudenosaunee allies in the Battle of Wyoming (Savas & Dameron, 2006: 178). The Patriots were ambushed at dusk, nearly 300 of their soldiers killed, homes burned, and livestock allegedly killed and stolen (Savas &

²⁸ DeWitt Clinton was the nephew of New York Governor George Clinton. He was both a politician and a naturalist. Clinton served as a United States Senator and Governor of New York. During his tenure as Governor he encouraged and oversaw the construction of the Erie Canal (Burrows, 2010).

Dameron, 2006: 180). News of the massacre in Wyoming, Pennsylvania, buoyed by accounts of the battle describing large losses of life and incidents of torture, demonstrated “the necessity of vigorous repressive action” to protect the northwest frontier came to the political forefront. (Sullivan & Cook, 1887: 447). Washington was advised that he was “dealing with a foe whom fear and the want of means alone could constrain,” and a perceived need for a campaign against the Haudenosaunee was emerging (Sullivan & Cook, 1887: 448).

As the burgeoning colonies continued struggling for independence, the previous three years of conflict had drawn heavily on resources (Sullivan & Cook, 1887: 428). By the time of the Sullivan Campaign, Washington wrote, “Our affairs are in a more distressed, ruinous and deplorable condition than they have been since the commencement of the war” (Manley, 1932: 14). The resources of the Haudenosaunee were, unfortunately in clear reach. One account of the Campaign indicated that “Washington saw that the Iroquois were encamped across the path of peace and progress for the young republic . . . The young republic felt the need of the position, and it took it regardless of the cost. (Sullivan & Cook, 1887: 436).²⁹

The Sullivan Campaign

In 1779, the American military, led by Major General John Sullivan (dispatched by General George Washington), along with nearly 6,000 troops marched into New York with the mission of “punishing the Iroquois Confederacy... and of breaking their alliance with Great Britain” (Eidenstadt, 2005: 1503). Washington’s orders were to wage a scorched-earth campaign

²⁹ General Sherman, in a Centennial celebration spoke of the land gained by the war: “I have never, in my whole travels in Europe, Asia or American, beheld a land towards which I would advise people to turn their steps, as this beautiful country... and I congratulate you all, on being inhabitants of this lovely country, leaving with everything which makes life desirable. Had it not been for the battle fought on this ground, it perhaps would have been long, before your ancestors could have had the farms, which you are now possessors of. Therefore, you have reason to be grateful to General Sullivan (Sullivan & Cook, 1887: 440).

against the Haudenosaunee in response to the Wyoming massacre, directing plans for the extermination of the Six Nations, starting with the Seneca (the largest of the nations).

The Sullivan Campaign was three-pronged. In April 1779 Patriot forces under Colonel Goose Van Schaick attacked the Onondaga; from August 11, through September 30, 1779 the campaign proceeded against the Cayuga and Seneca; finally, between August 11 and September 16 troops were sent north from Pittsburg to destroy additional Seneca villages (Venables, November 19, 2012). Attacks against the Cayugas, Onondagas, Tuscaroras, and Mohawks, and finally any Oneida that were acting in concert against the U.S. followed (Sullivan & Cook, 1887: 426). The 1779 Campaign forced many who remained neutral to ally themselves with one side or the other.

The raiders annihilated 40 villages, destroyed at least 160,000 bushels of corn and other crops, and displaced thousands. Those who lost their homes, but were fortunate enough to escape the military, spent the winter huddled outside Fort Niagara reliant on British allies for food (Sullivan & Cook, 1887: 428). The account given by Ellis Roberts,³⁰ a Utica politician, delivered at the Centennial celebration, painted a picture of a defeated Confederation:

The tribes were stripped of their homes, and for the purposes of the revolution, the Six Nations ceased to be organized allies of the British crown. They were reduced to wandering pillages, to revengeful, uncompromising warriors, who struck where they could, and sought to wreak vengeance on all the settlements, while they no longer had homes to be assailed. (Sullivan & Cook, 1887: 428)

Captain Graham, who led the attack on the Onondaga, was ordered to surround and destroy the settlement. Houses were burned, guns destroyed, corn burned, and stock killed (Bruce, Vol. 1, 1896: 146). The troops withdrew by October 1779. The Onondaga, who were “nearly destroyed” by the Campaign, then directed their allegiances towards the Americans (Strong,

³⁰ Roberts was a U.S. Representative from New York and the twentieth Treasurer of the United States. Prior to his political career he was the editor and proprietor of the *Utica Morning Herald*.

1894: 117). In a letter to Lafayette, Sullivan boasted that the Six Nations could now clearly see “Great Britain cannot protect them, and it is in our power to chastise them” (Strong, 1894: 117). Washington was satisfied with the decimation of the landscape, pronouncing “I congratulate Congress on his (Sullivan’s) having completed so effectually the destruction of the whole of the towns and settlements of the hostile Indians in so short a time, and with so inconsiderable a loss of men” (Brasby, 1893: 124).

Some Haudenosaunee were spurred to join the Crown in its efforts against the colonists at the end of the destructive Sullivan Campaign. The Haudenosaunee siding with the Crown returned the attacks in 1780 and 1781. Regardless, by the conclusion of the Campaign and the end of the Revolution, the power of the Haudenosaunee had been diminished. Many had been forced from their territory to become dependents of the British or the Americans. Smaller numbers remained devoted to the fight for continued control over their former territory with war parties operating until 1783 (Manley, 1932: 14). Sullivan’s campaign also drew attention to the vast potential of the land in central and western New York. Further, much of the Haudenosaunee land had already been promised to members of the American military at the end of the war as part of a Military Tract.

The Military Tract

The Military Tract originated with a resolution of Congress passed in September 1776 to create an incentive for men to join the cause by promising bounty lands. This inducement, offering from 500 to 5000 acre parcels, allowed many cash-poor, land-rich states to encourage enlistment by promising rewards commensurate with military rank (Eisenstadt, 2005: 1048). The initial resolution asked that 88 battalions be enlisted immediately, each state furnishing a specific number. New York was to provide four. A “bounty” of twenty dollars was promised to

each non-commissioned officer and private soldier and Congress would make provisions for granting lands. The resolution required the money to procure the lands would be provided by the states in the same proportion as the other expenses of the war (Bruce, Vol. 1, 1896: 5). Congress increased its provisions for bounty lands, on August 12, 1780 (Bruce, Vol. 1, 1896: 6).³¹

Individual states, including New York, passed similar acts to encourage enlistment, creating even larger boundaries in 1783 (Bruce, Vol. 1: 1896). The state set aside and defined the boundaries of 1.8 million acres of land for the Military Tract in July 1783, much of which included Haudenosaunee territory (see Figure 6). Before the war was over, the New York Legislature began formulating plans to cover their promised military bounty lands using the Nations' land (Law of the State of New York, 6th Session, Ch. XI, 267). That year, the New York Legislature proceeded to discharge the obligations of the United States and the state, granting land in previously established proportions.³² Boundaries for New York's Military Tract were altered in 1786, shifting farther north towards what is now the Adirondack Park, though this land was undesirable as it was ill suited for farming. It was not until after treaties were brokered with the Haudenosaunee that the land was balloted, surveyed, and patents issued to cover the country's debt (Eisenstadt, 2005: 1048; Bruce, Vol. 1, 1896: 6).

³¹ The terminology used for provisions from different governments is generally for state protection—bounty land, for federal service—gratuity lands (Bruce, Vol. 1, 1896: 6).

³² The distribution was set forth as follows: Major-general—5,500 acres; Brigadier-general—4,250; Colonel—2,500; Lt. Colonel—2,250; Major—2,000; Chaplain—2,000; Captain or Surgeon—1,200; subaltern or surgeons mate—1,000; and non-commissioned office or private—500 (Bruce, Vol. 1, 1896: 6). The state did not stop at determining the size of the plot, but also mandated the tract's layout: Townships would be laid out in six, two-mile plots, and then further subdivided into 156 lots of 150 acres each. Two lots were to be reserved for the minister and two more for a school. Each individual would receive as many lots as the gratuity or bounty provisions dictated. Those given land were required to improve land at a rate of five acres for every 100 within five years in order to retain possession. All of these lands would have to stay within the bounds of the designated Military Tract (Bruce, Vol. 1, 1896: 7).

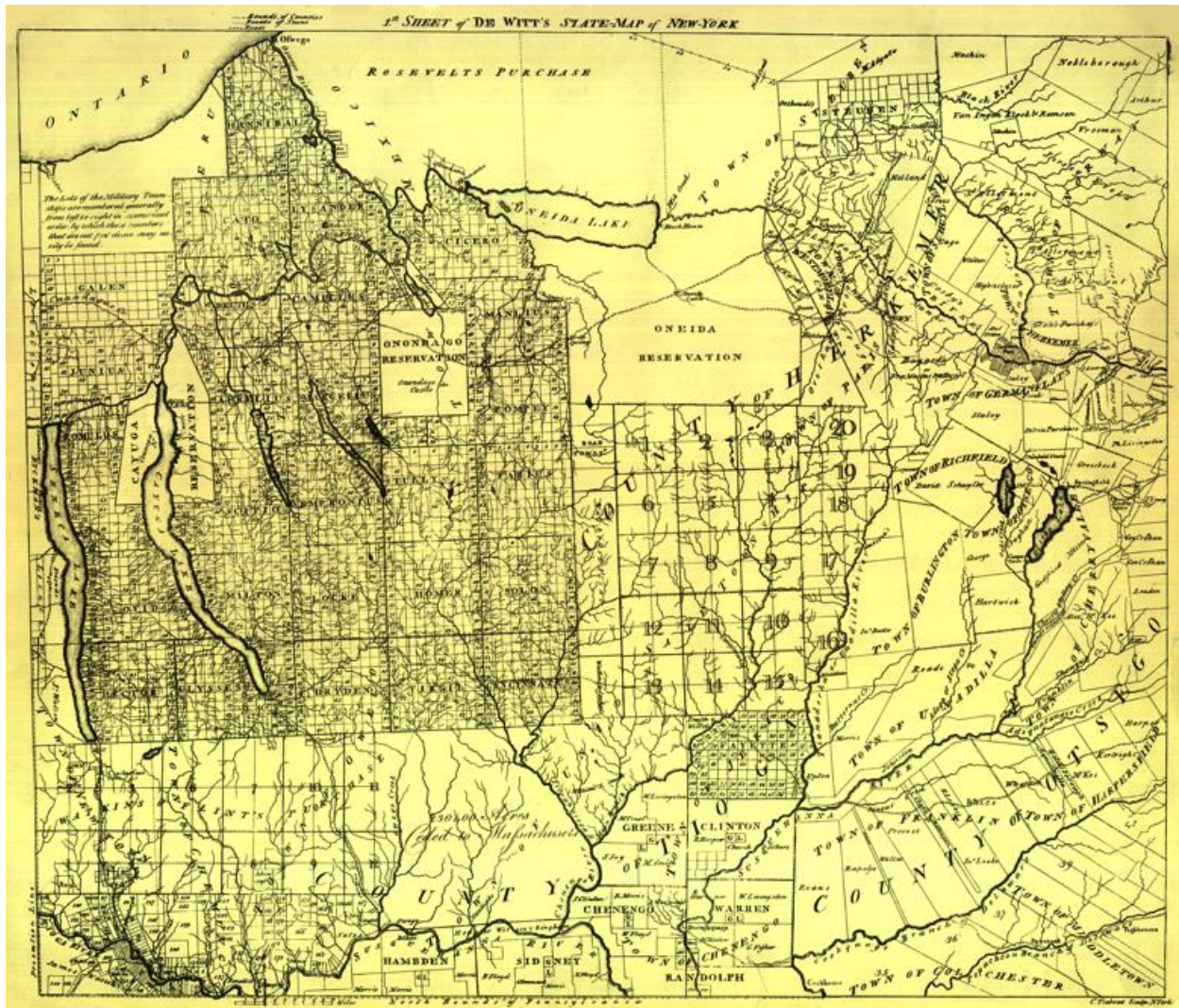


Figure 6. Central New York Military Tract [full map] (DeWitt, 1792).

The survey of the New York Tract began in 1789, after “treaties” were secured with the Onondaga (1788) and Cayuga (1789) ceding the land within the already defined boundaries (Eisenstadt, 2005: 1048). The provisions for the distribution of the lands were finalized that year, though their distribution was “a source of almost infinite perplexity to the commissioners, as well as to the real owners” (Bruce, Vol. 1, 1896: 10). Individuals frequently had turned to the courts to settle disputes between soldiers and squatters. Frauds committed throughout the process led to a 1794 requirement that all deeds and conveyances previously executed (and all

subsequent) be filed with Albany County or deemed fraudulent (Bruce, Vol. 1, 1896: 10).

According to Bruce, the number of soldiers who settled on granted Military Tract lands was comparatively limited because of their general dissatisfaction regarding the territory (Bruce, Vol. 1, 1896: 145). That so few of the deeded owners ever settled on their parcels, meant the lands were left open to settlement by “unscrupulous speculators” (Bruce, Vol. 1, 1896: 11). It has been suggested that of the 2,090 individuals entitled to land, only 158 received their letters of patent, indicating that less than eight percent actually took up their claims (Schein, 1991; citing Rose, 1935). Additionally, many grantees were reluctant to wait for the distribution of their entitlements, attracted instead to frontiers further west (Schein, 1991: 149). As a result, most rights to these bounty lands were sold by the original grantees between the end of the War and the final balloting of the lots in 1793 (Schein, 1991: 150). By the mid-1790s over 90 percent of these lands were owned by small-scale speculators interested in making a quick profit (Schein, 1991: 151). Some grantees profited by selling their bounty rights several times over, which complicated the legitimacy of all Military Tract land purchases (Schein, 1991: 151). Disputes arising over title were brought to the state in such great numbers that a board of arbitration, the “Onondaga Commissioners,” was established in 1797 (Schein, 1991, n. 17).³³ Eventually, New Englanders from Massachusetts, Connecticut, Rhode Island, and Vermont settled these lands (Rosenberry, 1909) (see Figure 7). They found New York “far excelled anything they had been accustomed to see [and] were so well pleased that they located in the vicinity (Rosenberry, 1909: 155).

³³ This board oversaw nearly 1,800 cases regarding 2,700 lots before its dissolution in 1805 (Schein, 1991, n. 17, citing Rose, 1935: 74). Of these title disputes, over 40 percent were brought by only 13 men, which suggests that many of the land was purchased by a small number of speculators (Schein, 1991, n. 18).

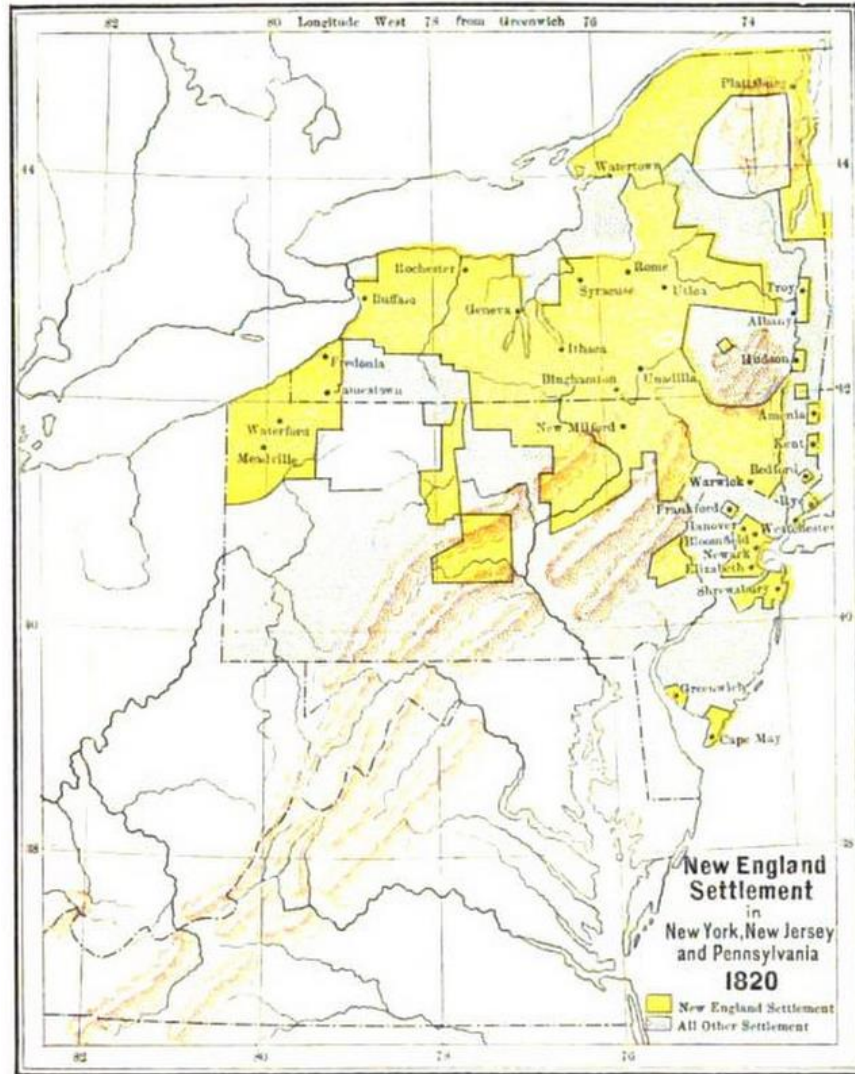


Figure 7. Settlement of New York, New Jersey, and Pennsylvania by New Englanders. (Rosenberry, 1909: 168) (P.D).

Despite the Military Tract and the expansion of the colonists into their territory, by the close of the War the Haudenosaunee still held extensive lands: most of Central New York, all of western New York (with the exception of the military posts located at Oswego and Niagara), a large percentage of northern and western Pennsylvania into Ohio and southward (Graymont, 1976: 439). Various reasons have been given as to why the Six Nations would so quickly lose such an expanse of land after the War: a weakened military position, the abandonment by Great

Britain, poverty, and disunity among the Nations (Graymont, 1976: 440). Further, the impact of the unethical, often illegal land transactions negotiated by the new federal government and the state as well as the misappropriation of Indian sovereignty cannot be overstated.

Parties from all sides acted in self-interest. State officials usurped federal authority, federal authorities spied on state undertakings, and Haudenosaunee with no authority offered up large parcels of land in exchange for money and supplies. Conflicts quickly arose over who had control, particularly between the states and the federal government. New York and the United States also each had notions of Indian policy. The federal government inherited Great Britain's responsibility to maintain a just and peaceful relationship with the Indians while simultaneously attempting to settle War debts, develop already existing claims, and expand westward (Prucha, 1995: 29). The Haudenosaunee were similarly faced with maintaining a shaky peace with the new United States (who some had squared-off against in battle), while trying to protect themselves from the new nation's rapacious need for land. The Confederacy would enter the coming decades of land deals and treaty negotiations at a disadvantage.

CHAPTER 4

NEGOTIATING PEACE AND PROPERTY IN POST-REVOLUTIONARY NEW YORK

The conflict between the United States and Great Britain closed with neither country having negotiated terms for its Haudenosaunee allies. The 1783 Treaty of Paris transferred jurisdiction over, but not ownership of, Indian lands to the United States. The country gained preemptive rights to territories from the Great Lakes to Florida, and from the Atlantic Ocean to the Mississippi River (Campisi and Starna, 1995: 467).³⁴ The Six Nations were caught in a power struggle between New York and a nascent federal government, both of whom wrestled with how they would operate, a process no more apparent to those creating the new federal system than the states it encompassed.³⁵ Further, four of the six Nations were faced with the disadvantages of defeat; the other two gained little leverage from their alliance with the Americans. Notwithstanding these obstacles, within a year the Haudenosaunee and the United States reached initial terms in a 1784 treaty.

Eager and retaliative state and federal representatives were anxious to refill government coffers and settle scores by amassing Six Nations' land. At the end of the Revolutionary War, Haudenosaunee territory extended over more than half of New York State. In less than a century they were relegated to small reservations, parting with thousands of acres for very little in return, all beginning with the Treaty at Fort Stanwix (Upton, 1980: 49). The federal government faced a divisive state government and reluctant nations of the Haudenosaunee

³⁴ The British continued to feel some claim over the Six Nations after the War, discrediting the attempts of the authority of the federal government to negotiate with "our Indians" (Manley, 1932: 33).

³⁵ A conflict exists in considering it a failure of the Americans or Great Britain to consider the Haudenosaunee in the Treaty of Paris. While the Six Nations were possibly disadvantaged by this oversight, they did consider themselves a sovereign nation (Sullivan & Cook, 1887: 431).

Confederacy in order negotiate a treaty and to set federal policy.

Arguably, any recognition of the Six Nations' sovereignty disappeared at the close of the Revolution. They received little political support after the War, though Canadian Governor Sir Frederick Haldimand spoke out in November 1783 to assert that England had no right to cede jurisdiction of Indian lands (Upton, 1980: 17). Haldimand also offered to the Haudenosaunee that although any intervention on his part could renew the general war, he could provide them with new territory within the Canadian border (Manley, 1932: 21).

Tensions created by strain of the long, arduous struggle that left the country drained were intensified by the fact that military and public expenditures had depleted the national purse (Jay, 1800: 3). Each state attempted to grab and develop land as quickly as possible. New York and the United States rapidly parceled off Haudenosaunee territory to fulfill military tract bounties. New York had relinquished interests in the Northwest Territory in a resolution to Congress on October 20, 1782. Further, the threat of losing territory to Vermont, Massachusetts, and Pennsylvania led state officials to survey beyond the 1768 Line and to assert rights to treat the Six Nations within state borders (Manley, 1932: 25). New York claimed a desire to make peace with formal rivals, but more accurately it sought to accumulate as much land as possible (Manley, 1932: 25).³⁶ Thus began the struggle for supremacy over relations with the Haudenosaunee.

The struggle between New York, the federal government, and the Haudenosaunee over

³⁶ In September 1782, Pennsylvania attempted to secure federal approval to deal with the Indians with support from Connecticut, New York, New Jersey, and North Carolina (Manley, 1932: 25). Massachusetts and Rhode Island favored securing a national treaty first (Manley, 1932: 26). The Pennsylvania delegates posited that the federal government wished to treat first because of its intent to acquire land in compensation for the act of war; if states were allowed to enter into agreement with the Haudenosaunee exchanging monetary compensation for land it would undermine the federal efforts.

title would be a long one.³⁷ Despite the desire of many New Yorkers to completely expel the Haudenosaunee from the state, George Washington and Philip Schuyler (a general during the Revolution and later a Senator from New York) opposed such treatment. Both men preferred to offer, or more accurately dictate the terms of peace (Bruce, Vol. 1, 1896: 172). Legally, the Americans should have interpreted the nature and scope of existing treaties with the Six Nations as with any other foreign nation, which would have meant adhering to the 1768 boundary line (Manley, 1932: 19).

Federal and state officials justified taking Indian lands “to make atonement for the enormities which they have perpetrated, and a reasonable compensation for the expenses which the United States have incurred by their wanton barbarity” (Journals of Continental Congress, 1783: 688). Many later recognized that members of the Six Nations were forced into allegiances by the ill-treatment of the colonists. One centennial account of Onondaga County noted that “memory must ever be mingled the thought, that unwarranted acts of white men were to a large extent the cause of desertion by the Indians to the royal cause” (Bruce, Vol. 1, 1896: 133). These governments, however, needed to settle with the Indians not only for the sake of peace, but also to establish the boundaries of its promised Military Tract (Journals of Continental Congress, 1783: 682). Negotiating a new boundary line would require a great deal of care, neither claiming nor conceding too much territory.

Questions quickly arose in New York regarding the distribution of the Military Tract (Jay, 1800: 1). The New York State Land Commissioners reported to the Governor that the state

³⁷ Massachusetts also laid a claim to Haudenosaunee territory after the Revolutionary War. In the 1786 Treaty of Fort Harmar, New York and Massachusetts claimed nearly 13 million acres in central and western New York. Massachusetts secured the rights to ten towns surrounding Binghamton and six million acres of Cayuga and Seneca lands. This land was sold to settlers and eventually became part of New York (Treaty of Fort Harmar, 1786).

was fearful that soldiers, many still occupying fortresses across the state, could easily resolve to "conquer or pillage" in return for unfulfilled promises of land. To diffuse the situation, the State Legislature declared on March 27, 1783 that it would keep Congressional promises made regarding bounty lands and added five additional acres for each one the federal government had promised as "a kind of peace offering" (1800: 4). Despite this attempt to quell tensions, problems with the distribution persisted.

Confusion arose as to with whom the land could vest. The date of issue was March 27, 1783, but it was unclear at what point this interest could vest in a soldier's beneficiary. The state decided that if the soldier intended to receive the grant was alive on the date of issue, the interest then vested and he could transfer his title to any heir or grantee he wished (Jay, 1800: 4). To determine otherwise would be asking the state to provide additional bounties. Before this determination was made, a number of individuals had already settled and improved the land to which they believed they had a right. Land Commissioners, adopting a Locke's philosophy of property ownership and labor, suggested the Governor allow some rights be given based on these improvements. The state agreed that these improvements could justify that, regardless of the actual title, occupants were entitled to consider their labor as their own (Jay, 1800: 6). Without reaching some understanding with the Haudenosaunee, however, the state would never have sufficient land to satisfy its land debts. In the interim, the federal government issued notes or papers to those to whom it had promised land.

Negotiating for Peace and Property

After the divisiveness of the war, the devastation of the Sullivan campaign, and the abandonment by England in the Treaty of Paris, the United States recognized the importance of prompt peace negotiations with the Haudenosaunee. Washington feared that New York's

proposed scheme to expel all of the Indians from their territory, might lead to another “Indian War” (Manley, 1932: 46; Prucha, 2000: 1). Advisors to the United States Congress determined that the Haudenosaunee were “well disposed for peace” and yet also “ready for War” (Manley, 1932: 42). Washington instead sought a slow, deliberate expansion that would force a gradual retreat of the Native Americans, hoping that “as our settlements advance upon them...they will be as ready to sell, as we are to buy” (Prucha, 2000: 1). Initially, Washington’s plans allowed for federal and state purchases of Indian land: "No purchase under any preface whatever should be made by any other authority than that of the sovereign power, or the legislature of the State in which such lands may happen to be" (Prucha, 2000: 1).

In May 1783, Congress and the Secretary of War sent Ephraim Douglass to inform the Indians of the desire for peace and the settlement of border disputes (Manley, 1932: 37). Douglass traded extensively with the Haudenosaunee prior to the War and was versed in several Native American dialects (Burton, Douglass, & McCully, 1910). During the War he represented the Patriots in meetings with various tribes (Burton, Douglass, & McCully, 1910). Washington travelled to New York in 1783 to assess conditions (Cohen, 1945: 418). He and Jefferson closely followed peace negotiations. The presence of James Madison, James Monroe, Lafayette, and General Butler further demonstrates the importance of the meetings with the Six Nations (Cohen, 1945: 418). Washington assessed the situation at Fort Stanwix in July 1783 meeting and began to formulate ideas on Indian policy, settlement, and governing of the western country (Manley, 1932: 45).

Washington expressed a preference for peace over war, claiming that out of "compassion" the country should come to some agreement with the tribes and recognizing the need to establish a trade relationship and also claimed. The federal government wished to

establish a new boundary line beyond which Americans would not settle and within which the Haudenosaunee would not come except to make treaties, trade, or conduct "other business unexceptionable in nature" (Manley, 1932: 45).³⁸ Washington's strategy for negotiations required that New York politicians remind the Haudenosaunee that they were on the losing side of the conflict and were now subject to the benevolence of the United States (Prucha, 2000: 1). Federal strategy also required monitoring the actions of New York State as a potential rival, initially in regard to dispensing Military Tract lands. A report of a committee on Indian affairs to Congress recognized early on the state's strained relations with the Haudenosaunee, particularly cautioning of the New York's potential of overstepping its bounds: "It shall appear that persisting in such grants and appropriations may so far irritate the Indians, as to expose these United States to the dangers and calamities of an Indian war" (Journals of Continental Congress, Vol. 25, 1783: 642). Federal concern over state actions were warranted as New York and its leaders contrived plans to address the "hostile" tribes. General Philip Schuyler, for example, urged the remaining Nations to retreat to the north (Manley, 1932: 18).

The United States was also faced with lingering loyalist soldiers in Canada, some of whom supported a policy of conciliation, others encouraged the Indians to be prepared to take up arms "in defense of their rights and property if they were invaded or molested by the Americans" (Manley, 1932: 19). The British in Canada also conveyed to the Americans that they were fearful that any interference may "bring on disputes" between British soldiers and the nearly 3,000 Haudenosaunee being housed at their forts (Manley, 1932:38). This fear was reinforced by Joseph Brandt, who remained tied to the Crown, asserted that the Haudenosaunee would likely never peaceably surrender their lands (Manley, 1932: 39). The Six Nations expressed their

³⁸ Washington also noted his desire to highly regulate trade with the Indians – wishing either to create a federal monopoly and regulate individual interferences (Manley, 1932: 47).

apprehensions regarding peace negotiations (Manley, 1932: 38).

In October 1783, recognizing the need for peace with the Indians and relying on the suggestions of the Committee on Indian Affairs, letters from General Schuyler and Ephraim Douglass, and numerous other documents, Congress provided instructions on how proceed. Congress requested that the Indian Commissioners of the Northern and Western districts hold conventions with the tribes in their districts (*Journals of Continental Congress*, 1783: 645). The states received one month's notice of the federal government's intentions of treating with the Native Americans, so they had an opportunity to send representatives to the negotiation of the settlement of new boundaries. While both sides desired peace, it was known that the Haudenosaunee did not want to cede territory (*Journals of Continental Congress*, 1783: 681).

Neither the federal nor the state governments were concerned with the welfare of the people they had just defeated in war. It was also unclear as to which possessed the authority to negotiate with the Haudenosaunee or who from the tribes had the authority to deal with them. The Articles of Confederation, the earliest permutation of a document establishing federal authority, considered negotiations with Native Americans to be the purview of Congress: "The United States in Congress assembled shall also have the sole and exclusive right and power of... regulating the trade and managing all affairs with the Indians" (*Articles Of Confederation*, 1781: Article IX, §4). Despite their sovereign status, Indian relations were addressed separately from relations with foreign nations (1781: Art. IX §1). The sovereignty of Indian Nations during the colonial period was not consistently addressed. The French and English sometimes referred to them as dependents or subjects in their absence, but as allied nations at Council (Manley, 1932: 23). New York, both as a colony and later as a state, had consistently asserted control over the Six Nations.

Despite the seemingly clear language of the Articles of Confederation, New York and Governor George Clinton would assert the state's authority to control the Indians within its border for years, claiming the reach of the federal government was vague (Graymont, 1976: 441). The state contested whether federal control reached to the Old Property Line or further west, whether the Confederacy was sovereign or part of New York State, and if the state had sole (or at least preemptive) control over Native Americans within its borders. Clinton's and the state's asserted position was that New York had control over anyone within its borders.

If federal and state authorities were unclear on authority to deal, the Haudenosaunee had no more satisfactory understanding, ultimately negotiating treaties with both. Initially, they deferred negotiating with the state until after arranging peace with the federal government. Mohawk Joseph Brandt conceded, however, that the state also had authority: "We have considered the Confederation of the United States, the Constitution of this State and the law under which you act and are fully sensible of your right, as Commissioners of this State, in treating with us the Six Nations who live and reside within its Limits" (Graymont, 1976: 442). As time progressed the ideas on who had authority invariably continued to shift.

The Treaty of Fort Stanwix

The first treaty negotiations between the federal government and the Haudenosaunee took place in 1783 at Fort Stanwix when the United States met with the Six Nations to settle a peace and determine the punitive boundaries for those Nations that had taken up arms against the Americans (Graymont, 1976). New boundary lines "separating and dividing the settlements of the citizens from the Indian villages and hunting grounds" were to be drawn (*Journals of Continental Congress*, 1783: 684).

Twenty years earlier, the boundary line established by Great Britain and the

Haudenosaunee stretched south from Rome, New York along streams, then south through Pennsylvania and along the Ohio River. Even prior to the Revolutionary War, this boundary was not seen as a permanent limitation of settlement. For example, a September 21, 1767 communication between an opportunistic George Washington and William Crawford asked that Crawford find a suitable 2,000 acres in territory beyond the Old Property Line, believing “nothing is more certain than that the lands cannot remain long ungranted, when once it is known that rights are to be had” (Butterfield, 1877: 2). The future President elaborated, stating “I can never look upon that proclamation in any other light (but this I say between ourselves) than as a temporary expedient to quiet the minds of the Indians. It must fall, of course, in a few years, especially when those Indians consent to our occupying the lands” (Butterfield, 1877: 4).

After the War, Washington determined to limit the amount of land the country would initially "negotiate" away from the Haudenosaunee and issued a proclamation making it a felony for individuals to survey or settle beyond the line (Washington to Duane, September 7, 1783: 2; Prucha, 2000: 1). Absent such restrictions, the West could potentially be over settled by individuals “skimming and disposing of the cream of the country at the expense of many suffering [individuals] who have fought and bled to obtain it” or hostilities with the Indians renewed (Prucha, 2000: 1). Congress agreed it was necessary "to accommodate the Indians as far as the public good will admit" and if necessary, provide them with some compensation for their land (*Journals of the Continental Congress*, Vol. 25, 1783: 693).

A declaration prohibiting the unauthorized settlement or purchase of Indian lands was issued on September 22, 1783 by the Continental Congress. This Ninth Article of Confederation declared that the federal government had the sole and exclusive right and power of regulating trade and managing all affairs with the Indians (Articles of Confederation, Art. 9). This was to

the exclusion of the states, provided that the rights of the state were not infringed or violated. It also prohibited settling on lands already inhabited or claimed by Indians or from purchasing or receiving Indian lands without the express federal authority. Failure to comply with these mandates would render a land transfer null and void (*Journals of the Continental Congress*, Vol. 25, 1783: 602). On October 15, 1783, James Duane and the Committee on Indian Affairs prepared a report to the Continental Congress proposing procedures for conferring with the Native Americans in the north and the west. Though chairman of the committee, Duane a New Yorker at heart, was interested in land development. This was often reflected in his advice to Governor Clinton to act in the manner that best suited the state in regard to Native American relations. The Governor's desire to amass Indian territory for the state before the federal government was clear. New York State quickly turned its focus towards extinguishing Indian title to land, ignoring the sovereignty of the Six Nations and attempting to usurp any claims the U.S. Congress might assert over Indian affairs within the state borders (Graymont, 1976: 440). The Six Nations indicated, however, that working with both governments was contrary to custom and that they were determined to "first meet Commissioners of the whole thirteen States and after that if any Matters should remain between Us and any particular State, that We should then attend to them" (Hough, 1861: 54).

New York State had ratified its own constitution prior to the close of the Revolutionary War on April 20, 1777. This was done in response to the "many tyrannical and oppressive usurpations of the King and Parliament of Great Britain on the rights of liberties of the people of the American colonies" (*Journals of the Provincial Congress*, 1777: 892). The state's constitution acknowledged the need for peace with the Haudenosaunee and to address those citizens in entering into fraudulent land agreements. The later was covered by a provision that

no land transactions could be made with the Native Americans absent the authority and consent of the state legislature (New York State Constitution, 1777, Article 37). With these provisions already in place, the state and a scheming Governor Clinton were prepared to implement a strategy to try and outmaneuver the federal government in procuring Indian lands.

Clinton's strategy encouraged dissension and jealousy among the Haudenosaunee and deception and manipulation of federal adversaries (Upton, 1980: 21). For example, the governor was provided no official notice from Congress regarding the federally appointed Indian commissioners until March 4, 1784 (Graymont, 1972: 447). His immediate response was to draft a resolution addressing the state's sovereignty over the Indians, whom he and his political associates claimed as members of the state (Graymont, 1972). Clinton's position remained the same throughout the conflicting negotiations between the Haudenosaunee and the state and federal governments; it was the state that had the true authority to deal with the Indians within its borders. Further, his advisors encouraged him to act in advance of the new federal government, directing him not to allow the federal commissioners to hold a conference or negotiate any cession of land with the Indians without the express permission of the state legislature (Clinton papers, 1904). Clinton's strategy embraced a spirit of non-cooperation in the actions and policies adopted in nearly all subsequent dealings involving state, federal, and tribal governments.

On March 17, 1783, the New York State Assembly (and soon after the State Senate) adopted "instructions to the Commissioners to be appointed in pursuance of the act for Indian Affairs" (Manley, 1932: 23). This guidance provided a detailed explanation on how to approach regulations with former allies, the Oneida and Tuscarora, regarding their territory. Despite their loyalty, the state's guidance encouraged their removal to less valuable lands (Manley, 1932: 23; New York Assembly Papers, Vol. 40, 1794: 5). If the Oneida and Tuscarora were unreceptive to

a land exchange, the commissioners were directed to discover which land they were willing to sell and at what cost. They were further directed to assert that New York State alone had the authority to purchase land from the Six Nations (Manley, 1932: 28). If these nations were completely unreceptive to parting with any land, the commissioners should discover the extent of their claimed territory in order to clarify national boundaries (Manley, 1932: 29). The instructions were silent as to how the Commissioners would address the Onondaga, Seneca, and Cayuga land deals. Schuyler and the other New York Indian commissioners questioned the propriety relocating the Oneida and Tuscarora. They reported their reservations to Clinton about the proposed actions prior to the federal treaty for peace, fearing Indian hostilities might follow (Manley, 1932: 32).

Clinton, and therefore the state, had a distinct advantage in that federal representatives negotiating the treaty at Fort Stanwix were restricted in their actions during their initial inquiries. Further, federal Indian Commissioners were ordered that: “The proceeding measures of Congress relative to Indian affairs shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits” (*Journals of Continental Congress*, 1783: 693). The commissioners were also instructed not to enter into any treaties or create any stipulation or condition that might imply or confirm any individual any grant of land (*Journals of Continental Congress*, 85: 692). These restrictions only served only to add to the confusion over whether the federal government or the state had the superior claim to treat with the Haudenosaunee. Federal representatives including Oliver Wolcott, Richard Butler, and Arthur Lee first met the Six Nations at Fort Schuyler in October 1784 to define a western boundary for the Haudenosaunee at the meridian of Buffalo. They would promise “peaceable possession” of the land east of that line, less six square miles around the Fort at Oswego (Cohen, 1945: 418). At

every turn, the state attempted to usurp federal power and assert a superior claim.

Cohen remarked the state “stopped at nothing, even arresting agents of the Confederated Government who were trying to negotiate the treaty of peace” (Cohen, 1945: 418). Before the federal representatives had an opportunity to meet with the Haudenosaunee, New York representatives, particularly the governor, would act as deceitful adversaries. Early state discussions considered completely removing the Haudenosaunee, even their former allies, or at the very least confining them within very restricted reservations (Cohen, 1945).

New York justified control over the Haudenosaunee by claiming the Six Nations had been dependent on the state since the initial creation of the Board of Indian Commissioners in 1696 (Upton, 1980: 17). Proponents argued that Sir William Johnson recognized the sovereignty of the board in the 1750s when he became the Director of Indian Affairs. Further they contended that although the Articles of Confederation gave Congress the power to regulate trade and manage Indian affairs, it also restricted Congressional actions so “that the legislative right of any state within its own limits be not infringed or violated” (Articles of Confederation, 1781).

While the state did not recognize Indian sovereignty, it displayed some cursory recognition of Haudenosaunee title to the land. This ownership recognition did not extend to control over the entire country, but only those areas previously under British control. The state operated as if any prior sovereignty or control belonged to the Crown, not the Indians.³⁹ The state’s legislatively appointed Indian Commissioners also claimed rights to enter into compacts and agreements with Indians residing within state borders ahead of the federal government (Hough, 1861: 50). Like the federal government though, the state moved to purchase title rather than simply take it (Graymont 1976: 442).

³⁹ This adoption of the Doctrine of Discovery would persist into the 21st century, granting the “conqueror” or “discoverer” title over lands with no regard for indigenous rights or occupation. See Chapter 11.

State and Federal Negotiation Strategies

Seeking to outmaneuver the state, Congress named five commissioners in March 1784 to negotiate a treaty with the Native Americans (Upton, 1980: 20). They were directed to meet in New York on April 10 to begin negotiations with the Haudenosaunee. The federal commissioners had been directed to negotiate the relocation of the Oneida and Tuscarora Nations if possible and the expulsion of the remaining nations (Upton, 1980: 18). Ironically, the state was cautioned against a similar action by federal officials, warning that it may lead to loss of trade or a potential rise in violence on the frontier (Upton, 1980: 18). It was suggested that the state wait until Indian populations gave way. By April 15, an insufficient number for a quorum were present. In the interim, Congress appointed two additional commissioners, Benjamin Lincoln and Arthur Lee (*Journals of Continental Congress, 1784*). Several weeks later Lee joined Wolcott and Butler in Albany, but by this time Governor Clinton's communications with the Six Nations regarding a treaty with the state had begun (Manley, 1932: 49).

In April 1784, Governor Clinton ordered the Indian commissioners he appointed the previous year to "enter into compacts for agreements with any Indians residing within the state" (*Clinton Papers, 1904: 323*). A week later, the state Indian Commissioners invited the Six Nations to a meeting at German Flats. The meeting was to be kept secret by orders of the Governor who hoped to garner favor with powerful members of the Six Nations (Upton, 1980: 19). The Haudenosaunee accepted the invitation, but requested that the meeting be moved to Fort Stanwix and indicated that "at the same time we wish to see proper persons from the different states present and we expect to make one peace with the whole" (Hough, 1861: 15).

The notion of a state "treaty" was challenged at the federal level (Manley, 1932: 107). A letter from Jacob Reed to Washington described the Governor's behavior as "So glaring a

violation of the federal Compact by this State [it] is to me alarming” (Manley, 1932: 107). James Monroe found the state’s actions excusable. In a correspondence with James Madison, Monroe attributed the behavior to a suspicion of Congress having the intent to injure the state, arguing New York’s attempt to advance before the United States was understandable as questions remained as to whether the Indians were members of the state (Manley, 1932: 109). Madison was less sympathetic, finding the actions of state officials “violated both duty and decorum” (Manley, 1932: 110). Reasserting federal authority to treat with the Indians, Madison rejoined that the Six Nations were not members of the state as they “do not live within the body of the Society, or whose persons or property form no objects of its laws” (Manley, 1932: 110). Even at this, however, he was hesitant to concede that the states ever intended to forfeit their preemptive land purchase rights (Manley, 1932: 111).

The Six Nations expressed frustration, confusion, and impatience with the state’s actions. Joseph Brandt expressed his grievance with the dual proceedings and the miscommunications between the state, federal, and Hadenosaunee governments, stating “Here lies some Difficulty in our Minds, that there should be two separate Bodies to manage these Affairs, for this does not agree with our ancient Customs” (Manley, 1932: 70). Though Brandt questioned whether the state had any authority, he agreed to a meeting with the Commission anyway.

The federal Indian Commissioners also grew suspect of Governor Clinton's plans. Commissioner Lee, arriving in New York by early August, reported back to his superiors about Clinton’s intentions. He cautioned that if the Haudenosaunee were aware that two distinct, jealous competitors were attempting to treat with them, they were likely to use it to their advantage. Lee and Butler wrote to the Governor requesting that the state delay negotiations until the United States had finished its general treaty (or at least act in concert with the larger

negotiation). The compatibility of Clinton's intentions with Congress's plans for Indian relations was also questioned (Hough, 1861: 29). Lee and Butler further informed Clinton of their intent to meet with the Six Nations in September and continued to investigate his intent to corrupt the federal proceedings (Hough, 1861: 18). They also attempted to dissuade the Oneida and Tuscarora from negotiating with New York, warning them not to part with their lands and reiterating that the state's actions were not authorized by Congress (Hough, 1861: 36). Clinton, at the suggestion of the New York State Indian Commissioners, determined he would not fully respond to Lee and Butler as whatever answer might lead to further difficulty (Hough, 1861: 33). He did agree to provide the federal proceedings with a few militia with the stipulation that "no Agreement be entered into with the Indians residing within the Jurisdiction of this State" (Manley, 1932: 55).

Lee and Butler were not alone in finding the Governor uncooperative and untrustworthy. Prior to the official federal negotiations, Congress sent the men to observe and report on the state proceedings (Hough, 1861: 29). Reverend Samuel Kirkland also tried to dissuade the Haudenosaunee from dealing with the state before they even arrived at the meeting.⁴⁰ Kirkland's actions to subvert the state were discovered by and described in a letter from a Jellis Fonda (a soldier, merchant, and justice of the peace from Schenectady, New York) to Clinton, stating the Reverend's intent was "to put the Oneida Indians on their Guard not to exchange their lands with you or any other Person for any other Lands" (Hough, 1861: 35). His warnings only delayed the arrival of the Oneida and Tuscarora for a few days (Hough, 1861: 36). In return, the Governor

⁴⁰ Kirkland was a Presbyterian missionary among the Oneida and Tuscarora, who assisted in negotiating land purchases between the Indians and the State, acquiring his own lands in the process (Hauptman, 2001). He had served as an intermediary between the Haudenosaunee and the Americans during the war as well (Hauptman, 2001: 69). Joseph Brandt intimated that Reverend Kirkland had told the Oneida that the State was going to force them to move farther westward – advising them "not to give over a Foot of the Ground to this State" (Hough, 1861: 33).

tried to complicate Congress's part in Indian affairs, asking the Six Nations to assemble at Fort Herkimer instead. The Haudenosaunee agreed to speak with state representatives only if they could meet at the more centrally located Fort Stanwix where they were already headed to meet with federal commissioners (Graymont 1972: 447).

When they finally met with the Haudenosaunee, the New York State commissioners walked a fine line. The state wanted to acquire as much land as possible, and sought retribution against those who had fought in opposition during the Revolution. Strategically, though, it would be imprudent to force a potential enemy to reside with and be assisted by the British, which would weaken the fur trade and drive up the costs of defending the western territory. State Indian Commissioner Peter Schuyler believed if left in place, the Six Nations would “doubtless dwindle and give way before the advance of civilized people” (Manley, 1932: 31).

Clinton instructed Schuyler and his fellow commissioners to act with the utmost caution and courtesy towards the Oneida and Tuscarora, and to assure them “that this State will offer no encroachment to be made within their limits nor any settlement there without their free consent” (Manley, 1932: 28). Schuyler, in return, cautioned the Governor to allow the federal government to negotiate first. Clinton was set on securing an agreement before the federal government had an opportunity. Schuyler's negotiations with the Six Nations perpetuated the Haudenosaunee's confusion regarding whom they were meant to deal with, and how and in what order to address competing interests. They also raised the concern that surveyors had already begun to infringe on their territory.

The states meetings with representatives of the Oneida and Tuscarora members of the Six Nations would last from August 31 through September 10, 1784. New York's first attempt at negotiating accomplished nothing. When the Governor, the Indian Commissioners, and other

associates arrived at Fort Stanwix on August 31, there were no official representatives from the Oneida or Tuscarora Nations present (Manley, 1932: 68). The Oneida and Tuscarora representatives did not arrive until September 3, but the following day Governor Clinton finally had his desired audience (Manley, 1932: 65). Clinton began by invoking the language and imagery of the Covenant Chain: being of one mind, maintaining the Chain of Friendship, preventing rust from forming on the chain, and polishing or brightening the chain for future generations (Venables, 2011: 36). He assured the Six Nations that his intentions were nothing like what the Reverend Kirkland and others had suggested, but that he intended to deal fairly and in the “ancient tradition.” He also discouraged them from dealing with anyone but the state, especially the federal government (Venables, 2011: 36). Clinton asserted that the state was due land as payment for costs incurred during the war and that the Nations who had sided with Great Britain would be held responsible for these the expenses (Hough, 1861: 58). In order for the Haudenosaunee to mend fences (or buy forgiveness), Clinton reasoned that “it is reasonable that you make to Us such a Cession of your lands as will aid Us in repairing and discharging the same” (Hough, 1861: 57).

Governor Clinton also attempted to reassure the Haudenosaunee by claiming that the state had no intentions of taking their lands. He stated that while the land “will ever remain secured to you” that the state’s intentions were to “have the Metes and Bounds thereof precisely ascertained in all its Parts, in order to prevent any Intrusions thereupon” (Hough, 1861: 41). Despite such assurances, communications with other government officials demonstrated his true intentions. Clinton maintained, however, that “ancient” custom did give the state a right of preemption should the Indians choose to cede their land (Hough, 1861: 58). Though specific boundaries were not mentioned in the discussions with the Oneida and Tuscarora, the state

sought to acquire lands in the vicinity of Niagara and Oswego.

Clinton also used the meeting to request information from Haudenosaunee representatives regarding their arrangements with Congress and what if any lands the federal representatives wished to deal (Manley, 1932: 76). He cautioned that those present should comply with any state offer they might receive: “Brethren! We recommend You to embrace the present Opportunity, lest, if this be lost or neglected, some unavoidable Accident or unforeseen Event may render a future one precarious and possibly less favorable to your interest” (Hough, 1861: 50). In rejoinder, the Oneida claimed they never held concern for the Governor’s intentions, but appreciated the states’ continued “interest” in the land and in what was “right” (Hough, 1861: 44).

Despite his best efforts, Clinton had little success. He was informed on the last day of negotiations that those who had come to talk only possessed the authority to make peace, not land deals (Hough, 1861: 60). The Haudenosaunee representatives offered to bring back the requests for lands in Niagara and Oswego, but they conveyed “This Business We expect they will treat with you about as soon as the Treaty with the Commissioners of Congress is ended” (Hough, 1861: 61). Thus in spite of his obdurateness in trying to outmaneuver the federal government by arriving at an agreement first, Lee and Butler were triumphant. Clinton, unsatisfied with the proceedings, left behind Phillip Schuyler and Peter Ryckman at the federal negotiations to observe and interfere with the proceedings, providing the direction: “You are to remain in Place with Mr. Peter Ryckman [a translator], who is to attend You, to observe the Conduct of the Commissioners of Congress in their proposed Treaty, and take Notes of their daily Proceedings” (Hough, 1861:63; see also Graymont, 1972: 449). Brant and the others present at the meeting with Clinton conveyed their true intent to the federal commissioners,

assuring the government that the Six Nations' representatives had not actually gone to Stanwix to transact any actual business with the state, but merely wanted to discover its intentions as guidance in future transactions (Manley, 1932: 78).

Federal Negotiations

The federal government began its negotiations with the Six Nations at Fort Stanwix in October 1784, one month after the representatives of New York State had left. Before the discussions began, problems arose from representatives of New York State. Further, a federal resolution had to be passed on October 5 prohibiting the sale or distribution of "spirituous liquor" to the Native Americans during the negotiations. A number of people representing the state violated this resolution. Schuyler, accused of distributing liquor with the intent of interfering with the federal negotiations, was reminded his presence was allowed only by virtue of the U.S. Commissioners sufferance, permission that could be easily terminated (Manley, 1932: 82). The militia seized the alcohol, holding it until such time as the Commissioners allowed its return.⁴¹

The alcohol distributors whose product was seized sought assistance from the lower courts to have Lieutenant John Mercer, the man charged with enforcing the no liquor law, arrested. The U.S. Commissioners refused his surrender, writing to the court to question its reasoning and authority for sanctioning the arrest (Manley, 1932: 83). New York officials insisted they had no desire to offend or violate the rights of Congress, but claimed they were obligated to enforce the arrest so as not to upset the state's legal system (Manley, 1932: 84). The federal commissioners took Mercer directly to Congress, preventing his arrest. Again, Ryckman

⁴¹ Troops were present from New Jersey, Pennsylvania, and Connecticut; however, New York troops were noticeable absent (Manley, 1932: 82)

and Schuyler remained behind to frustrate the proceedings (Manley, 1932: 92).⁴² The federal representatives ordered the troops that neither man be allowed in the Council, and “if [sentinels] see them, or either of them listening to or observing what passes in the Council, they direct them to move off” (Hough, 1861: 120).

At Congress’s first session during treaty negotiations, the commissioners delivered a speech similar to Clinton’s for the state’s, only asserting federal authority over making treaties with the Indians. They too emphasized the Haudenosaunee’s error in joining the British, particularly how their former allies abandoned them in the Treaty of Paris. Congress stressed the importance of peace, and also the need to surrender prisoners and land. The federal commissioners’ speech finally reached the conclusion that it should be the Haudenosaunee who should propose the boundary line (Manley, 1932: 87). It took five days for a response.⁴³ The Native Americans explained their allegiance to the British and agreed with the mutual need for peace between nations (Manley, 1932: 88).

As the discourse continued throughout the week, the Haudenosaunee reiterated that their lands were precious to them. Representatives proposed a boundary line that was not substantially different than the Old Property Line of 1768 (Manley, 1932: 89). This proposal was not well received. The Commissioners declared that any treaty negotiated would be between the U.S. and the Six Nations; any prior arrangements with the British were irrelevant, and it was presumptuous to suggest otherwise (Manley, 1932: 90). Further, that the Six Nations

⁴² Four years from this meeting, another would be held at Fort Stanwix, this time Peter Schuyler and Peter Ryckman would be in opposition to the state being associated with an illegal leasing company (Manley, 1932: 86).

⁴³ Those present included warriors of the Six Nations (who claimed the authority to speak also for the Ottawas, Chippewa’s, Hurons, Potowatomas, Messasagas, Miamis, Delawares, Shawnees, Cherokees, Chicasas, Choctas and Creeks) (Manley, 1932: 88).

were only following the terms of their agreement with the English in taking up arms against the Americans was deemed an insufficient excuse, particularly in light of the fact that they had entered into two separate covenants to remain neutral in 1775 and 1776 (Manley, 1932: 90). Butler went so far as to deny any sovereignty that the Six Nations asserted, harshly stating: "You are a subdued people; you have been overcome in a war which you entered into with us, not only without provocation, but in violation of most sacred obligations" (Manley, 1932: 91). He further reminded the Haudenosaunee present that the King of Great Britain ceded the whole United States, so by right of conquest they might claim the whole. The United States, he suggested, only sought a small part (Manley, 1932: 93).

The federal government would ultimately gain less than they desired in these negotiations, though they were more successful than New York State. The Treaty of Fort Stanwix, although brief, had a substantial impact. It was the first of many treaties signed between Native American Nations and the United States (Richter, 1992). It paternalistically stated: "the United States of America gives peace to the Seneca, Mohawk, Onondaga, and Cayuga and receives them into their protection" (Kappler, 1904: 2). Despite an express desire not to part with any more land, the delegates for the Six Nations were unable to refuse the federal Commissioners' demands, ceding all claims to land west of New York State and Pennsylvania to the United States (Graymont, 1972). They did not cede land in New York or Pennsylvania, except to grant the Americans access to Oswego. Subsequent agreements, however, would lead to substantial loss of land in those regions as well. The Oneida and Tuscarora were relatively secure in their holdings at this point (Manley, 1932: 92). The Commissioners proposed that the suggested line left extensive enough country "as they [could] in reason desire, and more than, from their conduct in the war, they could expect" (Manley, 1932: 93). With the federal Treaty at

Fort Stanwix complete, Governor Clinton noted that New York had a "right and reason for grievances" over the arrangements made between the Indians and Congress. He described these dealings in a communication with the State's Commissioners on Indian Affairs as "totally repugnant" (Hough, 1861: 81).

In later years, some Haudenosaunee refused to recognize the 1784 Treaty of Fort Stanwix as legitimate. Opponents have asserted that the Haudenosaunee delegates were unauthorized to make land deals and had done so only through coercion (Eisenstadt, 2005: 1576). Such claims have not been successful. The Grand Council rejected the 1784 Treaty of Fort Stanwix in the summer of 1786, making the 1789 Treaty of Fort Harmar necessary (Venables, November 19, 2012). In January 1789, the Harmar treaty, between the federal government and a series of tribes with claims to the Northwest Territory, was signed by representatives of the Six Nations, as well as delegates from the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi, and Sauk (Treaty of Fort Harmar, 1789). This agreement was intended to address lingering issues not resolved in the 1784 Treaty of Fort Stanwix and the 1785 Treaty of Fort McIntosh, but it did little more than to restate those treaties with only minor changes.

After Fort Stanwix, federal law and policies addressing Indian relations continued to evolve. Even after the divergent results of state and federal negotiations, questions about where the nation's authority began and the state's authority ended continued to revolve around Article 9 of the Articles of Confederation as there was no clear line defining the boundaries between state and federal Indian relations. A clear line would arguably not exist until the ratification of the Constitution (Upton, 1980: 24). Various suggestions were made regarding Congressional power "to regulate affairs with the Indians, as well within as without the limits of the United States," and the power "to regulate commerce... with the Indians, within the limits of any state, not

subject to the laws thereof” was proposed (Manley, 1932: 114). The ultimate language adopted in the U.S. Constitution Article 1, Section 8, Subsection 3, albeit weak, was more transparent than the Articles of Confederation. It asserted that "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Laws like the 1787 Northwest Ordinance professed aspirational goals regarding the treatment of Native Americans and their lands, stating: “The utmost good faith shall always be observed towards the Indians. Their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed” (*Journals of the Continental Congress*, Vol. 32: 41). New York’s policy began to evolve as well as the state began to push even harder to obtain Haudenosaunee land, perpetuating the conflict between the state and federal government in negotiations with the tribes. The state justified land acquisitions as a service to the Indians, taking territory off their hands that they would not use properly and whose occupation would only lead to tensions with their encroaching neighbors (Hough, 1861: 296). An act was even passed "to facilitate the settlement of the wasted and appropriated lands within the state” to obtain as much land as possible before October 1 (Upton, 1980: 24). Even after the negotiation at Fort Stanwix (and against federal law), Indian lands were traded with or ceded to the state (Bruce, Vol.1, 1896: 172).⁴⁴ Ultimately, New York State, in spite of both strengthening federal laws and a reluctance to part with more territory, would

⁴⁴ The Oneida and Tuscarora were first to cede territory to the state in 1785, agreeing to sell a parcel half the size of what New York demanded (Hough, 1861: 103). On June 23, 1785, although the Indians would not express any real interest in parting with their lands, they offered the lease of a line of farms along the existing boundary line, noting that “since last winter We had determined not to sell any of our lands, and that the Boundaries fixed should remain. The United States have informed us that the Soil of our Lands was our own, and we wish your Assistance to prevent your People from coming among Us for that Purpose” (Hough, 1861: 91). This frustrated Governor Clinton, who said of the fruitless trip, “if you did not incline to sell any of your lands that you would have told Us so by Return of a Messenger, and saved Us the Trouble and fatigue of so long a Journey, that leasing was not an option, and that any ill result of the mixture of Indian and white settlements would be the fault of the Indians (Hough, 1861: 96).

quickly manage to wrest even more land.

CHAPTER 5

SPECULATORS, SWINDLERS, AND STATES: THE CONTINUING LOSS OF HAUDENOSAUNEE LANDS

Following the treaty at Fort Stanwix, the Haudenosuanees continued to see their land holdings picked apart by greedy state governments and land companies. The structure of the new United States was still unclear. At times the states acted as part of the United States; at other times, individual states asserted their authority as independent entities. As it would be years before the United States Constitution was ratified in 1789, it remained unclear as to how governments would interact with the Indians (McKelvey, 1939: 5). Meanwhile, settlers, speculators, and state governments continued pushing westward, acquiring lands to which they had no rights and assuring the Nations it was in their best interests. The Oneida Good Peter said succinctly, "Our Landed Affairs [have] become one continued scene of confusion and disorder" (Hough, 1861: 226).

Undeterred by the failure at Fort Stanwix, Governor Clinton appointed new Indian Commissioners in March 1788 with the authority to enter into agreements with Native Americans for the purpose of "preserving their friendship," purchasing lands, and supervising and enquiring into "all Leases, or other Purchases of or Contracts for the Sale of Lands, suggested to have been obtained or made without the Authority or Consent of the Legislature" (Hough, 1861: 117). The commissioners were further authorized to utilize militia during negotiations and to remove "obnoxious Persons beyond the Reach of their influence," somewhat ironic in light of Governor Clinton's orders to disrupt federal proceedings only a few years prior (Hough, 1861: 118). Provisions for interfering parties were implemented in response to illegal negotiations undertaken by private land companies.

Livingston and the New York Genesee Land Company

In 1787, a group of influential New Yorkers formed a land company for the purpose of negotiating 999-year “leases” with the Haudenosaunne. The general disarray, not unlike what the federal government had with the state at the Fort Stanwix negotiations (Hough, 1861: 119). This time, New York was the parent and the land companies the petulant children. What ensued was an extensive, frequently deceptive struggle between self-interested individuals, with the state and the land companies vying for Indian lands as the landholders played both sides. Initially, however, it was a treaty between two recalcitrant states and the resulting Gorham and Phelps purchase that opened the door to these devious land speculators.

New York and Massachusetts had long fought over upstate New York in a colonial charter dispute. A compromise was reached in the 1786 Hartford Treaty: Massachusetts abdicated sovereignty and jurisdiction over the disputed territory but retained the preemptive rights to purchase and sell the Haudenosaunne land (McKelvey, 1939: 3). To settle Revolutionary War debts, Massachusetts sold these rights to Oliver Phelps and Nathaniel Gorham and their group of New England land speculators (Eisenstadt, 2005: 1197). On July 8, 1788 Phelps and Gorham entered into an agreement termed (incorrectly) the Treaty of Buffalo Creek to purchase nearly two million acres of land from the Seneca for an initial payment of \$5,000 and a \$500 perpetual annuity; other nations received payments as well (Eisenstadt, 2005: 1197).

The Onondaga, though they had nothing to do with these negotiations, were fearful of the potential implications for their Nation (Hough, 1861: 194). The Nation had sent representatives to observe, but they claimed no agency in nor approved either agreement. In fact, they expressly disavowed any agreement made on their behalf, reinforcing that “The Lands are our own, and we appeal to you Brothers, how would you feel if People at a Distance would undertake to sell

Lands which belong to you and on which you live” (Hough, 1861: 196).

Federal law dictated that any authority to transfer rights of preemption, either between states or to a private company, was illusory as the rights to these lands had been settled at Fort Stanwix. Still, the acts of New York, Massachusetts, Gorham, and Phelps allowed land companies to gain traction in Haudenosaunee territory by perpetuating the concept of the 999-year lease as a viable alternative to selling land. The New York Genesee Land Company, led by John Livingston, was the most aggressive of these interests.

Banking on political influence to gain government approval of its leases and influence among traders to persuade the Native Americans to part with their land, the New York Genesee Company sought to obfuscate federal and state laws in brokering land deals. Its leader, John Livingston, was one of New York's wealthiest men (McAndrew, August 9, 2000). He and his family already owned nearly a million acres of land, primarily in the Catskills and Hudson Valley. Its members included former Indian commissioners who had overseen federal treaties, an acting State Senator, Clerks of Albany and Columbia Counties, Members of the State Assemblies, and sheriffs from surrounding counties (Hough, 1861: 119). The proposed leases, if successful, would have given Livingston and land company control over nearly all of the Haudenosaunee territory, leasing 12 million acres spanning from Rome to Buffalo, and Jamestown to Alexandria Bay, leaving the Six Nations with barely enough land to subsist (McAndrew, August 9, 2000).

Leasing land had been common between the Haudenosaunee and the English, but the terms and duration of the Livingston leases were significantly different (Flick, 1925: 65). The leases offered were not technically a “sale,” but for all intents and purposes these extraordinarily long-term agreements rose to the level of a purchase. A Livingston “lease” stripped Six Nations

lessors of their rights to the land and all the improvements and natural resources on it for 999 years (Hough, 1861: 120). Although a 999-year lease followed the letter of the law, it completely defeated its spirit (Hough, 1861: 119). The leases left victims with limited fishing rights, and reserved only a few small parcels. The contracts also only paid \$1000 for the first ten years, increasing payments \$100 annually for five years, and subsequently paying the sum of \$1,500 for 984 years (Hough, 1861: 122). Complicated, misleading language, misapplied terms, and false claims of title were also used to confuse the potential lessors (Strong, 1894: 8).

The state tried to dissuade the Six Nations from entering into these agreements, noting their failure to follow custom and warning them that the leases were disguised sales brokered by “disobedient Children” (Hough, 1861: 119). Governor Clinton, this time the lesser of two evils, attempted to warn the Haudenosaunee and encourage them to treat with the state instead, but the only translator present when his message was received was an employee of the Genesee Company who deliberately misinterpreted the message. He instead told those present that the Governor forbade that the land company to provide any provisions to the Haudenosaunee at the “treaty” proceedings (Hough, 1861: 187).

Despite warnings, it was still many Haudenosaunee’s preference to lease their lands, believing it preserved title for their heirs. The Oneida freely admitted entering into the agreements, stating:

We at length consented to sell them a part of our Lands in consequence of the solemn and your Chief Sachems then made, that this should be the last Application that our Brother of the Legislature of the State of New York would ever make to us for our Land. Brothers. We are determined then never to sell anymore . . . We wish that our Children and Grand Children may derive a comfortable Living from the Lands, which the Great Spirit has given us and our Forefathers. We therefore determined to lease them. (Hough, 1861: 124)

Other Haudenosaunee expressed concerns that the state presumed to dictate how the Six Nations

might dispose of their own lands, relating, “Brothers, we are more surprised still to learn you claim a right to control us in the disposal of our lands; you acknowledge it to be our own as much as the game we take in hunting. Why then do you say that we shall not dispose of it as we think best?” (Hough, 1861: 125). Somewhat contradictory to this assertion that they should be allowed to dispose of their land as they saw fit was the argument by some Haudenosaunee leaders that those who had already leased the land had no authority to do so. Some Oneida, for example, claimed the agreements were made by “some of our young men, contrary to the Resolutions and speech from the whole of the Sachems and Chiefs of the Six Nations” (Hough, 1861: 148). The Land Company, however, also made false representations. Joseph Brant alleged that men representing themselves as speaking for Congress had fraudulently obtained the leases (Hough, 1861: 159). These misrepresentations led to an “uneasiness prevailing among the Six Nations in a great Measure from the improper Procedure of Individuals towards them respecting their Lands” (Hough, 1861: 139).

Livingston and his associates, in addition to creating the unethical lease terms, tried to impress upon the Haudenosaunee the ill intentions of the state. This did not prevent the land company from recognizing the need to gain government approval for its leases, which was necessary to enforce their provisions against the Haudenosaunee or to prevent other individuals from attempting to obtain title to the land. In February 1788, Livingston attempted to legitimize the leases with the state, submitting copies to the state for approval "on such terms and considerations as may be consistent with the justice, dignity and policy of the state" and asking that the legislature validate the 999-year terms (Hough, 1861: 124). His petition was summarily rejected on February 16, 1788 and the legislature declared by concurrent resolution that the leases were purchases. The legislature further granted the governor the force of the state to keep

the land company from settling on the claimed lands (Hough, 1861: 126).

Livingston responded by proposing to the Indian Commissioners and Governor Clinton that the state repay him and his associates the cost of the leases, the expenses acquired obtaining them, and any money relating to any other proper vouchers relating to the deal and assume the leases (Hough, 1861: 138). Further, he suggested that after the conveyance of the lands by the Indians, the state would also grant Livingston and his associates 1,100,000 acres jointly. Perhaps understanding the absurdity of his proposal (or that he was providing incriminating evidence of his and his colleagues' potentially illegal dealings) Livingston conditioned his offer, suggesting that if it were rejected by the Commissioners, "it shall never be used directly or indirectly to the Prejudice of himself and his Associates, or either of them, but shall in every Respect be considered as if the same had never been made" (Hough, 1861: 139). The government's reply to the proposal was swift. The next day the commissioners responded, "your Propositions are of such a Nature that they do not conceive themselves authorized by Law to treat with you thereon, and if they had Authority for that Purpose, the Propositions would be considered by them as altogether inadmissible (Hough, 1861: 139). The land company and its members were then banned from all future treaty negotiations. Failure to comply would result in charges as conspirators. Livingston, still unprepared to give up his efforts, focused again on trying to persuade the Native Americans of the state's ill-intentions, which were no different than his own. He focused on Governor Clinton's desire to purchase land, and that he too would likely propose a lease, but "after he has got it he will settle it and drive you off" (Hough, 1861: 147).

Even after the state's refusal to adopt the leases, it was still necessary to impress upon the Haudenosaunee that these agreements were contrary to tradition and their best interests and that the government would be unable and unwilling to help them if the deals went bad. The

Governor noted that “if disobedient Children from among us go into your Country, and take a Barrel or two of Rum . . . and if you are so unwise . . . and sell or lease your Lands to them . . . how can you expect Assistance from your friends . . . for you have brought the Trouble on yourselves (Hough, 1861: 134). Clinton threatened that, if the Nations continued to negotiate with Livingston, they would “lose your Friends and your Country” (Hough, 1861: 135).

New York took additional steps in March 1788 to prohibit individuals like Livingston from brokering land deals with Native Americans, adding an article to the state constitution prohibiting such transactions. Article 37 declared that if any person not under the authority of the state “should purchase any lands within the limits of this State, with any Indian or Indians residing therein, he should forfeit one hundred pounds and be punished by fine and imprisonment” (New York State Indian Commissioners, 1883: 25).⁴⁵ Further, land from any illegal purchase made after October 14, 1785 would be forfeited to the state (Powell, 1899: 586). Because leases extended into Massachusetts, Governor Clinton worked with Governor John Hancock to render all of the Livingston leases null and void (Upton, 1980: 34). County governments located in and around the areas affected voiced their support for the state. They agreed their representatives would avoid any participation in meetings held by land companies and would attempt to suppress any such meetings. One county passed a Resolution that termed the actions of land companies as “ill-timed and improper . . . [and] pregnant with danger” and declared the actions were “treasonable and improper” (Hough, 1861: 126).

Livingston and his companions, though they continued to acquire leases, began to sense the severity of their situation. The state presence at their negotiations had become obvious. One

⁴⁵ These same provisions against such leases were reiterated (or reenacted) in 1813 (New York State Indian Commissioners, 1883: 25). In 1821 an act was passed authorizing the district attorney to prosecute for penalties or to make complaints for intrusions on Indian lands (New York State Indian Commissioners, 1883: 26). Leasing as an issue lingered well into the 19th century.

state Indian Agent noted, “My Presence is very mortifying to this Company . . . they sometimes threatened to confine me and sometimes to send me off the Ground” Hough, 1861: 57). In May 1788, the Six Nations informed Livingston that they had no business with him and would only deal with the state (Hough, 1861: 147). Livingston and the Genessee Land Company threatened to seek action against those who had already received compensation for the leases. The Oneida who agreed to the leases recognized that each side should bear some responsibility for the improper transactions, claiming that some of their members were susceptible to bribes while the whites were covetous of Indian land and would remain so as long as any available patch existed (Upton, 1980: 37). The state prepared summons to depose those individuals involved in the lease agreements (Hough, 1861: 181). Livingston was unsuccessful again. The Land Company was eventually able to secure patents for a small, ten square mile tract from the legislature in 1793, however, the battle over the validity of the Livingston leases continued into the 19th century (Livermore, 1939: 198).⁴⁶

Despite the dishonest nature of these leases and the potential result of their application, technically, even an agreement for such a duration could have left the Indians with title to the land, though this is unlikely as the state declared the Livingston leases were purchases. The rights of preemption the federal government gained in the Treaty of Paris, federal law claiming authority over all negotiations with the tribes, and similar state laws claiming that same authority made such purchases illegal. The acquisition of Haudenosaunee territory was, nonetheless, “imminent and inevitable” (Alan, 2006: 10). What was essentially a federal monopoly actually

⁴⁶ In 1789, Livingston would offer his services to George Washington as a Commissioner of Indian Affairs, claiming “opportunities have presented, which have given me an extensive Acquaintance, with the principal Sachems and Chiefs of many of the Northern & Southern Nations of Indians and I flatter myself it is no vanity to say, that I have a considerable degree of influence over them” (Livingston, 15 August 1789).

prevented the Haudenosaunee from seeking higher prices from individual buyers or even renters willing to offer market value, preventing citizens from acquiring territory and promoting the poverty and dependence of the Six Nations (Alan, 2006: 16).

Governor Clinton and New York State Claim Authority

While the state was denouncing the actions of the New York Genesee Land Company, it too was seeking to continue its pursuit of land agreements with the Haudenosaunee. In March, 1788, only ten days after the instatement of a new set of Indian Commissioners, they delivered a message to the Six Nations asking for a July meeting “to confer with you on Matters of very great Importance to our mutual Happiness and Welfare” and further warning of the dangers of the Livingston leases (Hough, 1861: 119). The meeting, another attempt at a treaty negotiation between the state and the Haudenosaunee, would not occur until September. Clinton requested the presence of representatives from all Six Nations, however, only the Onondaga and Oneida nations arrived. The Governor would use the absence of the other Nations to his advantage by dealing with the Nations one at a time (Venables, 2011: 38).

Clinton opened the September negotiations by addressing the problematic leases and seeking to quiet fears about the state taking more land (Hough, 1861: 184). He conceded that the bad leases were not the fault of those defrauded, but the consequence of “misrepresentation and falsehoods” perpetrated by Livingston and the Genesee land Company and continued even while the state met with the Native Americans (Hough, 1861: 193). The governor conveyed the “great pain” caused by the young men of the state who had acted so imprudently and illegally (Hough, 1861: 185). Lingering questions existed as to what would occur with the leases that the state had voided, although the Governor reiterated that the leases fell outside the scope of state law and assured the Nations that the grants of land were void (Hough, 1861: 338). The state, though

condemning the land companies, wished to acquire the lands for itself. Clinton went so far as to threaten that “it will not be in [our] Power to assist you unless you agree to what we have proposed to you” (Hough, 1861: 226). Concurrent with their condemnation of Livingston and his associates, Clinton and the state Indian commissioners redirected the conversation with the Haudenosaunee towards negotiating for property, parlaying the fear of losing more land to manipulate the Onondaga and Oneida.

Livingston, for his part, continued to cause problems for the state during the treaty negotiation process.⁴⁷ The state cautioned Livingston to stay away from the proceedings, but he and his partners had been partially responsible for keeping the Seneca and Cayuga, who had also been asked to the negotiation, at Kanadasaga by plying them with liquor and keeping them under guard (Hough, 1861: 258). Infighting was also reported between those Onondaga meeting with Livingston and those meeting with the state. In a later deposition, state representatives testified to bribes offered by Livingston to "procure his influence to induce the Onondaga Indians to return home and not sell the Lands to the Commissioners" (Hough, 1861: 186).

Despite Livingston's best efforts, in 1788 Clinton would finally have the long-desired agreement with the Onondaga Nation. On September 12, 1788 at the council held at Fort Schuyler (Fort Stanwix), 28 Onondagas signed an agreement with the state relinquishing title to

⁴⁷ Even prior to the negotiation process, Livingston and his partners attempt to complicate the land agreements by attempting to divert the Haudenosaunee who were on their way to the proceedings with the state, providing the travelers with a letter reading:

“Brothers: Do not listen to him; he has Warriors and so have we: if he comes here we will fight it out with him. We know you are distressed for provisions, till your corn be fit to eat, we will grant you supplies (Hough, 1861: 182).

The Governor's Business at this proposed Treaty is to purchase your Lands, but you have leased them to us. He means to pay you all at once for them, and then in a few years to drive you off and tell you that you have no property here. But we mean to pay you a great sum the next Spring, and then pay a certain sum annually forever, that your children may have something to live upon.

all their lands, reserving ten square miles around their castle and partial rights to the salt springs in return for a minimal annuity and benefits (New York Church of the Most Holy Rosary, 1916: 5). The negotiation is illustrative of the state's aggressive, deceitful, and patronizing treatment of the Six Nations typical of such land deals which were passed off as "treaties." This would cede and grant nearly all of its lands to New York State. The Onondaga and their heirs would retain "the free Right of Hunting in every Part of the said ceded Lands and of fishing in all the Waters within the same" (Hough, 1861: 199). The Salt Lake and the land one mile around it were to serve for the common benefit of the Onondaga and New Yorkers for the purpose of making salt, but would not be released for other purposes (Hough, 1861: 199). The payment agreement guaranteed \$1000 in French crowns, 200 pounds in clothing, and \$500 worth of silver (or provisions if requested) on June 1 every year in perpetuity. Finally, the state agreed to prevent people from settling on the reserved Onondaga lands (Hough, 1861: 200). At the close of the September 1788 negotiations, Black Cap, an Onondaga representative, said of the so-called treaty that "The Covenant we have entered into this Day will confirm and establish our Friendly Alliance with our American Brethren forever" (Hough, 1861: 201). The terms established with the Cayuga and Oneida were similar to those with the Onodnaga, including a cession of all their lands to New York State with the exception of a small reserved area, payment up front, and an annuity (Upton, 1980: 38).

Problems with the treaty with the 1788 Treaty of Fort Stanwix arose almost instantly. The lands ceded by the Onondaga, as well as another tract to the west, had already been set aside as part of the Military Tract in a September 16, 1776 Act of Congress as bounty lands to Revolutionary War soldiers (Smith, 1904: 195). Questions also arose about the disparity in the size of reservations, which Governor Clinton explained was the result of the differing number of

members of each nation and their proximity to white settlers. The Oneida retained more property because of their larger number and proximity to the whites as being contiguous to such development would hurt their hunting practices (Hough, 1861: 272). Additionally, the Haudenosaunee disputed the authority if the members of the Six Nations present to actually enter into land agreements. They alleged that the "ancient customs" the governor had based the state's authority upon had been violated as the treaty was negotiated when the state knew the authorized Nation representatives were meeting to the south with federal Indian Commissioners. In a rebuke of the actions of the state, a Haudenosaunee representative said:

You proceeded to Business (you say) in full Council according to the Custom of your Ancestors, after the most serious and solemn deliberations; true, it was the Custom of your Ancestors to do business with ours in full council, but it was not the council of our ancestors to call a council and treat on business of importance to their Nations and posterity, without the presence or knowledge of the Chiefs, nor was it the custom of yours to require. (Hough, 1861: 341)

The Onondaga were also upset by the state's brazen attempt at dictating who should receive the money from the treaties.

Even in advance of the agreement, the Onondaga insisted that individuals had started to settle and develop their land. Asa Danforth, for example, had already started settlement at the salt springs. In 1788, Major Danforth of Johnstown settled the first "Christian home" on the former Onondaga territory, followed by his brother John (NYS Flood Control Commission, 1947). Danforth, who is credited with starting the Salt Works, claimed to have Governor Clinton's permission for his actions. Joseph Brant cautioned the Governor and the commissioners that if the Six Nations and the state were unable to resolve their differences of opinion on borders, they would have no other recourse but to seek assistance from Congress. Clinton promised to remove the individuals who had constructed a home on top of the Haudenosaunee fishing grounds, insisting that he had not given permission to anyone to settle at

the salt springs. He further promised to direct the surveyor to ask these settlers and Danforth to vacate as soon as the Onondaga desired it (which one might have easily implied from the point of the initial receipt of their letter to Clinton) (Hough, 1861: 332). Clinton also suggested a meeting at the start of the following year to clarify the land transactions between the Six Nation's and the state (Hough, 1861: 344).

As the terms of the 1788 “treaty” were being implemented, the relationship between the Six Nations and the state continued to deteriorate. The Haudenosaunee claimed a discrepancy in the amount of money they were promised and the amount received. While the governor promised to resolve any financial discrepancies, he cautioned that any interference by the Six Nations against the surveyors would be construed as acts of hostility. In a letter from Joseph Brandt and "other Indians,"⁴⁸ it was indicated that the Nations’ intended to stand on their own: “We are not frightened at your threats, nor are we directed by your disobedient children, but by the feelings of an injured People who seek for Justice” (Hough, 1861: 341).

Attempts by individuals to illegally purchase Indian lands continued after the “treaty.” The Onondaga informed the state of these attempts in June 1789 (Hough, 1861: 331). In their communication, they restated their understanding of the traditions for dealing with the state and requested clarification as to who had actual authority to broker land agreements with the Indians. The Onondaga representatives (Sharongyowanon and Kakondenayen) also curiously claimed they could not make any more arrangements with the state until they were paid for their transactions at Buffalo Creek, an activity in which previous representatives denied they had participated.

The state legislature passed another permutation of their treaty-granting law in February

⁴⁸ This included the Sharonyowanew, Tehodageradon, Kagondenayen, Tekanaghgwaghshea, Athorwine, and Oghniokwendon (Hough, 1861: 342).

1789. The state met the Cayuga that month to try and acquire more land, but similar disagreements arose (Upton, 1980: 37). Clinton again denied that the state wished to amass any more land as it already possessed enough. He insisted that “disorderly children” had migrated into the Indian territory and would continue to be a problem if the Indians did not sell more property to the state. In a rather illogical response, he stated: “There is every reason why your reservation should not be large; you have all the lands for hunting and all the waters for fishing. If the lands you wish to reserve are too rough for cultivation they will remain unsettled and you will have every advantage of hunting as if they were reserved” (Hough, 1861: 232). Governor Clinton and Senator Egbert Benson did pass an act on March 18, 1789, defining the boundaries of the lands in question, authorizing the governor to destroy all dwellings, barns or other buildings on the Indian lands built by settlers, and if necessary to call out the militia to eject trespassers in the territory (Bruce, Vol. 1, 1896: 186).

Complaints of broken treaty promises made to the Onondaga, the Oneida, and the Cayuga, continued to bombard Governor Clinton. The Oneida received none of the promised food and complained of border violations from Pennsylvania. The Onondaga reported squatters on their grounds, and Joseph Brant began asserting that unauthorized individuals signed the treaties in an attempt to cause dissension among the tribes (Upton, 1980: 38). Additionally, the Oneida would ask for more money and a larger reservation, but the State Board of Indian Commissioners refused to make any adjustments to the boundary (Hough, 1861: 367).⁴⁹ The 1788 treaties made at Fort Stanwix with the Onondaga and Cayuga were not affirmed or the annuities delivered until June 1790.

Changes to Federal Law Impact State Actions

⁴⁹ By this time, the authorization for the State Indian Commissioners expired although they were reinstated on January 28, 1790.

In the midst of the bad leases and illegal state land deals, the new federal government had finished drafting its Constitution in Philadelphia by 1787. While the Stanwix treaty negotiations were ongoing in 1788, the states were in the process of ratifying the new Constitution (Venables, 2011: 37). Governor Clinton opposed New York's ratification on the grounds that the new government would create additional restrictions on the state's role in Indian affairs (Venables, 2011: 37). New Hampshire's ratification on June 21, 1788 officially made the Constitution the supreme law of the land (Venables, November 19, 2012). Virginia's subsequent ratification forced New York State's hand in joining the union or standing alone.

New York ratified the U.S. Constitution on July 26, 1788. This included Article 1, Section 10, Paragraph 1, which in no uncertain terms stated that "No State shall enter into any Treaty, Alliance, or Confederation" and Article II, Section 2, Paragraph 2 granting treaty-making powers to the President by and with the advice and consent of the Senate. One year later in New York City, George Washington was inaugurated President of the United States (Chernow, 2010). The Bill of Rights was submitted to the states for ratification on September 25, 1789, securing the rights of citizens. Its ratification would take from 1789 through 1791, and several states including Massachusetts, Connecticut, and Georgia, never ratified the document. After ratification "most Americans promptly forgot about the first ten amendments to the Constitution, [which] remained judicially dormant until the twentieth century" (Wood, 2009: 72). Questions still remained over what, if any, authority the states might have to negotiate with the Indians. To avoid further confusion on which governing body had the highest authority to deal with the Indians, Congress began to try and set policy to limit state involvement (Manley, 1932: 114).

Clarifying Federal Authority

The unfairness of the negotiations between the federal government and the

Haudenosaunee at the end of the Revolutionary War was not lost on other Indian nations across the country who recognized that the Haudenosaunee had been subjected to the "expansionist ambitions of the new United States" (Mohawk, 2000: 48). The federal government negotiated treaties with dozens of other nations subsequent to the 1788 Stanwix agreement. When the federal government met in Detroit with the Western Confederacy in the autumn of 1785 the new country had grown too self-assured, contending that it already owned all of the Ohio country by virtue of conquest (Mohawk, 2000: 48). Tensions began to rise and the United States was on the verge of bankruptcy. States were not paying into the treasury and the national tax had failed. In response, Congress passed the Northwest Ordinance, selling parcels of land to fill its coffers (Mohawk, 2000: 49). Settlers migrated farther west across the Ohio River and into territory already occupied by Native Americans that had been armed by the British (Tucker, 2011: 449). Chief Little Turtle and the Miamis, Blue Jacket and the Shawnee, and other tribes rallied against the settlers. These and subsequent attacks led the federal government to counterattack as the government's response grew in the wake of the continuing battles.

George Washington turned to the Haudenosaunee for assistance in persuading the Western Indian nations to part with lands and make peace although this endeavor met with limited success (Mohawk, 2000: 53). A 1790 letter from Washington sought to ensure peace with the still-powerful Haudenosaunee while the country was at war with the Miami and their allies in the Ohio Valley (Onondaga nation.org, 2016). Washington proposed that the United States and the Six Nations should be brothers, each promoting the other's prosperity by "active mutual friendship and justice" (Washington, December 29, 1790). He also overtly denied responsibility for prior unethical land acquisitions while clarifying the federal power to treat with the Indians. He promised to respect the property boundaries secured in the 1784 Treaty of Fort Stanwix and

reminded those present that whenever the Six Nations wished to sell their lands it was mandatory that a federal agent be present. The federal government also believed that as white settlement expanded into Indian country, game populations would rapidly decrease, leaving the land less desirable and making the Indians more willing to sell (Mohawk, 2000: 51). Though this would also make the land less valuable to those who eventually settled there it was still far less costly to purchase lands from the Native Americans than it was to go to war with them. Washington further cautioned that before any further land transactions, the Haudenosaunee needed to determine exactly who among them would have the authority to make conveyances. This decision was necessary to "forever prevent all Disputes relative to the validity of the sale" (Hough, 1861: 167).

In December 1790, representatives the Six Nations, including several Seneca chiefs and Cornplanter, met with the federal government and the President to share their complaints and concerns regarding the unfair land transactions that had occurred between the Six Nations and New York (Mohawk, 2000: 50). The focus of the discussions was the unfairness in the terms of the 1788 Treaty of Fort Stanwix. Cornplanter (Seneca) spoke to those in attendance about the Six Nations' concerns over the loss of large swaths of lands. He indicated further that this loss hindered their ability to survive on hunting and severely limited their agricultural pursuits:

Father. The Game which the Great Spirit sent into our Country for us to eat is going from among us. We thought that he intended that we should till the Ground with the Plow, as the White People do, and we talked to one another about it. But before we speak to you concerning this, we must know from you whether you mean to leave us and our Children any Land to till. (Hough, 1861: 165)

The Seneca's position regarding this land fraud used an argument similar to the modern idea of duress, asking that the land be returned because of the states of mind of the parties involved had resulted in their being compelled to relinquish too much land. Although they conceded that the

Nation was bound by what was done, the agreement had been made when the state was “too angry” at the Haudenosaunee after the Revolutionary War and was, therefore, “unreasonable and unjust” (Hough, 1861: 168). To repent for this unfairness, the Seneca asked the state to restore a part of their land. This proposal was rejected as not being in the best interest of the state, however, late twentieth century Haudenosaunee land rights actions would use similar arguments with similar results.

The federal response to the illegal treaty problems was to enact the Trade and Intercourse Act in an attempt to centralize control over Indian land transactions and to maintain peace on the frontier (Prucha, 2000: 41-50). This law was the first use of Congress’s constitutional grant of power to regulate commerce with the Indian tribes (Cohen, 2005: 37). The intent of the Trade and Intercourse Act was to “prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of the Congress, and to enable the Government... to vacate any disposition of their lands made without its consent” (*Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960)). It prohibited the purchase of Indian land without the approval of the federal government through a treaty negotiated by a federal agent and ratified by the Senate. Section, 4 declared (1 Stat. 137, 1790):

No sale of lands made by any Indians, or any other nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not unless the same shall be made and duly executed a some public treaty, held under the authority of the United States. (1 Stat. 137)

The July 1790 Trade and Intercourse Acts provided the additional vague language:

Nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states (1 Stat. 331, 2 Stat 139, 819).

Enacted in July 1790, this was the first law in which Congress specifically defined the

substantive rights and duties of the federal government in Indian affairs (Cohen, 2005: 37). The law regulated trade with the Indians and prohibited the purchase of Indian lands by anyone but federal government agents in official proceedings. Further, it provided for the punishment of non-Indians committing crimes and trespass against Native Americans (Prucha, 1984: 30). This law was the first use of Congress's Constitutional grant of power to regulate commerce with the Indian tribe (Cohen, 2005: 37). The government enacted subsequent versions of the Act in 1793, 1796, 1799, 1802, and 1834. Each version was a reaction to treaties negotiated with various tribes, and each was increasingly dedicated to stopping crimes against the Indians and preventing the unauthorized acquisition of their land (Cohen, 2005: 39). The Onondaga Nation later asserted to the Second Circuit Court of Appeals that they understood the Act as “an explicit promise from the United States that their lands would be protected against predation by New York State” (Brief of Appellant, 2012: 7).

Despite federal declarations of authority in the Trade and Intercourse Act, New York pressed on to secure more Onondaga territory. The Onondaga had already ceded nearly all of their lands to the state in the 1788 Treaty except approximately 100 square miles reserved for living and locations on and around Onondaga Lake that they held in common. In November 1793, motivated by the continuing and increasing encroachments on the salt springs and surrounding land, the state brokered another illegal "treaty." In this agreement, the state allegedly purchased two tracts of land that included all of the remaining Onondaga lands except for a rectangular tract four and a half by four miles in the southwest corner of the former reservation, an additional stretch of land one-half mile wide along the west side of Onondaga Creek from the northern boundary of the rectangular tract to the Lake and the lands around the

Lake held in common with the state (U.S. Department of Interior, 1938: 1).⁵⁰ By the conclusion of the March 11, 1793 “treaty,” the Nation had relinquished over three-quarters of its reservation to the state. Consideration for the land was a paltry lump sum of \$638 and a stipulated perpetual annuity of \$410 payable on June 1 every year. This “treaty” parted with the valuable segments of the reservation located in the salt lands and granted a right to lay roads across the reservation for this small consideration.

This arrangement with the state was problematic for numerous reasons. First, the individuals representing the Onondaga were allegedly unauthorized to make such deals. These agreements were also in direct conflict with the provisions of the Non-Intercourse Act prohibiting land cession treaties absent federal oversight and participation (Lehman, November 20, 1006). Further, state representatives and commissioners fraudulently presented the cession as a lease, not a sale (Lehman, November 20, 2006). This deception was a significant motivation for the “treaty” being signed.

Recognizing the enduring, vexing behavior of the state, the federal government acknowledged a need to further assert federal authority over associations with Native American nations. In 1794, the President called a conference of the Six Nations “for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them” (Kappler, 1903: 27). This meeting was also intended to secure the United States' alliance with the Haudenosaunee and prevent them from taking action with the Ohio Indians. The result of this nearly two-month long meeting was the Treaty of Canandaigua (Cohen, 1945: 467).

Although Congress authorized meeting with the Haudenosaunee at Canandaigua in late

⁵⁰ The land sat atop the future location of Syracuse as well as several adjacent towns (Congressional Series of the United States Public Documents, 2264, 1888: 54).

July 1794, to conference would not begin until months later (Mohawk, 2000: 57). Initially, some members of the Confederacy refused the invitation, supporting a continuation of wars in the Old Northwest territory between an allied group of Native American tribes and the U.S. Army. After deferring a meeting until the position of the western Nations in relation to the federal government was settled, substantial losses on the Native American side led the Seneca and Onondaga to concede to a meeting at Canandaigua on October 14, 1794 (Tucker, 2011: 450).⁵¹ News of the defeat of the western tribes persuaded them that a peace agreement with the federal government was in their best interest (Jemison, 2015).

Washington sent Timothy Pickering⁵² to meet with the Onondaga at Canandaigua in a series of private meetings with selected individual representatives. Red Jacket⁵³ served as the speaker on behalf of the sachems (Mohawk, 2000: 58). For six months, the Nations discussed the terms of an agreement (Powless, 2000: 30). The negotiations were influenced by complaints about prior treaties (Stanwix, Harmar, and Ft. McIntosh) and considered which lands the Six Nations believed to still be their own. Pickering reminded those present that prior attempts to discuss or resolve these issues had been frustrated by British interference (Mohawk, 2000: 58).

Nearly 1,600 Haudenosaunee were party to the negotiations at Canandaigua, over half representing the Seneca, the remainder, the Cayuga, Onondaga, Oneida, and Tuscarora (only one

⁵¹ With a rather substantial defeat of the Native Americans in a June 1794 battle, the departure of British soldiers from lingering frontier forts after Jay's Treaty (1794), and the Treaty of Greenville, which ceded the disputed lands to the United States on August 3, 1795, this option would truly no longer be an option (Tucker, 2011: 450).

⁵² Pickering had been appointed commissioner to the Haudenosaunee to represent the United States at the Treaty of Canandaigua in 1794. He was later the Secretary of State from 1795 to 1800 under Washington and Adams.

⁵³ Red Jacket was a Seneca orator and chief of the Wolf clan who had served to negotiate on behalf of his nation with the United States. He is well known for a speech to the senate on "Religion for the White Man and the Red" (Denismore, 1999).

Mohawk, who was pro-British, participated) (Eisenstadt, 2005: 1576). The Six Nations intended to use the negotiations at Canandaigua to "tell our minds. The business of this treaty is to brighten the Chain of Friendship between us and the fifteen fires" (Jemison, 2015). During the negotiations, members of the Confederacy built temporary bark shelters and hunters took as many as 100 deer per day to feed the people in attendance (Jemison, 2015). There was also fishing and hunting of waterfowl and migratory birds.

The United States acknowledged the lands reserved to the Oneida, Onondaga, Cayuga, and Seneca in their earlier treaties with New York. Additionally, the United States promised not to claim these lands, which "shall remain theirs, until they choose to sell the same to the people of the United States to have the right purchase" (Treaty of Canandaigua, Article 3).

Canandaigua did not terminate the option of land deals with the Six Nations; it limited them (Upton, 1980: 44). The treaty was intended to protect Haudenosaunee territory from further encroachment by whites. For the Haudenosaunee, the 1794 Treaty of Canandaigua defined their relationship with the United States (Cohen, 1945: 468). According to Cohen, it "guaranteed to the Iroquois the right of occupancy of their well-defined territories and had the effect of placing the tribes and their reservations beyond the operation and effect of general state laws" (Cohen, 1945: 419). It further assured the Six Nations various rights in their reservations as well as their right to (at least some degree) self-governance (U.S. Census, 1995: xiii).

In return for the "security" of the federal government, the treaty stated: "The Six Nations, and each of them, hereby engage that they will never claim any other lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof" (Treaty of Canandaigua, 1794). The Haudenosaunee further agreed to avoid any conflicts arising between the United States and the Nations to the west in return for the

government's promise not to construct a four-mile road between Cayuga Creek and Buffalo Creek. The road would have negatively impacted the area fisheries (Venables, 2011: 48). Payment was ten thousand dollars' worth of goods, as well as an additional annuity. This yearly sum of \$4,500 was for the purchase of "clothing, domestic animals, implements of husbandry, and other utensils " (Treaty of Canandaigua, 1794, Art. 6). The Haudenosaunee could distribute it to the individuals or Nations (or their "Indian friends") as needed (Treaty of Canandaigua, 1794, Art. 6). As with other treaties, there was no provision addressing concepts of inflation or cost-of-living increases, leaving the current payment essentially insignificant though still distributed to the Nations on a yearly basis.⁵⁴ Neither the Mohawk nor the Tuscarora were party to this treaty. The Onondaga recorded the treaty with a wampum belt featuring 13 figures holding hands with two native figures on either side of a house at the center (Powless, 2000: 31). This belt is commonly referred to as the "George Washington Treaty Belt." The Treaty of Canandaigua remains significant today. Though occasionally violated, it has never been broken (Jemison, 2015).

Although the Treaty of Canandaigua and the Trade and Intercourse Act expressly prohibited New York State from acquiring Onondaga land absent federal involvement, the state continued to enter into such agreements. In 1795, Pickering sent Governors Clinton and Jay communications during another illegal negotiation with various Indians to purchase land specifically informing them of U.S. Attorney General William Bradford's opinion that the Trade and Intercourse Act "prohibited the sale of Indian lands except pursuant to a federal treaty"

⁵⁴ In 1954 the federal government offered to "buy out" the treaty's annuity rights, offering a lump sum in their stead. Every Nation responded in the negative, insisting the "As long as the cloth comes to us, that means that the treaty is still in effect. We cannot make a decision like that because we would be making a decision that affects our grandchildren. Sometime in the future, the children might ask us why we made that kind of decision" (Powless, 2000: 31).

(Brief of Appellant, 2012: 10, citing *Cayuga Indian Nation of New York v. Pataki*, 165 F. Supp. 2d 266, 344 (N.D.N.Y. 2001)).

Prior arrangements had left the Onondaga with common rights to the Salt Lake and mile around the Lake as well as all lands to the west side of Onondaga Creek for the one-half mile from the Creek. In the state's third "treaty," however, the Onondaga allegedly ceded their right to Onondaga Lake, the mile of land around it, and a half mile along Onondaga Creek. The compensation was money, clothing, and 100 bushels of salt amounting to \$2,430 (Smith, 1904: 192). The state again misled the Onondaga Nation to think that they were signing a lease and deliberately excluded federal representatives from the negotiations (Lehman, November 20, 2006). The "treaty" also reaffirmed the boundary lines established by prior agreements and increased a \$410 annuity to a perpetual annuity of \$800 in order that they would be "more comfortable" (Bruce, Vol. 1, 1896: 177).

Federal treaties with the Haudenosaunee during this period recognized them as a distinct and separate political entities capable of managing their internal affairs, though this would later be called into question (Cohen, 1945: 419). What was problematic to the United States government, however, was a state acting as if it possessed its own sovereignty to deal with other nations. New York State, in just three fraudulent negotiations in 1788, 1783, and 1795, managed to take 99% of the Onondaga's land holdings (Lehman, November 20, 2006). Despite great advances made in federal laws declaring the supremacy of the federal government in dealing with the Native American, the actions of the petulant state caused the traditional homeland of the Nation to shrink from an estimated 2,500,000 acres to a mere 7,100 (Lehman, November 20, 2006). The Six Nations, and the Onondaga specifically, denied the validity of these agreements

and repeatedly sought assistance from the federal government to protect their land to no avail.⁵⁵

This change in ownership of land would be damaging not only to the Onondaga Nation, but also to the environment. In the coming years, rapid development and industrialization by landholders, indifferent and oblivious to the consequences of their actions, quickly turned a place with resources described as “so abundant and good” that “may be equaled [but] cannot be excelled,” into a noxious mess (Beauchamp, 1908: 45).

⁵⁵ Individuals also continued to try to purchase Six Nations’ land in violation of federal and state laws. Specifically, the lands in Western New York were sold in the Holland purchase, with the Indians relinquishing title to 337 square miles (Evans, 1924: 189). The Haudenosaunee were fortunately released from the purchase obligation in 1802 by the Secretary of War (Upton, 1980: 45).

CHAPTER 6

INDUSTRIAL DEVELOPMENTS AND ENVIRONMENTAL LOSS IN THE 19TH CENTURY

The Onondaga Valley was sparsely populated when the nineteenth century began. The area that would become Syracuse had only eight frame houses, a few log homes, a post office, and a courthouse (Hand, 1889: 9). Relatively few whites lived and worked at Salina manufacturing salt, but the natural resources would quickly draw settlers. A dense forest of cedars, pines, and other trees grew around Onondaga Lake and fish and game were plentiful enough to entice Albany trading boats to travel to the region to barter for furs, live bears, deer, and wolves (Hand, 1889: 8). As more land became available, people immigrated to try their hand at making a living with various occupations. Though the salt industry was a particular draw, other ample natural resources and productive land supported numerous industries.

The growing population focused on developing the region by drawing in more settlers, improving industry, and increasing wealth. Such progress required more land, improved public health, and a city structure that encouraged production. Moderating the attraction to the region was its extraordinarily bad reputation Syracuse had earned as “the most unhealthy locality in the state... it seemed to be the abode of pestilence and death” (Hand, 1889: 13). Such concern was understandable. When the area was initially settled, much of the land surrounding Onondaga Lake was swamp and parts of where the city now sits were underwater during much of the year. This created a breeding grounds for disease carrying pests (Andrews, October 15, 1985: A4). Further, progress was not kind to the environment. Industrial expansion led to the release of noxious substances into the water, sedimentation and nutrient buildup resulted from agricultural and extractive practices, and growing populations dumped garbage and discharged sewage into the Lake and its tributaries (Savage, 2012).

Some individuals, recognizing the need to create a healthier environment if the area was to continue to prosper, supported improving public health by lowering the level of the Lake to dry out marshy areas. An early 19th century survey of Onondaga Creek and Lake revealed the Lake's level equal to that of the surrounding land at the water's high mark, which often led to flooding in the swampy surrounding lowlands (Hand, 1889: 14). Levels were impacted by the high water level of the Seneca River, which obstructed Onondaga Lake's outflow. The narrow and crooked river's architecture meant that even when its level subsided, the Lake did not drain until late summer (Strong, 1894: 322). If the water level could be lowered by increasing the Seneca River outlet by a few feet in width and depth the water level in the Lake would drop more quickly in the spring (Hand, 1889: 14). The government authorized lowering Onondaga Lake by two feet in 1821, levying a local tax on the land benefitted by the project (Strong, 1894: 322). Those living along the Lake and waterways were required either to pay for the work or to dig the drains and ditches themselves (Smith, 1904: 329).

Ditches and drains were cut through swamp and marshlands and a reef was blown up at the Seneca River outlet to widen and deepen the outflow point and to bring lake level with the river. Although the water level was lowered overall, water from the Seneca River would sometimes still flow back into the Lake, moving both ways at once at different points in the outlet. This undertaking had "improved" the land around Salina and Syracuse, and from 1822 through 1823 the focus shifted to drying problem lands. More onerous areas were drained using ditches and sewers connected to Onondaga Creek (Hand, 1889: 15). These improvements positively impacted the health of the residents (Strong, 1894: 322). Alterations in the landscape made to accommodate expanding industries were equally important. As Syracuse grew, an increasing number of mills and factories, including a gristmill, sawmill, linseed oil factory, ax

factory, and tannery, appeared on Onondaga Creek, altering the waterway (Strong, 1894: 122).

Engineers and officials struggled to keep up with the rapidly developing city or alter the environment in a way that met the needs of its citizens. Village and city officials were accused of “culpable negligence and unjustifiable indifference” (Hand, 1889: 133). Despite Lake improvements, physical characteristics of the landscape remained problematic. A local historian noted, “Few cities have had to contend with more natural disadvantages than Syracuse” (Hand, 1889: 133). Flooding, which continued to be a problem, was addressed by filling in the swampy land. By the mid-1800s, fourteen feet of fill had been deposited on top of the city’s original log roads (Hand, 1889: 134). Excavations later uncovered fence posts in front of homes indicated that engineers added several feet of fill to roads flooded by Onondaga Creek surges. Even some shop entrances were located several steps below grade.

Those acting in the interests of public health also addressed Onondaga Creek. Lacking a proper sewer system, Syracuse residents used Onondaga Creek and Yellow Brook, which ran through the southern part of the city, both emptying into Onondaga Lake (Smith, 1904: 263). The Creek also frequently flooded during heavy rains and snowmelt. In 1854 and 1855, a particularly winding portion of the Creek was re-channelized to create a straighter course (OEI, 2008). Rather than draining the original serpentine branch, however, the city left it to grow stagnant and mosquito-infested (Hand, 1889: 148). This oversight led to more illnesses along this pass.

In 1866, concerned (and frequently ill) citizens petitioned the Syracuse Common Council for relief from the effects of the stagnant water, eventually bringing the matter before a Grand Jury for indictment as a nuisance. Local physicians gave extensive testimony, explaining that the site was the cause of many illnesses. A local attorney provided testimony on the conditions

caused by the stagnant Creek. Testimony from First and Second Ward citizens, living on a different stretch of the Creek, provided a deeper look into the rather extensive poor environmental conditions surrounding water across the City and nearby towns. A local attorney provided testimony on the conditions caused by the stagnant Creek. Testimony from First and Second Ward citizens, living on a different stretch of the Creek, provided a deeper look into the rather extensive poor environmental conditions surrounding water across the City and nearby towns. Although there was a declaration that it was a nuisance there were no further legal proceedings (Hand, 1889: 148). Instead, the Mayor called a public meeting to propose a tax to raise funds to fill the old, serpentine channel. Residents removed from these portions of the Creek resented paying taxes to fill in the Creek when they suffered their own maladies from similar poor conditions. These wards, at the southern and central part of the city, drained sewage into Onondaga Creek, which would often lodge in the bends of the stream, polluting the “atmosphere.” These citizens wanted funds dedicated to channelize and repair their portion of the Creek before any additional outlays were made (Hand, 1889: 149). Despite vocal arguments from residents along the Creek, nothing would be accomplished until 1867 when the State Legislature appointed an Onondaga Creek Commission to address their concerns. The Commission hired George Geddes to survey and report on the course of the Creek to Onondaga Lake. In a particularly severe flood that year, the Creek overflowed its banks, covering nearby streets, flooding railway company barns, filling the parlors of living rooms, causing the plank sidewalks to float, and drowning a local boy (Hand, 1889: 151).

An extreme drought followed this flood, during which time Geddes was finally able to complete his maps and surveys. He issued a proposal to lower the creek bed by an average of 6-1/2 feet and line its bottom with timber planks. He further suggested covering the ends of the

planks with six foot, heavy, un-mortared stone walls (Hand, 1889: 152). Taxes levied for railroad construction were so high, however, that any Creek project had to be put on hold (Hand, 1889: 152). The Commission did conclude that increased incidents of illness corresponded with rising Creek water levels and therefore decided to redirect Onondaga Creek again, though this would not actually occur until the following century (Hand, 1889: 147; OEI, 2008: 13).

In 1868, the first sewage commission was established in Syracuse, formally addressing municipal waste disposal (OEI, 2008: 11). The use of backyard privies was banned in 1896, replaced by sewers, which still flowed directly into Onondaga Creek and Harbor Brook (Onondaga Lake Partnership, 2010: 10). The merits of this were questioned in 1904 when the mayor of Syracuse authorized the creation of a five-member committee to investigate sewage disposal and flooding (OEI, 2008: 13). The members determined the best solution was to construct intercepting sewers along the Creek to address the sewage and improve general sanitation. Although the city continued to struggle with disease and sanitation, as conditions improved and the commercial importance of the area increased, Syracuse began to receive "recognition and a fair start in its career of prosperity" (Smith, 1904: 227).

With these alterations to the environment, health began to improve. By the mid-19th century, there was a relatively low death rate in Syracuse (as compared to surrounding areas), though this was attributed to the high levels of salinity in the air and the effects created by plant matter. The persistent high number of malaria fatalities were blamed on the gases released by decaying plants, which were believed to produce a "poison arising from the decomposition of vegetable matter in the midst of stagnant water and marshy grounds."⁵⁶

⁵⁶ Hand elaborated that "In the early history of Syracuse so favorable and abundant were the conditions to generate fever poison, and so highly charged was the atmosphere, that the fever was of a malignant type and frequently dangerous to life, while at a later date, when the causes were less abundant, the same disease was of a much milder form (Hand, 1889:178).

The Rise of “Salt City”

The salt springs, which provided growing wealth to its occupants, were critical to the growth of the region. The first settlement on the Salt Springs Reservation was at Salina, settled in 1789 (Smith, 1904: 303). Though salt extraction initially involved dipping brine from shallow pits, advances in demand and technology led to larger, deeper, pits and pumps replacing the dipper and pail (Strong, 1894: 310). Production converted to "solar" manufacture during the 19th century, which required more concentrated brine than what naturally flowed from the springs. Deeper wells were drilled in and around the springs to search for the halite deposits that produced the salt. These exploratory boreholes were often unsuccessful. By the late 19th century, the Salina pump was receiving brine from two marshes, forcing it up into a tower, and then distributing it to different manufacturers of fine and coarse salt (Strong, 1894: 310).

Much of the land where the salt springs were located, which had been acquired by the state in treaties with the Haudenosaunee, was eventually sold to citizens. The state, however, retained the right to any salt wells found, even on private property (Strong, 1894: 308). The regulation of the Syracuse salt industry began in 1797 with the appointment of a salt superintendent, when the manufacturing of salt was only 25,000 bushels. The superintendent oversaw the Onondaga Salt Springs Reservation, settled disputes over property rights, and promoted the interests of the industry (Strong, 1894: 307).

Settlement near the springs, known as “salt point,” was initially limited by virtue of the low, wet, marshy lands, which fostered disease. If an individual was “brave” enough to settle here, the state would give him “a term of years on a salt lot, a store and house lot, seven acres of posture, fifteen acres of marsh, and limited logging rights” (Strong, 1894: 308). Industrious settlers cleared forests, improved roads, and utilized waterways to transport salt as far west as

Detroit (Strong, 1894: 309).

The salt industry changed in 1821 when the Onondaga Salt Company secured legislation authorizing it to take possession of the grounds and construct processing works (Strong, 1894: 206). As soon as the company acquired the land, it proceeded with cutting away trees, clearing grounds, and creating a large reservoir sourced by pumps and aqueducts powered using water from the Erie Canal (Strong, 1894: 207). The Salt Company expanded, breaking ground west of Onondaga Creek and cutting down a large portion of an old growth forest (Strong, 1894: 207).

Syracuse, growing in population and commercial and industrial success, was incorporated as a village in 1825. The village was served by 15 merchants, a newspaper, a fire department, and several industries in addition to the salt works. Industrial growth was accelerated by the construction of the Erie Canal. Before the Canal, there were numerous waterways in the area for transportation, but these rivers and lakes were often difficult to navigate, making their use slow and expensive. When the Erie Canal project came along, Onondaga County residents were highly in favor of the project. Judge Forman, who had been an advocate for the alterations made to Onondaga Lake, was a propagandist for this project to the legislature as well. James Geddes made the first exploration as an engineer; and ground was broken on the Syracuse portion by Onondaga contractor John Richardson (Strong, 1894: 108). Despite all of the alterations already made to the swampy landscape, the land where the Canal was situated remained a waterlogged “mess of standing water and a mosquito hatchery” (Marcus, 2004: 43). From 1817 to 1820, in the midst of construction, a malarial epidemic broke out, delaying the completion of the project.

From the 1820s through the 1860s, the Erie Canal stimulated the success of the salt industry and made Syracuse an important shipping point (Eisenstadt, 2005: 1518). Merchandise transported by canal included salt, wheat, flour, grain, stone, clay, lumber, coal, iron and other

ores. After only four years of being open for navigation, the number of commodities leaving the city had become substantial: 12,065 barrels of flour, 2,862 barrels of provisions, 2,565 barrels of ashes, 76,631 barrels of salt and 64,240 bushels of wheat. Tolls collected in one year amounted to \$18,491.58 (Strong, 1894: 104). To accommodate heavy traffic and provide a place for boats to hold up and avoid navigating ships the city built an additional basin. Unfortunately, because of a lack of current, this basin “became a miserable, nasty hole; and it was the dread of all the inhabitants, because it tainted and infected the whole atmosphere with disease” (Strong, 1894: 106). Eventually, the utility of the canal was surpassed with the addition of railroads.

The first railroad, completed in Syracuse in 1839, ran east to west, eventually becoming part of the New York Central Railroad; a north-south rail was in place by 1854. The railroads took over the roll in shipping once filled by the canal. In return for granting rights-of-way to the railroads, the city sometimes demanded further “improvements” for the growing community. The railway company's promises included the construction of a new sewer through downtown streets, laying of flagstone walkways, planting of trees, maintenance of the streets and purchase of enough land for alleyways (Hand, 1899: 71). Factories were also constructed near the tracks, particularly on the west side of the city (Eisenstadt, 2005: 1518). Competition from the railroads (Syracuse-Utica Railroad in 1838, Auburn-Syracuse in 1841, and Owego-Syracuse in 1848) led to the decline of the Canal (Strong, 1894: 111).

The brackish waters of the salt springs served many more industries beyond salt production. From the 1880s to the 1980s, many non-salt producing industries located in the Onondaga Valley to utilize this natural resource (Kappel, 2000: 3). For example, sand and gravel extraction companies used the water for washing and cooling processes, discharging the used water (and byproducts from the cleaning process) into nearby streams. These industries

were also moving brackish water from underground sources to surface ones, thus changing salinity levels (Kappel, 2000: 3). During this time period, an average of nearly six million pounds of salty waste was discharged daily into Onondaga Lake. The most impactful of these industries, industrial newcomer Solvay Process Company, organized in 1881 and began production in 1882, also found an alternative use for the salt (Andrews, October 15, 1985: A4).

The Solvay Process Company (“Solvay”) began a long history of pollution when it opened its doors on the southern shore of Onondaga Lake to produce soda ash from halite and limestone. When Solvay opened, however, salt concentrations at the salt springs were already in decline, forcing the company to seek out another source. Additional wells were found at the southern end of the Tully Valley 15 miles south of Syracuse. Solvay began extracting brine from the Tully Valley in 1889, sinking over 120 wells into four halite beds (Case, 1991: A-5). A composite of salt 150 feet thick was removed from the bedrock using water injection to extract brine (Kappel, 2000: 2). Water was injected into the salt layers through a series of wells ranging in depth from 1,000 to 1,400 feet (Onondaga Lake Partnership, 2010: 25). Operators then pumped the brine to the surface and transported it by pipeline from the Tully Valley to the Solvay plant (Onondaga Lake Partnership, 2010: 25). Solvay removed over ninety-six million tons of salt from the Tully Valley over a 94-year period (Case, 1991: A-5).

Not long after the Solvay company opened its doors the fish in Onondaga Lake began dying. Only two years after the company commenced production, perch, whitefish, and many other freshwater fish, started to disappear from the Lake (Andrews, October 16, 1985: A4). The U.S. Fishing Commission reported in 1885 that commercial fishing in the Lake dropped from 20,000 pounds to 1,000 pounds in only a year. By 1898 whitefish had disappeared entirely. The Solvay Process Company denied any fault, claiming in 1887 that “The fishing in the lake has

never been good, and we have no evidence it has become poorer” (Andrews, October 16, 1985: A4). The pollution also destroyed the ice industry when in 1901 the state banned ice cutting in the Lake because of “impurities” in the water (Andrews, October 16, 1985: A4).

Despite the negative impacts of industry and rapid development that had surfaced by the mid-19th century, Syracuse officials were hopeful that residents might still appreciate the area's natural resources for more than just their extractive values. In 1847, Harvey Baldwin, the first mayor of Syracuse, proclaimed "Our beautiful lake will present continuous villas ornamented with shady groves and hanging gardens and connected by a wide and splendid avenue that shall encircle its entire waters” (Andrews, October 16, 1985: A4). He hoped the “gay and prosperous citizens” would enjoy the avenue “towards the end of each summer's day [and] throng to it for pleasure, relaxation or improvement of health" (Andrews, October 14, 1984: A4). Swimming and fishing were still permitted on Onondaga Lake at the start of the century and recreational opportunities along the lakeshore abounded (Andrews, October 15, 1988). In 1859, there was a race course on the shore, in 1868 a fox chase along the lake, in 1877 a rugby match played alongside the lake, and a wild duck shoot in 1878 (Andrews, October 15, 1988: A4). Syracuse officials frequently expressed a desire to create a tourism resource out of “that beautiful sheet of water . . . to sail on its surface, to wander along its banks, to shoot the wild fowl which skim over, to capture the fish which swim in its depth” (Andrews, October 15, 1988: A4). With this, a short-lived resort industry was developed, but unfortunately also destroyed by environmental degradation (Andrews, October 16, 1985: A4).

By the middle of the century, greater wealth and more leisure time allowed Americans more opportunities to seek out recreation opportunities by mid-century, fostering a growth in pleasure travel and summer resorts (Dulles, 1940: 148). Newly constructed turnpikes, canals,

steamboats, and railroads, which greatly impacted industry, also influenced recreation. These destinations started out as places for “the better classes . . . carrying their desire for travel to a passion and a fever” (Dulles, 1940: 149). The wealthy took advantage of new transportation for summer travels to destinations like Nahant (near Boston), Newport, and Saratoga Springs to seek out amusement and sometimes to establish their social positions (Dulles, 1940: 150). With advances in transportation, even the less well-to-do were able to go on such excursions, albeit to a lesser extent (Grund, 1837: 325).

The Syracuse resort industry began on Onondaga Lake in 1872 at the outlet of Nine Mile Creek entered the Lake with the construction of Lakeview Point (Andrews, October 16, 1985: A4). Pleasant Beach, opened in 1874. It featured a bowling alley, dance pavilion, roller coaster, circus, photo studio, row boats, fishing pier, and midway. Operators promoted it as having “the greatest attractions of this progressive age” (Andrews, October 15, 1985: A5). The Iron Pier at the southern end of the Lake boasted a 327-foot dance hall and a toboggan chute into the water. Long Branch was a family-oriented location with chestnut groves, beer gardens, billiard rooms, photo galleries, roller coasters, and swing dancing. The White City Resort mimicked the 1893 Columbian Exposition with every building painted white, 25,000 lights, a house of mirrors, Japanese tea garden, miniature railway, and a 1,000 seat restaurant.

The Onondaga Lake resorts were short-lived (Andrews, October 15, 1988: A5). By the close of the 1930s, dreams of a resort industry, already hindered by the Great Depression which impacted recreational travel, and crippled by ongoing pollution along the shore, ended (Williamson & Hesler, 2006: 10). The industry was doomed as soon as it began as polluting industries like the Solvay company arrived at nearly the same time. A decline in recreational and commercial fishing, industrial waste disposal (both directly into the water and onto chalky, white

hills of waste), and municipal sewage flowing into the Lake and its tributaries turned the water into a liability. By 1938, the last of the Onondaga resorts, Maurer's Long Branch Resort, closed its doors.

In addition to the growing industries that used Onondaga Lake and the course of Onondaga Creek for dumping waste, that Lake lost value when Syracuse abandoned it as the city's source of drinking water in 1880 (Cramer & Kerlin, directors, 2009). It what has been called the "great water steal," the city determined that it would use water from nearby Skaneateles Lake as its source for potable water, leaving Syracuses' polluters unchecked. The long, narrow, glacial lake, had been spared the heavy settlement that Syracuse had suffered due to its remote and relatively inaccessible location. Because of this, the Skaneateles watershed had not been stressed in the same way as Onondaga Lake. This Lake was also situated 460 feet above what would become the location of the Erie Canal, making it ideal as a source of water that could be drawn from using a gravitational flow water system. Syracuse, seeking a cheap and reliable source of water, convinced the state legislature to grant it rights to Skaneateles Lake, thus eliminating the need for an expensive mechanical pumping system to use water from Onondaga Lake in favor of the more cost effective gravity flow system available with the higher water source. By 1894, a 19-mile conduit from Skaneateles Lake to Syracuse had been built. From this point on, Syracuse obtained all of its potable water from Skaneateles. The decision to disregard Onondaga Lake as a source of drinking water would also impeded the Lake's listing as a federal Superfund site in the future.

In a rapid progression, pollution destroyed much of what once attracted pleasure seekers to Syracuse. The Solvay process and other industries carelessly and extensively polluted Onondaga Lake. Plans for "shady groves and hanging gardens" encircling the Lake's waters

were quickly lost. White fish featured on resort menus disappeared and ice harvesting and swimming were also banned due to the high levels of pollution (Thompson, 2002: 127; Onondaga Lake Partnership, 2010: 10). One former resort guest recalled decades later: "You'd be swimming around there and, once or twice, when you hit the bottom, you hit slime. Once you got a dose of that, you quit" (Andrews, October 15, 1988: A5). In the name of progress, the city moved along at a rapid clip as a flourishing industrial hub at the continuing expense of its watershed.

CHAPTER 7

NINETEENTH CENTURY TRIBAL RELATIONS

Syracuse's rapid growth came at the expense of not only the environment, but also the Haudenosaunee Nation's territory and sovereignty. The people on the Onondaga reservation were exceptionally poor during the 19th century: "The spectacle of their dilapidated buildings and neglected lands, like that of the ragged and wretched people who inhabit them, is one only too familiar to our readers" (*Syracuse Journal*, April 3, 1869). Such conditions were cited as a reason for stagnation in population growth.⁵⁷ Advocates of acquiring additional Haudenosaunee territory attributed these abysmal living conditions to a lack of individual property ownership. Community property, it was argued, was "calculated to stifle the good attributes [of] industry and success" and fostered a "clannish isolation from the world" (*Syracuse Journal*, April 3, 1869).

In reality, the onslaught of white settlers forced the Six Nations to decrease their reliance on hunting as animal populations decreased. The settlers' agricultural practices cleared increasingly more land for fields drove game away (Tooker, 1978: 449). Haudenosaunee horticultural practices were also disrupted as, being confined within the borders of increasingly smaller reservations, higher populations on diminished territories led to less productive fields. Traditionally, the Haudenosaunee had relocated villages after periods of 8, 10, or 25 years as

⁵⁷ The population of Indians in New York State had fallen substantially by the end of the 19th century. The numbers of Onondaga in the region was small at the close of the 18th century. Only about 300 lived at Buffalo Creek, around 100 in the Onondaga's original homeland (at least as of the early 1790s) (Blau, Campisi, & Tooker, 1978: 495). The population slightly increased over the next decade to 143 at Onondaga in 21 houses on the reserved land by 1806 (Blau, Campisi, & Tooker, 1978: 495). Populations grew slightly as the Onondaga returned to their territory. By 1821, there were 272, by the mid-1820s over 400, and by the next decade nearly 500 (Blau, Campisi, & Tooker, 1978: 496). Reservation populations continued growing, although not rapidly, increasing in the State of New York from and estimated 3,753 in 1845 to 4,139 in 1865 (*Syracuse Journal*, April 3, 1869). The Onondaga in 1865 had a population of 302 living on the reservation and 172 living on other reservations (*Syracuse Journal*, April 3, 1869).

natural resources, from fish to fertile land, became exhausted. Having to contend with increasingly limited resources, they were forced to adopt western farming methods. These agricultural practices were encouraged by individuals who anticipated that a decreased reliance on hunting would lead to an increase in the willingness of the Haudenosaunee to abandon vast hunting territories.

The Onondaga also faced Catholics, Episcopalians, Presbyterians, Quakers, and Methodists who travelled to the Reservation during the 19th century attempting convert them, with limited success (Blau, Campisi, & Tooker, 1978: 497). One 1872 *Harper's Weekly* account attributed the Nation's perseverance and success (as opposed to that of the other Nations of the Haudenosaunee) to the adoption of Christianity and agricultural practices (141).

There was never a large-scale conversion on the reservation; rather, traditional practices such as the "Sacrifice of the White Dog" and the "Green Corn Dance" persevered (*Harper's Weekly*, 1872, February 17: 141). Other aspects of western culture took hold more strongly than religion. Many members of the tribe learned English and attended schools outside the reservation. Younger members of the tribe also adopted "foreign" dress and appearance" (*Syracuse Evening Herald*, June 7, 1860).

On the reservation, residents were employed as basket makers, bead workers, bow and arrow makers, "peacemakers," and were also engaged in "normal" occupations. By the mid 1870s western farming practices were adopted on the 913 acres of improved land with farm buildings valued at \$3,750, stock at \$11,345, tools and implements \$4,875 (*Syracuse Journal*, February 9, 1878). Of this land, 488 acres were tilled, raising hay, corn, oats, wheat, beans, peas, and potatoes. Extensive livestock, including horses, chickens, cattle (including dairy cows), sheep (that produced 10,500 of wool per year), and pigs, was also kept (*Syracuse Journal*,

February 9, 1878).

As physical aspects of the Onondaga reservation were evolving, so were the Nation's increasingly hostile political and legal relationships with the state and federal governments. Changes in the political climate and in law eventually led to the creation of state and federal "Indian policy," always without input from those upon whom it would be imposed. Proposed methods, such as assimilation, were in actuality, thinly veiled attempts to acquire more land. State and federal governments also considered and attempted to create allotment policies, a "political assault" by which they attempted to force the concept of "homesteader" and individual property rights on American Indians (U.S. Census, 1995: xv). Although the Haudenosaunee arguably escaped the century with more of their sovereignty and traditional territory intact than many other Native American Nations (and the Onondaga even more so than others within their own Confederacy), they suffered losses during this period that would leave them subject to a legal system that would invariably fail to acknowledge their rights.

New York continued to wrongfully appropriate Haudenosaunee territory despite the laws prohibiting such land agreements or treaties. In one 1817 transaction, the Onondaga "sold" the state a 4,320-acre tract east of the Reservation known as the "Onondaga Residence Reservation" (Blau, Campisi, & Tooker, 1978: 496). They allegedly ceded an additional one-and-a-half-mile wide strip of land on the east side of the Reservation in return for a meager initial payment of \$1000, annual payments of \$430, and 50 bushels of salt (Robertson, 2006: 9). In 1822, the state acquired 800 additional acres from the south end of the reservation for \$33,380 cash, \$1,000 in clothing, and an annuity of \$2,430 and 150 bushels of salt (Blau, Campisi, & Tooker, 1978: 496). The Onondaga retained only 6,100 acres (Blau, Campisi, & Tooker, 1978: 496; see also Smith, 1904: 192). Another illegal "treaty" signed in 1838, in which the Haudenosaunee allegedly

parted with their remaining lands, was fortunately deemed fraudulent (Kappler, 1904, 2: 502; 537).

State Indian Policies

After having spent the first half of the century acquiring land, by mid-century the state, recognizing that the effort was becoming increasingly difficult, determined it necessary to address the nature of Indian-State relations. Many attempts were made by the state to allot reservation lands before the federal government ever proposed it in the General Allotment Act. The threat of state imposed allotment spanned from 1849 to 1924. The New York State Legislature's first proposed allotment law authorized the Indian Nations within the state to divide their own lands into tracts apportioning a share to each individual. Twenty years after the deeds to the distributed properties were recorded, owners could redistribute, partition, and sell them to anyone, thus opening up vast amounts of land to white settlement (New York State Laws, Ch. 421 of Session Laws of 1849). The Onondaga Nation wished neither for allotment nor for the state-citizenship that came part and parcel with it (Declaration of Robert E. Bieder, 2006: 5).

In 1853, Onondaga chiefs composed a letter expressing concern for and opposition to the policy, believing it would be responsible for "destroying that bond of common interest which unites & holds Indian communities together" (Letter from the Onondaga Chiefs to Hon, Nathan Bristol, New York State Senate, 1853). Additional concern was expressed for individuals who were not members of the Nation, but had been permitted to live on the reservation "by courtesy," who would be dispossessed of their homes as a result of the policy (Letter from the Onondaga Chiefs to Hon, Nathan Bristol, New York State Senate, 1853). The policy would also lead to the levying of state taxes, which the Chiefs feared might force some to sell their land. Inch by inch, this policy would cause the Nation to lose its land, traditional government, community, and

ultimately its identity (Declaration of Robert E. Bieder, 2006: 5).

New York State further delved into Indian Affairs in 1855 to investigate the potential for improvement of education and civilization on the reservations and examine what other conditions required attention. The account, which detailed the "hopelessness and poverty of the once mighty Confederacy," suggested a permanent system of administration (Upton, 1980: 52). One suggestion was to "educate" the Six Nations in the ways of white civilization including Christianity, agriculture, mechanics, and household arts. It again promoted the idea of distributing the reservation land held in common to individuals.

In February 1859, the chiefs of the Onondaga Council met to consider the proposition of dividing tribal land. Although not all members were present, after consideration "it was decided by a nearly unanimous vote that a division of the lands would not advance the interest of the nation... [and] this decision of the chiefs meets... with the general approval of the members of the nation, and it is to be hoped their desires will not be disregarded" (*Post-Standard*, February 14, 1859). Another proposal was presented to the state Senate on February 27, 1865 for the division of Onondaga lands. This proposal suggested that individual members of any given Nation receive title in the division of the lands owned by the tribe (*Herald-Journal*, February 27, 1865). This proposal too, was unsuccessful.

A state constitutional convention was held in 1868, tasked one committee with further examining Indian administration. Despite contrary existing federal law, the committee suggested heavy state control with provisions giving the state sole power to authorize the sale or subdivision of Indian land. Recommendations were made to authorize the state to use eminent domain to take Native American lands for public works projects. It also suggested the power to unilaterally confer citizenship on the Nations. Two years later, a report specific to the Onondaga

was released on April 18, 1870 to the State Legislature, in Assembly. This "Report of the Committee on Indian Affairs in Relation to the Petitions of the St. Regis and Onondaga Tribes of Indians, as to Their Annuities and Leases" offered an explanation of the nature of state "treaties." The report referred to the agreements between the state and the Haudenosaunee as being "of the most sacred character," but also addressed the practice of paying the Six Nations in depreciated currency rather than the silver promised. It at least found this action was "in violation of sacred obligations" (New York State Legislature, 1917: 1). It also acknowledged the controversial idea that the Haudenosaunee owned the land before the state was "first discovered" (New York State Legislature, 1917: 1).

The Report went on to address the abuse of the State Indian Agents leasing Onondaga territory. This affirmed that individuals continued to make illegal agreements in violation of federal and state laws (whether ultimately legal or not) prohibiting individuals from acquiring Haudenosaunee land (New York State Legislature, 1917: 2). Tribe members and non-Indian advocates complained that these state-appointed agents were leasing reservation lands for a fraction of what they were worth. Even if the leases had met the legal requirements for authority, they suffered by virtue of being significantly undervalued. Of particular note were lands containing one of the region's most valuable stone quarries that the lessees obtained and exploited for public building construction materials (New York State Legislature, 1917: 2). Although the state regarded these agreements as unacceptable, the leases were not terminated. Rather, ignoring the failure to meet federal requirements, and contrary to its own laws on land transactions, the state merely pronounced "No Indian lands or property belonging to the Indians should be leased for more than three years, and the value of such lease should be made in yearly payments to the Indians" (NY State Legislature, 1917: 2).

The state revisited allotment again in 1880 in a proposed bill from State Assemblyman Thomas G. Alvord to the New York Assembly Committee on Indian Affairs, which would divide the Onondaga reservation (*Syracuse Courier*, January 20, 1880). The Onondaga and some Syracuse residents opposed this proposition, complaining to State Indian agents that such a treaty would result in more unfair land deals between whites and Indians. A *Buffalo Courier* correspondent depicted the opposition as “some six or eight red men whose dusky forms appeared as historic vestiges of a race that once held sway over the Empire State” (Parker, et al., 1880: 1). The opposition, however, was greater than just a few men.

One local paper, the *Syracuse Daily Journal*, offered its support for the Onondaga against the “Alvord Bill,” claiming “The object of this proposed legislation is to destroy the existing Onondaga people” (*Syracuse Daily Journal*, March 2, 1880: 1). Further, a letter to the Editor indicated public support for the Onondaga, albeit overly paternalistic, expressing concern over the intentions behind the proposed law: “The Indians who have little business experience and no capacity for dealing with the whites in trade and barter, would speedily find themselves landless and homeless, with nothing to show for their former possessions” (*Syracuse Daily Journal*, March 5, 1880). Allotment, the editorial argued, was “a measure of practical and sure extermination.” Lewis H. Morgan, a Senator from Rochester (and the author of *Apologies to the Iroquois*) also opposed the bill. Morgan believed that the law intended to take what little property remained in the Onondaga's hands, calling the law “an act of cruelty, as well as a public shame” (Declaration of Robert E. Bieder, Exhibit E, 2006).

Onondaga representatives recognized that the proposed “bill” was nothing more than another attempted treaty that would likely leave many Onondaga homeless after being taken advantage of in unacceptable land deals (*Syracuse Courier*, March 30, 1880). They asserted that

existing treaties, in which the state promised to protect the Haudenosaunee and to "secure them in holding their lands peaceably, without any intrusion in any way from any source," prohibited the proposed plan for allotment (Parker, et al., 1880: 1). The Onondaga clearly understood the underlying reasons for the bill, noting: "We thought of you as friends; we gave you a place to lie down, but by and by these treacherous men go to work to deprive us our homes, so that we now have scarcely left enough of land upon which to lay our blankets" (Parker, et al., 1880:3). Alvord's bill failed to gain traction, but a comparable bill was proposed only two years later (*Syracuse Journal*, March 24, 1882: 1).

The Schoonmaker Bill had the state trying to acquire lands that were already moderately settled. As of 1882 there were around 90 houses on the Onondaga Reservation (New York State Indian Commissioners, 1883: 10). Some properties had adjoining barns and cultivated acres that appeared to be "held by the occupants exclusively" as agricultural practices had become more common (New York State Indian Commissioners, 1883: 10). Schoonmaker's bill immediately received opposition from individuals on and off the reservation. Benjamin Casler, a federal Indian Agent in the New York Region, criticized the proposed law, stating "I think I can safely say if the Schoonmaker bill should become a law that in ten years from that time you would not own more than one-half the land you now own. This bill is to help the whites and not the Indians" (*Syracuse Journal*, March 24, 1882: 1). Testimony before the Indian Committee of the State Assembly also labeled the bill unjust and inhumane treatment towards the Onondaga. This bill was also defeated (*Syracuse Journal*, March 24, 1882: 1).

Allotment was suggested again in the following year in a Report of the State Indian Commissioners. State Indian Commissioners had been directed to report on the nature of relations with the Onondaga and whether "the social and moral condition and usages of the

Onondaga Indians are compatible with order and virtue” (New York State Indian Commissioners, 1883: 1). Additional information was sought as to whether a new treaty should be negotiated and whether the state should step in to “prevent wrongs and enforce rights between individuals and parties within the tribe” (New York State Indian Commissioners, 1883: 1). The Report proposed a treaty that would “allow” the Onondaga to “set off sufficient land as a homestead to each family,” but make it “absolutely inalienable for all time, and placed by law beyond the reach of all liens and encumbrances” (New York State Indian Commissioners, 1883: 12). The lands not allotted were proposed to remain in common and inalienable. The Onondaga again rejected provisions for severalty (New York State Indian Commissioners, 1883: 11).

The Report recognized the Nation’s sovereign status, stating the Onondaga did "constitute a nation, recognized as such in our treaties and by our courts, and holding their lands to themselves and their posterity forever, for their own use, but not to be sold, leased, or in any manner disposed of to others" (New York State Indian Commissioners, 1883: 3). It further advised that state actions regarding Indian land required consent and a treaty with the Onondaga (“as a matter of right as well as of success”) (New York State Indian Commissioners, 1883: 27). The Commissioners related that the Onondaga had no desire to alter their current status, noting “In their answer, they protest against the power of the State to force them to make new treaties and say that they are opposed to it” (New York State Indian Commissioners, 1883: 27).

In 1884, a state Joint Commission on Indian Affairs continued to press allotment, attempting to broker a treaty with the Onondaga that would replace the 1788 Treaty of Fort Stanwix (*Syracuse Standard*, January 11, 1884). The treaty proposed that the Onondaga adopt a constitution guaranteeing a right to hold property, elected officials, marriages performed by an official, and a commission to oversee the lease of the stone quarries (*Syracuse Standard*, January

23, 1884). It further promised the state would provide protection for the reservation against all occupation by non-Indians that could be enforced in state courts. The state promised to cancel existing leases and prohibit any more leases granted to whites. State courts would be opened to the Onondaga for reservation matters, which would be tried there according to Onondaga law. The state further offered to provide a reservation school. Finally, any person found taking reservation natural resources (timber, stone, poles, bark) absent permission would be charged with theft.

The results of the negotiations were published in an article entitled “A Treaty with the Indians—Commissioners Succeed Finally to Bring the Pagans to Terms—Christians Greatly Pleased—Full Text of the Proposed Treaty—White Men Are not to be Allowed Even to Rent Lands on the Reservation” (*Syracuse Standard*, January 23, 1884: 4). The Onondaga did not want any part of the 1788 treaty changed. The Nation, gathered in the Council House, turned down the agreement by a strong majority (*Syracuse Standard*, March 5, 1884).

The state persisted in seeking allotment despite a recognition that existing laws and treaties created obstacles to land acquisitions. Some offered that morality justified breaking these laws and agreements. For example, one State Indian Commissioner rationalized:

The state is undoubtedly bound by treaties formally entered into, but when treaties perpetuate barbarism and protect vice they should be broken. These people are not to be considered as equals; they are unfortunate; they do not know what is best for themselves; they are the children of the state...treaty obligations should be fulfilled roundly, in equivalents if not in kind; but treaty obligations should not forever protect. (Draper, 1889: 13)⁵⁸

⁵⁸ The same State Indian Commissioner stated:

It is quite the fashion to say that the Indian has been badly treated. There is little to no truth in the assertion. . . if the original holders, a simple-minded, crude and barbarous people, have suffered in the readjustment, it is not strange. But it cannot be truthfully said that the State of New York has treated its Indian inhabitants either unjustly or ungenerously. For many years it has recognized and sacredly guarded their ownership in fee to some 90,000 acres of the best lands in the state...it has saved these lands to these people, in spite of themselves, by interdicting traffic and forbidden

On March 21, 1888, a resolution of the State Assembly created a Special Committee to investigate the “Indian Problem” to officially search for such justifications (Whipple Report, 1889). The Whipple Report, named for the committee’s chairman, Assemblyman J.S. Whipple of Salamanca, was issued on February 1, 1889. The Special Committee was charged with reviewing the social, moral, and industrial condition of the tribes; the amount of land cultivated; the tribal organizations and manner in which they allotted land among their tribal members; existing title to the lands on their reservations; the claims of the Ogden Land Company, other land companies, or individuals; all treaties made between the Indians and the state and federal governments; and other matters that might facilitate Indian-State relations in the future (Whipple Report, 1899).

Committee members travelled to the various reservations to survey conditions and interview residents. The report also collected letters from a variety of New Yorkers supporting allotment, deeming it as a way to “elevate” the Haudenosaunee civilization. The Committee's findings suggested a “need for the changes in land patterns and tribal governments” (Hauptman, 1988: 11). It concluded that the “Indian problem” could only be solved by "dissolving their separate status, giving them full citizenship, and assimilating them into “the great mass of the American people” (Hauptman, 1988: 11). In addition to supporting allotment, the Whipple Report encouraged the expansion of state laws and state jurisdiction over the Native Americans in New York, contending that they had been wards of the state long enough. Without adopting land ownership, it asserted, there was no incentive for self-improvement. The Whipple Report condemned traditional governments as “corrupt and vicious,” the religious practices “depraved, immoral, and superstitious,” and the state of industry as “chronic barbarism” (Hauptman, 1988:

alienation. With doubtful expediency, it has almost supported them upon these lands in general idleness. (Draper, 1889: 6)

11). The Onondaga Nation received the harshest criticism in the Report, with missionaries and state officials claiming to be annoyed by their “conservatism and resistance to change” (Hauptman, 1988: 11). The condition of the Onondaga Nations' reservation was described as "vile and detestable, and just so long as they are permitted to remain in this condition, just so long will there remain upon the fair name of the Empire State a stain of no small magnitude" (U.S. Census, 1995: xvi). The Report concluded that “These Indian people have been kept as ‘wards’ or children long enough. They should now be educated to be men, not Indians” (Whipple Report, 1899). Similar investigations persisted into the next century, though they would shift from justifying allotment to promoting assimilation. Despite this targeted attack, the Onondaga were fortunately able to keep the state at bay to avoid the allotment of their territory. The Nation’s struggle against the federal government would prove equally as tedious, but fortunately as unproductive.

Federal “Indian Policies”

The federal government was also eager to amass more Indian territory and often no less corrupt than New York State. In an act of fraud, the United States government was complicit in an attempt to strip the Seneca of their remaining lands and sovereignty in New York in the 1838 Treaty of Buffalo Creek (U.S. Census, 1995: xiii). Lewis Henry Morgan said of the agreement that it was brokered "with a degree of wickedness hardly to be paralleled in the history of human avarice" (1962: 33). On July 9, 1819, negotiations began between the United States and the Haudenosaunee at Buffalo Creek (Venables, 2011: 49). Through this agreement, the Seneca (under protest) traded their remaining reservation lands (Allegany, Cattaraugus, Tonawanda, and Buffalo Creek) to the Ogden Land Company for 500,000 acres in Wisconsin, all under the supervision of a representative of the United States government (Johansen and Mann, 2000: 37).

The Seneca had sold some land and preemptive rights to remaining lands to the Ogden Land Company in 1826 (U.S. Census, 2000: xiv). The federal government set aside acreage in Wisconsin for the Nation and granted an additional 1.8 million acres in northeastern Kansas. Despite clear evidence of fraud, forgery, and bribery, President Andrew Jackson (a strong proponent of removal) ratified the treaty. The land was returned to the Seneca in an 1842 treaty, but the Land Company still retained rights of preemption (Johansen and Mann, 2000: 37). Although the Onondaga were not signatories of this treaty, it serves as evidence of the federal government's intentions towards the Haudenosaunee and their territory during this period.

The federal government had no intention of sharing the country with dozens of nations and also spent the second half of the 19th century focused on allotment with greater success than New York State (U.S. Census, 1995: xvi). The policy focused primarily on those Nations west of the Mississippi who retained the majority of their lands, but also imposed this policy on groups in the east. New legislation to address Federal-Indian relations became necessary with Congress's 1871 decision to no longer enter into treaties with Native Americans. Those treaties already in place would remain valid after this date, but acquiring more land would require a new policy. Under the proposed federal allotment, the Office of Indian Affairs would survey existing reservation land, divide it into 160 acre parcels for individuals to own privately, and sell the remainder on the open market. After a period of time (usually 25 years), individual allotments converted to fee simple ownership. Individuals could then sell their land to anyone, removing its trust status and subjecting it to taxation and market forces. Native American nations were thought to possess too much land, which the government wanted opened for settlement, railroads, mining, forestry, and other industry (ILTF, 2015). Proponents invented numerous justifications for this principle. For example, the collective way of life was considered

“communistic and backwards,” whereas individual property rights an essential part of civilization (ILTF, 2015). Even citizenship proposals and assimilation measures were little more than a thinly veiled attack on land rights and sovereignty.

Two federal bills for allotment were proposed in January 1879, although Congress tabled both before a vote (Holm, 2005: *The Vanishing Policy*, para. 22). Measures proposed in April 1879 and January 1880 met the same fate (U.S. House of Rep. 46th Congress, 1st Session, HR 354, 1879). In May 1880 Richard Coke (TX) proposed yet another general allotment bill, the first to gain some traction in Congress. He proposed allotment would assist the government in “uplifting” American Indians, helping to “persuade them that assimilation was the best way to place them on the highway to American citizenship.” His allotment law would also “break up tribal relations and place them under the jurisdiction of the Constitution of the United States” (Black, 2015). Coke’s Bill would give individuals a secure title to land. With title came all accompanying property rights so that the owner would have an “assurance of reaping what he has sown” (Report of the Board of Indian Commissioners, 1885: 38). The proposed bill also authorized the President to issue patents for Indian reservations set aside by treaty or act of Congress. The Coke Bill specifically excluded the Seneca from the provisions of the Act, however, due to the outstanding leases on their territory. Coke's proposal also contained a stipulation requiring tribal consent to the allotment (Holm, 2005: para. 24).

Coke's bill met with opposition. Senate antagonists argued that the Native Americans “lacked the skills necessary to assimilate” (Black, 2015). Members of Congress proposed amendments to the bill such as providing that Indians have the right to sue in courts. Coke believed the bill stood a better chance of passing without such a provision (Report of the Board of Indian Commissioners, 1885: 58). He led a series of votes to reject numerous amendments to

his bill, but ultimately the numerous changes would mean it never reached the House floor.

Those struggling to pass allotment laws recognized that existing treaties stood in the way of accomplishing either citizenship or allotment, yet considerable support existed for breaking up reservations and traditional tribal governments. Hence, although Coke's bill did not pass the House because of conflicts of opinion, the ideas he offered influenced the drafting and led to the passage of the Dawes Act, also known as the General Allotment Act or the Dawes Severalty Act of 1887 (Black, 2015).

An 1885 Report of the Board of Indian Commissioners, published three years after the rejection of the Coke bill, made clear that allotment and the Dawes Act were on the horizon. The report outlined the growing problem of large tracts of grazing lands falling into the hands of only a few individuals, cautioning of "the danger that in a short time the whole Territory, except the small part actually occupied by Indians, will be in the possession of great monopolies" (Report of the Board of Indian Commissioners, 1885: 11). To remedy this perceived imbalance in land holdings, the government proposed to simply take more land from the Native Americans. The scheme was to add provisions for organizing governments in the Indian Territory, declaring Indians as citizens of the United States, and providing for an increase in educational facilities on reservations to a general allotment bill.

In December 1885, Henry Laurens Dawes (MA) introduced his allotment bill; it passed in the autumn of 1886; and Grover Cleveland signed it into law on February 8, 1887 (Holm, 2005: para. 28). The Dawes' Act called for the survey of Native Americans' land. The surveyed land would then be parceled out to individual tribal members. A trust period was placed on allotments requiring a 25-year inalienable period. Although each possessed their allotted land, it was still not owned by the individual Indians, rather, the United States held the land "in trust" for

those 25 years. Only after this time did the individual own it outright (or “in fee”). Only with this fee ownership did the individual gain the right to alienation (Dawes Act, 1887). Along with their parcel, each allottee received the full rights of United States citizenship.

Pursuant to the Dawes Act, reservations would be divided into 160-acre parcels for heads of families, putting the power of ownership with men and not women, 80 acres for single men, and 40 acres for minors. The remaining acreage would be surplus (i.e. part of the United States' public domain) and sold or leased to non-Indians. Senator Dawes explained the necessity of the program, stating “They have not got as far as they can go because they own their land in common, and under that [system] there is no enterprise to make your home any better than that of your neighbors. There is no selfishness which is at the bottom of civilization” (Ambler, 1990: 10). Despite this justification, it was clearly the desire to open up surplus lands to whites, not any interest in promoting individual ownership and civilization that motivated the Act (Ambler, 1990: 11).

Some tribes were specifically excluded from the provisions of the Dawes Act: the Cherokee, Creek, Choctaw, Chickasaw, Seminole, Miami, and Peoria in "Indian Territory;" the Osage, Sac, and Fox in the Oklahoma Territory; any Seneca reservations in New York; and a strip of territory in Nebraska adjoining the Sioux Nation (Cohen, 1965: 208). The Dawes Act specifically exempted the Seneca because of the existing terms of the Ogden Purchase, but the Treaty did not specifically address the other Haudenosaunee Nations. By law these reservations could have been allotted. For the majority of the tribes in the Northeast this was impracticable, however, because there was insufficient available land to make subdivision of the reservations a viable option (U.S. Census, 1995: xvi). According to the *Eleventh Extra Census Bulletin* on the Six Nations, Haudenosaunee land had a completely different character than did other Indian's

land making allotment impossible as it was assumed that the courts would protect them (Donaldson, 1892: 11).

The *Bulletin* also suggested that the Haudenosaunee already demonstrated a kind of individual ownership, or at least possession. Evidence existed to individual title to Six Nations' lands, which "largely depended upon visible possession and improvement, rather than upon the record of evidence common to white people. Verbal wills recited at the dead feasts, in the presence of witnesses to the devise, were usually regarded as sacred, and a sale, with delivery of possession, was respected when no written conveyance was executed" (Donaldson, 1892: 12). Additionally, the *Bulletin* noted the existence official proceedings regarding grants or sales of lands though none were recorded in the same manner as under state laws. Despite the differences in method, the Agent acknowledged that "Indian common law . . . generally carried its authority or sanction with effective prohibitive force against imposition of fraud, even when occupation and improvement of public domain have been actual but without formal sanction" (Donaldson, 1892: 12). Despite this, Enumerator T.W. Jackson still contended that the best way to civilize the tribes was to make them citizens and secure the division of their lands. The *Bulletin* did recognize the Nations' sovereignty, which had allowed the Haudenosaunee managed to escape allotment.⁵⁹

The impact of the General Allotment Act was the loss of 90 million acres of Indian land across the United States, approximately two-thirds of the total land base (ILTF, 2012). During the period of allotment, profitable lands rich in mineral deposits and agricultural potential were often taken from Native Americans and leased to developers by the Bureau of Indian Affairs.

⁵⁹ The *Bulletin* also addressed the health and welfare of those living on the reservations (U.S. Census, 1995: vii). It reported on the problem with the dichotomy of existence for the Haudenosaunee, noting that the struggle for control "lies between the pagan and Christian elements" and recognized that the Six Nations were more "advanced" than other tribes on other reservations (Donaldson, 1892: 2).

The profit potential and control was out of the hands of the land owners. Such actions were rationalized by the suggestion that the Indians were not using the acreage productively (Ambler: 1990: 14).

Allotted lands became increasingly subdivided with each generation as ownership interests were divided among heirs, leading to exponential growth in the ownership of parcels. Lands within reservation boundaries sold as a result of the Dawes Act have led to lands split between trust lands, fee lands, lands owned by tribes, individual Indians, and non-Indians (ILTF, 2012). This division impairs the ability to use lands in an economically beneficial manner due to the lack of large enough contiguous sections. It prevents access to lands that are important for traditional use. Additionally, these split reservations become subject to the control of many different governing authorities (federal, state, county, and tribal governments), which can lead to jurisdictional issues (ILTF, 2012). Such debates about control raise questions of authority to regulate, tax, and conduct activities within reservation borders (ILTF, 2012). Many landowners also eventually lost their land by virtue of their inability to pay taxes or through foreclosure. The Indian Reorganization Act of 1934 ended the sale of Indian allotments and returned the lands to the federal trust (Champagne, November 18, 2013). According to the Indian Land Tenure Foundation, an organization dedicated to restoring ownership and management of land to Native landowners, the problems created by General Allotment resulted in "economic uncertainty, racial tension, and community clashes within or near the reservation (ILTF, 2012).

Initiation of Natural Resource Management Policy

While politicians were struggling to amass territory, natural resources were being exploited and pollution was accumulating in New York waterways sacred to the Onondaga. Interest began to rise in protecting economically valuable natural resources by both the state and

by the Onondaga Nation. For example, there was a law preventing the harvest of natural resources on Reservation territory absent the consent of the Indians and their agent. In 1855, whites frequently travelled to reservation lands to illegally take natural resources. In response, a law was passed prohibiting the removal of stone, wood, timber, and bark from the reservation absent the consent of an Indian agent and in concert with Onondaga permissions (*Post-Standard*, June 18, 1857). Those found violating the laws were charged with trespassing and fined five times the sum of the value of the resources stolen (NYS, 1881: 147). The fines collected for these violations were paid to the chiefs of the Onondaga Nation for the benefit of the Nation after the Indian agent deducted his own fees. Various permutations of this law existed, though the strict enforcement of such laws was questionable based on how often resources were stolen and how frequently reminders of such restrictions were published in local papers (*Post-Standard*, July 18, 1857).

Persistent reminders of these laws by the Indian agents were insufficient in preventing the crimes, as evidenced in a July 2, 1870 letter from an Onondaga Chief to the Governor of New York requesting government intervention. Despite repeated requests, however, no assistance was forthcoming. In response to the continuing abuse of Onondaga natural resources, in January 1871, the Onondaga Nation adopted a resolution on the harvesting and use of timber from the reservation. The Nation detailed requirements for timber harvested by Indians and non-Indians alike, created use requirements on-reservation, and processing requirements for off-reservation. The State Legislature published an official notice of law in September 1873 regarding timbering on the Onondaga Reservation following the Nation's regulations. The notice supported the Nation's sovereignty over actions on reservation land (*Syracuse Journal*, September 10, 1873).

To the state and federal governments, the 19th century had been another one wrought

with struggles over which had the authority to negotiate treaties with and purchase lands from the Six Nations. Although their respective policies for allotment had failed to impact the Haudenosaunee, each government had managed to appropriate land from the Indians at the beginning of the century. Having failed with allotment, they would attempt different policies with the same goal of control and land acquisition. For the Haudenosaunee, the century drew to a close with diminished territory and lingering questions regarding sovereignty. Though they had managed to gain some protection for their valuable natural resources, these protections were not far reaching. During the coming century, the three powers would continue to clash over issues of control as Syracuse grew and the environment declined.

CHAPTER 8

TWENTIETH CENTURY INDUSTRIAL GAINS AND INDIAN LAND CLAIMS

Twentieth century Syracuse was forging ahead with rapid population growth supported by quickly expanding industry of national repute. The municipal government reacted to this development boom with planning efforts and infrastructure improvements. Only a few miles away, the Onondaga reservation continued to suffer from suboptimal conditions and the actions of outside governments that continued to take advantage of its poor bargaining position. The Haudenosaunee, dissatisfied with the situation, began to voice their grievances regarding improper land acquisitions even while the state persisted in trying to acquire more territory. State and federal Indian policy continued to evolve, each government surmising some concept of what the Haudenosaunee might concede. When the Six Nations refused to capitulate, a policy of termination was proposed. The contemporaneous rise of the city and the Haudenosaunee's fall resulting from a combination of unfavorable Indian policies and unsuccessful land claims, defined the majority of the century, culminating with a landmark Supreme Court decision in 1974 addressing aboriginal title.

From Salt City to Diverse Industry

The success of Syracuse's salt industry served as a catalyst for rapid development and overall industrial growth, and the accompanying pollution and other environmental damage that comes with it. Salt production had been the economic foundation of "Salt City" in the 18th century. Syracuse produced the majority of the nation's salt during the 19th century (Bell, 1998). Production did continue into the early 20th century, but the amount of salt being produced and sold steadily decreased as cheaper sources became more readily available. Due to this decrease in production, much of the land used in salt production was parceled off and sold to

diverse incoming companies that produced wallpaper, typewriters, knitting mills, coal yards, lighting companies, and time registers (Beauchamp, 1908: 502). The final blow to the salt industry was dealt by a hurricane in 1926 that decimated the solar sheds used to make salt from the brine. The Onondaga Coarse Salt Company, the city's last salt manufacturer, closed its doors in 1926 after 125 years (Chan, December 31, 2009). The Solvay Process Company ("Solvay"), the "pride of the Syracuse industrial field," assumed the use of the brine (Beauchamp, 1908: 505). By 1900, Solvay employed over 3,000 residents in the production of soda ash, caustic soda, refined carbonate of soda, soda crystals, precipitated sulphate of lime, chloride of calcium, coke and ammonia salts. The company was valued at \$8 million by 1908. Other extractive industries, including rock salt mined in Tully (which piped brine to Solvay by the Tully Pipeline) and limestone excavated from split rock quarries, surfaced as well (Beauchamp, 1908: 505).

Syracuse's industrial production was among the highest in the state by the start of the 20th century. The city was first in the country for manufacturing salt, typewriters, and candles; first in state for the value of its iron, steel, and rolling mill products; third in the production of shoes, bread, food preparations; and fourth in clothing production (Beauchamp, 1908: 513). As World War I approached, the city played a substantial role in preparing for war. Solvay's subsidiary, Semet-Solvay, erected an explosives plant at Split-Rock Quarry to manufacture carbolic acid, picric acid, ammonia picrate, and TNT. The Split Rock plant produced nearly one quarter of America's supply of explosives, leading President Woodrow Wilson to describe Solvay and its affiliates "one of our most precious possessions" (Cominoli, 1990).

Solvay began producing organic chemicals in 1918. These chemicals and the materials used to produce them were knowingly released into nearby water and negligently allowed to flow into it (Onondaga Lake Partnership, 2010: 10). In 1920, Solvay and affiliate Semet-Solvay

Company, along with four other companies, were absorbed by the Allied Chemical and Dye Corporation.⁶⁰ Before World War I, Germany had previously provided the country with the majority of its chemical needs, but the desire for chemical independence led to the cooperation of a number of producers before and during the conflict. The success of the consolidated efforts to supply the United States soda ash, dyestuffs, and explosives during the war led to the post-war merger in 1920. This union provided access to a large supply of raw materials, consolidated the research efforts of an exceptional group of chemical and engineering experts, and combined plants and laboratory facilities (Chandler, et al., 1990: 179).

Unfortunately, the actions of the growing chemical company led to unethical and illegal arrangements with individuals on the reservation to further general production. In testimony delivered before a 1929 Senate Subcommittee regarding the placement of a Solvay/Allied brine pipeline that snaked across the Onondaga reservation, it was revealed that the company had taken advantage of the state's vague relationship with the Onondaga to obtain a lease for a right-of-way across reservation territory:

The State agent, who came to these Indians... He got the lease from them. He came up to these Indians, these Chiefs and got them together. They refused to have the pipeline go through, absolutely refused. They didn't want it. They held a meeting there all day long. Finally they had to light the lamps for the old men to see. Finally one of the chiefs was taken outside, and some of them were given \$5 per head for voting on it, and that was how the pipeline came about. (S. Res. 79, 1931: 5018)

This testimony spoke to the persistent battles between factions on the reservation alleging authority to bring lawsuits, enter into lease agreements, discuss matters of policy with government officials, and speak on behalf of the Nation to members of the media (S. Res. 79, 1931: 50120). Both factions provided testimony before the Subcommittee. The Subcommittee

⁶⁰ These companies were Semet-Solvay Co. (coke and coke by-products), General Chemical Co. (acids), Barret Co. (coal-tar products), and National Aniline and Chemical Co. (dyestuffs) (Eisenstadt, 2005: 58).

determined that the “possessory title” to reservation land belonged to the entire tribe, and therefore must be leased by the tribe as a whole. It further questioned how the state could claim any role in obtaining leases for rights-of-way from the Nation as jurisdiction over such matters belonged to the federal government (S. Res. 79, 1931: 50124). The company assured the Onondaga that the pipeline would not negatively impact their land. Residents testified, however, that it had already affected Onondaga Creek and its banks. They offered evidence of leaks and that company-provided staff were paid to overlook dying fish and trees and grass that would not grow along the pipeline (S. Res. 79, 1931: 5018).

Planning for a Growing City

Notable “improvements” to the Syracuse landscape were made at the start of the twentieth century. Up to this point, Onondaga Creek had been valued for its use in milling and as an open sewer. Much of the land surrounding the creek was overdeveloped, serving the industrial uses that had become common along waterways. At times it was subject to heavy (often deadly) floods, particularly when the snowmelt at higher altitudes flowed into the valley, cause Onondaga Creek to rise above its banks. Further, as Syracuse continued expanding, the volume of waste dumped into the Creek grew. In response, Syracuse established an Intercepting Sewer Board in 1907 to address pollution from combined sewers from the city and surrounding towns emptying directly into Harbor Brook, Onondaga Creek, and Ley Creek (OLMC, 1993: 4). An intercepting sewer system was completed in 1922 to direct dry weather sanitary flow and some stormwater runoff directly into Onondaga Lake rather than into the creeks (OLMC, 1993: 4). This was justified as a viable option as it was thought that the health effects and bad odors from discharging waste into creeks was not comparable to when the effluent was directed to the Lake, because dilution made the material less noxious. Combined sewers directed the remaining

excess sanitary and stormwater (combined sewage) into the creeks. Syracuse didn't construct its first primary treatment facility until 1925 when it built one on the southern end of the Lake to address settleable solids and disinfection (OLMC, 1993: 4).⁶¹ In 1927, the Intercepting Sewer Board completed an exhaustive study of Onondaga Creek, recommending a comprehensive plan for flood control, the construction of reservoirs upstream of the city, and an extension of the improved channel of the Creek (New York State Flood Control Commission, 1947).

Urban life in New York State was also improved with the creation of planning commissions. In 1913 the state passed enabling legislation authorizing cities and incorporated villages to create and maintain city planning commissions armed with the powers and duties originally delegated to municipal governments (Planning, 1919: 3). Syracuse's planning commission immediately saw potential in Onondaga Creek and Onondaga Lake, proposing beautification projects such as concrete banks and non-native plantings (Planning, 1919: 9). In conjunction with the city's Park Commission and the Intercepting Sewer Board, the planning commission sought to acquire both banks of the Creek for an Onondaga Creek Parkway to "beautify it for park purposes and utilize it as a direct avenue for vehicular traffic" (Planning, 1919: 10). The Commission believed that the west side of the Creek was "valueless for building development" unless raised, which they intended to accomplish using "the spoil to be taken from the bed of the creek" (Planning, 1919: 10). Thousands of yards of the creek bed would need to be dredged for gravel to raise the west bed and grade roadways. With grass-planted sloping banks, ornamental shrubs, and trees separating the Creek from the road, the previously "valueless" area around the creek could be converted into "one of the most beautiful residential sections of the city; the creek's banks, instead of being a convenient backyard rubbish heap, will

⁶¹ A second was not built until 1940 on Ley Creek (OLMC, 1993: 4).

be desirable gardens and lawns” (Planning, 1919: 10). The Commission also sought to construct a park on reclaimed land on the Lake’s south shore, an area formerly occupied by the New York Central Railroad (Planning, 1919: 13). It was proposed to fill the site with dredge from the lake bottom or waste from Solvay, covered with top soil, planted with grass, trees, and shrubs, and laid out with drives and walks. The Commission saw a future for the Creek in which “the water of the stream, free from all pollution, will flow in a concrete channel” (Planning, 1919: 10).

The commission contended that before any construction could begin on the Lake and Creek improvements, a “modern sewage treatment plant” was needed to “remove the course of the greatest pollution now going into the lake, and it is altogether probable that some way will be found by the Solvay companies also to keep contamination from the lake water” (City Planning, 1919: 13). Onondaga Lake “was widely known as one of the prettiest of inland lakes, and it surely should be put back into a sanitary and respectful condition by the city and made a place of recreation and beauty for her citizens” (Planning, 1919: 13). Actions towards remediation efforts would not begin until the end of the twentieth century as a part of a broader environmental restoration effort.

The Haudenosaunee Begin Contesting Land Rights

Only a few miles away from these municipal planning efforts, the threat of land acquisitions continued to occur on Onondaga territory. The land the Nation still possessed was valuable for timber, limestone quarrying, abundant spring water, and fertile land (Smith, 1904: 199). These resources continued to be a draw for individuals off the reservation where the land was still relatively untouched: “In the 5,600 acres of the reservation there are but few signs of life” and the population, only 600, was scattered (*Syracuse Herald*, November 13, 1900).

The reservation physician observed that the Onondaga were "the most cosmopolitan in its

population of all the reservations in the State" (*Post-Standard*, July 23, 1902). Reservation amenities had modernized with the addition of a grocer, a barber, and a school. The reservation remained covered by traditional, albeit slightly modernized long house style residences, which a local paper referred to as "Old log cabins, like the traditional birthplaces of great men, stand today on the hills of Onondagas. Reminders of that heroic past" (*Post-Standard*, November 8, 1916). By contrast, the majority of the roads were unpaved and the sanitation on the reservation was poor overall.

Many reservation residents suffered from tuberculosis, which caused the majority of reservation deaths. Most residents were unvaccinated, and an underfunded medical staff and lack of provisions worsened the situation (*Post-Standard*, July 23, 1902).⁶² The reservation's physician suggested a more permanent doctor be appointed, a medical dispensary established, and the isolation of tubercular patients (*Post-Standard*, July 23, 1902). Additional suggestions included carefully reporting births, deaths, and marriages and the implementation of sanitary regulations, although these changes were not forthcoming. Tribal expenditures included the maintenance of the main Long House, a graveyard, as well as the support of widows and invalids. Taxes were not assessed on the reservation so money was brought in by the lease of a stone quarry to an outside firm (*Syracuse Herald*, November 13, 1900).

Recognizing the ill-gotten gains of the state and the persistent threats to their remaining territory and resources, the Onondaga began assessing the potential of a land claim in federal court in the mid-1920s (Declaration of Robert E. Bieder, 2006: 16). Chiefs from the Six Nations met at the Onondaga Reservation to discuss the potential lawsuit, which they claimed had been a

⁶² "Many of the little log houses have been infected for years with the germs of consumption and have become hotbeds for the spread of disease. These infected Indians are a great source of danger to the neighboring whites, and Syracuse may well feel alarmed for her safety if the Rapid Transit lines are ever extended to this source of communicable and dreaded diseases (*Post-Standard*, July 23, 1902).

topic raised before the Council since 1790. The *Syracuse Journal* published an article on these deliberations in 1924, reporting that some present at the meeting believed that “Approximately one-half of New York State is their legal property, he said, including all land east [sic] of Utica. Syracuse is really located on land belong to Onondaga Reservation” (*Syracuse Journal*, January 30, 1924). Some members of the Nation expressed resistance to filing a lawsuit against New York State because it would be costly (*Post-Standard*, 1924: 7). By July, those in favor of legal action decided to pursue a claim, and contracted with attorneys to begin a suit the state for \$500,000,000 (*Syracuse Journal*, July 8, 1924: 6). The contract was sent to the Department of Indian Affairs for ratification. The *New York Times* ran the headline “Indians Claim Half of New York” (*New York Times*, December 7, 1924).

The proposed claim would have asserted that the Six Nations were the rightful owners of lands whose boundary was first established in the 1768 treaty with Sir William Johnson. Later “treaties” were illegal, as was supported by the federal stipulation that the Six Nations could only convey land by treaty, and that any such treaty would need federal sanction (*New York Times*, December 7, 1924). The *Times* recognized “No such treaties have been made, yet the Indians do not now hold the land.” The land, it was argued, was taken away “without validity,” and no sale was made that satisfied the federal requirements. The boundaries of the Six Nations suit, which included Buffalo, Syracuse, Oswego, Rochester, and Ithaca, promised to include the land from 27 counties. The potential impact of the suit was clear: “If the Iroquois get back their old stamping grounds, they will hold two-fifths of New York State” (*New York Times*, December 7, 1924). The *Times* did not mention the potential named defendants, but the proposed plaintiff was Tadodaho George Thomas (*New York Times*, December 7, 1924). The paper threatened a successful claim would be the “opening wedge” that could incite the Haudenosaunee to go after

the remainder of their holdings and to “be a new factor in international polity.” After the *Times*’ article, numerous other New York papers addressed the potential claim. With far less fanfare, a short paragraph on page six of the May 1, 1925 edition of the *Syracuse Herald* announced that the Land Claim had been postponed indefinitely (*Syracuse Herald*, May 1, 1925: 6).

Land claim issues arose again in 1927 in an action brought by St. Regis Mohawk James Deere (Declaration of Robert E. Bieder, 2006: 18). The claim in the Northern District of New York asserted an interest in a square mile of land occupied by the St. Lawrence River Power Company, among others (*Deere v. St. Lawrence River Power Co. et al.*, 32 F. 2d 550 (1929)). Deere claimed the land was reserved by the Mohawk Nation in a 1784 federal treaty, which was reaffirmed in a 1796 treaty. Despite these agreements and the physical occupation of the lands by members of the Nation, the state and the power company took possession of the land, justifying their occupation on an 1824 “treaty” negotiated between the New York State and a Mohawk individual falsely claiming authority to negotiate such a land transaction. Notably, this “treaty” was created after the enactment of the Trade and Intercourse Act and the signing of the Treaty of Canandaigua. In 1929, the court ruled against Deere, holding that federal courts had no jurisdiction to hear Indian land claims cases. The Circuit Court of Appeals for the Second Circuit agreed: “A guaranty of the right of possession by a treaty of the United States does not render an action in ejectment to recover possession of the property in a case arising under a treaty of the United States, in so far as the jurisdictional statute is concerned” (*Deere*, 1929: 552). This decision seemingly closed federal courts to Haudenosaunee land rights claims. The Six Nations continued asserting land rights before Congressional Committees and the press.

Others attempted to promote the land rights cause as well, some less desirable than others. Contemporaneous with the *Deere* case were the efforts of Laura Cornelius Kellogg, a

politically active Oneida writer and outspoken member of the Society of American Indians. Kellogg was a major critic of the Indian Bureau, maintaining it should be abolished and replaced with a nonpolitical trust led by individuals of national and international reputation who would oversee Indian Affairs (Hauptman, 1981: 12). Her efforts focused primarily on matters of sovereignty, treaty violations, and land rights.

Kellogg spoke before the Six Nations Council at Onondaga in 1923, proposing a land rights action claiming 18 million acres of land in New York and Pennsylvania. While promoting her claim, she collected money from members that would allegedly go towards a land rights action. Many of these individuals were hard-pressed to contribute funds to her cause, but Kellogg warned if they did not they would not be eligible to receive any part of the claim (Hauptman, 1981: 13). She contested the validity of any New York “treaties,” claiming the state’s failure to obtain the abrogation of a federal treaty gave the Nations the sole right to the land in perpetuity. She appropriately questioned “the right of the state to negotiate for and take over the land without explicit approval from the Federal Government” and reasserted the importance of federal treaties (*Syracuse Herald*, April 29, 1923: 1). Kellogg further claimed that the Haudenosaunee had made similar claims in the past but lacked the resources to pursue legal recourse (*Syracuse Herald*, April 29, 1923: 4).

In September 1924, several members of the Onondaga Nation signed a contract with Wise, Whitney & Parker of New York and E.A. Everett of Potsdam to pursue the land claim (*Syracuse Herald*, September 26, 1924). Opposition to the lawsuit came from members who asserted that Kellogg was “illegally usurping power and mulcting⁶³ money from Indians to finance a futile land claim against the State and federal governments” (*Syracuse Herald*,

⁶³ “Mulcting” is to deprive someone of money or possessions by fraudulent means.

September 27, 1924). Kellogg claimed these “traitors” were not even enrolled with the Haudenosaunee, and called them an ostracized group operating under "old Confederacy laws.” Her opponents met with an attorney to attempt to prevent her "spreading propaganda and collecting funds" (*Syracuse Herald*, September 27, 1924). These individuals believed a claim against the state might exist, but found Kellogg's methods of obtaining support and funding inappropriate (*Syracuse Herald*, September 29, 1924).

Kellogg had great success in stirring emotions and in factionalizing the members of the Six Nations. Despite her lack of actual legal authority, she and her followers began referring to themselves in their correspondence as the official voice of the Six Nations, and raised new chiefs on several reservations (Hauptman, 1981: 14). These actions did not go unnoticed. In October 1927 Canadian authorities arrested Kellogg and her husband and indicted them on charges of conspiracy to defraud and obtaining money under false pretenses. Soon after, one of the Kellogg-supported land claims cases alleging a violation of the Treaty of Fort Stanwix of 1784 was dismissed by the United States District Court for lack of jurisdiction. Although they were eventually cleared of charges and released, the extent of Kellogg and her husband's embezzlement scheme unraveled by the mid-1930s. The federal government warned the Haudenosaunee about the malicious activities of the Kellogg Party, but she continued promoting the land rights issue (Hauptman, 1981: 14).

Kellogg spoke before the Senate Subcommittee of the Committee on Indian Affairs in 1929, again claiming authority to speak on behalf of the Six Nations. She discussed the nature of her intended claim, her goal of overcoming *Deere*, and the federal government's need to intervene. She contended that the Haudenosaunee’s “superior legal status” entitled them to “the highest protection in the land, the protection of the United States Government” (S. Res. 79,

1931: 4860). The federal relationship was the only one the Nations could recognize; all other agreements were “fraudulently gotten” (S. Res. 79, 1931: 4860). She also presented petitions alleging that claims of rightful ownership were brought to Committee repeatedly in 1929 in the context of the possible construction of a flood control dam on the Onondaga reservation.

Kellogg’s testimony before the Senate Subcommittee only served to earn her the disdain of most of the senators, particularly E.B. Merritt, the Assistant Commissioner of Indian Affairs, who accused Kellogg of fraud and attempted to launch a federal investigation (Hauptman, 2008: 156). Further, many of her financial supporters were angered by her lack of results. Infighting over her authority resulted in a claim brought before the District Court for the Northern District of New York, which determined a Kellogg supporter was not the official legal representative of the Six Nations (*Syracuse Herald*, August 9, 1929). Her efforts continued into the 1930s without tangible success, but did pave the way for land claims brought by various nations of the Haundenosaunee.

Ever-Evolving Indian Policy

Federal policy’s focus during the 20th century shifted from allotment to termination: Congress sought to eliminate special rights and the special federal relationship with tribes by stripping tribal governments of their powers, forbidding leaders from meeting, removing those who failed to comply, abolishing tribal courts, and dividing tribal treasuries among members (Ambler, 1990: 11). The century opened with the Supreme Court setting major Indian policy in *Lone Wolf v. Hitchcock*, which addressed allotment and Congressional authority over Native Americans (1903). *Lone Wolf* involved a Kiowa chief living on territory bounded by the 1867 Medicine Lodge Treaty, which mandated that three-quarters of all the male members of the Kiowa, Apache, and Comanche tribes needed to agree to any subsequent changes to its terms. In

1892, Congress sought to alter the boundaries of the reservation to open up 2.4 million acres of “excess” tribal lands to settlement by whites. Chief Lone Wolf’s claim on behalf of the tribes alleged a treaty violation and a Fifth Amendment takings claim. The Court considered whether Congress had the authority to change substantively the terms of the 1867 treaty and open the acreage to settlement. In a unanimous decision, the Court rejected Lone Wolf’s takings claim. The Indians were considered the “wards of the state,” and matters involving their land, the sole discretion of the federal government. Further, the Court held Congress had the authority to “abrogate the provisions of an Indian treaty” when the interests of the country and the Indians justified it (*Lone Wolf*, 1903). Subsequent decisions would use *Lone Wolf* to justify ever more sweeping legislative and judicial control over Native Americans and their resources (Clark, 1999: 95).

Termination, although more prevalent by the mid-century, became evident in the 1902 Report of the Commissioner of Indian Affairs to the Secretary of the Interior. The Report again made clear that the federal government alone possessed the authority to deal with the Indians. It also, however, proposed the need was to “[throw] the Indian on his own resources” by terminating the guardianship (or trust relationship) between the tribes and the federal government (Report of the Commissioner of Indian Affairs, 1902: 1). Under the existing system, an individual could not achieve independence, therefore, Native Americans should put aside their “savage customs like a garment,” adopt the principles of self-reliance and private property, and each “become a useful member of the community in which he lives” (Report of the Commissioner of Indian Affairs, 1902: 5).

Allotment had not entirely disappeared though. In an attempt to circumvent the limitations of the Dawes Act, which had specifically excluded the New York Indians, in 1914

Congress considered bill H.R. 18735, which provided for the allotment in severalty of the remaining Indian lands in New York State (U.S. Department of the Interior, 1915). The majority of the resolution addressed the allotment of Seneca territory, though one short sentence doomed the remaining Nations as well: “That the provisions of this act, as far as applicable, shall extend to any and all of the other Indians and reservations in the State of New York” (U.S. Department of the Interior, 1915: 3). The Department of the Interior received a great deal of support for the proposed allotments, however, this attempt, as well as a proposed New York constitutional amendment to abolish reservations failed (Churchill, 2003: 71). In 1917, the creation of reservations by Executive Order became limited; in 1918 it was completely abolished.

New York politicians were forced to question the status of Indian lands and the nature of the state’s relationship with the Six Nations with the 1920 Second Circuit Court of Appeals decision in *United States v. Boylan*. The court addressed an Oneida Nation land claim for what remained of the 32-acre parcel of their reservation in New York State. An Oneida had mortgaged the land to secure a loan and the non-Indian owner foreclosed and removed the Oneida from the land (265 F. 165 (2d Cir. 1920)). The United States sued for the return of the land to the Oneida Nation as the land transfer occurred without federal involvement or approval and, therefore, in violation of the Trade and Intercourse Act. Standing for the claim to remove the wrongful owners and occupiers was based on a 1784 treaty and the federal trustee relationship. The Second Circuit held that valid conveyances could only be made where Congress enacted legislation addressing the disposition of property on Indian reservations. Further, the power to remove the Indians from their lands was specifically a federal one. The state, in this instance through foreclosure, could not extinguish the Oneidas' right of occupancy. For these reasons, the court found the conveyance null and void. For the first time, a federal

court held that, absent complying with the Trade and Intercourse Acts, transfers of Indian lands in New York State were not legal (Declaration of Robert E. Bieder, 2006: 10). In response to the decision, Congressman Snyder (NY) proposed solving the New York “Indian Problem” by introducing H.R. 3342 in 1921, which would confer jurisdiction over Indian affairs to the state (United States Congress, Committee on Indian Affairs, 1930). House Resolution 9720 presented a similar solution in 1930 (United States Congress, Committee on Indian Affairs, 1930). Congress rejected both.

State Indian policy was also evolving. On May 12, 1919, the New York State Indian Commission Act (Chapter 590, Laws of New York) was enacted to consider the “history, the affairs and transactions had by the people of the state of New York with the Indian tribes resident in the state and to report to the legislature the status of the American Indian residing in said state of New York” (Everett Report, 1922: 2). In 1922, the Commission scheduled the release of a “Report of the New York State Indian Commission to Investigate the Status of the American Indian Residing In the State of New York,” more commonly referred to as the Everett Report, named for E.A. Everett, a New York congressman, attorney, and chairman of the State Indian Commission.

The Commission's job was tasked with determining “whether the whole of the state of New York belongs to these Indians and if they should have compensation for what they have lost” (Everett Report, 1922: 39). It challenged the state’s claims to control Haudenosaunee land and interpretation of sovereignty, asserting that lands west of Rome, New York still legally belonged to the Six Nations. The Everett Report was different from prior reports because the purpose was to secure the views of the Indians (Daniels, 1934: vi). The Commission visited the reservations to collect information and Haudenosaunee opinions (Daniels, 1934: vi). For

example, one Onondaga stated that “The Indians made their own laws right on this reservation. There was a time when no state or County authorities dared to cross that line... I say, we are a separate country from the United States as long as we have treaties” (Everett Report, 1922: 68). In one interview, Tadodaho George Thomas recognized federal authority over Indian affairs in one interview, stating:

It is the will of God and the people, we the Chiefs of the Onondaga Nation of New York State and do hereby agree that the federal Government of Washington, D.C. be the guardian of the Indians of the State of New York and to see that the treaties of 1795 [sic] between the Five Nations of New York State be lived up to by the government. We firmly believe that the State of New York has no jurisdiction over the Five Nations of New York State. (Everett Report, 1922: 62)

It was further recognized that litigation might be necessary to clarify the land issue and legality of treaties (Everett Report, 1922: 65).

Everett’s own thoughts on the solution to the Indian problem entailed examining the history of government-to-government relations, paying particular attention to the period during which the balance of power shifted from the Six Nations to the Americans (Everett Report, 1922: 44). Everett claimed that the Haudenosaunee still had rights to all the territory reserved by them at the close of the Revolutionary War unless it was disposed of through some legally binding instrument (Everett Report, 1922: 340). Unfortunately, the rest of the Commission did not agree.

The Everett Report showed the government’s preference for the defense of laches. The other commissioners argued that even if the Haudenosaunee did have the right to their lands as suggested by Everett, the state and federal governments would have "exceeding difficulty in unscrambling the eggs. It cannot be done [and is] outside the practical question which must be settled by the Commission” (Everett Report, 1922: 40). Members questioned whether it was their goal to solve the “Indian problem” or solely to determine the status of the relationship triangle that was the state, federal, and tribal governments. One member contended:

“If the question is what is the present status with relation to the National Government and the State of New York, I should say it is like Mohammed’s coffin suspended between heaven and earth and touches neither” (Everett, 1922: 46).

Everett presented his report to the presiding officer of the Assembly of the Commission on April 27, 1922, but the Assembly rejected the report for questioning the rights of state and federal authorities to regulate the New York Indians absent their consent and holding that all state dealings with the Indians had been illegal as not directly sanctioned by the federal government (Daniels, 1934: vii). When Everett began to believe (correctly) that the majority of the members of the commission were unlikely to sign off on the report, he mailed the results to the relevant tribal leaders (*Syracuse Post-Standard*, February 10, 1922). He assured them of their rights and title, although he had no power to take action. He suggested the Six Nations not bring land claims against the state until after they had a meeting in Albany in February and intimated that support for his findings would be limited. Despite the rejection of the Report, local papers published the results of Everett’s findings, as holding that title to lands estimated at \$2.5 billion should be provided to tribal chiefs (*Syracuse Journal*, February 10, 1922: 2). Everett continued his support for the Six Nations despite being faced with harassment for his beliefs. On May 24, 1923, Chapter 600 of the laws of New York State created another five-member commission to continue exploring the “Indian problem” (Daniels, 1934: ix). The state made appropriations to finance the new Commission, but the governor never made any appointments as the federal government was predicted to step in (Daniels, 1934: ix).

In July 1923, Federal Indian Commissioner Warren K. Moorehead was tasked with surveying the conditions of the Haudenosaunee in New York State. The federal Commissioner visited the Onondaga, Allegheny, Cattaraugus, Tonawanda, and Tuscarora Reservations. The

results of Moorehead's investigations were similar to those of the Everett Report—pointing to a Nation who wished to hold onto its independence and land. His interviews focused primarily on the question of citizenship; most interviewees opposed the concept.⁶⁴ The Commissioner inquired about reservation conditions. Those interviewed expressed satisfaction with their living conditions and considered themselves fit to manage their own affairs. Strong opposition was expressed towards persistent attempts to allot their lands, the prevailing opinion being that it would result in non-Indians taking over Native American lands. The Onondaga and Allegheny were concerned that outsiders were feigning interests in morality for the sole purpose of obtaining valuable property. The consensus from all of the reservations was "they should be let alone to continue to live as they have been living" (Board of Indian Commissioners, 1924: 20).

Disregarding the Haudenosaunee's insistence that they were sovereign, the report addressed the state and federal governments' persistent bickering over the political structure and degree of control over the Nations. The United States government wished to hold and administer the lands. The state wanted sole control over relations and land deals. The Haudenosaunee wanted the administration to be left to tribal authority without outside government interference (Board of Indian Commissioners, 1924: 21).

Moorehead's report also sought input from individuals who played some role in the day-to-day affairs of the Haudenosaunee. For example, Dr. Earl A. Bates, a physician and advisor in the Indian Extension program at Cornell who worked extensively with the Haudenosaunee and was the president of the Indian Welfare League of Syracuse (Dean, 2002). He visited reservations, assisting residents with farming, bringing livestock and seeds, and created a

⁶⁴ The Snyder Indian Citizenship Bill passed in June of 1924 conferring citizenship on Native Americans born within the territorial limits of the United States without affecting their governments or property (43 U.S. Stats. At Large, Ch. 233, 1924).

revolving loan fund to assist with their agricultural practices during the Great Depression. Bates also worked with the state farm bureaus, home bureaus, and Department of Education for the benefit of the Native Americans. He called for a natural evolution of two governments by which the Haudenosaunee could remain independent and join and enrich New York State. He declared:

I have daily more faith in the solution of their problem by themselves, for they are a proud people, jealous of their inheritance and their bill of rights, mentally equal, and with educational possibilities equal to the average white. They are morally and socially as decent as any white community of equal opportunities. If properly protected from the whites who seek personal gain, and if given the same recognition as accorded them when they allowed the whites to settle in their country, these New York Indians will solve their problem in their own way, of their own free will and accord. It will then be a true assimilation, and the citizenship of New York and the Nation will be the richer by their contribution. (Board of Indian Commissioners, 1924: 21)

His contemporary, Dr. A.C. Hill of the New York State Education Department and the Supervisor of the Indian Reservation Schools, held the opposite opinion. He blamed the ills of the ever-growing white community on the alleged actions of those on the reservations, stating “The Indians cannot be left alone. They are our neighbors, and the contagious social diseases will spread from the reservations to every part of the Commonwealth. They cannot be left as breeding places of immorality and crime (Board of Indian Commissioners, 1924: 22). Hill contended it was the state’s responsibility to “extend its laws and customs to these bits of territory within its borders,” harshly adding “The policeman's club must reinforce the human touch, or the stone will be rolled to the top only to roll down again” (Board of Indian Commissioners, 1924: 22). The report concluded with Moorehead expressing the widely held opinion on the merit of the treaties that “We should not act in too great haste. Let the Indians continue their belief in the treaty of 1784, which is in reality chiefly a matter of sentiment” (Board of Indian Commissioners, 1924: 22).

The 1925 Merriam Report, a two-year, non-governmental study funded by the

Rockefeller Foundation and published by the Brookings Institute, was the first general study of Indian conditions throughout the country published since Schoolcraft's six-volume report for the U.S. Congress in the 1850s. Lewis Meriam, a PhD from the Brookings Institute, had worked for other government bureaus including the Census and Children's Welfare, was hired by the Secretary of the Interior based on his expertise in government administration and prior experience with technical studies (Meriam, 1928: 79). "The Problem of Indian Administration," commissioned in June 1926 and published in 1928, combined statistics and a narrative account criticizing the implementation of the Dawes Act, the poor conditions on reservations, and the dire situations at Indian boarding schools. Findings indicated a federal failure to meet its trust responsibility to the Native Americans, particularly regarding land and natural resources. Further, the health of those surveyed "compared with that of the general population is bad" (Meriam, 1928: 3). The income of a typical Indian family was "low and the earned income extremely low" (Meriam, 1928: 4). The survey also intimated "frankly and unequivocally that the provisions for the care of the Indian children in boarding schools are grossly inadequate" (Meriam, 1928: 11). It would take nearly a decade for the Report to be put to use in creating federal policy.

In 1933, Executive Order 6166 created the Submarginal Lands Retirement Program authorizing the Bureau of Indian Affairs to acquire lands within reservation boundaries from non-Indian farmers rather than allowing foreclosure. These reclaimed lands would allegedly be used for the "readjustment and rehabilitation" of the Indian population, but very little of the purchased land was returned to the tribes after the discovery of oil and gas (Ambler, 1990: 21). In 1934, however, the Indian Reorganization Act ("IRA"), also termed the Wheeler-Howard Act or the "Indian New Deal," incorporated the results of the Meriam Report. It provided surplus

lands be returned to the tribes rather than sold to white homesteaders. The Act authorized funds for the establishment of a revolving credit program for tribal land purchases, educational assistance, and aid for tribal organization (Wheeler-Howard, 1934). Unfortunately, it also encouraged Nations to draft written constitutions and charters to manage internal affairs, ignoring centuries of effective tribal government.

New Yorker's held conflicting views about the "Indian New Deal." While progressives believed the program would help create laws that would bring about the gradual assimilation of the Onondaga Nation (believing this to be positive), conservatives believed it was a terrible idea (Atlas, August 27, 1933). Syracuse University professor Edwin Tanner expressed concern over the assimilation of the Onondaga, fearing "while the State is performing admirable service in education, health and highway construction . . . That the traditional customs are passing into oblivion" (Atlas, August 2, 1933).

In the midst of arguments over broader Indian policies, the Syracuse Intercepting Sewer Commission had released a plan on December 15, 1927 to construct a flood control dam on the reservation and started negotiations for more land with the Onondaga. In 1931, the state negotiations with the Onondaga Nation began. Representatives of the Commission complained about the pace of the discussions, but stressed the need to construct a dam on the reservation to control the periodic flooding of Onondaga Creek (*Post-Standard*, February 11, 1931). Dam construction would not begin until April 25, 1947.

In 1943, yet another state Joint Legislative Committee on Indian Affairs was tasked with "find[ing] a solution for the confused and paralyzing legal status of New York Indians" (Director of Indian Services, 1959: 14). The Committee was directed to "assure Indians complete equality of opportunity with other citizens and to encourage increased participation by Indians in the

economic, political, and social life of adjacent communities" (Director of Indian Services, 1959: 14). On the morning of September 30, 1943, this collection of New York Assemblymen and Senators met with the Onondaga in Nedrow, New York to discern the problems confronted on the reservation and hear suggestions for improvements that the state and federal governments might make in the community (MacKenzie, et al., 1943: 4).

The Committee came to a reservation then occupied by between 500 and 600 Onondaga that were operating under a traditional government. Though the Nation utilized the services of state police when "the need arises," no "court" existed for the resolution of disputes between members; rather, disputes were settled by the Onondaga Council (MacKenzie, et al., 1943:14). Questions were again raised regarding Haudenosaune opinions on who had the authority to deal with the Nation. Onondaga testimony indicated that there was no confusion regarding the conflict in the jurisdiction of federal and state laws (MacKenzie, et al., 1943: 43). Conflicting testimony on the jurisdictional dispute was given by the State Board of Charities, however, who indicated that confusion existed, if not on the part of the Indians, then at least on the part of law enforcement officials from off-reservation who found it difficult to get a clear response in terms of what authority they possessed (MacKenzie, et al., 1943: 45). Additionally, demonstrating the continuing bewilderment over land agreements, Chapman Shenandoah, an Oneida living on the Onondaga Reservation testified regarding his farming practices on land purchased from and transferred by the Onondaga Nation, it being "an accepted practice to permit an Onondaga who has land to transfer it to another Indian even though he doesn't happen to be an Onondaga" (MacKenzie, et al., 1943: 20). No records of such transactions were kept; according to Shenandoah it was "not necessary" (MacKenzie, et al., 1943: 20).

The Onondaga tried again to assert their land rights with the federal government in

United States Senate hearings addressing bills granting New York civil and criminal jurisdiction over Indian lands (United States Senate, 80th Congress, 1948). In 1948, this jurisdictional question implicated the state's unlawful land deals by raising questions of jurisdiction (United States Senate, 80th Congress, 1948). The proposed bill's position on jurisdiction would impair the Haudenosaunee ability to bring land rights claims against the state. Tadodaho George Thomas stated "we would be working backward by trying to pass this legislation, and by doing so the result would be that it would hamper the transactions of the negotiations for a settlement of these claims if we transfer jurisdiction" (United States Senate, Eightieth Congress, 1948: 163). Testimony from Livingston Crouse, another Chief present at the hearings cautioned the intent was to destroy the Confederacy, so that it was no longer possible to pursue claims against New York State (United States Senate, Eightieth Congress, 1948: 168). The Onondagas' testimony did not sway the representatives present, and the Onondaga's welfare remained threatened.

During the 1950s the state, through local public welfare departments, did provide numerous services to the Haudenosaunee living on (and sometimes off) the reservation (Director of Indian Services, 1959: 11). One state report indicated "administration of these programs helps the Indian to feel he is a part of the community and encourages the counties to recognize their responsibility to the Indians as well as to other residents" (Director of Indian Services, 1959: 11). Although this was the report's assertion, there was no indication that this was the feeling on the reservation (Director of Indian Services, 1959: 11). In 1952, a State Interdepartmental Committee on Indian Affairs was created to evaluate and coordinate state-provided Indian services and to recommend changes in laws impacting Indian Affairs (Director of Indian Services, 1959: 14). Its members included the Commissioners of Education, Health, Social Welfare, Mental Hygiene, and Conservation and the Superintendents of Public Works and State

Police (Director of Indian Services, 1959: 14).

The New York State Department of Health provided "public health supervision" services with on-reservation care from local public health nurses and physicians, immunizations, clinic care and home visits, emergency care, health education, and public health activities. Sanitary engineers conducted inspections of public and quasi-public water supplies and sewage disposal (Director of Indian Services, 1959:12). The State Department of Education provided on-reservation schooling through high school, access and transport to public high schools, enforced compulsory attendance laws, and provided adult education (Director of Indian Services, 1959:13). The Department of Public Works constructed and maintained roads and bridges as well as other state structures. The Department of Conservation assisted with fire control and prevention, the apportioning of water resources, and the enforcement of Fish and Game Laws on the reservation. The Department of Mental Hygiene gave child guidance and clinic services, and the Labor Division assisted residents with employment (Director of Indian Services, 1959:13).

During the 1950s New York's treaty violations continued. For example, the State Conservation Department attempted to force the Onondaga to abide by state hunting and fishing laws concerning seasons, bag limits, and weapons within reservation boundaries (*Syracuse Herald American*, January 30, 1955:39). The Treaty from 1784 at Fort Pickering had guaranteed hunting and fishing rights to the Haudenosaunee (*Syracuse Herald American*, January 30, 1955: 39). Chief George Thomas noted the state's lack of authority, stating: "Attorney General Goldstein has no right to render opinions on the Indian reservation status, especially when he ignores and defies existing treaties between the Six Nations and the United States " (*Syracuse Herald American*, January 30, 1955: 39).

Controversy had always surrounded Native American hunting and fishing rights

generally and rights to hunt and fish off reservations were often litigated. Prior federal court decisions had addressed the application of conservation laws to members of the Haudenosaunee off of the reservation. The Court in *Kennedy v. Becker* had upheld the enforcement of such laws off of the reservation (241 U.S. 556 (1916)). In *Becker*, three Seneca were arrested for fishing within ceded territory in violation of New York State conservation laws. The Seneca argued the state had no authority to regulate state lands or waters for the Seneca, who maintained the right to fish and hunt on the land conveyed in a 1797 treaty. They argued that ceded territory was subject to dual sovereignty, meaning the tribe regulated tribal members and the state its citizens. The Supreme Court found "[s]uch a duality of sovereignty instead of maintaining in each the essential power of preservation would, in fact, deny it to both" (1916: 563). Instead, the Supreme Court found that the Seneca were subject to the state conservation laws. Federal courts have consistently upheld "valid conservation measures" (Roat, 2001).

The state surveyed reservation conditions again in 1969 (NYS, 1969). The Onondaga Reservation population included 1,594 people occupying 7,300 acres (NYS, 1969: 303). The architecture had become essentially indistinguishable from that off the reservation: "A regrettable few of the original Indian cabins remain on the Onondaga Reservation. Fires and modern architecture of split-levels and Cape Cods have eliminated the characteristic cabins of 150 years ago" (Caupkell, 7 July 1963). Onondaga was described as "one of the poorer reservations in New York State" (NYS, 1969: 304). There was little infrastructure on the reservation other than roads. Wells and septic tanks rather than public services such as water and sewage were used. The Syracuse Electric Company served the reservation, but no public gas lines were available. Medical care was provided by the State Health Department at a clinic in Nedrow.

The 1969 report misstates several legal concepts. The state claimed “Fee title to the land is held by the State of New York, having equitable title with the Indians. . . Following the adoption of the constitution the State never ceded any land or territory to the Federal Government, and the Indian lands have, therefore never at any time been federal territory” (NYS, 1969: 303). The state did repeal Section 13 of its constitution, which dealt with the purchase of lands of Indians, by a November 6, 1962 amendment (Sharp, August 13, 1967). Unfortunately, confusion over the state, federal, and Tribal authority persisted.

The 1970s began with complaints from the Onondaga Nation sent to Vice President Agnew, the appointed the head of the National Council on Indian Opportunity (Russo, 1970:4). The letter of asserted that despite the Onondaga’s recognition of federal authority, "On one hand, we receive less than minimal services from the State of New York. On the other, we receive none from the Federal Government. Meanwhile... the Indians suffer physically, mentally, and spiritually" (Russo, 1970: 4). Sovereignty and state and federal responsibilities to the Six Nations were also addressed in a September 1, 1970 meeting between the Onondaga Nation and the New York State Legislature, represented by the Governmental Operations Committee. The subcommittee had the authority to recommend the revision of Indian law and had staff assistance to write new provisions (NYS Legislature, 1970: 6). It was, at least, the stated intent of the Committee to “Sit down with the Indian and to discuss problems . . . so that we may be better enlightened, and in drawing up the laws of the State of New York might have a better opportunity [to do] it with your help, with your thoughts and hopefully in accordance with your desires” (NYS Legislature, 1970: 5).

The Onondaga were resistant to this statement of purpose. Onondaga Chief Irving Powless asserted “you are always passing laws against the Indians or for the Indians without

the knowledge of the Indians. Too many times we read about laws after they have been passed. Most of the time, we disapprove of all your laws” (NYS Legislature, 1970: 9). This lack of faith in the process was in no way unwarranted. Powless explained that the nature of relations between New York and the Haudenosaunee had historically been bad for the Indians (NYS Legislature, 1970: 13). Powless further expressed his hesitancy in even talking with representatives of the state, not wanting anyone to question the sovereign status of the Haudenosaunee based on the meeting. He stressed that the Onondaga were not citizens of the United States. Their land was not part of the United States or New York, and as such federal and state laws could not apply. Haudenosaunee laws controlled members, and treaties governed their relations and protected their rights with those outside the reservation (NYS Legislature, 1970: 14). Concern was also expressed over taxation, in particular sales tax, on the reservation (NYS Legislature, 1970: 16). The lack of available health care and education was also addressed (NYS Legislature, 1970: 28).

State relations continued to be tenuous. Growing concern over an Oneida land claim led to the suggestion that a jurisdictional act be passed regarding the claims of the Six Nations against the State of New York comparable to the Federal Indian Claims Commission Act (Lazarus, April 28, 1971). Proponents contended "relations between the State and the tribes would be greatly improved if the latter were given their day in court" (Lazarus, April 28, 1971). They lamented that prior Six Nations' claims were dismissed by the Federal Indian Claims Commission because the state perpetrated the alleged wrongs, not the United States government (Lazarus, April 28, 1971).

In May 1971, the Assembly Subcommittee on Indian Affairs was invited to attend a meeting of the Six Nations Grand Council. Assemblyman Leonard Bersani stated “At this

meeting the subcommittee hopes to learn from Indians themselves what they feel must be done so that the state can meet any unmet obligations or implement in a more effective manner the provisions of these treaties” (*Post-Standard*, May 9, 1973). The Onondaga Grand Council unsuccessfully attempted to explain the meaning of the Two-Row Wampum belt and its significance to sovereignty to those present (Hornak, 1973).

In 1974, the Supreme Court handed down a landmark decision on aboriginal title in *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974). This was the first modern-day Native American land claim litigated and decided in a federal court system as opposed to the Indian Claims Commission. The Court found federal subject-matter jurisdiction exists for possessory land claims brought by Indian tribes based upon aboriginal title, the Nonintercourse Act, and Indian treaties. The case, often referred to as *Oneida I*, was the first of three Oneida land rights cases to reach the Supreme Court. It was followed by *County of Oneida v. Oneida Indian Nation of New York State* (“*Oneida II*”) (1985), and *City of Sherrill v. Oneida Indian Nation of New York* (“*Sherrill*”) (2005). It would also eventually serve as a catalyst for the Onondaga Nation’s land rights action.

The twentieth century opened with very dissimilar circumstances off and on the Onondaga reservation. Whereas the Onondaga dedicated a great deal of time and effort to holding on to what few rights and little land they still possessed, Syracuse sought to further its industrial success and rapid growth. As businesses and populations grew, state and local governments sought to keep up with the development with planning efforts that would both add to the comfort of its residents. These governments and residents would, however, also be faced with having to address increasing environmental concerns.

CHAPTER 9

A GROWING RECOGNITION OF AND RESPONSE TO ENVIRONMENTAL LOSS

As state and federal Indian policy was evolving at the expense of the Haudenosaunee, Syracuse was evolving at the cost of the environment. Unsuccessful attempts at flood control caused significant impacts on and off the Onondaga Reservation. Careless corporate actions led to major contamination events. Aging, overtaxed, and underbuilt infrastructure continued to foul the waters of Onondaga Creek and Onondaga Lake. This, however, led to local actions to address an increasingly poor environment, which in concert with an expanding environmental ethic and improved environmental laws, finally set in motion a multilevel effort towards improving the surroundings.

The Onondaga Dam

The desire for flood control has been present in Syracuse nearly as long as white settlements began to develop. Prior attempts to reduce water levels in Onondaga Creek, such as the 1822 channel improvements, were insufficient to address regular flooding. On December 15, 1927, the Syracuse Intercepting Sewer Commission released a construction plan for a dam on the Onondaga Reservation for flood control. The plan also addressed the process of negotiations with the Onondaga for the land needed for the flood control project. A series of floods in and around Syracuse during the early 1930s led to the proposal of a bill in Washington, DC in 1935 directing the Army Corps of Engineers to survey Onondaga Creek. The city saw this survey as “the first step toward prevention of future floods” (*Syracuse Herald*, 1935: 3).

Numerous studies were conducted prior to arriving at the appropriate solution. Suggestions were made and rejected to re-channelize, fence in, guard, or even top Onondaga Creek with a wooden cover. Some of these suggestions were unsuccessfully implemented, while

others were found either too costly or deemed ineffective. The Flood Control Acts of April 10, 1936 and June 22, 1936 authorized preliminary reports, additional surveys, and improved flood control plans for the Creek (NYSDEC, 2015: 4). No survey had occurred by January 1937 when a severe flood occurred raising the Creek three and a half feet in 22 hours (*Syracuse Herald*, January 25, 1937). Portions of the city were inundated as water knocked down stone walls surrounding the Creek near Onondaga Park. Workers stretched lifelines across the river to prevent potential drownings in the rapidly coursing water (*Syracuse Herald*, January 25, 1937). In the wake of this disaster, more reports were requisitioned.

On February 25, 1939 another flood control survey report was submitted supporting a flood control project (NYSDEC, 2015). The Flood Control Act of 1941 finally authorized the dam's construction (Public Law 228, 77th Congress, 1st Session; see also, NYS Flood Control Commission, 1947). The original plan suggested a two-reservoir project, however, further investigation indicated that the site selected would not lend itself to such a grand design (NYSDEC, 2015: 5). Instead, the Commission chose, and Congress authorized, a dam and reservoir on Onondaga Creek four miles south of Syracuse on the Onondaga Reservation.

At the recommendation of the New York State Flood Control Commission, on October 27, 1943, the state pledged its participation in the project, executing an agreement with the federal government to provide the requisite land, easements, and rights of way, and to maintain the site upon completion. The site selected on the Onondaga Reservation, 12 miles upstream of Onondaga Lake and four miles south of Syracuse reflected reports that determined that the Creek's peak flows could best be stabilized there using a dam and reservoir. The full reservoir area was intended to cover 860 acres, 270 of which were on the Onondaga Reservation (NYS Flood Control Commission, 1947). After nearly a century of trying to control the "dire threat" of

uncontrolled waters, the dam project was believed to solve a major environmental problem.

The selected dam was categorized as a "Class C - High Hazard" dam, meaning dam failure could result in the loss of human life, serious damage to homes, industrial or commercial buildings, important public utilities, main highways or railroads and cause economic loss (Braymer, 2007). The resulting dam was intended to hold back water two-times the amount of the largest flood in the history of the city of Syracuse (*Post-Standard*, September 29, 1946). The dam was not intended to impact the minimum flows of the Creek and was in no way intended to affect the "natural use" of the stream (Hilleboe, 1951: 12). The construction bidding process opened May 29, 1946, the original estimates of the project falling between \$1,447,000 to \$1,876,000 (*Syracuse Herald*, April 24, 1946). While the state awaited the submissions, the public works department operated to secure the Reservation land needed for the dam and reservoir (*Post-Standard*, April 16, 1946). Deadlines for construction bids and estimates for completion were constantly pushed back due to opposition from the Onondaga Nation, though work was set to begin in June 1946.

Protests over construction began soon after the call for bids opened. The Onondaga passed a resolution on May 11 opposing the federal flood control project because the Nation would be "disturbed from their abiding places" (*Post-Standard*, May 12, 1946). Opposition to construction was based on five complaints: (1) it would lead to deprivation of land for a considerable number of days each year; (2) it would lead to the total deprivation from some of their land, particularly the portion the dam would be constructed on; (3) construction, and eventually the dam itself, would be an attractive nuisance to children particularly during flood season causing constant worry to their parents and relatives; (4) the Nation would lose a large part of its sovereign land to an easement; and (5) a number of people would be displaced by the

project (Hoffman, 1946). Chief David Russel Hill believed the proposed project, “initiated by a handful of politicians in this area,” was “unnecessary” (*Post-Standard*, May 19, 1946). He further asserted that “This matter of dams on the Onondaga Indian Reservation will never be consented to by the Indians” (*Post-Standard*, May 19, 1946).

Onondaga objections only temporarily delayed the process. Their refusal to relinquish the necessary rights of way to the state, as well as opposition from the others of the Six Nations, led negotiations to be relocated to Albany. The Nation insisted that “the Iroquois Confederacy has treaties with the United States under which the United States would never disturb the land of the Confederacy” (*Syracuse Herald-Journal*, May 29, 1946). Despite these protests, an agreement was reached with the Nation securing approximately 200 acres on the reservation (*Post-Standard*, May 12, 1946). The Onondaga Chiefs assented to the dam construction in a referendum with a 5-1 vote in favor of the project. The agreement with the state was reached in September 1946 (*Post-Standard*, September 29, 1946). It included a flowage easement for the reservoir south of the dam and an easement to relocate state highway Route 11-A through the Reservation to higher ground above the reservoir. Additionally, the plan called for the relocation of 5,000 feet of a 20” brine line and 3,000 feet of a 12” brine line, relocating sewer lines, reconstruction of several small bridges, waterproofing and anchoring 1,200 feet of oil pipelines, power, gas, and telephone lines (*Post-Standard*, September 29, 1946). In return for the use and occupancy of 310 acres of land, the Onondaga received \$40,000. The project was estimated to displace only four or five families; the government would move their homes, or they would be compensated for the taking (*Post-Standard*, May 12, 1946). Ultimately, however, 20 properties were in the line of construction, 11 of which would need to be moved (*Post-Standard*, September 29, 1946). By the time both governments had agreed on the land transfer, projected costs had

climbed to \$2,351,637 for the construction of the dam, the reservoir, and improvements to the creek channel in the city (*Post-Standard*, September 29, 1946). Although the project was approved by the Onondaga, doubts remained about the necessity of the massive undertaking.

On April 24, 1947, as the Syracuse Military band played the National Anthem, ground was broken for the Onondaga Reservoir Syracuse Flood Control Project (NYS Flood Control Commission, 1947). The dedication program noted a number of "distinguished guests" such as federal level representatives from the War Department Corps of Engineers, the Senate, and the House of Representatives. There were state representatives from the Flood Control Commission, Departments of Public Works and Social Welfare, State Senate, and State Assembly; as well as City of Syracuse and Onondaga County representatives. No member of the Onondaga Nation was listed in the program (NYS Flood Control Commission, 1947). Additionally, "a crowd of approximately 400 whites and Indians braved the inclement weather to attend the ceremonies" (*Post-Standard*, April 25, 1947).

The program boasted "When this plan is consummated, floods will no longer threaten to impede or decelerate the Syracuse march of progress" (NYS Flood Control Commission, 1947). After the groundbreaking, State Superintendent of Public Works Charles H. Sells and Great Lakes Division Engineer of Chicago Colonel D.O. Elliot climbed into bulldozers and roughed out the centerline of the dam (*Post-Standard*, April 25, 1947). When the earthmoving portion of the events finished, a \$40,000 check for the "relinquishment of their communal rights of occupancy" was handed over to Chief Jesse Lyons who explained that "funds would be shared among tribe members" (*Post-Standard*, April 25, 1947). Construction began the following day.

During construction,⁶⁵ the Onondaga Nation maintained its sovereign status by attempting to sustain their relationship with the federal government as opposed to the state in undertakings regarding the dam. For example, when State Conservation Department authorities attempted to relocate fish landlocked by the re-channelization of the Creek, reservation residents informed them that they were "not wanted." The reservation, they asserted, was under federal jurisdiction for such matters (*Syracuse Herald-Journal*, July 1, 1947).

The construction schedule called for completion of the dam portion of the project in 18 months (NYS Flood Control Commission, 1947). The dam was a 1,782-foot-long, 67-foot-high compacted earth embankment with a crest width of 25 feet. The 18,200 acre-feet capacity reservoir holds inflow from Onondaga Creek; low flows pass through a 6.5-foot conduit running through the base of the dam. Engineers designed the dam for the "1000-yr event;" the water level did reach the spillway crest during the 1960s, but an auxiliary spillway has never flowed (NYSDEC, Division of Water, 2007).

Construction of the dam, its outlet works, and the spillway was completed August 19, 1949 (NYSDEC, 2015: 5). The channel straightening was completed the following year. By this time, the total cost of the flood control project exceeded \$5 million (*Syracuse Herald-Journal*, November 4, 1949). Even after completion, the project could not escape complaints by residents. A letter to the *Post-Standard* lamented that the government never compensated off-reservation residents whose land had been impacted by the project. People also questioned the dam's effectiveness, claiming that it did not hold water back and criticized the policies and

⁶⁵ The Onondaga Dam was one of the several projects that, in the twenty-year period after WWII, led to the loss of significant acreage in Haudenosaunee territory. The Dam was constructed in the 1940s; the St. Lawrence Seaway project in the 1950s led to the loss of nearly 1300 acres of Mohawk land; the Kinzua Dam saw the state of Pennsylvania flood the Cornplanter tract and 9000 acres of the Seneca Nation's territory; and the Niagara project condemned 560 acres of the Tuscarora Indian Reservation (Hauptman, 1988: 20).

motives involved in its construction (Hosmer, 1972). As the state owns the dam, the responsibility for its operation and maintenance falls to the state's Department of Environmental Conservation Region 7 Office (Remmers, 2008).

Visual observation of the dam today reveals little more than a dry pond and a slow moving creek. Unfortunately, the dam has not greatly impacted flooding. The Army Corps of Engineers planned the massive structure based on water flows from the first two decades of the century when the majority of the area was farmland. This acreage had returned to forestland by the time of construction (Black, May 29, 2012). This change in the landscape meant that the Creek above the dam has never produced the type of floods that had washed over the banks in the late 1920s. The overbuilt dam has yet to see a flow of water that even raises the water level to that of the flood spillway. Onondaga Creek flooding within the city limits (the purpose of the dam's construction to start with) is not caused by upstream rainfall and snowmelt, but is the result of the impervious nature of the floodplain within the city's limits that prevent the land from absorbing excess flows during flooding events. The dam's failure to hold back floodwaters was not the only aspect that was problematic. The straightened portion of the Creek was an environmental problem as well. In October 1953, the Syracuse Department of Public Works Commissioner requested the city council allocate \$85,000 for dumping of garbage into the old creek bed (*Post-Standard*, October 9, 1953).

Onondaga Creek continued to rise above its banks causing problems along the unpredictable waterway. Since the completion of the dam, the government had spent an additional \$2 million on the improvement of the Onondaga Creek channel (*Herald-Journal*, January 22, 1959). This was insufficient to prevent the creek from flooding towns outside of the city. In January 1959, Nedrow homeowners struggled to pump water from their basements and

make the streets passable (*Post-Standard*, January 23, 1959). Twenty homeowners' cellar walls collapsed from flooding, and one man reported having to abandon his car in his driveway as the waters rose to the level of his windows. Police, firemen, and volunteers worked to reopen the highways that were flooded and to help repair the damage to homes (*Herald-Journal*, January 22, 1959). One death resulted from the rain and sudden thaw that caused the formerly ice-choked Creek to spill over its banks (*Herald-Journal*, January 22, 1959). The town supervisor explained the continued flooding occurred because when the dam was constructed the flooded area was "wilderness." He proposed to widen and deepen the Creek (*Post-Standard*, January 23, 1959). During the period of time when snow melt was capable of causing flooding, police officers were stationed to patrol the Creek's banks and prevent children from drowning (*Herald-Journal*, February 23, 1959). Regular floods and numerous deaths from drowning persisted. Seemingly endless attempts to ordering the Creek, costing various levels of government millions of dollars for dams, fences, towers, patrols, and channelization began to wear thin with area residents. People expressed frustration with the city's poor handling of the Creek and the meager and ineffectual solutions being implemented (*Herald Journal*, June 7, 1963).

The Onondaga Dam has never witnessed a flood that has brought the water storage behind the dam up to the level of its flood spillway to make it into the reservoir and flood storage basin over-engineered for much greater flows to prevent flooding in Syracuse. It has, however, diverted water into the homes on the northern end of the Onondaga Reservation. The banks of Onondaga Creek below the dam continue to overflow with heavy rain and snow melt due to the impervious nature of the flood plain land along the Creek within the city (Black, May 29, 2012).

Solvay's Environmental Impacts

In addition to facing an over-engineered dam on the reservation, the Onondaga were also

plagued by the actions of industry. During the 1930s, the Solvay Process Company, in conjunction with the Tully Pipe Line Company, sought to run a brine line across the Onondaga Reservation to relay brine from the Tully wells to increase production (*Post-Standard*, June 26, 1930 a). Eighty active wells in the Tully Valley pumped steady flows of brine to the company's facility. A derrick topped each well, giving the appearance of oil fields in the valley (*Syracuse Herald*, July 6, 1930 a). As part of a plant expansion, five additional wells and a \$1 million pipeline were constructed. These 1000 to 1200-foot-deep wells, were hammered out much in the same way as oil wells. The presence of sulfur in the wells produced a strong odor around them (*Syracuse Herald*, July 6, 1930a).

Solvay representatives and the Onondaga held meetings, prepared contracts, and exchanged money before the Federal Indian Affairs Committee determined that no money could legally be paid or accepted for the use of the Indian land for the proposed pipeline absent federal approval (*Post-Standard*, June 26, 1930). Opinions on the reservation over the construction of another brine line were mixed (one already ran across the reservation). Chief Jesse Lyon noted that despite the protests of two Onondagas falsely alleging to represent the Nation, that the majority of reservation residents approved of the pipeline hoping the project would provide substantial income (*Syracuse Herald*, July 6, 1930b).

After resolving conflicts arising from contracting for an easement, in July 1930 Solvay initiated the construction of the brine line. Solvay had already acquired contracts with individuals on the reservation whose land was traversed by the pipeline as well as with the "recognized chiefs" of the Onondaga Nation. The Company faced greater problems acquiring rights-of-way off the reservation (*Syracuse Herald*, July 6, 1930c). In the summer of 1939, the pipeline sprung a leak in front of an Onondaga cemetery on the main reservation road (*Syracuse*

Post-Standard, December 15, 1940). The fountain of brine shot 20 feet in the air and was blown around the land by wind. Streams of brine also flowed across the cemetery destroying and damaging trees. In December 1940, an out of court settlement reached between the Onondaga and the company provided \$2,200 to the Nation for damages resulting from the leak (*Syracuse Post-Standard*, December 15, 1940).

Solvay's negative impacts also extended to Onondaga Lake. On Thanksgiving Day, 1943, a dike holding back the Solvay waste beds gave way, inundating a two-mile area of land including the State Fairgrounds, with flowing waste (Williamson & Hesler, 2006: 10). The overflow was large enough to carry away cars and flood people from their homes. The disaster took no lives, but more than twenty of the rescuers had to be treated for chemical burns from contact with the waste. A later account of the incident characterized it as "an 8-foot wall of goo, thicker than week-old mashed potatoes, flowed into the Lakeland neighborhood" (Andrews, October, 14, 1985: A10). Everything for more than a square mile was inundated: homes, trees, the boulevard, even the State Fair Grounds. Army vehicles were unable to make it through the sludge forcing one resident used his canoe to rescue people trapped by the waste. The resulting damage was extensive. The inundated homes were bulldozed, the Fairgrounds took months to clean, and every tree, shrub, bush, and blade of grass within a square mile died (Andrews, October 15, 1985: A1). The state quietly settled with the chemical company, agreeing not to file claims for damages in return for title to the 400 acres of abandoned waste beds on the west shore of the Lake, some of which was used in the construction of Interstate 690. The majority of large white hills of waste were abandoned for decades (Andrews, October 16, 1985: A7).

Government Reactions Towards Pollution Concerns

By 1947, nearly 100 large industries were operating in the city producing typewriters,

pottery, candles, gears, electrical and air conditioning equipment, traffic signals, plated silverware, window fixtures for trains, cast stone building blocks, clothes pressing machines, door knobs, shoes, and many other products (NYS Flood Control Commission, 1947). Solvay (just west of Syracuse) was producing ammonia, soda ash, oven coke, and their byproducts and began discharging mercury into the Lake in 1946 (Onondaga Lake Partnership, 2010: 10).

Recognizing the increasing stress put upon Onondaga Lake and the surrounding environment, the Department of Health surveyed Onondaga Lake and its tributaries in 1946 and 1947 (Hilleboe, 1951: 10). The DEC issued a supplemental report in 1947 regarding the aquaculture of the Lake and its tributaries. The following year, the City Department of Engineering surveyed a portion of the Lake and its tributaries in an industrial assessment, identifying specific locations of possible point source pollution (Hilleboe, 1951: 10). The city engineer's report concluded that a \$9 million expenditure would be required to "end Syracuse's share of the pollution of Onondaga Lake" (*Post-Standard*, January 26, 1949).

A number of specific recommendations on how to address the increasing water pollution were made. First, the city should require industries and commercial developments to dispose of all liquid waste into sanitary sewers after filtering, neutralizing, or processing to remove "objectionable contents" (*Post-Standard*, January 26, 1949). Second, owners of any properties that were depositing raw sewage into streams should be required to connect their systems to sanitary sewers as soon as possible. Third, the city should immediately construct the sewers and connections to provide outlets for raw sewage and industrial waste. Manholes and diversion chambers should be repaired and altered, siphon crossings cleaned, and connecting sewers reconstructed as soon as possible (*Post-Standard*, January 26, 1949). Recommendations were also made for the removal of silt and debris from intercepting sewers and the Onondaga and

Harbor Brook beds.

The city engineer was adamant that more regular inspections and maintenance as well as the enlargement and improvement of the existing sewage treatment plant to treat effluent that was in compliance with state requirements were required to keep up with the growth and development of industry and commerce and the accompanying increase in population (*Post-Standard*, January 26, 1949). Residents' also expressed a desire for a higher degree of sanitation, greater recreational areas, and improvement in natural surroundings, all of which required addressing a system of sewage disposal that was inadequate and obsolete. The report concluded that further research was needed (*Post-Standard*, January 26, 1949).

In August 1949, the Special Committee on Pollutions Abatement of the Joint Legislative Committee on Interstate Cooperation issued another report indicating how widespread pollution was in New York State. It indicated that an "inadequate city plant" handled Syracuse's sewage, requiring the construction of a sewage pumping station and trunk sewer improvements. Additionally, investigations addressed complaints of pollution in Bloody Brook and Onondaga Creek (*Post-Standard*, August 14, 1949). In response, the city determined to upgrade its sewage treatment facilities, constructing a second major treatment plant to supplement the first built on the southern end of Onondaga Lake on Ley Creek (OLMC, 1993: 4). This upgrade was the first plant in the state to use an activated sludge treatment process. Even with this addition, however, the sewage collection and treatment facilities were unable to keep up with the rapid development of the region (OLMC, 1993: 4).

By mid-century, the degraded status of the Lake was increasingly apparent (Hanlon, 1957: 7). Some fish managed to live in the upper reaches of Onondaga Creek, but not in the other tributaries. Little to no recreational use remained; the primary function of the waters was

waste disposal and as an industrial water supply (Hanlon, 1957: 7). Mercury, benzene, toluene, PCBs, cadmium, and chromium contaminated the sediments of the Lake and its tributaries (Williamson & Hesler, 2006: 10). Solvay's waste beds rose as high as 80 feet over the lakeshore in some places. The large amounts of sewage pumped into Onondaga Creek and Lake turned the water cloudy and produced a noxious odor from algal overgrowth. Visual accounts of the water described "rafts of sewage sludge" that would rise to the surface forming "floating mats of decaying material" and produced foul smelling methane gas that often drifted over lakeside communities (Williamson & Hesler, 2006: 10).

Anecdotal evidence of Onondaga Lake during the 1950s described it as nothing less than foul: "It stank. It looked dirty. People who went to the bottom emerged with thick, black goo covering their feet and legs. Human excrement floated on the water" (Andrews, October 14, 1985). Despite these conditions, hope remained that the water quality of Onondaga Lake could be improved and that with more parks constructed on the shores of the Lake that recreational use would increase (Hilleboe, 1951: 16). In June 1950, Syracuse Mayor Thomas Corcoran and several city officials, in a surreal yachting trip across the polluted lake, went about "inspecting sewage" and concluded that conditions were "worse than usual" (*Post-Standard*, June 22, 1950). Corcoran observed the consequences of the continuous contamination from sewage, industry, Solvay's waste beds, and the pollution flowing in from Onondaga Creek (*Post-Standard*, June 22, 1950). He suggested appropriating \$4.5 million to improve the city sewage plant, to make the Solvay waste beds redundant, and to stop pollution from entering the Lake.

Complaints about the inadequate sewage treatment facilities came from a variety of sources. For example, the Syracuse Manufacturers Association asserted that the County facilities were "lagging." The Vice Chairman of the County Public Works Commission posited that

construction of an additional treatment plant would ease the amount of sewage being dumped into the lake. Surrounding towns, which were all being served by the same plant, had plans for completing their own plants as well (*Syracuse Herald-American*, December 31, 1950). The notion of constructing an improved sewage plant passed between various potential responsible parties with no institution wanting to claim the project. Questions arose as to whether it should be a city or county project, which engineering firm should get the bid, whether effluent should be discharged into Onondaga Lake or the Seneca River, and who would pay for the project (Andrews, October 16, 1985). In response to these questions, another report was commissioned.

In October 1950, New York amended its Public Health Law to declare "the public policy of the State of New York to maintain reasonable standards of purity of the waters of the state" (Hilleboe, et al., 1950: 3). The goal was to promote public health and enjoyment of the waters, protect fish and wildlife, and safeguard industrial development. Testing requirements, the classification-standards system, and the anti-degradation policy introduced with this legislation were more developed than previous laws. Classifications under this law identified the presence of floating solids, settleable solids, oil, sludge deposits, tastes or odor producing substances, sewage or waste effluents, pH levels, dissolved oxygen levels, toxic wastes, deleterious substances, colored or other wastes or heated liquids (Hilleboe, et al, 1950: 6). The highest and best classification of water was AA, which indicated a "water supply for drinking, culinary or food processing and any other usages" (Hilleboe, et al., 1950: 6). The law required that after the pollution control board made a classification determination, a plan be drawn up for bringing waters to the required classification (*Post-Standard*, March 29, 1953).

The Water Pollution Control Section of the Bureau of Environmental Sanitation from the New York State Department of Health prepared a report for the Water Pollution Control Board

(Hilleboe, 1951). It considered the water's physical and hydrographical features, land uses bordering it, past and present uses, and the extent of pollution (Hilleboe, 1951). Researchers took stream, industrial waste, and sewage treatment plant effluent samples to measure the "present defilement of surface waters" (Hilleboe, 1951: 19). The DEC considered this information in terms of its impacts on the watershed's fishery. Finally, data was analyzed to consider the best use of the water for consumption, recreation, fishing and fish culture, agricultural and industrial purposes, transportation and navigation, and sewage and industrial waste disposal (Hilleboe, 1951: 13).

The 1951 report showed that domestic users did not recognize Onondaga Lake as a source of the domestic water supply, but saw it as dedicated to "industrial use" (Hilleboe, 1951: 14). There were no recognized bathing areas (as designated by the state's Public Health Law) although people still swam at the southern end of Onondaga Lake Park. Despite the pollution, there were still plentiful pike-perch, catfish, sunfish, and suckers as well as less prominent populations of white perch, northern pike, silver bass, and bass (Hilleboe, 1951: 14). Carp, a non-native species often associated with poor water quality, flourished in the Lake. According to the report "little fishing occurs here, allegedly because of its polluted condition and the report that the fish are so tainted as to be inedible" (Hilleboe, 1951: 14).

Inadequate primary sewage treatment plants from Syracuse, the Village of Liverpool, and the Village of Solvay discharged effluent into the southern end of Onondaga Lake through an underwater outfall (Hilleboe, 1951: 19). At times of extremely high flow at the plant, the outfall overflowed at a surface discharge point on the south shore of the Lake (Hilleboe, 1951: 19). Pollution also entered into the Lake from Ley Creek, Onondaga Creek, Harbor Brook, an unnamed tributary referred to as "Tributary 5A," and Ninemile Creek (Hilleboe, 1951: 20).

Although there was no agricultural land use in the immediate vicinity of Onondaga Lake, industrial use was heavy. The primary source of pollution was believed to exist at the southernmost and southwestern sections of the Lake (Hilleboe, 1951: 19). The water was impacted particularly negatively by the Solvay plant and the Crucible Steel Company of America (later known as Sanderson-Holcomb), which drew water from the southwestern section (Hilleboe, 1951: 14). Solvay also emptied waste into the Lake through a flume that mixed with sanitary sewage from the Village of Solvay into the southwest corner (Hilleboe, 1951: 15).⁶⁶

In March 1953, the State Water Pollution Control Board met in March 1953 to determine what classifications to assign to various sections of Onondaga Lake based on the new law and the research findings. Preliminary recommendations were made that the south end would receive a D classification (reserved for industrial and agricultural purposes), the north section a B rating (suitable for bathing), and the middle of the lake a C rating (suitable for fishing) (*Post-Standard*, March 29, 1953). Sportsmen's groups lobbied to classify the entire lake as B. Other locals wished the classification of the north end to be raised to a C rating, pushing for the higher classification so that the law would mandate remediation (*Post-Standard*, March 29, 1953).

Research on the polluted lake continued, though action to physically address the problem was limited. One 1957 report indicated that during periods of low flow, what was actually flowing into Onondaga Lake was at least 60% sewage or industrial waste. During extremely dry

⁶⁶ Onondaga Creek's conditions were similar to the Lake. Fish, particularly trout, were bountiful, particularly in the stretch on the Onondaga Reservation. Unlike the Lake, the Creek was in part surrounded by agriculture. Industrial uses along the Creek meant waste was washed into the Creek along with the industries' effluents (Hilleboe, 1951: 17). The most severe environmental contamination of the Creek was through waste disposal, particularly the continued discharge of raw sewage (Hilleboe, 1951: 16). Additionally, stormwater overflows from the city's intercepting sewers regularly occurred. Such overflows were supposed to occur only in times of excess flow, but stoppage from silting, deterioration of walls, and uneven settling led to raw sewage emptying into Onondaga Creek (Hilleboe, 1951: 17).

years that percentage could rise to as high as 80-90% (Hanlon, 1957: 7). An estimated 70% of the bottom of the Lake was covered with oxygen depleting sludge (Hanlon, 1957: 7). Nearly all of this waste was either partially or completely untreated. The report also observed that a much larger portion of the Lake basin was settled than other watersheds in the country. Residential and industrial development covered nearly half of the watershed; the remainder was split between woodland, farmland, and swamps (Hanlon, 1957: 7). Watershed planning efforts were inadequate to address the rapidly expanding metropolitan area properly. The research concluded that “the satisfactory treatment or elimination of industrial discharges, plus rehabilitation and continuing maintenance of the city sewer system, particularly the intercepting sewers” were necessary if the lake was ever to be renewed (Hanlon, 1957: 7).

In 1960, the Onondaga County Metropolitan Syracuse Wastewater Treatment Plant (“Metro”) was constructed, addressing 50 million gallons per day. Additional sedimentation tanks were added after a short time, doubling the amounts of solids removed. The system continued to experience hydraulic overloads of nearly 20 million gallons per day and Metro effluent was still being discharged directly into Onondaga Lake (OLMC, 1993: 4).

The pollution plaguing the Creek gained attention in the mid-1960s. The polluted tributary had been “a source of complaint for many years by the state” (*Post-Standard*, August 14, 1965). Area residents, regional environmental groups, and local academics, contended that “with some cleaning of debris, Onondaga Creek may not be a bad canoeing stream” (*Post-Standard*, June 18, 1965). The Creek, however, was contaminated by far more than just debris. Raw sewage was entering the water from numerous sources, oil was being released into the stream near Oil City (an industrial area along the creek), and storm runoff made its way to the water because of an inferior intercepting sewer system (*Post-Standard*, June 18, 1965).

Engineers estimated that the city could keep 1.8 billion gallons of raw sewage out of the Lake annually by simply cleaning and repairing its sewers to keep it from entering the Creek (*Syracuse Herald-Journal*, August 14, 1965). City engineers found enough grit and silt in the intercepting sewers to cover a football field a yard thick. By January 1966, a plan to address creek pollution had been approved and announced by the Mayor (Roth, January 5, 1966: 43). The program called for the elimination of all raw sewage entering Furnace Brook (a feeder tributary to Onondaga Creek), the completion of ongoing construction projects to eliminate raw sewage, and the initiation of several new projects to improve the system and lessen the current strain. Industrial sewage discharge abatement was also deemed necessary. The plan also included yet another study of the intercepting sewer system. Money and work addressing pollution continued to focus more on research than action (*Post-Standard*, December 14, 1967).

In April 1966, another step was taken towards addressing the pollution in Onondaga Creek when the city enacted an ordinance that authorized the construction of two intercepting sewer chambers, the installation of new sewer pipes, and additional manholes at various locations (Lee, April 25, 1966: 8). The city, in concert with the state, intended to “abate and keep abated all discharge of sanitary sewage into waters of the state” (Lee, April 25, 1966: 8). Pleas were made (with little response) that the same be accomplished by addressing the direct discharge of sewage into various locations along the Creek (Lee, April 25, 1966: 8).

Studies conducted by Syracuse University limnologist Daniel F. Jackson concluded that the salt in Onondaga Lake, in combination with the chemicals Allied Chemical Corporation dumped into the water were what prevented it from becoming “a huge stinking mess of filamentous or blue-green algae” (Hannon, June 20, 1967: 9). The natural chlorides of salt coupled with the calcium discharges from Allied Chemical had inhibited algal growth despite the

heavy amounts of raw sewage and primary treated wastewater that constantly emptied into the lake (Hannon, June 20, 1967:9). Unfortunately, Jackson nonetheless concluded that the current condition of the water was “a huge stinking mess of unsightly brown-green water” (Hannon, June 20, 1967: 9).

Onondaga Reservation Conditions

As public discussions on the environment became ever more commonplace, and while agencies and academics created stacks of reports on Onondaga Lake and its tributaries, attention was noticeably lacking for conditions on the Onondaga Reservation. After the completion of the Onondaga Dam, accounts of the activities south of Syracuse were relatively rare. A multi-part series in the *Syracuse Herald-Journal* published in 1961 provided some insight into the 7,300 acres of reservation territory, which was bordered by the Nedrow Air Park on one side, a junkyard and lumber yard on the other, and pierced by highways 11, 11a, 80 and 81 (Crowe, April 2, 1961). Off these main arteries ran dirt roads lined with residences of mixed quality, "a collection of homes in which the monotony of unpainted rundown buildings is relieved by a sprinkling of neat ranch houses and trailers with attractive yards" (Crowe, April 2, 1961: 11). The lack of mortgages available to American Indians reinforced this disparity of housing quality. Federal law prohibited banks from taking possession of real property on reservations, precluding foreclosures. Although most homes had electricity, central heating was rare, few homes had running water, and there were no sewers.

Environmental abuses also occurred within the reservation borders. In July 1966, the State Health Department began receiving complaints about burning on the reservation at an open dump controlled by Benny Shenandoah along Route 11A (Goshorn, July 27, 1966). State Representatives, Assemblymen, and the Onondaga Supervisor filed complaints about smoke

hanging over Nedrow. Shenandoah's counsel argued that state laws outlawing open burning without a state permit did not apply because he was a Native American living on the reservation. The state contended the burning was a nuisance and potential hazard that had to be stopped (Goshorn, July 30, 1966). The District State Health Officer referred the case to Albany, and the Director of Indian Affairs repeated requests that the burning stop but to no avail. Shenandoah encountered further trouble with the state Department of Transportation in 1973 for an auto junkyard located adjacent to Route 11 in Nedrow (Bliven, 1973). The Department of Transportation maintained that 20 to 30 cars encroached on the state right-of-way. The agency expressed concern that the cars constituted a traffic hazard and needed to be removed, though mandating removal was questionable as it was on the reservation (Bliven, 1973). These complaints would arrive at a time shortly after a conflict arising over highway construction on Interstate 81, another undertaking opposed by the Onondaga.

The 1970s began with the battle between the Onondaga and the State regarding the construction of highway Route 81. The Onondaga Nation filed a federal complaint with the District Attorney against Potter-DeWitt Corporation, the construction company working on the Interstate 81 South truck lane that crossed reservation property (*Syracuse Herald-Journal*, August 20, 1971: 29). The Nation argued that the state breached a contract and had no right to build on reservation land. The state maintained that a lease for the original right-of-way for Route 81, established in the early 1960s, allowed it to make any necessary improvements to the roadway. The original construction plan for the road followed the contours of the land and did not include the climbing lane (for large trucks). This route would have required construction and acquisition of property from "people of influence" which would have caused officials "to step on a lot of vote-getting toes" (*Syracuse New Times*, November 4, 1971). The plan was altered to

use land that angled into the Onondaga territory. The government hoped it could acquire this land more cheaply--although at the obvious cost of continued deteriorating Indian relations. Onondaga representative Chief William L. Lazore contended that the existing agreement allowed only for the construction of the existing road, not subsequent additional lanes. It was asserted that the easement that was in place allowed improvements and repairs, not additions (Hauptman, 1988: 97).

Over 200 men, women, and children protested at the construction site, forcing the undertaking to stop temporarily. The New York State police were ordered to stop the protestors, however, at the last moment the heavily armed troopers were called away to stop the riots at the Attica State Prison. It has been said of the protest that “the bullets meant for the people at Onondaga were used against the Attica inmates” (George-Kanentiio, 2006:34). The argument regarding highway construction again turned towards questions of broken treaties, broken promises, and past relationships. The Counsel of Chiefs met with Governor Nelson Rockefeller in October 1971 to resolve the issues stemming from the impasse between the state and the Nation. In 1972, the Onondaga took the case to court in Utica, presenting its position on sovereignty and treaties. Judge O’Donnell ruled that the New York State Department of Transportation did not have the power of eminent domain in Onondaga territory and work on Route 81 was stopped (Powless, 2016: 108). Additionally, charges were dropped against protesters arrested, and consultation with the Nation at all stages of what was left of the project became mandatory.

Implications of Lackluster Corporate Responsibility

At the close of the sixties, in the context of a growing sense of social responsibility, corporate polluters reluctantly began to step forward to clean up the mess they had made. In

August, Crucible Steel pledged to participate in the Onondaga Lake remediation efforts, in particular to clean up the west shore for the purpose of creating a park (*Post-Standard*, August 1, 1966: 9). In partnership with Onondaga County, Allied Chemical agreed to construct a dike to prevent water from waste beds from entering the Lake. The company also agreed to dredge Nine Mile Creek to remove calcium build up from the industry's wastes, pumping the removed waste into an area behind the dike. They would then cover the bed with dirt and grass (*Post-Standard*, August 1, 1966: 9). Allied also offered a \$10,000 grant to Syracuse University social sciences faculty to study the socio-economic aspects of pollution, hoping to use the study to "define objectively what constitutes the best public interest" (*Post-Standard*, August 1, 1966: 9). By August 1966, \$29 million had been invested in Onondaga County for the construction of facilities for water pollution control, \$496,000 of which were federal funds (Carroll, August 20, 1966:7). Solvay, the Syracuse Works of Crucible Steel Co., the Metropolitan Development Association, and the Manufacturers Association of Syracuse all cooperated in these efforts.

These actions came in the midst of criticism of Allied Chemical from the Congressional Subcommittee on Natural Resources and Power regarding the Solvay Division's impacts on Onondaga Lake (Carroll, August 20, 1966: 7). The Chairman of the subcommittee noted that Solvay had emptied 4,000 tons of pollutants into the Lake per day, calling that "an indictment in itself" (Carroll, August 20, 1966: 7). Allied argued it was not responsible for the Lake's most significant problem, oxygen deficiencies. Further, the company alleged that it circulated more than one million gallons of water daily for cooling purposes without altering the "characteristics" of the water (Carroll, August 20, 1966: 7). Despite this claim, however, thermal pollution (changing the water temperatures of lakes, rivers, oceans, etc.) does cause significant harm by adversely affecting ecosystems and contributing to the decline of wildlife populations through

habitat destruction.

The following year, Allied Chemical agreed to construct a multipurpose sewage and waste disposal plant on Nine Mile Creek to eliminate major sources of pollution (Bliven, June 20, 1967). The initial idea was that Allied, Crucible Steel, and Onondaga County would participate in its construction, though Allied would continue with the project even if the other two parties declined to assist (Bliven, June 20, 1967). The company understood that though their Solvay branch provided the area with a number of benefits, “there is a feeling of resentment here among some people who feel the company has acted against the public interest through the creation of some existing public problems” (Bliven, June 20, 1967). Allied and Crucible began by jointly financing another feasibility study on the construction project and whether it could be tied in with the existing system (Bliven, June 20, 1967).

Although Allied made numerous claims that it was trying to improve the environment. Unfortunately, many of the company's improvements only exacerbated the degradation. Solvay representatives contended that the company had spent a great deal of money to find ways to use the hundreds of tons of waste produced each day but was unsuccessful. It had also attempted to mitigate problems and help better the environment by helping to reclaim swamplands near Onondaga Lake, by converting them to a 400-acre parking lot (Bliven, June 20, 1967). Ironically, the conversion of this land likely exacerbated environmental problems by creating an impermeable surface that would cause to greater runoff and pollution. The company also dredged Nine Mile Creek, removing waste and pumping it into basins along the Onondaga Lake shoreline, another environmentally unsound plan. The company chlorinated 100 million gallons of lake water daily, and alleged that “the liquids that flow from the Solvay Process plant are not toxic or harmful and contain no bacteria or viruses” but were “beneficial” because they inhibit

the growth of algae (Bliven, June 20, 1967).

In 1964, in a boat called the "Saltine Warrior," Syracuse University engineering professor Daniel Jackson began advocating for the Lake (Andrews, October 16, 1985: A7). The boat, financed by the University, helped gain visibility for the Lake as Jackson escorted individuals like Secretary of the Interior Stewart Udall, U.S. Senators Jacob Javits and environmentalist Robert Kennedy, Onondaga County executives and politicians, and numerous members of the press across the polluted waterbody (Andrews, October 16, 1985: A7). The County appointed Jackson to its Scientific-Economic Council where he proposed sweeping environmental remediation projects costing upwards of \$25 million, though his recommendations were ignored (Andrews, October 16, 1985: A7).

Before departing to work on environmental issues in Louisiana, Jackson battled with the County's Drainage and Sanitation Commissioner John Hennigan. The former wanted to construct a new treatment plant to address the problems, the latter to allow Allied to continue to dump its calcium-based waste into the Lake to abate phosphorous problems (Andrews, October 16, 1985). Their decade-long battle was so contentious that years later Hennigan said of Jackson: "He was no civil engineer. He was a bug worshipper. His ideas were so bad; I just can't put into words how flaky that man was" (Andrews, October 16, 1985). Jackson, however, prevailed and a \$127 million Metropolitan Sewage Treatment Plant (a more advanced tertiary treatment plant) would open on the south shore of Onondaga Lake (Andrews, October 16, 1985: A7). The Syracuse Metropolitan Treatment Plant pointed towards progress in remediating the dying Lake (Kelly, 1975: 6). The city broke ground on the \$88.7 million Metro project in February 1975. The new facility would treat sewage from Syracuse, Solvay, Liverpool, East Syracuse, Salina, DeWitt, Onondaga, Geddes, and Camillus. The tertiary facility served 343,000

people and would remove in excess of 90% of the organic material in the sewage, which would reduce phosphorous levels to less than one part per million.

A Growing National Environmental Ethic

With population growth, urban and suburban growth, urban renewal, highway building, and industrial growth, the entire country experienced the use, overuse, and abuse of natural resources and the environment. After a decade of social activism addressing civil rights, labor movements, and farm workers' rights, the idea that the environment might finally be a priority is not surprising. The decade that opened with the first celebration of Earth Day saw the federal government enact numerous environmental regulations, indicating a recognition of the environmental troubles the country had brought upon itself. Nearly every year in the 1970s saw a major federal environmental measure. Many of these laws enhancing the enforcement capabilities of state and federal authorities against polluters.

Federal recognition of the growing national pollution problem increased rapidly. In July 1970, the Justice Department filed its first suits under the 1899 Refuse Act, a section of the Rivers and Harbors Act that prohibited dumping refuse into navigable waters except by permit (33 U.S.C. 407). U.S. Attorneys in districts where polluters were located received authorization to file claims seeking injunctions against the continued discharge of mercury and to require that the companies take the necessary steps to remedy the past impacts of their pollution. Assistant Attorney General Shiro Kashiwa noted that the offenses were being taken seriously "Because mercury pollution is a serious matter, civil injunction proceedings are being authorized instead of the usual criminal action under the criminal Refuse Act, where the penalty is relatively light" (Brown, 24 July 1970). That same year, New York State had banned fishing on Onondaga Lake for health concerns associated with mercury and other pollutants (Onondaga Lake Partnership,

2010: 10). Criminal penalties could include fines up to \$2,500 and sentences of up to one year for individuals. In 1970, charges were filed against ten companies including Allied Chemical Company for its discharges into Onondaga Lake (Brown, 24 July 1970). By November 1970 the House Government Operations Conservation Subcommittee, a House subcommittee monitoring pollution, announced that the Army Corps of Engineers had agreed to demand for actions against 50 firms in total for discharging mercury into waterways (*Evening Observer, Fredonia*, November 19, 1970).

In September 1970, Allied agreed to limit its discharge of mercury to eight ounces per day from its plants in Solvay (*Post-Standard*, September 16, 1970: 10). The firm was scheduled to face a non-jury trial, but instead agreed to a stipulation of the discharge reduction, to measure daily the mercury content of its effluent from each plant, and send weekly reports to the U.S. Attorney for the Northern New York District and the federal Water Quality Administration (*The Post-Standard*, September 16, 1970: 10). Additionally, the firm was required to submit a plan to the State Department of Environmental Conservation regarding the pollution (*The Post-Standard*, September 16, 1970: 10). The Justice Department retained the right to withdraw this stipulation and renew its application for a preliminary injunction if the company failed to meet these requirements. It also did not preclude the Justice Department from bringing future actions against Allied Chemical for the discharge of other substances (*The Post-Standard*, September 16, 1970: 10). By 1971, the company had cut its discharge of mercury into Onondaga Lake to .15 pounds per day (down from 21 pounds per day) (*Syracuse Post-Standard*, July 3, 1971: 5). The company retained federal permission to release up to one pound of the substance per day (*Syracuse Post-Standard*, July 3, 1971: 5).

In 1977, the Allied Chemical Corporation closed the doors to its chlorinated benzene

plant and its Willis Avenue chloralkali plant (Onondaga Lake Partnership, 2010: 10). A setback occurred, however, when the pipeline carrying brine to the Allied Chemical facility burst on the Onondaga Reservation causing a massive fish kill (Blank, July 23, 1979). Brine leaks had previously occurred along the pipeline in 1961, requiring the company to replace sections and add cathartic protection systems to prevent leaks (*Syracuse Herald-Journal*, August 2, 1979: 33). In 1975, additional leaks nearly led the DEC to order installation of a leak detection and containment system. Unfortunately, the agency's order was dropped in favor of oil and air pollution controls (*Syracuse Herald-Journal*, August 2, 1979: 33). The large volume of concentrated salt water released in 1979 killed all of the fish from the site of the leak on the reservation near Nedrow to beyond the Seneca Turnpike, a distance of two miles. Descriptions of the Creek's condition painted a picture of waste: “dead fish lay belly-up in the water, forming bobbing silver dots on the water. The few fish that showed any life appeared to be laboring for breath. Trout, catfish, and carp were among those spotted” (Blank, July 23, 1979: 1).

The state had the option of assessing the plant as much as \$10,000 for each day of the spill (Blank, July 23, 1979: 1). The DEC conducted an investigation and held an administrative hearing to determine the possibility of negligence and the extent of damage (Blank, July 23, 1979: 1). While Allied employees were able to find the leak by walking the line of the pipe, law enforcement never went to the point of the leak near Route 80 because it was on the Onondaga Reservation. They inspected downstream for dead fish with Allied officials. A second, smaller leak was found further downstream (Blank, July 23, 1979: 1). The DEC's regional engineer called the spill a “significant environmental disaster” (Blank, July 24, 1979). Brine had escaped from the pipe at an estimated 110 gallons per minute from 3pm Saturday through 2pm on Sunday (Blank, July 24, 1979). Days after the spill young children who had often fished Onondaga

Creek spoke of their disappointment at the massive fish kill, which had by that time obliterated the fish along a 10-mile stretch of creek from the Onondaga Reservation all the way to Onondaga Lake (Blank, July 27, 1979: 6). Fishing on Onondaga Lake had already been banned only a few years earlier.

State officials feared it could take up to two years before the Creek returned to normal (Blank, July 27, 1979: 6). Adding to the contamination problems was the fear that rats would overpopulate the area to feed on the dead fish. Both state and County health departments were considering the potential for additional health problems. (Blank, July 24, 1979). A statement made by Chief Irving Powless Jr. indicated that the impact on the reservation was not as severe as that downstream and on the way to the Lake. He asserted that the majority of the reservation would not be injured by the fish kill as it affected only the northern edge and a significant portion of stream remained unaffected by the leak (Blank, July 24, 1979).

Allied Chemical workmen labored to clean up, wading through the river to collect dead fish in plastic bags to bury in the company's Solvay plant landfill (Blank, July 25, 1979: 10). Although the County Health Department declared the fish a public nuisance, Allied's work to clean up the dead fish was voluntary. It was understood, however, that the upcoming hearing would consider this assistance when determining liability and assessing fines (Blank, July 25, 1979: 10). The state only fined Allied Chemical Corporation \$5000 (Blank, September 13, 1979). The DEC ordered the company to install a more effective warning system (Blank, September 13, 1979). The company responded to the fine and system upgrade requirements with a smug statement by the manager of environmental services: "We did it and I guess we have to pay the price" (Blank, September 13, 1979).⁶⁷

⁶⁷ Allied Chemical's leaky brine pipeline continued to plague water quality despite large sums of money

As the decade drew to a close, two *Post-Standard* reporters took a canoe trip down Onondaga Creek in October 1979 to ascertain the state of this “inaccessible and little used” waterway (Lawless & Ehmann, October 28, 1979: 1). What they found was not surprising. The men were required to maneuver their boat to avoid rusting street signs, automobile fenders, bits of bridges, and discarded toys to say nothing of the sewage fouling the water. They also took note of the “surreal” beauty that still existed, remarking on the birds, fish, and enclosing canopy of willows, ash, and poplars (Lawless & Ehmann, October 28, 1979: 2). Their three-hour trip was, in fact, illegal. Chain link fences blocked the majority of access points to the public. Few people took notice of their presence on the Creek with the exception of a road crew, an “old derelict,” and a boy who informed them that they were not supposed to be on the water. Further downstream, they witnessed decaying infrastructure, crumbling bridges, and an abandoned aqueduct that once carried the Erie Canal over the creek. The “ruins of the industries which built Syracuse,” the companies that used the water for transportation, power, and waste disposal, remained next to the water they polluted, for the most part, abandoned, but holding “a certain charm of age” (Lawless & Ehmann, October 28, 1979: 2).

Area residents remained hopeful that the Onondaga Lake watershed could be remediated

spent to address the problem. After the 1979 leak and fish kill, the company spent \$1.8 million to repair and improve the brine pipeline. Company engineers examined the entire pipeline, marked and replaced breakage spots in large 12’ sections, and installed a computerized leak detection system. Unfortunately, this did not address the issue sufficiently. From 1979 to 1984 the company was fined \$27,000 for 15 brine leaks, nine of which “damaged the environment” (Kelly, October 17, 1984). As a result, the DEC no longer stocked trout in the lower section of the creek. The 1984 leak, which lasted only two to three hours, emptied over 80,000 pounds of sodium chloride into Onondaga Creek.⁶⁷ The DEC fined the company an additional \$13,000 for the latest series of leaks. The State Legislature’s Health Committee Chairman, James C. Tormey, recognized, “It appears we’re killing this creek with our knowledge and consent” (Kelly, October 17, 1984). The pipeline leaked again in February of the following year, again discharging hundreds of gallons of highly concentrated salt water into the creek (McAndrew, February 2, 1985: A-1). The state of the Creek was revealed by a DEC official's admission that he did not expect many fish would die from this leak because the fish and all they fed on were virtually wiped out by the last spill (McAndrew, February 2, 1985: A-1).

and developed to create economically productive attractions for the city. For example, John Searles tried to promote interest in developing the stretch of Onondaga Creek that ran through downtown Syracuse as a river walk. The developer wanted to convert the dilapidated buildings that lined the waterway into cafés and nightclubs similar to what existed along the San Antonio River in Texas (Andrews, October 18, 1985: A1). Excited to share his idealistic vision of the waters, Searles packed half a dozen canoes with local businessmen, politicians, and reporters for a tour. The cold and rainy March morning turned out to be a disaster. The canoe of the director of the Cultural Resources Council tipped over into the cold, murky water, and floating debris including tree limbs, tires, logs and street signs bombarded the remaining canoes. The fate of Searles's voyage was sealed by the trip's guides--rats scurrying atop the debris along the garbage-lined shores. His vision was, not surprisingly, never realized.

Searles's plan was only one of many failed development proposals for the waterways, which included amusement parks, marinas, marketplaces, resorts, an industrial park, fishing piers, public beaches, skating rinks, amphibious plane landing sites, and nature preserves (Andrews, October 18, 1985: A16). The glacial pace of cleanup efforts limited any economic development plans. One member of the Metropolitan Development Association indicated "the lake and creek are like a beautiful orange that's rotted inside" (Andrews, October 18, 1985: A16). On the horizon, however, legal actions brought by environmental stakeholders in concert with advances in environmental laws would finally accelerate these efforts.

CHAPTER 10

SOLVAY CLOSES ITS DOORS AS THE NATION CONTINUES TO FIGHT

After nearly a century of polluting industries, reckless municipal waste and water management, and inadequate environmental laws, circumstances surrounding Onondaga Lake finally began to improve in the 1980s. In this decade, Allied and other area industries would finally close their doors, leaving behind an unfortunate legacy of environmental abuse. Some individuals, frustrated with past government failures to regulate polluters or require any remediation, took actions independent of government authorization or involvement. Others took advantage of the law, which had fortunately been improving in response to a growing national environmental ethic. Laws were also being tailored to address decades of industrial contamination. These industrial departures and improving legal actions would set in motion a chain of events that would lead to the gradual recovery of Onondaga Lake.

Discouraged by the inaction of all levels of government in addressing the Solvay wastebeds, one local man undertook the remediation of the chalky hills despite lacking legal authority to do so. Less than 100 yards from Interstate 690 and directly across the water from the Syracuse city skyline, the terraced hillsides of chalky chemical waste rose 80 feet above the lakeshore, covering more than 400 acres (Andrews, October 14, 1985: A17). The “white hills of the west shore” were formed from the Allied chemical byproducts dumped on the west side of Onondaga Lake. These hills once reflected the locals’ popular perception of a lake that would never be clean, “a concoction as vile as found in any witch’s brew,” and a “lake little loved and often ignored” (Andrews, October 14, 1985: A17).

Allied's environmental manager had already attempted to improve the waste beds, but believed that planting anything there was impossible as the waste lacked any organic matter such

as phosphates that would have allowed plants to grow. Norman Richards, a SUNY ESF forestry professor, attempted to improve the white hills, coming up with the seemingly common sense idea of adding fertilizer. For over a decade, the professor improved the beds with bags of fertilizer and seeds, planting St. John's wort, butterfly milkweed, and dozens of other flowers, shrubs, grasses, and trees (Andrews, October 18, 1985: A17). He never received permission from any authority to undertake this planting project; in fact, the state had denied his application. Undeterred by limitations potentially imposed by the government, he continued to show up at the waste beds. His planting led to the successful reintroduction of orange butterfly milkweed, a protected flower, indicating that his efforts, contrary to the opinions of Allied's environmental manager, had significant impacts.

Richards was not alone in his efforts to improve Onondaga Lake. Remediation efforts would finally take off during the 1980s. Encouraged by "cleanup" efforts, Onondaga County officials were already promoting a revival of Onondaga Lake's recreation industry (Kelly, March 18, 1983: 49). In 1983, they reported a "significant improvement" to water quality and a "successful start toward reviving the lake as a recreational haven" (Kelly, March 18, 1983: 49). Efforts thus far had cost government and industry over \$280 million for pollution control and abatement. Despite these expenditures and the claims of improvement, many of the complaints regarding the water remained the same as decades earlier: high bacteria levels from the periodic flow of raw sewage from an antiquated combined sewer system and high levels of mercury and other contaminants in lake sediments (Kelly, March 18, 1983: 49). New fears also arose regarding the pollution. One idea was that reductions in the amounts of calcium and sodium in the lake might lead to increased release of the mercury from the lakebed.

Fortunately, remediation efforts would be spurred by the most important law impacting

Onondaga Lake and the surrounding area: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, 1980). Other federal and state environmental laws also continued to gain strength. For example, the Clean Water Act was amended to include provisions which required the remediation of combined sewer overflows, finally mandating that cities like Syracuse had to address their aging infrastructure (33 U.S.C. §1251 et seq.). The enforcement of these two laws brought about community action and litigation that would force the remediation of Onondaga Lake and Onondaga Creek to become priorities for federal, state, and local governments. Limitations in remediation efforts would also push the Onondaga Nation to file a land rights claim against the state, county, and city governments as well as corporate defendants responsible for polluting the environment.

Allied Closes its Doors

After over a century, Allied Chemical Company closed its Solvay-process soda ash manufacturing plant in 1986 to move to a more cost effective facility in Wyoming (Mulder, 1985; Effler, 1994: 11). Part of the property was sold off to Church & Dwight, a company that sold baking soda under the Arm & Hammer trademark (Mulder, 1985: A1). Initial talks of closure came as a surprise to many people, particularly to local unions representing the company's employees. Representatives were scheduled to begin negotiations for renewed labor contracts in two months when they learned of the company's plans to relocate. The lead union representative noted "I am surprised and discouraged that the company hasn't notified us... They're sneaky" (Mulder, 1985: A5b). Allied's plant closure reinforced the fear of the continuing loss of economic opportunity in the region.

Despite Allied's reputation, the city and state fought to keep the company from leaving. Assemblyman Melvin Zimmer (D-Syracuse) said of the relocation "If we're unable to reverse the

decision [to move], it's an absolute disaster for Syracuse and Onondaga County” (Mulder, 1985: A5b). In addition to the plant's antiquated setup, however, the overstocked market in soda ash was leading to a loss of millions of dollars for the company (Mulder, 1985: A5b). Local politicians tried to reinforce that the move "has nothing to do with such matters as environmental regulation or the business climate in New York State or any considerations locally" (Mulder, 1985: A5b). The president of the Manufacturers Association of Central New York deemed the closure "devastating news for the manufacturing economy of Central New York" (*Herald-Journal* staff: 1985: A5b). He estimated the economic impact to approach \$750,000 weekly based on the average incomes of the workers at the plant (*Herald-Journal* staff: 1985: A5b). Local business owners expressed their concern at Allied's leaving: "I would assume it would make a ghost town out of it... Taxes have to go up... what's it going to do to all the businesses?" (*Herald-Journal*, 1985: A5b). Allied's closure was seen as the "toughest blow" to Syracuse employment since the departure of General Electric 15 years earlier. It caused the city's unemployment rate to climb from 5.8 to 6.2 percent (Crozler, April 23, 1985: A5b).

The DEC maintained that Allied would be required to address the environmental issues the company had created. The agency continued its investigations of the inactive hazardous waste sites as well as conforming to all other environmental regulations before the company's doors could close (Driscoll, 1985: A5b). The Solvay plant was listed as a "suspected hazardous waste site" that year, requiring that the waste beds be addressed according to state environmental protections guidelines. The DEC further recognized that Allied had created significant environmental problems in the past: water effluent discharges into Onondaga Lake, air pollution,

and brine pipeline leaks.⁶⁸

The company's departure could also potentially lead to new environmental issues. For example, Allied had operated a number of quarries. Local officials wanted to convert these into landfills after they left (Driscoll, 1985: A5b). Further, when the plant closed, the waste beds where the company once dumped their lime-laden sludge began to emit a bad odor (Gramza, 1986: B-1). Sludge from remaining industries including Anheuser-Busch, Linden Chemical & Plastics, and County waste were still being deposited there (Gramza, 1986: B-1). The previously undetectable air quality problem devolved to the point that area residents found the smell "unacceptable" and in need of immediate remediation. People began calling for the dredging of another of Allied's former lime-heavy waste beds and dumping this waste on top of the "smelliest beds" to counter the odor.

Allied was not the only company to close. In 1988, Luden Chemicals & Plastics Inc. ("LCP"), one of the largest chloralkali producers on the East Coast, closed its doors (Fish, 1988: A7). LCP had only been in Syracuse since 1979, making products used in the manufacturing of plastics, paper goods, and detergents. Purchasing its facility from Allied Chemical, it had only taken four years for the company to earn a reputation among local environmental groups as an "inadequately regulated polluter" (Fish, 1988: A7). LCP had numerous problems with chlorine leaks, particularly from 1984 to 1988.⁶⁹ Hundreds of pounds of chlorine gas escaped from

⁶⁸ The final would occur in February 1985 when nearly 200,000 gallons of concentrated salt water leaked from a ruptured pipeline into Onondaga Creek leading to a massive fish kill (Driscoll, 1985: A5b). The plant was fined only \$27,000 for a total of 15 brine leaks during its operations, but the company spends \$1.8 million repairing the 18-mile pipeline.

⁶⁹ In 1988, the LCP Chemical plant had 16 chlorine gas leaks over a two-month period (Weiner, March 8, 1991: B-1). Although LCP Chemicals shut down in 1988, in 1991 the DEC identified 22 spots on the former plant's site that required further investigation for hazardous substances. One perceived problem was the contamination to the pollution of Geddes Brook (Weiner, March 8, 1991: B1). By this time, the LCP site was a listed hazardous waste site and was recognized as a major contributor to the mercury

machinery in the plant's cooling and drying facilities, at times requiring the hospitalization of employees (Fish, 1988: A7). In February 1987, the DEC charged LCP with violating air pollution laws for some of these emissions. In June of that same year, the plant was assessed a \$10,000 fine and required to make a number of modifications and improvements to its equipment. Complaints about air quality from neighbors persisted, and the plant was shut down only a month after it completed repairs to address persistent chlorine leaks. In 1988, LCP gained permission from the DEC to dump some of the lime used to absorb chlorine gasses into Onondaga Lake tributaries. These accidents and the number of accompanying OSHA fines continued until the 1988 shutdown.

Prior to the closure of LCP, branch and DEC officials worked hard to resolve state complaints against the company for discharging chlorine and mercury in excess of allowable levels during what was intended to be a temporary closure. The state permitted the company the discharge of .28 pounds of mercury into Onondaga Lake per day, but it was dumping up to 1 lb per day, resulting in the DEC charging the company with 107 violations of water pollution control laws, and nearly \$1.07 million in fines. The state also assessed charges for chlorine gas leaks and fines for health and safety violations under OSHA (Andrews and Cappon, 1988: A7). LCP's closure, in response to threats by state environmental officials due to continued mercury pollution, resulted in the layoff of over 150 employees (Andrews and Cappon, 1988: A1).

The loss of LCP and its revenues constituted another significant blow to the area's

contamination of Onondaga Lake. A man-made channel connected the company's land to Geddes Brook, which then flowed into Nine Mile Creek and eventually to the Lake (Weiner, March 8, 1991: B5). Continued investigations of the property and contaminants presence in the soil and water beneath the plant persisted throughout the sites eventual Superfund cleanup through preliminary tests indicated mercury levels ten times the state limit. Additionally, the plant operated two hazardous waste lagoons on the property for thirty years. Hanlin Group's Handor, Inc., a \$50 million chemical plant that produces sodium chloride crystal used as a bleaching agent in the paper making process, replaced LCP.

economy (Andrews and Cappon, 1988: A-1). As with the Allied plant's shutdown, the LCP closure meant fewer paychecks spent at local shops, restaurants, and other retail locations (Tompkins, 1988: A7). These plant closures, however, coupled with legal actions and changes in environmental laws, were the catalyst needed for environmental change required to restore Onondaga Lake and its tributaries.

Legal Actions Drive Remediation

Significant improvements to the Onondaga watershed would start with a complaint filed by the Atlantic States Legal Foundation (ASLF) and the New York State Attorney General against Onondaga County in 1988 alleging violations of discharge permits and addressing municipal water problems. The same institutions would file another complaint against Allied-Signal the following year for pollution violations and natural resource damages in federal court. As the decade drew to a close, a Consent Judgment required the County to perform studies and upgrade the municipal waste treatment process for Syracuse and the surrounding areas (Onondaga Lake Partnership, 2010: 10). The ASLF suit against the County alleged that Metro and CSO discharges violated federal water pollution control standards under the Clean Water Act. New York State also joined as a plaintiff, asserting that the County violated the state's Environmental Conservation Law (OLMC, 1993: 10).

In June 1989, Attorney General Robert Abrams filed a lawsuit in the United States District Court on behalf of New York State against Allied-Signal pursuant to CERCLA, the New York State Environmental Conservation Law, and the common law doctrine of public nuisance. This suit had two goals: first, to compel the company to remediate the impacts of its waste disposal activities on the Onondaga watershed; and second, to force the company to pay the state damages for the injury, destruction, and loss of natural resources (OLMC, 1993: 20). The money

was intended to restore, replace or acquire the equivalent of these resources (OLMC, 1993: 20). The court entered an interim consent decree in March 1992 requiring Allied to perform a remedial investigation and feasibility study (“RI/FS”) to determine the extent of the pollution and evaluate remediation options (OLMC, 1993: 20). Allied was required to complete a geophysical investigation, a calcite and mercury modeling plan, a bioaccumulation investigation, a determination of ecological effects, mercury and calcite mass-balance reports, a remedial investigation report, and a feasibility study report (OLMC, 1993: 20). Each report had to comply with the U.S. Environmental Protection Agency regulations under the National Contingency Plan (OLMC, 1993: 20). At the close of this remedial investigation and feasibility process, the state would select the appropriate remedy for addressing the Lake. The DEC also issued three of its own administrative consent orders requiring Allied the investigate the contamination at the Willis Avenue site, the Solvay waste beds, and the Semet tar beds.

During the 1990s, the Creek also began to be perceived as a problem of environmental justice. One community advocate called the Creek “a wall between different parts of the city” (Sterling, April 21, 1996: D3). Although city officials recognized the link between pollution in the Creek and the Lake, they failed to recognized the problems it brought to the people living along the Creek, over a third of whom were African American (Sterling, April 21, 1996: D3). Atlantic States Legal Foundation representatives considered the failure of the various levels of government to address the Creek as having less to do with race than with political clout, lamenting “They don’t care if the people are red, blue, black or green. The fact is that it’s people of color just means there’s less pressure on them to do anything.”

On May 10, 1993, the EPA proposed Onondaga Lake for listing on the National Priorities List, pursuant to CERCLA, which made increased federal money and enforcement authority

available for site remediation (OLMC, 1993: 21). The Lake was finally added to the list of Superfund sites in 1994, marking the start of the state's largest remedial undertaking yet. The 1994 listing required that the lakebed, not just the water, had to be remediated. The Lake and two other Allied disposal sites were already listed on the New York State Superfund list. Holding high hopes for the project in spite of the unfortunate connotation of Superfund designation, officials and environmental consultants appreciated the potential and necessity of the designation. One consultant representing a county executive affirmed that the Lake needed all the assistance it could get: "Anything which accelerates the restoration of the lake we certainly support.... This is just one more recognition of the difficulties of the lake" (Salant, 1993: B-1).

The CERCLA provisions did not address the wastewater problem, only the mercury, benzene, and other chemical contamination problems from the former industrial presence (Salant, 1993: B-1). County efforts to address raw sewage flowing into the Lake that was mandated by the Consent Judgment from the 1988 ASLF lawsuit continued and substantially improved when the Consent Judgment was amended in 1996. These amendments detailed the municipal wastewater collection and treatment program and created a schedule for compliance with the Clean Water Act. The AJC became part of the Onondaga Lake Management Conference ("OLMC") in 1999, combining the two projects created a consolidated plan for cleanup. That same year, the Water Resources Development Act of 1999 replaced the OLMC with the Onondaga Lake Partnership.

Despite the massive efforts undertaken in the remediation (both under Superfund and Clean Water Act requirements), disregard for the impact of pollution continued. For example, in 1997 when the County was repairing its treatment facilities it flushed the entirety of the days'

worth of raw sewage, seventy million gallons, into the lake and tributaries (Weiner, February 25, 1997: A1). For 48 hours, the untreated sewage ran freely into the waterways during the maintenance. Further, five containers of 15,500 gallons of a powerful bleach formula was mixed with the sewage to “kill germs.” Officials recognized “the waterways could turn brown, but the smell [would] be limited because of water temperatures and the bleach” (Weiner, February 25, 1997: A1). Residents, environmentalists, and anglers expressed concern over the plan. They feared it could lead to more fish kills and that there was no opportunity for public comment prior to the approval of the plan.

The Onondaga Nation filed its land rights action in 2005 (King, 2007: 471). The Nation’s leaders assured people that it would not seek title to the homes of the 875,000 families living on the 40-mile stretch of territory (nearly 4000 acres) in question (McAndrew, 2005: A1). Further, residents of Syracuse, Watertown, Oswego, Fulton, Cortland, and Binghamton were given assurances that they would not be named as parties in the action and monetary damages would not be sought. The Nation desired only that the court declare that the state violated federal and state laws when it purchased Onondaga land. It was the desire that such a declaration would force state officials to give the Nation a better position to play a role in decision-making in the cleanup of environmental hazards in the area. As Chief Jake Edwards stated, “We aren’t saying we’re coming after Syracuse because it’s ours. What are we going to do with Syracuse? We want to be at the table and help the people in Syracuse make it a healthier place to live” (McAndrew, 2005: A1).

The Nation hoped to force the state to properly clean up the Lake and other environmental problems, to enlarge their own untaxed territory by buying land from willing sellers, and to require the state to make payments to the Onondaga for the use of their land

(McAndrew, 2005: A10). The Onondaga's counsel, Joseph Heath, stated that "If New York makes a fair offer to settle the suit, the Onondagas will not expect individual property owners to pay any 'rent'" (McAndrew, 2005: A10). Such a statement was perhaps ill-advised in light of the existing legal precedent regarding the disruptive nature of Indian land claims (McAndrew, 2005: A10).

The massive undertaking of remediating Onondaga Lake was the result of the combined efforts of various governments, the Onondaga Nation, environmental experts and advocates, community members, and other interested parties over decades. Much of the remediation was driven by federal environmental laws, but enforcement was influenced by state and local actions, Native American land claims, lawsuits brought by environmental non-profits, and the sheer determination of those to whom the Lake is significant to bring this resource back to life.

CHAPTER 11

FOUNDATIONS OF NATIVE AMERICAN LAND RIGHTS CLAIMS

In 2005, the Onondaga Nation filed a land rights action in the United States District Court for the Northern District of New York in an attempt to regain control over its traditional territory and to hold polluters accountable. The claim named New York State, the City of Syracuse, Onondaga County, and five corporate defendants (named as polluters), alleging illegal takings and environment damage. Land rights actions like this one seek to restore land improperly taken from the petitioning nations. Such actions seek more than lost acreage because this land forms the basis for the social, cultural, religious, political, and economic life of American Indian Nations (LaVelle, 2001). Naming of corporate defendants, who though accused of causing environmental contamination of Onondaga Lake were not actually requested to remediate it in the Complaint, added a new level of complexity to the Nation's action. The companies' failure to consider the consequences of their actions that stripped Onondaga Lake of value led the Nation to include them to answer for over a century of destruction. Overall, however, the Nation's action sought to address questions of power, particularly who had the authority to negotiate with the Onondaga, the meaning of sovereignty, and how much control the Nation retains over environmental issues on land that was formerly theirs and remains culturally and spiritually significant.

From the beginning, the Onondaga Nation's suit faced a series of obstacles. Property law and land rights are predicated on western legal notions of property ownership that have not been generally adopted into the Haudenosaunee government. Further, as in other land rights actions, the Nation was forced to contend with the Doctrine of Discovery, an antiquated law justifying the theft of indigenous lands. Court decisions such as those handed down in the Marshall trilogy,

as well as other courts' interpretations of sovereignty and jurisdiction were unfavorable to the land rights action. These hardships required that the Nation present the federal court with an innovative claim.

Although the Haudenosaunee have been losing land to the United States and New York since the Sullivan campaign, as Tadodaho Sidney Hill stated, the Onondaga “have never left [their] homelands” (Declaration of Tadodaho Sidney Hill, 2006: 4). With the land rights action ("LRA"), the Nation sought to regain control of the land they lost and to reclaim a voice in its use and restoration. Its basis was simple: New York State seized Onondaga land through a series of agreements that were illegal under federal law. According to Tadadaho Sid Hill, the suit was not filed for the purpose of evicting or disturbing anyone living in the territory, but because "we want to live in peace with our neighbors, and our hearts reach out to [them]. With our lawsuit we can help fight to protect them" (Hill, 2005). The action was intended "to use [Onondaga] rights to this land as a legal and moral force for the environment and the Earth—to clean up polluted areas and protect those areas not yet defiled for generations to come" (Hill, 2005).

For the Haudenosaunee, environmental stewardship traditionally required no formal regulations. An 1870 report of the New York State Legislature recognized the Nation's ability to manage natural resources as “naturally careful and cautious; it is one of their strongest instincts” (NYS Legislature, 1917: 14). The Six Nations have long practiced the idea of "taking only what was necessary and leaving whatever was available for others" (Haudenosaunee Environmental Task Force, 2010). The Nations' leaders hold it as their duty to work for a healing of the land, to protect it, and to pass it on to future generations (Haudenosaunee

Environmental Task Force, 2011). The Haudenosaunee Environmental Task Force (“HETF”)⁷⁰ represents that the Six Nations tried to prevent the environmental abuse perpetuated by the first colonists, warning that they did not act sustainably, but “Like children possessed by a new toy, they the newcomers did not listen” (Haudenosaunee Environmental Task Force, 2010).

Communities have since suffered from the destruction of natural resources. Ironically, modern environmental conservation, restoration, and management practices are frequently based on the indigenous knowledge that was disregarded in the past.

The fight for land rights has been an ongoing struggle between the Haudenosaunee, the United States, and New York State since the latter two existed. While fighting for land rights, the Haudenosaunee have witnessed polluting factories, chemical companies, natural gas developers, and overdevelopment destroy their former territory. Hill has expressed his concern over how the actions of “callous corporations and indifferent government officials” have changed the Lake, “the center of Onondaga way of life and culture, into a toxic pool hostile to fish, wildlife and humans alike” (Hill, 2005). The remediation efforts to address over a century of pollution have left too many toxins in sediments and fail to address all sources of contamination. Further, the Nation has alleged that those initially in charge of the Lake remediation failed to consult the Onondaga during early phases of the planning process, neglecting to seek input from Chiefs, Clan Mothers, or citizens. This lack of involvement was a catalyst for incorporating the environmental aspects of the land rights action (Peace Council, 2010b).⁷¹

⁷⁰ In 1992, the Grand Council established a Haudenosaunee Environmental Task Force (HETF) to identify environmental problems in their communities and work to find solutions (HETF, 2010).

⁷¹ The DEC came to the Longhouse in 2004 with a Proposed Remedial Action Plan for Onondaga Lake, scheduled to be presented days later. The Nation’s request for a delayed Record of Decision to provide it

Claims like the Onondaga Nation's that implicate corporate defendants for environmental transgressions may serve as an alternative venue to raise environmental justice concerns.

Seeking redress in a land rights claim, in part for the purposes of gaining a more prominent role in environmental decision-making, is a novel approach to addressing injustices and distributional disparities. Win or lose, such an action may contribute to creating a comprehensive strategy to in challenging environmental injustices, giving claimants leverage by bringing attention to issues.

The foundation of the Nation's claim, however, was that the lands were illegally acquired.

The Broad Foundation for Native American Land Rights Claims in the United States

An overwhelmingly strong desire to own property, combined with the commodification of natural resources and a general disregard for environmental health, has resulted in the displacement of Native Americans and destruction of habitat throughout American history. For centuries, tribes were forcibly relocated as their territory was often obtained in unfair, sometimes illegal land cessions (Sutton, 1985: 4). Agents of the United States alone are estimated to have purchased nearly ninety percent of the land in the forty-eight contiguous states employing treaties and agreements (Hagen & Cobb, 2012: 17). The percentage of land that remains in Native American hands is astoundingly small. Approximately 60 percent of U.S. land is privately owned, 29 percent by the federal government (mostly in the western states), and nine percent by state and local governments (Nickerson, Ebel, Borchers, and Carriazo, 2001: Table 12). The majority of acreage in private holding, around 89 percent, is rural and agricultural land. Indian trust land, managed by the Bureau of Indian Affairs, accounts for only about two percent. Native Americans (including Native Alaskans and Native Hawaiians) own only eight percent of

the opportunity to give ample input was denied. This effectively prevented the Nation's consulting in the decision-making process. Fortunately, during the course of the process, shifts in management of the Superfund remediation allowed for improvement in the Nation's participation in the process, though not before the land rights action was filed.

the privately held land or only .07% of the total land base (2007: Table 12).

The special significance of land to Native Americans makes its loss particularly difficult. Justice William Brennan's dissent in *Lyng v. Northwest Indian Cemetery Protective Association* explains that "Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being" (485 U.S. 439, 460 (1988)). It has been further noted that topography is used to plot the narratives of stories tied to religion, culture, and history (Foer, 2011: 97). With such close ties between story and landscape, the taking of land results in a loss of homes and mythology. Because their land is not fungible, the dislocation of Native Americans from their land becomes much more egregious, and the need for its return that much more important.

Land rights actions like the Onondaga Nation's are complex undertakings in which federal, state, and tribal governments argue over negotiated treaties and agreements arranging for the transfer of land. Although some agreements are legally valid, far more were arranged outside the confines of the law. The latter often resulted from state and federal disputes over authority as well as from individuals falsely representing their authority to negotiate agreements. One of the foundations of a land rights action, therefore, rests upon how the property came to be owned. Property law scholar Carol M. Rose notes "any chain of ownership or title must have a first link. Someone has to do something to anchor that first link" (Rose, 1985: 73). The links (or acquisitions) that follow must be lawful.

That one may own property and do with it whatever they wish is one of the fundamental

rights outlined in the United States Constitution.⁷² William Blackstone, an eighteenth century English jurist, defended the necessity of ownership and control of property, explaining no one could be expected to improve the land if another person could come and freely take the fruits of his labor (Blackstone, 1893: 2).⁷³ English colonists “brought with them, as their inheritance . . . certain guarantees of the rights of life, liberty, and property” (*Hurtando v. California*, 110 US 516, 539 (1884) (Harlan, J., dissenting)). Federal laws, which favor individual rather than communal rights, have evolved to procure, develop, and much later, protect the land. Such concepts of ownership and property are virtually non-existent in Native American traditional philosophy where the right to use the land was communal and ownership unheard of. These conflicting concepts were often used to justify taking indigenous lands. In instances like the remediation of Onondaga Lake, the proper application of the law and the equitable involvement of stakeholders in the remediation process requires an understanding who is guaranteed what rights (from possession to consultation), specialized knowledge regarding land tenure, sovereignty, the federal trust responsibility, and the Doctrine of Discovery.

Establishing Ownership

United States property law is strongly rooted in the theories of Englishmen, traceable back to the Magna Carta, and often evolved from the English common law. The Magna Carta

⁷² Note that Americans are not the only group who find this a necessity. Article 17 of the Universal Declaration of Human Rights states: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property" (UDHR, Art. 17).

⁷³ Blackstone noted at what would later be referred to as the “tragedy of the commons” in his *Commentaries*, first published in 1753: Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other (Blackstone, 1893: 4).

asserted the principle that the government could not impose laws at will that deprive people of liberty or property. Such undertakings were wrongs not only against the individual but against society at large (Hume, 1817).⁷⁴ It also prevented the government from confiscating or excessively regulating private property and even sought to reverse arbitrary land takings stating that if anyone “has been dispossessed or moved by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him” (Siegan, 2001: 9). Further, it promised the government would not again deprive men of their lives, liberties, or properties unless required by existing law and then only subject to fair procedures.

Later philosophers, like John Locke, believed ownership vests in the individual who mixes his labor with the land. In his mind, “[God] gave it to the use of the industrious and rational, (and labor was to be his title to it)” (Locke, 1980: 14). Locke believed that improvements that would “remove [property] out of the state of nature” required that the land be developed through traditional European farming practices. He considered the practice of Native Americans holding lands in common as contrary to natural rights, explaining that “The fruit . . . which nourishes the wild Indian, who knows no enclosure, and is still at tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life” (Locke, 1980: 12).

Locke believed in ownership, but he did not condone excess; rather, he accepted ownership in the amount required for support “keeping within the bounds, set by reason, of what might serve for his use.” Locke’s *Treatise on Property* states: “. . .whatever is beyond this, is

⁷⁴ Hume says of the changes in thought: “Acts of violence and inequity in the crown, which before were only deemed injurious to individuals, and were hazardous chiefly in proportion to the number, power, and dignity of the persons affected by them, were now regarded, in some degree, as public injuries, and as infringements of a charter, calculated for general security” (Hume, 1985:487-88).

more than his share, and belongs to others” (Locke, 1980: 13). Logically, the vast swaths of land taken from Native Americans by state and the federal governments and redistributed to individuals in parcels far exceeding the size necessary to sustain a family were not what Locke envisioned.

William Blackstone also contributed to the English common law of property by addressing what “it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before generally belonged to everybody, but particularly to nobody” (1893: 8). Blackstone pronounced an absolute right of property that “consists of the free use, enjoyment, and disposal of all [an owner’s] acquisitions without any control or diminution, save only by the laws of the land” (Blackstone, 1893). He asserted that that the government could not take private land for public use without compensation, and then only to serve some public purpose (Siegan, 2001: 34).⁷⁵ Both the ratification of the Constitution in 1788 and the Fourteenth Amendment in 1868 granted protection for property rights identical to those expressed by Locke and Blackstone (Siegan, 2001: 5).

The Constitution, Bill of Rights, and Fifth and Fourteenth Amendments confirmed and broadened these principles (Siegan, 2001: 9). In the United States, the constitutional right to property established by the Fifth and Fourteenth Amendments, prohibiting federal or state governments from depriving any person of life, liberty, or property without due process of law.

⁷⁵ Blackstone’s theories concerning trespass and private nuisance followed the example set forth by Coke, but also extended to those situations in which an individual’s actions in nuisance deprived an owner of all or a portion of his property—in particular he addressed the flooding of another individual’s land by building a structure on your own land and the stopping or diverting of surface water that would run to another person’s property (3 Blackstone, Commentaries, 217). Injury sustained by a property owner whose land is flooded by government actions or who is deprived of water as a result of diversion created by the government would rise to the level of a taking requiring compensation (3 Blackstone, Commentaries, 220).

From the English common law, the United States common law adopted the concept that possession (or occupancy) was the defining parameter of ownership. Common laws addressing activities from fox hunting⁷⁶ to the capture of groundwater⁷⁷ have been decided on the basis of interpreting possession, each requiring some demonstrable act or statement—a declaration of one’s intent to appropriate (Rose, 1985: 77; Blackstone, 1893: 6).

Early non-Native land claims cases attempted to clarify the term possession. In *Brumagim v. Bradshaw*, the claimant argued he had constructed a fence and pastured livestock on the property in question (*Brumagim*, 1870: 30, 41). His opponent argued the fence was constructed improperly, leaving access to the property available. He further argued that pasturing cattle was not a suitable use for property so close to a city, making it unclear that the claimant possessed the land (*Brumagim*, 1870: 51). The court considered the suitability and clarity of the use as notice of possession and determined “actual possession of land can only be taken by such open, unequivocal and notorious acts of dominion as plainly indicates to the public that he who performs them has appropriated the land and claims the exclusive dominion over it (Deering, 1895: 2293; *Brumagim*, 1870). Following Locke’s precedent, first possession rewards the individual who communicates his claim through labor—the labor being the act of speaking clearly and distinctly about one’s claims to property (Rose, 1985: 82). Adverse possession reinforces the idea that individuals claiming ownership must clearly assert their right to a

⁷⁶ *Pierson v. Post* (3 Cal. R. 175 (N.Y. Sup. Ct. 1805)) considers the ownership of a fox during a hunt. Post, in the midst of hunting, had the fox in his sight when another hunter killed the fox and ran off with the creature. Post sued for the value of the fox on the theory that his pursuit of the animal had established a property right to it. The court disagreed, noting that the fox must go to the individual who killed or trapped it, thus placing it in “certain control” giving rise to possession (178). This required a “clear act” that would make the world understand that the pursuer had “an unequivocal intention of appropriating the animal to his individual use” (178). This has been known as the “clear act” theory of possession.

⁷⁷ For water to be in possession, it must be captured. *Forbell v. City of New York*, 164 N.Y. 522 (1900).

property.

Native Americans and Property Ownership

Because the foundations of U.S. property law establish that ownership requires a clear communication of occupancy and rewards useful labor, no question should ever have existed as to whether the Six Nations owned the land that became New York State. The Haudenosaunee and their ancestors had clearly improved the land long before the first Europeans arrived (Bradley, 1987: 9). Long-term occupation of specific sites began in Central New York around 1000 AD during the late Woodland period prior to the formation of the Iroquoian culture (Bradley, 1987: 9). Owasco and Cabin Creek phases practiced subsistence based on the cultivation of corn, beans, and squash supplemented by fishing, hunting, and gathering (Tuck, 1971: 324). Large palisade-enclosed villages were constructed, connected to satellite developments via complex trail systems to cultivated fields.

The Haudenosaunee's claim to their territorial lands is deeply rooted. Onondaga Canasatego explained "that long before One Hundred Years our Ancestors came out of this very Ground, and their Children have remained here ever since . . . the Lands belong to us long before you knew anything of them" (Venables, 2011: 19).⁷⁸ Based on Locke and Blackstone's theories and common law notions of possession, Native American ownership should be easily inferred from lands improved by villages and other structures, trail ways, and cultivated crops. Based on western legal theory, this would seemingly have made the Haudenosaunee the clear owners.

The Haudenosaunee, however, had no interest in owning the land, at least not in the same way as those subscribing to the theories of Locke. Francis Leupp, an early twentieth-century Commissioner of Indian Affairs, explained the conflicting philosophies, stating, "These

⁷⁸ This history of the Covenant Chain was delivered to representatives of Pennsylvania, Maryland, and Virginia at a meeting held in Lancaster, Pennsylvania on June 26, 1744 (Venables, 2011: 19).

socialistic or communistic dreams [of the Haudenosaunee] were dispelled when the Caucasian invader pushed his way across the frontier . . . Indian policy for our government lay the philosophic premise that civilization has always gone hand in hand with individual landholding” (Leupp, 1910: 24). Secretary of the Interior H.M. Teller further expounded on the ideas of private property rights among Native Americans:

The right of property, as recognized by an Indian, is the right in his clan. All right to the soil and the productions thereof inhere in the clan, and he who takes this land in severalty, or cultivates the common soil to the exclusion of others, is guilty of a crime against Indian society. (New York State Indian Commissioners, 1883: 9)

European settlers viewed this common ownership as primitive. They argued that civilized people utilize land for farming; that every Indian should be a farmer was the government’s duty (Leupp, 1910: 24). Morgan referred to ownership as the next step towards the improvement of the Six Nations’ way of life, claiming that when they had the stability associated with being agriculturalists, they could then progress towards dividing their lands among the members of each nation. This, coupled with the power of alienation, would “give to them that . . . ambition which separate rights of property are so well calculated to produce” (Morgan, 1962: 455).

The desire to possess property, justified by the opinion that the Haudenosaunee were incapable of managing their land without private ownership, in part justified large land acquisitions. Because ownership was a foreign concept, the Haudenosaunee were manipulated and forced to divest their homeland in return for money and provisions that nowhere matched the value of what they lost.⁷⁹ Onondaga Chief Oren Lyons believes viewing property as an input and not an asset is unsustainable, and therefore bound to fall, because it is against natural law

⁷⁹ The Americans were not the only society forcing their land ethic upon the Haudenosaunee, by virtue of the Indian Act the Canadians, their lands which were are one time held in common, were assigned to individuals who held their allotments in fee simple, subject to certain restrictions or the power of alienation (sales could only be made to another Indian on the Reservation and only upon the permission of the Chiefs in Council) (Chadwick, 1897: 57).

(Lyons, 1982: vi). Unfortunately, the notion that land is a resource to be exploited has deep roots in western legal history and its continued strength gives little indication that Lyons will prove correct.

Doctrine of Discovery

The Doctrine of Discovery, another policy used to deny land rights claims and justify taking indigenous lands, traces back farther. Discovery dictated that “lands not occupied by any person or nation, or which were occupied but not being used in a fashion that European legal systems approved were considered to be empty and waste available for Discovery” (Miller, 2008: 21). The property right gained was not absolute title, but a preemptive right. This left indigenous people physical possession but restricted rights of alienation (Miller, 2008: 11). The Catholic Church was initially responsible for this concept, asserting universal papal jurisdiction and a divine mandate to care for the world and prevent any violation of the church’s definition of natural law. This created a quasi-legal authority to establish a Christian commonwealth (Miller, 2008: 12).

Philosophers in later centuries continued to promote Discovery. During the 1500s, some thought was given to the idea that actual occupation or current possession was needed to perfect title, but the basic concept of the doctrine remained the same (Miller, 2008: 18). Vattel, in his 1758 work *The Law of Nations of the Principles of National Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, reasoned that Europeans could lawfully take possession of whatever land they needed, asserting that “Any area not claimed by a Christian prince belongs to any other Christian prince whose representatives could lay claim” (Vattel, 1872: 99). This was applied to “erratic nations” in the New World—indigenous people who occupied more land than they needed, and by virtue of their “unsettled habitation,” had no “true legal possession” (Vattel,

1872: 99).

Others spoke out against the Doctrine of Discovery, believing indigenous people had rights to their land and sovereignty. During the 16th Century, Brother Franciscus de Victoria in *On the Indians Lately Discovered* argued that indigenous people could not be barred from property ownership by reason of their beliefs, nor could Christians seize goods and lands by virtue of theirs (de Victoria, 1917).⁸⁰ He rejected the idea that either an Emperor or a Pope had the legal authority to exercise jurisdiction over the Indians. Indigenous populations, he argued, had their own “polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason” (de Victoria, 1917: 1532). Indigenous people, in peaceable possession of their land, could not reasonably be “despoiled of their property on the ground of their not being true owners” (de Victoria, 1917: 1531). Discovery alone could not confer title on interloping Europeans “any more than if it had been they who had discovered us” (de Victoria, 1917: 1531). He criticized the doctrine as little more than an “attempt to put a patina of legality on the armed confiscation of almost all the assets of the people of the New World” (Miller, 2008: 12). Instead, de Victoria believed that indigenous people should be considered land owners and their possession remain untouched. Although some other sixteenth, seventeenth, and eighteenth-century legal scholars concurred, the overwhelming hunger to acquire property meant that the idea that indigenous people lacked rights to property or governmental status prevailed (Cohen, 1932: 15).

European nations, notably the English and French, justified asserting property rights over

⁸⁰ Cohen finds de Victoria responsible for establishing the “foundations of modern international law” and in helping to define issues of equality, tribal self-government, federal sovereignty in Indian affairs and governmental protection of Indians (Cohen, 1982: 52).

indigenous land as well as governmental, political, and commercial control over indigenous people based on Discovery (Miller, 2008). England based its claim on Cabot's exploration of the North American coast from 1496 to 1498, arguing a superior right to those of the Spanish and Dutch (Miller, 2008: 17). France claimed rights in the United States and Canada by virtue Louis XIII's 1627 claim of "newly discovered lands" (Miller, 2008: 18).

Despite the justification of Discovery for land acquisitions, there were colonists who desired peaceable relations with the Native Americans because of their military strength, the need for trade relationships, the desire for land, and the idea that survival required a "minimum of friction with the tribes" (Cohen, 1982: 16). Befriending neighbors was also part of a strategy for holding competing nations at bay, using deeds of purchase from the Indians to preempt competing land claims (Cohen, 1982: 17). Governments and businesses sometimes tried to engage in "fair" dealing with the Indians. For example, the Dutch West India Company, under the orders of the States General of the United Netherlands, as well as the New Netherlands and England, required tribal consent to enter into land or trade agreements (Cohen, 1982: 15). Massachusetts's general court centralized acquisitions by 1634, and by the mid-eighteenth century eleven of the colonies including New York enacted similar laws. Sadly, many colonial laws remained steeped in the Doctrine of Discovery, disregarding sovereignty by exercising a preemptive right to control and regulate sales of Indian lands and asserting control over trade and commerce (Miller, 2008: 26). The United States government continues to invoke the Doctrine of Discovery as a justification for denying land claims (*City of Sherril v. Oneida Nation*, 544 US 197 (2005)).

Sovereignty

While Discovery provided a justification for taking land, the United States government's

selective interpretation of the concept of sovereignty as applied stripped the tribes of their ability to contest the inequitable doctrine. Chief Justice John Marshall articulated the confusing notion of Native American sovereignty as compared to other notions of the concept, stating “The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence... marked by peculiar and cardinal distinctions which exist nowhere else” (*Cherokee Nation v. Georgia*, 1831). Tribal laws governing members and lands are numerous, and the addition of legal issues raised by federal and state statutes, treaties, and caselaw make the subject incredibly complex. Further, environmental remediation and environmental justice take on a somewhat different character in Indian Country, complicated by the additional element of sovereignty.

To claim sovereignty as a foreign state is to assert the "ability and willingness to exercise the supreme powers of government" (Fairbanks, 1995/1996: 141). Varying degrees of sovereignty have been attributed to Native Americans by scholars and governments. Colden's nineteenth-century *History of the Six Nations* recognized each Nation as an "absolute republic," governed in all public affairs by its own Sachems or old men (New York State Indian Commissioners, 1883: 5). He took note of the respect afforded the Nations in regard to their reputation among the French and English for their form of government. Morgan's less favorable interpretation of Haudenosaunee sovereignty offered that “the events of their decline became interwoven with our civil affairs” (Morgan, 1962: 54). Morgan believed that the Haudenosaunee had “yielded up their sovereignty, from the rules of the land” leaving them as dependent nations “swelling under the protection of the government which displaced them” (Morgan, 1962: 54). In his 1851 writing he contended that “The destiny of the Indian is extermination” (Morgan, 1962: 457). In 1889, historian Lyman Draper called the idea of sovereignty a “fiction,” and claimed if

the Nations were even ever entitled to exercise sovereign powers, they were no longer. Draper called tribal governments “ignorant and corrupt show and pretense” that should have no recognition (Draper, 1889: 41).

Native American sovereignty, as applied by the federal government, is not as broad because the nations are, to some degree, controlled by the federal government. The federal government, through Congress and with the support of federal courts, has also restricted the power of Native Americans. For example, the Bureau of Indian Affairs controls health, education, and natural resources on trust lands (i.e. leasing forestland, water-power sites, or mineral leases) (Upton, 1936: ii). Federal Indian policy, although constantly evolving, has always entailed some degree of limiting sovereignty, for example, by pushing assimilation; asserting control over treaty-making; allotting lands; forcing citizenship; and promoting the adoption of constitutions.

Although the United States has always recognized at least some degree of tribal autonomy, federal authority to address sovereignty arises from the Constitution through Congress’s power to regulate commerce with the Indian tribes created by the Indian Commerce Clause (Article I, §8, Clause 3). The Supreme Court has also recognized that the legislative branch has an intrinsic power to deal with the Indian nations residing within the borders of the United States. The authority to treat with Indian tribe is an Executive one that comes from Article II, §2, allowing agreements to establish everything from peace to physical boundaries (Prucha, 1994). Treaties between Indians and other nations prior to the establishment of the United States can be binding as well. Nations often rely upon these documents to support their arguments for self-determination as well as land claims. The power to treat with Native American Nations, which had been used to secure tribal acquiescence to the demands of an ever-

growing nation, ended in 1871 when Congress passed legislation stating that “no Indian nation or tribe [would be recognized] as an independent nation, tribe, or power with whom the United States may contract by treaty (25 U.S.C. Ch. 3: Contracts and Agreements with Indians, §71).

Federal courts have clarified the concept of Native American sovereignty. The Supreme Court decisions referred to as the "Marshall trilogy" made a great impact on Federal Indian Law, establishing the basis for interpreting federal Indian law and defining tribal sovereignty. In the first of these cases, *Johnson v. McIntosh*, the Court held that Indian tribes could not sell land to private parties without the consent of the federal government (1823). Justice Marshall reasoned that according to the Doctrine of Discovery, European nations had assumed "ultimate dominion" over formerly tribal soil during the Age of Discovery. As a result, Native Americans lost "their rights to complete sovereignty, as independent nations," retaining only a right of "occupancy" (*Johnson v. McIntosh*, 1823: 574). Marshall asserted the rights from Discovery associated with John Cabot's charter from England, were passed on to the United States as successor to the right of "discovery," thus acquiring the power of "dominion" over the land after the Revolutionary War (*Johnson v. McIntosh*, 1823: 587).⁸¹ *Johnson v. McIntosh* and the Marshall court disregarded any possible preexisting Indian rights to the land. Justice Joseph Story later supported Marshall's opinion, adding: “The title of the Indians was not treated as a right of property and dominion, but as a mere right of occupancy. As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations” (Story, 1833: 550).

Cherokee Nation v. Georgia (1831), the second case in the Marshall trilogy, cemented the concept that Indian Nations do not possess the same type of sovereignty as other foreign

⁸¹ Marshall also considered the practices of Spain, France, Portugal, and Holland, all of which based their territorial rights upon the doctrine of discovery.

governments. *Cherokee Nation* addressed the Nation's standing to sue the State of Georgia in federal court under diversity jurisdiction, the jurisdiction of the federal courts to hear cases between citizens of different states or citizens of a state and an alien (Black's Law Dictionary, 1990: 477). The Court ruled that federal jurisdiction did not exist because the Cherokee and all Native American governments exist as "domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembled that of a ward to his guardian" (*Cherokee Nation v. Georgia*, 1831: 17). Native American sovereignty is, therefore, subject to limitation because these Nations exist within the geographical boundaries of the United States, but are not "foreign."

The declaration of Native Americans as "domestic dependent nations," provided the legal basis for the trust relationship between the United States and the Indian tribes. Inherent in this concept is a presumption that Native Americans are incapable of managing their affairs. This "trust" has served as the justification for many federal and state actions that have intruded on and diminished tribal sovereignty. Marshall supported the argument in *Cherokee Nation* by claiming foreign nations believed that the Native Americans were "completely under the sovereignty and dominion of the United States," and believed that any attempt to acquire lands or form political connection with them would be considered an act of hostility (*Cherokee Nation v. Georgia*, 1831: 18). Over a century later, the Court in *Board of County Commissioners v. Seber* would ironically attribute the paternalistic guardian/ward relationship in part to the hardship created by the loss of land (*Board of County Commissioners v. Seber*, 1943: 715). This "unique obligation" and "special relationship" between the federal and tribal governments has been used to justify

many other elements of federal Indian law (*Martin v. Mancari*, 1973: 552, 555).⁸²

In *Worcester v. Georgia*, the final case in the Marshall trilogy, the Court addressed the extent of state authority to impose criminal penalties within the borders of a reservation, holding that Georgia laws could have no effect in Cherokee territory (*Worcester v. Georgia*, 31 U.S. 515 (1832)). This was because the Cherokee Nation was “a distinct community, occupying its own territory, with boundaries accurately described,” and Georgians had no right to enter absent the assent of the Cherokee, in conformity with treaties, or by some acts of Congress (*Worcester v. Georgia*, 1832: 561). Pursuant to this decision, states are also intended to be prohibited from exercising their regulatory or taxing jurisdiction on Indian territory.

Ex Parte Crow Dog reaffirmed the idea of tribal sovereignty established in *Worcester v. Georgia*, this time addressing federal authority. Here, the Court overturned a federal criminal conviction of a Native American who had murdered another Native American on reservation land (109 U.S. 556 (1883)). The Court reasoned that dealing with such an offense was an attribute of tribal sovereignty that had not been specifically abrogated by any act of Congress. Congress responded by implementing the Major Crimes Act in 1885 (18 U.S.C. 1153). Under this act, seven major crimes,⁸³ which if committed by an Indian in Indian country, would fall within federal jurisdiction regardless of the victim. The Major Crimes Act was an intrusion into the internal sovereignty of the tribes in that it deprived them of the right to try and punish serious offenders on their own land. The theory underlying it was that tribes were not competent to deal with serious issues of crime and punishment.

⁸² The federal trust responsibility has been held to constitute a limitation on executive authority and agencies’ ability to administer Indian affairs. See for example, in *United States v. Creek Nation* (1935).

⁸³ This included murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny (18 U.S.C. 1153).

United States v. Kagama upheld the Major Crimes Act, concluding that although the statute was outside Congress's commerce power, it fell within the scope of the government's fiduciary responsibilities: "these Indian tribes are the wards of the Nation (118 U.S. 375 (1886)). They are communities dependent upon the United States . . . From their weaknesses and helplessness... there arises the duty of protection, and with it the power" (1886: 384).⁸⁴ The impact of the Marshall trilogy and subsequent decisions in *Crow Dog* and *Kagama*, constituted a substantial diminution if not abject elimination by the federal government of Indian sovereignty. These principles have continued to guide the Court in its interpretation of federal, state, and tribal authority (*City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)).

The powers vested in Indian tribes are not, by and large, delegated powers granted by acts of Congress, rather, they are inherent or reserved powers. Even with its severely limited interpretation, the federal government recognizes that Indian nations' sovereignty provides for some degree of power to create, regulate, and assume primacy over environmental issues on reservations. This recognition is evident in the federal treatment of Indian tribes as states under numerous provisions of federal environmental and heritage resource laws (Haudenosaunee Environmental Task Force, 2010).

The Haudenosaunee have always held fast to the notion that they are not subject to the authority of federal or state governments (Grand Council, 2002: 16). Despite the federal government's limited acknowledgement of their authority, the Six Nations have asserted their sovereignty by continuously operating under their own laws with their own government since the

⁸⁴ For more information on guardianships, see *LaMotte v. United States* (254 U.S. 570, 575 (1921)) granting Congressional power to modify statutory restrictions on Indian land is an "incident of guardianship" and *Cherokee Nation v. Hitchcock* (187 U.S. 294, 308 (1902)), holding there is a Congressional power to "administer upon and guard the tribal property."

arrival of the Dutch. They live on their original territory, never adopted the concept of citizenship, maintain a strong government and constitution, and continue to hold themselves out to the world as a sovereign nation. Despite this assertion, federal and state government actions indicate a refusal to recognize sovereignty. A late nineteenth century account of the New York State Indian Commissioners indicated that “they have always been and are still considered by our laws as dependent tribes governed by their own usages and Chiefs, but placed under our protection and subject to our coercion so far as public safety required and no further” (New York State Indian Commissioners, 1883:19). Further, in *Hastings v. Farmer* the Court of Appeals noted of the rights of the Indians in New York State: “Each Indian tribe has been uniformly regarded as an independent sovereignty; and yet, in its weak and dependent condition, as the subject of protecting care” (New York State Indian Commissioners, 1883: 24).

Sovereignty and Jurisdiction

Questions of sovereignty have created barriers to Native Americans’ access to federal and state courts. International law consistently provides that the courts of a sovereign are available only at the discretion of the sovereign (Robertson, 2006: 2). At the state level, legislation has demonstrated a limited willingness to allow the members of Indian Nations access to the New York State court system. After the Revolutionary War, specialized state courts were created to resolve disputes between Indians and non-Indians when the latter interfered with possession of recognized reservation lands (Robertson, 2006: 2). Almost immediately, the state began to seize powers for itself that belonged to the federal government as state appointments of trustees, agents, peacemakers, and attorneys restricted the rights of the Nations to bring their own actions.

The first such case involved Native Americans living at Brothertown and New Stockbridge. In 1791, New York State legislation authorized Native American nations to

appoint trustees to bring actions for trespass on their behalf (Act for the Relief of the Indians Residing at Brothertown and New Stockbridge, 1791 N.Y. Laws 212; Robertson, 2006: 3). Between 1792 and 1843, the legislation was amended and new laws enacted that took advantage of the nations. In 1796 the state altered the law, allegedly to protect the Indians from “impositions and losses from the ignorance of the laws of this State and of the proper means of seeking redress for injuries” (Act for the Relief of the Indians Who Are Entitled to Lands in Brothertown, 1706 N.Y. Laws, 655, 657; Robertson, 2006: 3). To guarantee this, the Governor appointed an attorney to advise the Native Americans in controversies between members and outsiders and bring actions on their behalf. This agent had authority to maintain actions even where not directed to do so by the individual(s) to whom the land was assigned (Act for the Relief of the Indians Who Are Entitled to Lands in Brothertown, 1706 N.Y. Laws, 655, 658; Robertson, 2006: 4). In 1797, in anticipation of conflicts with other Nations, New York enacted another such law, “An Act Relative to the Lands Appropriated by this State to the Use of the Oneida Onondaga and Cayuga Indians,” appointing agents for negotiating the sale of tribal lands (1793 N.Y. Laws 454; Robertson, 2006: 4). Further, “Peacemakers” were given authority to sue for the unlawful taking of timber from reservation land (Robertson, 2006: 5).

New York continued to undermine Haudenosaunee authority in choosing attorneys and agents and restrict their ability to bring action on their own behalf (Robertson, 2006:10).⁸⁵ In 1806, the Onondaga Nation petitioned the legislature to appoint an attorney to “commence and prosecute all such actions, for them, as . . . necessary and proper” (1806 N.Y. Laws 601: 604). When the Onondaga Nation’s claims continued to go un-litigated, it delivered a complaint to

⁸⁵ A decade after the state was directed that the federal government alone had authority to deal with the Indians, New York passed another law interfering on the matter of contracts between individuals and the Nations. In an April 4, 1801 “Act Relative to Indians” (1801 N.Y. Laws 364) the state made contracts with the Oneida, Onondaga or Cayuga.

Governor Daniel Tompkins in 1811, requesting that because trespasses and other injuries had gone without action, he appoint a resident agent (For the Appointment of an Agent of the Onondaga Tribe of Indians, 1843 N.Y. Laws 310; Robertson, 2006: 12). In 1825, the law was amended so that governors would make these appointments, but no agent was appointed until 1840 (1825 N.Y. Laws 231; Robertson, 2006: 9).

The New York legislature abolished the position of Onondaga agent in May 1841, leaving them to appeal to the local district attorney in cases of trespass, and “upon security for the payment of the costs of such suit,” could bring an action against citizens of the state, or bring cases to the town supervisors and county judges who could authorize tribal representatives to file suit (Robertson, 2006: 11). This too was short lived, and in 1843, the Onondaga agent was restored in a limited capacity to see that tribal rights and interests were protected, but without specific authority to bring actions on their behalf (An Act for the Appointment of an Agent of the Onondaga Tribe of Indians, 1843 N.Y. Laws 310; Robertson, 2006: 12). With the agent directed to obey the governor, the possibility of the Nation bringing suit to reclaim land was improbable. Generally, laws appointing attorneys and agents by the state restricted Nations’ ability to act on their own (Robertson, 2006: 10; see also *Jackson ex den Van Dyke v. Reynolds*, 14 Johns 335 (1817)).⁸⁶

⁸⁶ The New York court held this in *Jackson ex den Van Dyke v. Reynolds*, where it stated:

We have considered the legislature to have declared those Indians incapable of contracting; and if they cannot make a valid contract for the sale of their individual lands, if they are not amenable to the law upon any of their contracts, and if, upon theses hypotheses, the government has taken them under its protection, and authorized the appointment of an attorney to prosecute and defend all actions brought by or against any of them, it cannot be doubted that the only way in which the intention of the legislature can be effectuated, is to construe the statute as confiding to their attorney the exclusive right to prosecute and defend all actions by or against any of the Indians, whose interests are committed to him... The power of the legislature to restrain these Indians from suing or being defended, except exclusively by the attorney appointed for them, is as

In 1845, the New York Chancery Court in *Strong v. Waterman* determined that tribes had no right to bring actions to eject trespassers though the court could authorize individuals to sue in equity on their behalf to enjoin non-Indians from committing waste or trespass on reservation lands (*Strong v. Waterman*, 11 Paige Ch. 607 (1845)).⁸⁷ *Strong* also allowed for legislative authorization for actions on a case to case basis.⁸⁸ In 1899, in *Onondaga Nation v. Thacher* the state court held that state laws mirrored the federal government's intentions of treating Nations as its wards by trusting their protection to agents (67 N.Y.S. 1027, 1030 (1899)). When the Onondaga Nation attempted to bring a claim, along with three Onondaga individuals, a Seneca, and a Cayuga, to recover unlawfully sold wampum belts, the court dismissed the claim citing a lack of capacity (Robertson, 2006: 17). The Court of Appeals of New York affirmed this decision in 1903 (*Onondaga Nation v. Thacher*, 169 N.Y. 584 (1901), *aff'd Onondaga Nation v. Thacher*, 189 U.S. 306 (1903)). These decisions made plain that absent clear statutory statement, Indian nations possessed no legal authority or capacity to bring suit in state courts (Robertson, 2006: 18).

unquestionable as is the right to prevent them from alienating their lands, or declaring them disqualified from contracting (*Jackson ex den Van Dyke v. Reynolds*, 1817: 335).

⁸⁷ No legal provision has been made for the bringing an ejectment to recover possession of Indian lands. The right of possession is in several thousand individuals, in their collective capacity. Individuals, as a body, have no corporate name by which they can institute an ejectment suit (*Strong v. Waterman*, 11 Paige Ch. 607 (1845)).

⁸⁸ Due to an 1845 law entitled "An Act for the Protection and Improvement of the Seneca Indians, Residing of the Cattaraugus and Allegany Reservations in this State," (1845 N.Y. Laws 146) in 1847 the legislature authorized individual Senecas to maintain and prosecute cases in state courts against other Indians (*Jemmerson v. Kennedy*, 1889). In 1909, the New York Supreme Court would address the jurisdictional question again in *Seneca Nation of Indians v. Jameson* (114 N.Y.S. 401 (1909)), in which they decided that the Seneca Nation could maintain a civil action that was not brought by their appointed attorney. It was later held that the Seneca could maintain an action relating to a promissory note (*Seneca Nation of Indians c. Tyler*, 14 How. Pr. 109 (1857)), and could bring actions for ejectment (*Seneca Nation v. Christy*, 162 U.S. 283 (1896)), both without the work of an agent or an appointed attorney. The same would not be allowed of other Nations who did not benefit from the specifics of the 1845 legislation.

The Onondaga Nation has have had limited success in meeting the state's unclear threshold for approval for bringing actions in state court. For example, in 1940 the legislature gave the Nation one year to file a claim against the Tully Pipe Line Company for injuries arising out of the damage to the soil, trees, and cemetery property on the Onondaga Reservation caused by salt and salt brine from a burst brine pipe (Robertson, 2006: 18). State jurisdiction continued to evolve after World War II. In 1950, Congress extended state jurisdiction to civil claims between Indians or between Indians and other persons except in actions involving land (25 U.S.C. 233). New York State amended its laws in 1953 to reflect this change, providing that "any action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted in any court of the state to the same extent as provided by law for other actions and special proceedings" (1953 N.Y. Laws 1517), giving only individuals the right to bring actions. The state attempted to amend this law to extend to councils, chiefs, trustees, or other governing bodies of Nations to bring land claims relating to lands unlawfully taken prior to 1952, though this overstepped the state's authority as approved by Congress (*Oneida Indian Nation of New York State v. County of Oneida*, 464 F. 2d 916, 924 (2d Cir. 1972)).

Questions of federal jurisdiction also exist: for a case to be heard in a federal court the cause of action must arise under federal law. Constitutional and statutory requirements must be met before jurisdiction can be established. Article III of the Constitution grants federal jurisdiction in cases between states and foreign states (U.S. Constitution, Art. III). The Court held in *Cherokee Nation v. Georgia*, however, that the Cherokee were not a "foreign state" for the purposes of original jurisdiction, leaving Native Americans to seek redress in the lower federal courts (30 U.S. 1 (1831)). This is further complicated by the Judiciary Act of 1789,

which granted courts in New York civil jurisdiction over suits between citizens. Native Americans were not permitted citizenship in the state until 1924. Those refusing citizenship would have no capacity as individuals to sue in federal court; only a Nation would have capacity (Robertson, 2006: 22). Federal courts do possess the authority to hear claims based on federal treaties, statutes, and the Constitution (28 U.S.C. §1331 (2000)), though no federal courts would hold that an Indian land claim raised a federal question for jurisdictional purposes until 1974 (*Oneida Indian Nation of New York State v. County of Oneida* (414 U.S. 661 (1974))).

The Need for an Innovative Environmental Claim

In addition to seeking redress for the illegal acquisition of land, the Nation's land rights action sought to address environmental inequalities. Onondaga Jeanne Shenandoah stated of the action, "One of the responsibilities of our leaders is to preserve the natural world for those yet to be born" (Shenandoah, 2012). Statutory language makes it clear that most of the major federal environmental laws are applicable on reservation lands.⁸⁹ The EPA has also revised many implementing regulations to include provisions relating expressly to Indian reservations and the administration of environmental programs on them. In 1991, the agency issued a document entitled "Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments" reaffirming an earlier 1984 policy. In 1996, the EPA issued a manual on "Working Effectively with Tribal Governments" (EPA, August 1996). Despite these provisions, Native Americans lands have consistently been threatened by extremely serious environmental contamination (Clark, 2002: 410).

⁸⁹ See eg. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-11(a)(1)(1988) (treating tribes as states for certain purposes); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9626 (1988) (treating tribes substantially the same as states for certain purposes); Clean Water Act (CWA), 33 U.S.C. § 1377 (1988) (treating tribes as states for certain purposes); Clean Air Act (CAA), 42 U.S.C. § 7601(d) (Supp. II 1990) (treating tribes as states for certain purposes).

The government's blatant disregard for the special circumstances associated with Native American claims addressing the protection of sacred sites is also illustrated through a series of court decisions. In these, the lack of understanding of land-based religions becomes clear. For example, in *Sequoyah v. Tennessee Valley Authority* Cherokee plaintiffs opposed the Tennessee Valley Authority's (TVA) plans for the construction of the Tellico Dam (1980). Its completion required impounding water in a reservoir that would flood the Little Tennessee River Valley, a sacred place to the Cherokee, that would bury sacred sites deep underwater and deny access to places that were imperative to their religious practices (*Sequoyah v. Tennessee Valley Authority*, 480 F. Supp. 608 (E.D. Tenn. 1979)). Further, the project drew substantial attention because of the presence of the endangered snail darter fish, thus testing the power of the Endangered Species Act. Although the Supreme Court held that construction would violate the latter by destroying the last known habitat of the endangered fish, the district court was not willing to protect the Cherokee interests. Though the court conceded that the land was sacred, that active practitioners of that religion continued to utilize this land, and that its flooding would prevent the plaintiffs from accessing their sacred sites, it ultimately held that the impoundment had "no coercive effect on plaintiff's religious beliefs or practices" (*Tennessee Valley Authority*, 1978: 612).⁹⁰ Eventually, an act of Congress exempted the project from compliance with the ESA for political reasons.

Similar results failing to protect Native sacred sites were reached in *Lyng v. Northwest Indian Cemetery Protective Association*, a challenge to a Forest Service proposal to build a road and permit logging in the Chimney Rock section of the Six Rivers National Forest (485 U.S. 439

⁹⁰ More telling of the court's lack of understanding of the deep significance of the site was the conclusion that "The flooding of the Little Tennessee will prevent everyone, not just plaintiffs, from having access to the land in question" (*Tennessee Valley Authority v. Hill*, 1978: 612).

(1988)). In *Lyng*, the Supreme Court callously stated “Whatever rights [under the Constitution] the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land (1988: 453). Native Alaskan traditional practices were also ignored by the District Court in *Inupiat Community v. United States*, where the Inupiat opposed drilling of the Beaufort and Chukchi seas that would negatively impact their hunting and gathering lifestyle, practices inextricable from their religious beliefs (*Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Ala. 1982), aff’d 746 F.2d 50 (9th Cir. 1984). The court would not recognize the claims because the Inupiat offered no explanation of the religious significance of the hunting grounds or how the proposed development would impact the exercise of their religion.

With these failings in environmental laws and their enforcement, the Onondaga’s naming five non-state defendants in its land rights action presented a novel approach for holding polluters accountable. Environmental suits are filed for reasons ranging from the contamination of streams to the increase in global warming of unregulated greenhouse gas emissions (Martin, 2008). The Supreme Court has also held that non-economic injuries like harm to recreational, conservational, and aesthetic interests are considered “injuries-in-fact” where the plaintiff can show injury, and therefore create standing (*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The prayer for relief in the Onondaga action asked that the purported conveyances of various treaties with the state be declared null and void and that title to the subject land remain with the Onondaga Nation and the Haudenosaunee (Amended Complaint, 2005). The action did not implicate any environmental laws, nor did it call for any action in tort law; rather it only named the corporate defendants as part of the land claim as they were in possession of some of the lands in question at the time.

When the Onondaga Nation filed its first Complaint in 2005, it was engaging in a fray that other Native American nations had already faced with varying (limited) degrees of success. The Nation sought to, among other things, gain recognition of title to and possession of its aboriginal territory, to secure enough revenue and land for economic self-sufficiency, to secure protection for spiritual and cultural sites, and to provide a program for environmental restoration and protection (Onondaga Nation, February 18, 2014). Fighting against state and non-state defendants to regain rights to its traditional territory, the Onondaga entered the United States Court for the Northern District of New York with a legal landscape that would quickly erode as federal courts issued increasingly negative land rights opinions.

CHAPTER 12

THE ONONDAGA IN COURT

The Onondaga Nation filed a Complaint for Declaratory Judgment (“Complaint”) in the United States District Court for the Northern District of New York on March 11, 2005 with authority from its Council of Chiefs and the Council of Chiefs of Haudenosaunee Confederacy (Complaint for Declaratory Judgment, 2005: 3). The Complaint asserted first and foremost that:

The Onondaga people wish to bring about a healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural, and historic relationship with the land... This relationship goes far beyond federal and state legal concepts of ownership, possession, or other legal rights. The people are one with the land and consider themselves stewards of it. It is the duty of the Nation’s leaders to work for a healing of this land, to protect it, and to pass it on to future generations. The Onondaga Nation brings this action on behalf of its people in the hope that it may hasten the process of reconciliation and bring lasting justice, peace, and respect among all who inhabit this area. (Complaint for Declaratory Judgment, March 11, 2005)

The Complaint further alleged that the state unlawfully acquired the “aboriginal property of the Onondaga Nation, so far as it lies within what is known as the State of New York” in violation of federal law (Complaint of Declaratory Judgment, March 11, 2005: 2).⁹¹ Specifically, the pleading addressed the existence of both legal and illegal treaties. The Nation’s territory, it argued, had “never been sold, ceded, or given up by any Indian nation or entity” (i.e., there was a constant chain of title). Ownership was further recognized and secured by the 1768 Treaty of Fort Stanwix with Great Britain and the 1784 Treaty of Fort Stanwix with the United States (Complaint for Declaratory Judgment, 2005: 7). Additionally, the court was asked to consider issues of environmental contamination by five corporate defendants. It was also forced to

⁹¹ This property, running north to south, is bounded by the aboriginal land of the Oneida to the east and Cayuga to the west, from the St. Lawrence River, along the east side of Lake Ontario, then south as far as the Pennsylvania border, from ten to forty miles wide (Complaint for Declaratory Judgment, 2005: 7).

address questions of jurisdiction and standing in the midst of a changing legal landscape in which multiple unfavorable decisions were handed down.

Claim: Illegal Treaties

The first aspect of the Onondaga Nation's claim was to address illegally negotiated treaties. A series of defendants were named, each attributed with wrongfully claiming some interest in or occupying certain portions of the land in question. New York State was named as the "original purchaser." Because the Eleventh Amendment grants immunity to the states from lawsuits by citizens of other states, foreign countries, or citizens of foreign countries in the federal courts, the plaintiffs requested that the state waive immunity in the interest of justice and fairness to the other defendants. The Nation also requested the United States file an identical claim against the state, which would breach any immunity the state might assert (Complaint for Declaratory Judgment, 2005: 4). The U.S. had taken similar actions on behalf of the Senecas, Cayugas, Mohawks, and Oneidas in previous actions. Governor George Pataki was named in his official capacity; in his individual capacity he was accused of acting beyond the scope of his constitutional authority by unlawfully claiming an interest in Onondaga land. Onondaga County and Syracuse were also charged with having occupied and claimed interests in the land in question (Complaint for Declaratory Judgment, 2005: 5).

The Onondaga's primary assertion was that "treaties" negotiated between the state and the Nation, each dealing with differently defined borders, were illegal. The first, negotiated with the state in September 1788 prior to the federal enactment of the Trade and Intercourse Act, would have ceded all of their land to New York State, reserving only a limited tract for themselves. The Lake and one mile of land surrounding it were to be reserved for the common benefit of the Onondaga and New Yorkers for the production of salt (Complaint for Declaratory

Judgment, 2005: 8). Protests from Chiefs and other members of the Nation regarding the proposed 1788 treaty led the state to call a meeting in spring 1790 to resolve the conflicts and ratify the treaty.

On July 22, 1790 the federal government enacted the Indian Trade and Intercourse Act addressing the purchase of Indian lands (1 Stat. 137). It stated that “No purchase, grant, lease or other conveyance of land, 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 conveyance entered into pursuant to the Constitution” (25 U.S.C. 177). New York law and the State Constitution further required that the treaty was not valid until approved by the New York legislature (Act of March 18, 1788, 11th Session, Chapter 85), which did not occur until April 10, 1813 (Act of April 10, 1813, 36th Session, Chapter XCII (R.L.), Section VII). Because the state’s 1788 treaty remained unsigned until June 16, 1790, unrecorded until November 25, 1791, and unapproved until April 10, 1813, long after the ratification of the United States Constitution and the first Trade and Intercourse Act, the Onondaga argued that this conveyance of land was null (Complaint for Declaratory Judgment, 2005: 9). The 1792 treaty negotiations, in addition to being invalid as negotiated after the Trade and Intercourse Act, involved persons falsely claiming authority to represent the Onondaga Nation (Complaint for Declaratory Judgment, 2005: 10).

The Onondaga further refuted a 1795 treaty with the state as invalid for the same reasons. Here, the state claimed the Nation ceded its remaining rights to the land surrounding Onondaga Lake and a strip of land running along Onondaga Creek between the Lake and the northern boundary of the Onondaga reservation.⁹² An additional square mile of land inside the reservation was also set aside for individual use. There were no precise boundary lines outlined

⁹² These redefined borders were drawn as if the territory had been reduced by the prior 1793 “treaty.”

in this agreement (Complaint for Declaratory Judgment, 2005: 11). A fourth treaty negotiated between the state and alleged Onondaga representatives in 1817 conveyed two additional parcels from the reservation (Complaint for Declaratory Judgment, 2005: 11). The final contested treaty was brokered with the state in 1822 more than three decades after the enactment of the Indian Trade and Intercourse Act. Again, the Onondaga alleged that individuals falsely purporting to represent the Onondaga Nation parted with this large swath of the tribe's remaining land (Complaint for Declaratory Judgment, 2005: 12).

The Onondaga insisted that neither they as a Nation nor the Haudenosaunee as a Confederacy ever approved or ratified these treaties, rather, individuals lacking legal capacity or authority over Indian land arranged the conveyances. Further, the alleged treaties were never approved, ratified, or even witnessed by federal representatives, nor were the lands conveyed in compliance with the Constitution or pursuant to an act of Congress (Complaint for Declaratory Judgment, 2005: 13). The Onondaga further asserted that the state knew or should have known the purchases fell outside the scope of its authority and the treaties were not in compliance with the United States Constitution, the Indian Trade and Intercourse Act, the Treaty of Fort Stanwix, or the Treaty of Canandaigua, making these agreements "void, wrongful, illegal, and of no force or effect" (Complaint for Declaratory Relief, 2005: 13). As a result, none of the defendants in the action had any lawful interest in the subject lands. The Nation requested that the conveyances be declared null and void and that the land and title remain the property of the Nation (Complaint for Declaratory Judgment, 2005: 14).

Claim: Environmental Contamination

The Complaint also charged five corporate defendants with occupying or claiming an interest in portions of the subject land. Particular to the Onondaga action is that it also sought to

hold these corporate defendants out as responsible for the environmental and cultural degradation of the land. The charges of contamination were based on the EPA's findings of dangerous levels of mercury, pesticides, creosote, polycyclic hydrocarbons, volatile organic compounds, lead, cobalt, and polychlorinated biphenyls (PCBs) in Onondaga Lake attributable to industrial practices (Hill, 2005).

The first corporate defendant, Honeywell International, Inc., had already been named the responsible party pursuant to CERCLA based on "successor liability" for having acquired the Solvay Process Company and Allied Chemical (Peace Council, 2010). For nearly a century, Honeywell's predecessors polluted the Lake and "filled in extensive Onondaga lakeshore wetlands, covered wide expanses of lake bottom, and constructed huge artificial hills along the lake and tributaries with industrial wastes from soda ash production" (Peace Council, 2010). Estimates of this contamination put quantities of soda ash deposits at six million pounds per day from 1884 through 1986, which amounted to tens of billions of tons of waste deposited over the production lifetime, much of it ending up in Onondaga Lake. The water and sediments of the Lake and its tributaries were also contaminated with toxic, persistent chemicals such as mercury, PCBs, chlorobenzene, and dioxins.

Defendants Clark Concrete Company, Inc. and its subsidiary Valley Realty Development Company, Inc. had an interest in the Tully gravel mine on the north face of the Tully Valley moraine. Clark was a major supplier of concrete to Syracuse and Onondaga County, operating gravel mines at the head of Onondaga Creek on the north face of the moraine (Peace Council, 2010). The company's gravel wash ponds and sediment settling ponds created in the gravel mining process contaminated the Creek. Further, Tully residents and the Onondaga questioned whether the physical integrity of the moraine had been compromised. In addition to the

environmental concerns associated with mining, the Tully Lakes area was of extreme archaeological and cultural sensitivity to the Onondaga Nation as the place where the Peacemaker originated the Haudenosaunee system of condolence and the use of wampum for ceremony and to record history. Ancestral burial grounds also sit in the vicinity of the Clark gravel mine operations near the headwaters of Onondaga Creek (Peace Council, 2010). The Nation was never consulted during the development of the mine. The Complaint alleged that the companies' extractive practices negatively impacted the headwaters of Onondaga Creek, degraded land that rightfully belonged to the Nation, and damaged areas of extreme archaeological and cultural sensitivity. Defendant Hanson Aggregates North America was named for similar damage to the property known as the "Jamesville Quarry" (Complaint for Declaratory Judgment, 2005: 6). The third largest aggregate producer in the world, Hanson's mine sat on the DeWitt-Manlius town line, once home to plunge basin lakes, gorges, and ice caves. It became one of the largest open pit mines in New York State (Peace Council, 2010). Reclamation efforts here have been minimal as the geology continues to be obliterated.

The final corporate defendant, Trigen Syracuse Energy Corporation, is the owner/operator of a large energy cogeneration plant in the Town of Geddes. Trigen burns a combination of coal and plastic/paper waste to produce steam and electricity for local companies. This process emits large quantities of hydrochloric acid and dioxins (Complaint for Declaratory Judgment, 2005: 6; Peace Council, 2010). The coal-burning plant produced emissions in amounts that led Onondaga County's emissions levels to be the fourth highest in all New York counties. Trigen released more pollutants into the air than any other company in the county, and its release rates were rapidly increasing at the time of the suit (Peace Council, 2010).

Questions of Jurisdiction and Standing

On the same day the Complaint was filed, the U.S. District Court issued an Order Reassigning the Case because the nature of the claim precluded the action from being transferred to “any judicial officer residing in or owning any real property in the geographic area constituting the subject matter of this action in view of the perception that it would be a conflict of interest for such judicial officers to preside over the claims” (Order of Reassignment, March 11, 2005).⁹³ Members of the Six Nations at Akwesasne (Kanion’ke:haka Kaianerah’ko:wa Kanon’ses) also immediately disputed the Complaint arguing the court lacked subject matter jurisdiction and the Onondaga council lacked standing (Notice of Jurisdictional Suggestion, March 30, 2005). They argued that although the plaintiff “passe[d] itself off as the indigenous Onondaga constitutional government,” it ceased to be so by subjecting itself to Federal Indian law. Citing “Wampum #58,” “any chief or others persons who submit to laws of a foreign people are alienated and forfeit all claims in the Iroquois Nations” (Notice of Jurisdictional Suggestion, Memorandum of Law, March 30, 2005). The court denied the motion, and jurisdiction remained with the District Court.⁹⁴ This matter was appealed in the Second Circuit Court of Appeals on March 30, 2005, again calling for a rejection order based on lack of jurisdiction. The challengers adamantly stated:

The chicanery is the judicial misrepresentation of law alone that the only way in which the indigenous sovereign can get a remedy is to return to the jurisdiction of the federal court system and federal law, thereby extinguishing the indigenous sovereignty by necessary implication of law alone and equitable estoppel by conduct. (*In re*

⁹³ It is mandated under Canon 3(C)(1) of the Code of Conduct for United States Judges that “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which... the judge knows that the judge, individually or as a fiduciary, or the judge’s spouse or minor child residing in the judge’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding” (2014).

⁹⁴ The Court’s jurisdiction arises from 28 U.S.C. 1331, 1337, 1343 and 1362. Venue fell to the Northern District of New York under 28 U.S.C. 1391(b). The Plaintiff’s standing arises out of the Constitution, the Indian Trade and Intercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834, the Treaty of Fort Stanwix of 1784, and the Treaty of Canandaigua (Complaint for Declaratory Judgment March 11, 2005: 2).

Kanion 'ke:haka Kaianereh 'ko:wa Kanon 'ses:neh, Notice of Appeal, 2005: 1)

This second petition, which argued ejectment as the only constitutional remedy, was denied.

The Changing Legal Landscape

The legal landscape that existed when the Onondaga first filed the Complaint appeared favorable as tribes bringing similar claims had some success. The Supreme Court recognized federal jurisdiction over land rights claims in 1974 (*Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974)). In 1985 it ruled that several defenses, including a statute of limitations, could not apply (*County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985)). District Courts, including the Northern District of New York, held that all time-based defenses were inapplicable to land rights actions (*Cayuga Indian Nation v. Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1991)). Further, one of the largest judgments regarding aboriginal title ever entered against New York State, \$248 million in damages, including 200 years of prejudgment interest, was assessed in *Cayuga Indian Nation v. Pataki* (188 F. Supp. 2d 223 (N.D.N.Y. 2002)). Unfortunately, this would all change drastically in 2005 with *City of Sherrill v. Oneida Indian Nation of New York*, the landmark decision that prompted the reversal of the \$248 million *Cayuga* judgment.

In *Sherrill*, the Oneida purchased land in 1997 and 1998 in what had been part of their original reservation before a treaty with New York in 1805 (*Sherrill*, 2005: 1). The Oneida refused to pay property taxes on the ground that their acquisition of fee title to what was once reservation land revived their sovereignty over the parcels leaving the City no regulatory authority over the property. The Second Circuit, however, applied equitable time-based defenses to ancient possessory land claims, entering judgment for the defendants (*City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197). Justice Ginsburg majority opinion stated:

Given the longstanding distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneida's long delay in seeking judicial relief against parties other than the United States, ... the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. (Sherrill, 2005: 2)

Ginsburg evoked the doctrines of laches, acquiescence, and impossibility in support of determining the Oneida claim inequitable (*Sherrill*, 2005: 21). Laches, based on a desire for fairness, provides that equity aids the vigilant and not those who slumber on their rights.⁹⁵ It is not solely a matter of a delay in time, but a question of the inequity of allowing a claim based on some change in the condition or relations of the property of the parties (*Gallihier v. Cadwell*, 145 U.S. 368, 373 (1892)).

The *Sherrill* court found that, more often than not, federal policy has been to avoid “even a pretense of interfering[ing] with [the] State's attempts to negotiate treaties for land cessions” (Sherrill, 2005: 4). Though the Court conceded that the Washington administration objected to New York's 1795 negotiations to purchase Oneida land without federal supervision, it focused more on explaining the extensive periods of federal Indian policy dedicated to removal, opening reservation lands to white settlers, and moving tribes westward over preserving their traditional territories (*Sherrill*, 2005: 5). By the time the Oneida asserted its first claim for damages against Oneida County the state, county, and municipal governments had controlled the territory for two centuries (*County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) “*Oneida II*”), and the United States government had accepted New York's governing of the land, acquiescing to the validity of the sales to the state with indifference (*Sherrill*, 2005: 14). The Oneida, seeking to regain ancient sovereignty over land “converted from wilderness to become

⁹⁵ Black's Law Dictionary defines laches as “neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity” (Black, 1990: 875).

part of cities like Sherrill,” did not bring an action until the 1970s, and did not propose a unification theory for a tax exemption until the 1990s (Sherrill, 2005: 15). During this extended time, the "longstanding assumption of jurisdiction by the State" created "justifiable expectations" in the people living on the land (Sherrill, 2005: 15). A change in control would seriously disrupt the justifiable expectations of those individuals who had occupied and improved that land over two centuries (again recalling Locke's philosophies). The combination of the extended time, the perceived inequity, and confusion to government and non-Indians would lead to an inequitable result (Sherrill, 2005).⁹⁶

The *Sherrill* Court also applied the acquiescence doctrine, noting that when a party eventually asserts its right to present and future sovereign control over a territory, a court must consider “longstanding observances and settled expectations” (Sherrill, 2005: 18). Finally, the Court concluded the “impossibility doctrine” applied, based on precedent established in *Yankton Sioux Tribe v. United States* (272 U.S. 351 (1926)), noting that “the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences” (Sherrill, 2005: 19). *Yankton* had held it “impossible... to rescind the cession and restore the Indians their former rights because the lands have been opened to the settlement and large portions often are now in the possession of innumerable

⁹⁶ The Oneida brought multiple claims for damages against local governments for wrongful possession, but made no attempt to regain title to the land. The first case, *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974) decision (Oneida I), held that there was federal subject-matter jurisdiction for such claims. The 1985 decision recognized that the Oneida could maintain a federal common-law claim for damages for wrongdoing where the national or state governments were both involved (Sherrill, 2005: 2). The second round of litigation, Oneida II, the Supreme Court rejected various defenses the counties presented that might have barred an action for damages. *Oneida Indian Nation of New York v. County of Oneida*, brought in the Northern District of New York in 2000, was the first claim the Oneida brought where the remedy sought damages and the recovery of land (Sherrill, 2005: 9). The Oneida sought to join approximately 20,000 private land owners as defendants, seeking declaratory relief to eject these landowners (Sherrill, 2005: 10). Based on "practical concerns" and a need to "transcend the theoretical" the District Court excluded any liability against private landowners.

innocent purchasers” (*Yankton*, 1926: 357).

Ginsberg’s opinion that allowing the piecemeal application of sovereignty over the acquired property was impossible as it would create “a checkerboard of alternating state and tribal jurisdiction in New York State [that] would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches” (Sherrill, 2005: 20). She recognized procedure was already in place for the acquisition of lands for tribal communities, taking into account "the interests of others with stakes in the area's governance and well-being" (Sherrill, 2005: 20).⁹⁷

While *Sherrill* recognized that “only Congress can divest a reservation of its land and diminish its boundaries,” it did not consider potentially illegal treaties between the Oneida and the state (*Sherrill*, 2005: 21). Rather, it addressed the Nation’s right to exercise sovereign authority over what was formerly reservation land in light of the extended lapse of time during which state, county, and municipal authority was exercised (*Sherrill*, 2005: 15). Therefore, the decision should not have precluded a positive finding in the Onondaga’s action.

Soon after the Supreme Court’s decision in *Sherrill*, the Second Circuit addressed the state’s appeal in *Cayuga Indian Nation of New York v. Pataki*, concluding that land claims seeking a declaration of title must be dismissed as inequitable due to the “profoundly disruptive” outcomes of such declarations (413 F.3d 266, 274 (2d Cir. 2005)). Under these circumstances, a court must find that laches applies to ancient possessory land claims (*Cayuga*, 2005: 278). Put simply, the *Cayuga* court concluded that the equitable considerations in *Sherrill* were not restricted to cases addressing the revival of tribal sovereignty, but applied to “disruptive Indian land claims more generally” (*Cayuga*, 2005: 274). This Second Circuit decision recognized that

⁹⁷ The Secretary of the Interior is authorized to acquire land in trust for Indian Nations pursuant to Title 25 U.S.C. 465, and set that land aside as exempt from state and local taxation (*Sherrill*, 2005: 21).

the Supreme Court's holding in *Sherrill* “dramatically altered the legal landscape” in land rights actions (MOL in Support of State Defendants Motion to Dismiss, 2006: 20).⁹⁸

In *Cayuga*, a case of an attempted ejectment remedy, the Court found “this type of possessory land claim—seeking possession of a large swath of central New York State and the ejectment of tens of thousands of landowners—is indisputably disruptive” (*Cayuga*, 2005: 274). The Second Circuit went on to say that the decision was not based on the remedy sought (ejectment), but that the other damages sought (declaration of title to the land in question and monetary damages) were also disruptive in nature as “any remedy flowing from this possessory land claim . . . can only be understood as a remedy that would similarly ‘project redress into the present and future’” (*Cayuga*, 2005: 275). Again, the court relied on the period of non-Indian character of the place and people living there, the “impossibility” of returning it to Indian control, and the Cayuga’s “inordinate delay in seeking judicial relief” (*Cayuga*, 2005: 277). The Cayuga’s lawsuit was dismissed by the Second Circuit, who found the claim barred by laches.

Sherrill and *Cayuga* led to a change in the Onondaga’s strategy as they attempted to preemptively strike against laches by distinguishing their action. The Onondaga argued that the lapse of time between the illegal transactions and the land claim were reasonable (First Amended Complaint for Declaratory Judgment, 2005: 15). They added factual issues to the Amended Complaint, indicating that the Nation consistently and diligently pursued its claim, persistently protesting in various forms and forums across the state (Amended Complaint for Declaratory Judgment, 2005). Further, they maintained that the defendants acted in bad faith by deliberately addressing individuals who lacked the authority, deceiving the Nation about the nature of their

⁹⁸ The Cayuga’s claim also asserted a possessory right to former territory, reserved in a treaty with the state in 1789, but then lost in two subsequent treaties in 1795 and 1807 (413 F.3d at 268). Equitable defenses barred the claim. When the state raised an Eleventh Amendment defense, the United States intervened.

transactions, and ignoring explicit federal warnings (First Amended Complaint for Declaratory Judgment, 2005: 16). They pursued this redress despite obstacles such as a "lack of financial resources, lack of access to attorneys, lack of federal court jurisdiction, and an inability to communicate with and understand the English language adequately" (First Amended Complaint for Declaratory Judgment, 2005: 14).⁹⁹ The Nation also justifiably relied on the promises of the United States government that their treaties and federal law would protect them from the unlawful taking of their lands (First Amended Complaint for Declaratory Judgment, 2005: 14). It stressed their continuous cultural, spiritual, and legal connection to the land and the ties that also existed through citizens living in communities throughout the region who never left their former territory (First Amended Complaint for Declaratory Judgment, 2005: 15).

Both state and non-state defendants filed Motions to Dismiss in August 2006, reacting to the momentum created by *Sherrill*, basing their argument on laches, acquiescence, and impossibility (MOL in Support of State Defendants Motion to Dismiss, 2006: 4). The state defendants first moved for dismissal for lack of subject matter jurisdiction and failure to state a claim for which relief could be granted (Federal Rules of Civil Procedure Rules 12(b)(1), 12(b)(6); State-Defendants Notice of Motion to Dismiss, 2006).¹⁰⁰ They argued that the

⁹⁹ Another expert, Lindsay G. Robertson, a Professor of Law, History, and Native American Studies at the University of Oklahoma College of Law, also argued that limitations on access to courts and the absence of specific authorizing legislation, hindered the Nation from suing in New York. Similarly, federal jurisdiction was not established until 1974"(Declaration of Lindsay G. Robertson, 2006: 2).

¹⁰⁰ "Subject matter jurisdiction" is a "court's power to hear and determine cases of the general class or category to which proceedings in question belong" (Black's, 2000: 1425). Courts may only assume power over those claims that the laws of jurisdiction permit. State courts have general jurisdiction, but federal courts are usually of limited jurisdiction, meaning plaintiffs must find a constitutional or congressional grant of jurisdiction to allow the federal court to hear the claim. In the Onondaga's case, there is federal question jurisdiction under which a plaintiff may bring a claim in federal court if it arises under federal law. "Failure to state a claim for which relief can be granted" occurs where there has been a failure to present sufficient facts that demonstrate that any violation of the law has occurred or evidence that the claimant is entitled to any legal remedy.

Eleventh Amendment barred the claim against the state and Governor Pataki (MOL in Support of State Defendants Motion to Dismiss, 2006: 4). Further, absent the existence of a jurisdictional bar, they contended precedent prevented such a “disruptive” claim after a two-century delay.

The state conceded three exceptions to Eleventh Amendment immunity: a waiver of immunity; Congressional action to abrogate immunity through legislative action; or some Constitutional provision by which states forfeit immunity (MOL in Support of State Defendants Motion to Dismiss, 2006: 6). The state had neither waived immunity from suit nor consented to be sued (MOL in Support of State Defendants Motion to Dismiss, 2006: 6).¹⁰¹ Further, the Nation's argument that entering into the disputed treaties signified an implicit waiver was argued untenable. Finally, the Nation found no state statutory or constitutional provisions waiving immunity, nor was there any “explicit language of Congressional intent,” or waiver of immunity through Congress’s enacting legislation pursuant to Article I of the Constitution (MOL in Support of State Defendants Motion to Dismiss, 2006: 8; see also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996)).¹⁰² Specifically, neither the “treaties” negotiated with the Nation nor the Nonintercourse Act provided Congressional intent to waive immunity (MOL in Support of State Defendants Motion to Dismiss, 2006: 9).

¹⁰¹ A waiver need not be a specific statement. It can arise out of state statute or constitutional provision, by waiver of immunity, through litigation, or receipt of federal funds, but it must be explicit (MOL in Support of State Defendants Motion to Dismiss, 2006: 7). The Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (527 U.S. 666, 680 (1999)) emphasized the explicitness requirement, stating “The whole point of requiring a ‘clear declaration’ by the State of its waiver is to be certain that the State, in fact, consents to a suit.”

¹⁰² The Supreme Court in *Seminole Tribe* wrote:
We reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitutions vest in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996)).

The state defendants' Motion also asserted the claim against Governor Pataki, a functional equivalent of a suit against the state, was barred by the Eleventh Amendment because such a suit impacts vital state interests (MOL in Support of State Defendants Motion to Dismiss, 2006: 12). Precedent for this action was created in *Ex Parte Young*, which allowed a plaintiff to name an official who sued in his official capacity, had violated US Constitution or federal law on an ongoing basis (*Ex Parte Young*, 209 U.S. 123 (1908)).¹⁰³ The state claimed *Young* would not apply where the suit affects "a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state" because the claim was the "functional equivalent" of a suit to quiet title against the state, which directly and adversely affects state interests (*Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261: 287 (1997)). Further, the Governor had no personal involvement in or connection with the historic transactions or alleged wrongs that were the basis of the complaint (MOL in Support of State Defendants Motion to Dismiss, 2006: 15). As Governor, he violated no federal statutory law or treaty rights simply because he had the authority as the state's chief executive (MOL in Support of State Defendants Motion to Dismiss, 2006: 16). The Nation also sought equitable relief, which the Governor could not provide.

The Motion relied on *Sherrill* and *Cayuga* as grounds to dismiss the claim with prejudice as the "same type of disruptive, possessory action" that could not be brought up two centuries

¹⁰³ This issue in the case at hand existed between the Eleventh and Fourteenth Amendments. In *Hans v. Louisiana*, the Court held that the Eleventh Amendment prohibits the federal courts from hearing suits by citizens against their own states (134 U.S. 1 (1890)). The Fourteenth Amendment prohibits states from violating the due process rights of citizens. *Young* asked whether a federal court need consider a suit attempting to enjoin a state official from carrying out state laws alleged to be in violation of the Fourteenth Amendment. The Court concluded that where a state official's actions are unconstitutional; he cannot be acting on behalf of the state as the Supremacy Clause holds that the Constitution overrides state laws. Therefore, any state official who attempts to enforce an unconstitutional law would be acting outside of his official capacity as just another citizen who could be brought before a court for his actions.

after a state action (MOL in Support of State Defendants Motion to Dismiss, 2006: 21). While conceding that the Onondaga had sought the aid of the United States government to stop the settlement of their land by enforcing promises made in the Treaty of Canandaigua, the state argued that the Onondaga failed to address the change in the population or the nature of the land and had never asserted sovereignty over the lands by judicial decree while the state and its municipalities had constantly asserted jurisdiction over it for more than two centuries. That the Onondaga were seeking seeking a declaratory judgment and not ejection of current landowners was seen as immaterial (MOL in Support of State Defendants Motion to Dismiss, 2006: 23). Even a declaration of title would be disruptive as it would leave no right to possession for the current owners.

The non-state defendants also filed a Motion to Dismiss on August 15, 2006 (MOL in Support of Non-State Defendants' Motion to Dismiss, 2006). Their motion similarly argued for dismissal based on the equitable principles of laches, impossibility, and acquiescence. They focused primarily on *Cayuga*, asserting that on its face, the claim was identical to the possessory claim barred by the earlier decision (MOL in Support of Non-State Defendants' Motion to Dismiss, 2006: 6). The corporate defendants reiterated the notion that the Onondagas waited nearly 200 years before filing a complaint, leaving generations of non-Indians to settle the area and profoundly change the character of the land. They stressed the “existence of counties, towns, cities, roads, businesses, schools, and private residences” reflecting a “long-established non-Indian character of the land” (MOL in Support of Non-State Defendants' Motion to Dismiss, 2006: 9). To allow the claim to continue would “destroy the long-settled expectations” of the defendants based on a legitimate reliance on the passage of time and the state’s continuous exercise of sovereignty. The non-state defendants further reasoned that because the state was

immune from suit and should be dismissed as a party, the case against the non-state defendants should also be dismissed because the state was a necessary and indispensable party that cannot be joined (Non-State Defendants' Notice of Motion to Dismiss, 2006).¹⁰⁴

The Nation and its counsel were forced, by unfavorable court decisions, a changing political climate, and the defendants' Motions to Dismiss, to quickly alter their approach. The greatest complication arose as the Onondaga were suddenly required to play a defensive role, addressing these time-based defenses. This would lead to years of continued pleadings to resolve, in particular, the question of the laches defense.

¹⁰⁴ This claim relied on the Federal Rules of Civil Procedure, Rule 19 addressing the feasibility of requiring persons to be joined. Where a required party's joinder is not feasible, the court must consider if, "in equity and good conscience," the action can continue without the party or if it should also dismiss the other parties (Federal Rules of Civil Procedure, Rule 19).

CHAPTER 13

THE ONONDAGA RESPONSE: THE NATION REACTS TO NEW PRECEDENTS

The Nation responded to the Defendants' Motions to Dismiss on October 17, 2006, requesting a continuance to address the time-based defenses. The Onondaga would spend the next four years responding to the Defendants' Motions and attempting to overcome the negative precedent created by the federal court decisions that had so recently negatively impacted other New York Native American land claims. Counsel for the Nation provided extensive statements in support of the Onondaga's claims and utilized the testimony of legal experts, historians, and individual members of the tribe to counter the idea that their claim was barred due to questions of subject matter jurisdiction, immunity, or time-based defenses of laches, acquiescence, and impossibility.

Because the defendants' Motions relied on facts outside the complaint, the Onondaga argued they should be converted to Motions for Summary Judgment, which would require that the Nation be given more time for discovery to present a full and adequate opposition (Memorandum in Support of Plaintiff's Motion for Continuance, 2006: 3). The Nation, which had retained four historians to research and prepare affidavits on the issues relating specifically to laches and acquiescence, argued it had insufficient time to review records spanning a 200-year period. Further, much of the information they needed was in the hands of the Defendants. The motion seeking a continuance was not actually denied until nearly three years later on September 21, 2009 (Civil Docket, March 1, 2012).

The Nation filed several Oppositions to Motions to Dismiss, the first submitted to the

District Court in November 2006 by Robert Coulter, the Nation's original lead counsel.¹⁰⁵ The strongest argument in the declaration was that statutes of limitation for certain lawsuits by the United States contained in 28 U.S.C. Section 2415 specifically exempted Indian nations' suits for land title or possession from any time limit (Declaration of Robert T. Coulter, 2006: 20). Coulter also attempted to provide the factual basis needed to escape a laches defense. He asserted that lingering uncertainties from *Oneida I* and *Oneida II* combined with the Nation's exclusion from federal and state courts for two centuries contributed to the delay. The Nation had followed the evolution of federal court opinions to determine if and when the situation changed (Declaration of Robert T. Coulter, 2006: 3).

Coulter also argued, albeit contradictorily, that the Onondaga were so fearful that an action on their part might lead to a complete loss of territory that they avoided raising any potential red flags. The Supreme Court established in *Tee-Hit-Ton Indians v. United States* that Congress has legal authority to "extinguish" Indian land rights without due process or compensation (348 U.S. 272 (1955)). Congress has also consistently asserted plenary power to legislate Indian issues such as land use, land rights, and self-government. Coulter argued that these nearly unrestricted powers supported the fear that legal actions may result in "Congressional action to extinguish the Nation's asserted land rights and perhaps to take away other rights of the Nation as well" (Declaration of Robert T. Coulter, 2006: 6). Coulter specifically cited the fear created by the 1982 proposed Indian Claims Settlement Act in which Congress would have unilaterally extinguished Indian rights to lands by retroactively ratifying questionable land transfers. Onondaga representatives submitted a written statement against the

¹⁰⁵ Coulter is President of the Indian Law Resources Center, an organization providing *pro bono* legal services in legal battles over land, resources, human rights, environmental issues, and cultural integrity (Declaration of Robert T. Coulter, 2006: 2).

bill asserting that it was racially discriminatory and failed to pass Constitutional muster (Ancient Indian Land Claims, 1982: 66).¹⁰⁶ Coulter proposed it was a response to “unjustified fear that there is about to be a mass dispossession of non-Indians by Indians” fueled by politicians suggesting large communities would be displaced and “innocent” non-Indians would lose their homes (Ancient Land Claims, 1982: 70). After months of protests the bill was defeated, but it left the Onondaga reluctant to bring about any additional attention to land rights issues (Declaration of Robert T. Coulter, 2006: 8).

The Nation’s leaders and the Haudenosaunee Lands Committee further suggested that unless the law changed or the likelihood of federal action decreased, any action would be futile.¹⁰⁷ The action was further limited by the Onondaga’s participation in the land claims of the Oneida, Mohawk, Seneca and Cayuga, which would create precedent. Further, they could draw attention to the negative political implications impacting their land rights and those of other Indian nations in New York (Declaration of Robert T. Coulter, 2006: 8).

Coulter also discussed the actions the Nation had taken between the 1974 *Oneida I* decision and its initial complaint to prove that the Nation was cognizant of and had taken actions towards discussing its issues with the state. He noted the creation of the Haudenosaunee Lands Committee in 1976, composed of representatives from each Nation, and tasked with “studying and making recommendations about the land rights of the member nations of the Confederacy”

¹⁰⁶ Coulter’s argument that the Haudenosaunee had such rights was contrary to the statements made in Lyons’ submission asserting that the Six Nations were not subject nor would they ever be subject to US law, though the rights asserted are afforded to non-citizens.

¹⁰⁷ To the Haudenosaunee, and particularly to the Indian Law Resource Center, concerns led to pursuing the claim as a human rights issue with the United Nations beginning in 1976 and 1977 (Declaration of Robert T. Coulter, 2006: 6). Representatives of the Onondaga along with the ILRC presented their case in Geneva, demanding “an end to the discriminatory treatment of Indian land rights in the United States and an end to the denial of other human rights” (Declaration of Robert T. Coulter, 2006: 7). The Declaration of the Rights of Indigenous Peoples was adopted by the UN in 2007 and finally endorsed by the United States in 2010.

(Declaration of Robert T. Coulter, 2006: 4). They recommended that the resolution of land claims, to the extent possible, be accomplished through negotiations by the Confederacy as a whole, and not by individual nations (Declaration of Robert T. Coulter, 2006: 4). For example, in June 1975 the Committee conducted meetings with White House Counsel Roberta Kilberg to discuss the need for a “negotiated resolution” of land rights in New York. Though the Kilberg meetings were unsuccessful, the Committee continued to meet from 1976 to 1982 to “prepare for the requested negotiations with the United States” (Declaration of Robert T. Coulter, 2006: 4). Later that year the Onondaga received assistance from the United States government regarding a complaint to remove non-Indian intruders who had settled on the reservation in violation of the 1794 Treaty of Canandaigua. In 1982, the Haudenosaunee tried again to initiate negotiations with the United States, meeting with White House Advisor William P. Barr (Declaration of Robert T. Coulter, 2006: 5). Though while White House staff and the Department of the Interior agreed to a negotiation process with the Haudenosaunee, no meetings ensued.

The Onondaga Council of Chiefs also sought to work with the state, sending a letter to Governor Mario Cuomo in 1988 stating that the Nation and the Haudenosaunee regarded the “treaties” made by the state as void and in violation of both the valid treaties made between the Haudenosaunee and the United States, and other federal laws (Shenandoah, 1988). The Nation further warned Cuomo that it would “pursue legal remedies to resolve our claims . . . [and would] contact your office to arrange a meeting to discuss these matters” (Shenandoah, 1988).

In 1989, the Onondaga attempted to broker a meeting with President George H.W. Bush declaring that the “treaties” between New York and the Onondaga were void and violated valid treaties with the United States (Declaration of Robert T. Coulter, 2006: 14). The Chiefs indicated their intent to pursue legal remedies, but not before meeting to discuss the land rights

issues. No meeting occurred. The Interior Department and the Eastern Area Office of the Bureau of Indian Affairs considered the possibility of legal action on behalf of the Onondaga Nation to sue for title to a portion of the land taken contrary to the Trade and Intercourse Act. Again, however, there was no resulting action.

Coulter claimed limited financial resources of an overtaxed and underfunded Indian Law Resources Center (“ILRC”) (the Nation’s only source of legal assistance) impeded the Onondaga cause during the 1970s and 1980s, making provision of legal services nearly impossible. With similar financial problems of its own, the Nation still worked on the land rights issue from 1978 to 1982 with Coulter and the ILRC assisting for limited compensation. Coulter’s response to the Motions to Dismiss unfortunately focused more on a defense of the actions of ILRC than the Nation. His actions were complicated further by the Onondaga’s lack of interest in monetary damages that might be used for payment. By 1992, the ILRC no longer had sufficient funds to take on additional litigation on behalf of the Nation, leading the ILRC and the Nation to seek federal assistance (Declaration of Robert T. Coulter, 2006: 15). In 1995, the Onondaga requested attorneys’ fees, litigation assistance, and technical assistance from the federal government (Shenandoah, 1995).

In 1996, the ILRC formally requested that the Department of the Interior begin litigation against New York State on behalf of the Onondaga Nation for the state’s violations of the Trade and Intercourse Acts (Declaration of Robert T. Coulter, 2006: 16). The Nation’s requests for attorney fees and expert assistance were rejected, but the call for technical assistance was forwarded to the Department of Justice. The Nation, Coulter, and eventually the Nation’s General Counsel Joseph Heath had continuous contact with the Department of Justice from 1997 through 2000, meeting with officials, submitting memos, asking questions, and requesting

litigation support for a planned lawsuit. With each new administration, the Nation renewed their efforts, but gained no assistance (Declaration of Robert T. Coulter, 2006: 17).

The Nation made similar efforts at negotiations and notice of potential litigation with the state, contacting Governor Cuomo and later Pataki regarding the violations of land rights and the illegal treaties. The Nation offered state representatives a “preview” of the land rights suit in 1997, even proposing negotiations over litigation, but the state rejected the suggestion. In 1998, Pataki “insisted that the Nation first file its lawsuit before further settlement talks could be held [and] ... that the State could not properly evaluate the strength or complexity of the Nation’s land rights claim until formal litigation had actually commenced” (Declaration of Robert T. Coulter, 2006: 20). Coulter finally argued his own efforts beginning in 1995 put the public on notice about the plans for a land claim through his own extensive communication with the media.

The Onondaga Nation’s General Counsel, Joseph J. Heath, also submitted a Declaration in Opposition to Defendants’ Motions to Dismiss. Heath had long served as the Nation’s lawyer and representative in environmental and archaeological issues and worked extensively on communications and political outreach on its behalf (Heath, 2006: 2). Heath's Declaration focused on four assertions: (1) the Nation’s claim was not disruptive to the citizens, media, or governments of the region; (2) the Nation’s continued presence in their traditional territory had been and remained a welcome one by their neighbors and local governments; (3) a Nation’s retention of its recognized title to land is not necessarily disruptive; and (4) that the development of the land in question was “environmentally negative” (Heath, 2006: 2). Unfortunately, Heath’s declaration offered little legal basis to counter the Defendants’ Motions to Dismiss.

Heath disputed that the “inherently disruptive” nature of the claim was disproved in part by the positive media coverage, pointing to at least 175 articles supporting the Nation (Heath,

2006: 3). This coverage persisted even after the defendants filed their Motions to Dismiss (Heath, 2006: 4). He further attempted to negate the “inherently disruptive” argument by maintaining the continuing positive relationship between the Onondaga Nation and their Central New York neighbors, citing an ongoing speaker series entitled “Onondaga Land Rights & Our Common Future” attended by “hundreds of non-Indians.” Heath claimed no one in attendance “has been negative in nature or antagonistic to the Nation or to the speakers,” and “many of these audience comments and questions have included statements in support of the Nation and of this case, particularly the spirit of healing” (Heath, 2006: 7). Heath also noted the Nation’s positive relationships with various educational institutions such as the State University of New York Environmental Science and Forestry (“SUNY ESF”) and Syracuse University (Heath, 2006: 9). He further cited the community group Neighbors of Onondaga Nation (“NOON”) as an indication of the “non-disruptive nature of the atmosphere in Central New York between the Onondaga Nation and its non-Indian neighbors, since the filing of this land rights action” (Heath, 2006: 9).¹⁰⁸ Another indicator of the lack of disruption offered was the continued work and civility between the Nation and local governments. Meetings between the Nation and the Mayor after the filing of the action remained “positive and cordial,” a “constructive dialog” existed between the Nation and the City’s Common Council, and the Nation and the city worked together to address “environmental issues of mutual concern” (Heath, 2006: 11).¹⁰⁹

¹⁰⁸ The goals of NOON, as listed on their website, are “To promote understanding of and respect for the Onondaga people and culture within the broader Central New York Community; To educate ourselves and others about the history of the relations between the United States and the Onondaga Nation; To challenge racism towards Native peoples; and To work with the Onondaga Nation on matters of mutual concern” (NOON, 2013).

¹⁰⁹ While Heath’s declaration did establish a continuing working relationship between the Nation and some of its Central New York neighbors, it was by no means dispositive of the fact that a land rights

It is unlikely to see how, legally, governments could have ceased communications with the Nation in any of these matters or how civility necessarily proved the non-disruptive nature of the claim. Heath's most convincing argument regarding the non-disruptive nature of the claim, which was buried in the middle of his declaration, was the lack of impact the claim had on the real estate market (Heath, 2006: 10). His support for this claim was a solitary article published in the *Post-Standard* that stated "Native American land claims in Central New York have not hurt residential real estate sales, said two professionals in land transactions in other land claim areas" (*Post-Standard*, March 11, 2005). Heath, however, misstates the content of the article, indicating that "title insurance has been routinely written in Central New York covering land rights actions for thirty-five years" (Heath, 2006: 10). In fact, the article states that although insurance has been written for these properties, in reality "For property in a claim area, Tigor (the title insurance company mentioned in the article) writes into title insurance policies an exception that indicated it cannot guarantee the title because of the claim" (*Post-Standard*, March 11, 2005). Heath offered further support for this assertion by stating that the Washington Title Insurance Company was writing title policies to cover the Onondaga Nation's action since July 2005. This information could also be used to argue the alternate idea that the land rights claim was anticipated to have a potentially great impact on property owners.

Heath further argued that the "character of the area [had] not become distinctly non-Indian" and that the Nation's continued presence and participation should allow for a continued right to be involved with decisions about the land and waters (Heath, 2006: 12). He listed 27

action, even one as "different" as the one brought by the Onondaga, could be construed as non-disruptive solely because a good relationship existed as demonstrated by a series of articles, editorials, and conference attendance. Attendance at meetings is easily attributable to those who were already supportive of or sympathetic to the cause. Further, a positive relationship between the Nation and its neighbors did not mean that the results of the litigation would be non-disruptive. It is this aspect that is central to the laches defense—i.e. that the claim is disruptive—not the claimants.

occasions where the federal government requested the Nation's consultation in the National Historic Preservation Act Section 106 process, the National Environmental Policy Act's environmental impact assessment process, and their state equivalents. This information is again correlational at best in that the Nation's consultation is mandatory in these processes and not necessarily indicative of any goodwill. He also offered up a few brief words in a book published by the Onondaga Historical Association, *Crossroads in Time: An Illustrated History of Syracuse*, whose Preface acknowledges the Onondaga Nation's historic and continuing presence and importance.¹¹⁰ He additionally suggests "several pages" devoted to the matter in a work by a local historian in *The Golden Age of Onondaga Lake Resorts* that comments briefly on the Nation's presence around the lake during French and English occupation, the beginnings of the state, and the construction of the replica of the St. Marie Mission to the Iroquois (Heath, 2006: 16). His third argument for the continuing presence of the Nation within the community was the presence of the Haudenosaunee flag flying in downtown Syracuse and at LaFayette, New York High School "in recognition of the Onondaga's continued presence" (Heath, 2006: 17).

More persuasive than other arguments was Heath's example in which the Seneca Nation's retention of title to land in the city of Salamanca, New York had not been disruptive to the local, non-Indian government or to the area's real estate market (Heath, 2006: 18). The municipal website indicates that "Salamanca is the only city in the United States that lies almost completely on an Indian Reservation" (www.salmun.com/about.htm). The continued retention of Indian title to the land was recognized by the Second Circuit in *U.S. v. Forness* (125 F.2d 928, 930 (1942)) and *Fluent v. Salamanca Indian Lease Authority* (928 F.2d 542, 544 (1991)). This recognition of rightful title led to the passing of the Salamanca Settlement Act whose purpose is "To effectuate

¹¹⁰ Heath places in bold his line of relevance: "But the Onondaga People still live here," hardly overwhelming evidence to discredit the concept of "distinctly non-Indian" (Heath, 2006: 16).

and support the Agreement between the City [of Salamanca] and the Seneca Nation [and] to promote cooperative economic and community development efforts” (25 U.S.C. 1774(b)). Unfortunately, Heath’s only proof of the lack of disruption was a “ cursory check” of the two local papers and information on the city’s real estate market from www.city-data.com (Heath, 2006: 19). There was, however, evidence that the relationship between the Seneca and the city had been disrupted. For example, a July 28, 2012 article entitled “Senecas plan to evict Snyder Beach Residents” published in *The Buffalo News* demonstrated a tension between parties. The paper stated "The Seneca Nation announced plans Friday to evict about 80 families of "illegal occupants" living in summer cottages along the Snyder Beach area of Lake Erie, triggering a major battle over property rights” (Herbeck & Ronayne, 2012). Earlier in 1995 evictions were issued for failure to sign new leases when the lease agreements were altered to state that the Nation owned not only the land, but the improvements on it as well, leading to litigation over the extended leases (Palazzetti, May 12, 1995). Such instances indicate that disruption has occurred in this territory. The remainder of Heath’s declaration purported to list the environmental damages done by the non-state defendants, but it did address any assertions from the corporate defendants’ Motion to Dismiss.

Tadodaho Sidney Hill also submitted a Declaration against the Motions to Dismiss, considering elements of environmental degradation absent in those of counsel.¹¹¹ Hill’s declaration provided a far more in-depth look at the nature of the Onondaga government, laws, culture, and practices than what either lawyer submitted to the court. Hill explained the rationale behind the Nation’s process and actions in the course of fighting for the land, demonstrating why

111 Sidney Hill is the Six Nations’ Tadodaho. The Tadodaho is the spiritual leader of the Haudenosaunee and is the Head Chief of All the Six Nations. The Six Nations are presided over by a Grand Council, which is led by the Tadodaho.

certain actions were significant and why the Nation chose certain procedures over others, basing his Declaration on his extensive knowledge of the spiritual, cultural, and historic practices of the Haudenosaunee. As Tadodaho, he participated in many meetings relating to the discussion of the Six Nations' land rights, and his familiarity with Haudenosaunee oral traditions provided him with expert knowledge of how the lands were lost (Declaration of Tadodaho Sidney Hill, 2006).

Hill maintained that the Onondaga operated as a continuously sovereign government, maintaining its status as a distinct political entity with inherent sovereign rights of self-determination and governance from well before the establishment of the United States (Declaration of Tadodaho Sidney Hill, 2006: 2). He further advanced that the Onondaga's loss of land had been ongoing since the Revolutionary War even though the Washington administration had promised protection of their lands to "secure and maintain peace with and the neutrality of the Haudenosaunee" when the nascent government needed an ally in the Ohio Indian Wars (Declaration of Tadodaho Sidney Hill, 2006: 4). The federal government had also sought to protect Indians lands in the 1790 Trade and Intercourse Act.

Hill supported the argument of the Nation's concern regarding the degraded condition of its traditional lands and waters by suggesting its interference with the continuous, traditional use of their remaining lands and the lands in question for hunting, fishing, and gathering plants for cultural and medicinal purposes (Declaration of Tadodaho Sidney Hill, 2006: 5). The Tadodaho noted the Nation's role as caretakers of the environment as its members' lives, culture, and governance are tied to the land, the water, and the natural world (Declaration of Tadodaho Sidney Hill, 2006: 5). Because the Onondaga consider their relationship with the land as "mutual, life-sustaining and healing" they have faced a significant hardship as a result of lack of access to their former land (Declaration of Tadodaho Sidney Hill, 2006: 7).

Hill assured the Court that "this legal action was not meant to be disruptive to our non-Indian neighbors, but that it was meant to bring about a healing of past wrongs" including the state's illegal land taking of and "horrific and life threatening environmental damage" to their traditional territory (Declaration of Tadodaho Sidney Hill, 2006: 7). Using this argument, Hill sought to defeat laches by addressing equity and disruptiveness rather than the time delay. He argued that the language of the Nation's Amended Complaint, calling for a healing, clarified the non-disruptive intent of the complaint well before the "disruptive" language of the *Sherrill* decision or the dismissal of the Cayuga's claim in the Second Circuit came into play (Declaration of Tadodaho Sidney Hill, 2006: 8). This non-disruptive "spirit" was also evident in the Nation's decision "not to name any individual land owners as defendants in this land rights action, to never seek any evictions of the current land owners, and to never seek any money damages against any individuals" (Declaration of Tadodaho Sidney Hill, 2006: 13). He insisted that through communication with their neighbors the Nation managed to quell the typical uneasiness associated with such land rights actions. Hill consistently differentiated the Nation's land claim from others, claiming "Our concern is for the environment and how we as two peoples can live in the area that was our ancestors" (*Post-Standard*, March 20, 2005: C-2).

The Tadodaho next offered that while no official legal action had been taken up to this point, that the Onondaga had long recognized the land rights problem. He recalled that:

Since I was a child, I have always heard our elders talk about the illegal taking of our lands . . . our elders always discussed that our Nation lands had been merely leased, not sold to New York State. . . How to attempt to correct the illegal taking of our original lands and the subsequent environmental destruction of those lands has been discussed by our Council of Chiefs in our Nation's Longhouse. . . Onondaga leaders have always talked about how these historic injustices could be addressed . . . we have struggled with it for generations. (Declaration of Tadodaho Sidney Hill, 2006: 8)

When the Nation's leaders finally concluded their rights were being ignored and environmental

deseccration would not be addressed, they decided to take legal action.¹¹² Sovereignty, as well as a desire for diplomacy over litigation, kept the Nation from federal courts. The Nation repeatedly requested that the federal government file suit on its behalf in support of the land rights action. Hill's declaration supported the arguments made by the Nation's counsel: existing precedent was prohibitive, the Nation's oral history might be problematic evidence, finances were limited, and alternative options like negotiation and public awareness campaigns were preferred. Finally, Hill added that the preservation of Onondaga burial grounds on the land in question was a significant part of the claim (Declaration of Tadodaho Sidney Hill, 2006: 14).

Academician Robert E. Bieder, a historian and retired professor from the Department of History and School of Public and Environmental Affairs at Indiana University, also provided support for the Onondaga claim. Bieder's factual background relating activities and events of the Onondaga Nation helped establish claims and rights to the land from 1845 through 1974, the period prior to what the Onondaga's counsel had already considered (Declaration of Robert E. Bieder, 2006). Bieder presented evidence that the Nation's concern for their land and sovereignty had been ongoing since before the American Revolution and persisted through periods of allotment from 1849 through 1914, requiring the expenditure of energy and resources addressing policy problems. Each allotment and severalty bill had been met with registered resistance from the leaders of the Onondaga Nation. This limited the Onondaga's ability to attempt any "realistic action for the recovery of lands or assertion of its rights to the lands taken by New York State" (Declaration of Robert E. Bieder, 2006: 3). Further, any such action in state court would have been futile as courts were closed to land claims brought by Indian nations after

¹¹² While Hill's Declaration made no mention of the Superfund remediation efforts that had begun on Onondaga Lake, the EPA and DEC's failure to properly consult with the Nation was a driving force in filing the land rights action.

Montauk Tribe of Indians v. Long Island Railroad Company (28 A.D. 470 (1898)), leaving the Onondaga with no available political or legal forum for redress (Declaration of Robert E. Bieder, 2006: 4).

Bieder's declaration relied heavily on the Second Circuit decision in *United States v. Boylan*, holding that transfers of Indian lands in New York not in compliance with the Trade and Intercourse Acts were of no legal effect and the Nation continued to own the land. The United States sued for the return of Oneida land transferred without federal involvement or approval in violation of the Trade and Intercourse Act, and the Second Circuit held "We do not think that the state of New York could extinguish the right of occupancy which belongs to the Indians" (*Boylan*, 1920: 174). *Boylan* renewed efforts to gain back land and for New York, it prompted the creation of a legislative commission to investigate Indian land rights. Bieder asserted the case opened the legal possibility that the lands New York had purchased illegally from the Onondaga Nation were still the property of the Onondaga (Declaration of Robert E. Bieder, 2006: 11).

Bieder supported the notion that the Nation continuously advanced its cause and recognized the problem that needed to be addressed, but rather than bring an action challenging legal precedent, it tried to address the subject in a different venue. In a series of examples of testimony given at hearings before Committees on Indian Affairs, representatives of the Haudenosaunee continued to address the issue of the illegal treaties and the fact that the land had been taken illegally by the state. He also discussed the efforts of Laura Cornelius Kellogg whose standing among the Onondaga with actual authority to deal was questionable at best. (Declaration of Robert E. Bieder, 2006: 19). Kellogg's actions split the Nation into separate factions, creating a situation where it became unclear to outside parties who had the actual

authority to take actions ranging from testifying before Congress to entering into leases with outside companies. It is arguable, however, that her actions advanced the Nation's cause. The collective (and sometimes conflicting) Declarations from the Plaintiffs indicated a lack of coordination between those representing the Onondaga Nation in the action.

Responding to the Oneida Decision

The following year, the Onondaga changed tack, requesting that the Court rule only on the aspect of motions to dismiss based on the laches defense (Roberts, 2007), and requested oral arguments (which are generally not used in such Motions proceedings) because it claimed it could not "fully and adequately present its arguments, discuss the relevant evidence, and address the many issues presented by the motions" absent being given the full opportunity to speak (Coulter, January 6, 2007). This request was granted, but the date for oral arguments was postponed by the Nation, who had hoped that the United States government would intervene.

While the parties were awaiting oral arguments, the same court deciding the Onondaga case released its decision in *Oneida Indian Nation of New York v. State of New York* (2007 WL 1500489, N.D.N.Y. May 21, 2007). Here, the court relied on *Sherril* and *Cayuga* to hold that disruptive possessory land claims are barred by laches, acquiescence, and impossibility.¹¹³ The court negated claims seeking all forms of relief (ejectment, injunctions, damages, declaratory relief, etc.) that are "disruptive to Defendants' rights and might also call into question the rights of tens of thousands of private landowners" (*Oneida*, 2007: 7). The Defendants petitioned to submit a supplemental memorandum of law based on the judgment, applying the new

¹¹³ The *Oneida* court granted summary judgment, dismissing the claim as an "indisputably disruptive possessory land claim" barred by laches; particularly disruptive were the Oneida's claimed assertions of "current possessory right" to the land (Cuomo, et al., August 31, 2007: 3). In *Oneida* the Defendants filed a Motion for Summary Judgment rather than a Motion to Dismiss because of the already advanced state of the procedural posture—in other words the case had progressed far enough that the former was the appropriate course of action (2007).

Oneida analysis to show the possessory nature of the Onondaga claim was "crystal clear" as "an action to declare that certain lands are the property of the Onondaga Nation and the Haudenosaunee" (Cuomo, et al., August 31, 2007: 2). The Nation claimed the lands, requested the state conveyances be voided, and called for a declaration that the Nation continued to hold title (Cuomo, et al., August 31, 2007: 3).

The Defendants asserted the Onondaga's claim closely tracked *Oneida* as it was "predicated on their continuing right to possess land in the claim area" (*Oneida*, 2007: 4). The Defendants' predicted that the Nation would attempt to differentiate their case in that it did not seek ejectment or trespass damages, only a judicial order voiding prior land transactions and a finding that the Nation's title remained unextinguished. They argued these remedies were still inherently disruptive and would create a concomitant right to (or at least the prerogative to) evict current landowners (Cuomo, et al., August 31, 2007: 5).

The Defendants also argued that the *Oneida* court focused on time; the final transaction occurred over 150 years prior to the claim and that it took 130 years for any claim to be filed at all (*Oneida*, 2007: 5). The *Oneida* had made similar arguments to those made by the Onondaga regarding impediments to their access to the court system and their unsuccessful attempts at non-judicial remedies, but the court did not focus on whether they had "diligently pursued their claims in various fora" (*Oneida*, 2007: 7). The Onondaga claim spanned 173 years by the time of the Supplemental Motion was filed.

Regarding the distinctly non-Indian character, the Defendants asked that the court rely on census data like the *Oneida* court had, which would indicate that less than one percent of the population claimed Indian ancestry (Cuomo, et al., 2007: 8). They also focused on the decision's recognition that the non-Indian individuals had undertaken "development of every type

imaginable for more than two centuries” (*Oneida*, 2007: 6). Finally, the Defendants’ raised the fact that the Onondaga did not set forth any alternative, non-possessory claims, which left them no other course on which to maintain their action (Cuomo, et al., August 31, 2007: 10).

On October 10, 2007, the parties addressed the court about the Defendants’ Motions to Dismiss and the laches defense in a motions hearing. Judge Kahn would reserve decision on this date.¹¹⁴ For all of 2008, not a single filing was made to the court. In September 2009, the court denied the Plaintiff’s Motion Seeking a Continuance. As the case continued to stall, Coulter withdrew as the Nation’s counsel in June 2010. Also in the interim, the Second Circuit issued another blow in *Oneida Indian Nation of New York v. County of Oneida*, 2010 WL 3078266 (C.A.2 2010 (N.Y.)) when the Court of Appeals for the Second Circuit upheld Judge Kahn’s decision from the lower Northern District of New York Court, holding that laches barred the possessory claims of the Oneida and the United States. It further held that the tribe’s Nonintercourse Act claim and contracts-based claim were barred by the same equitable defenses recognized in *Sherrill* and *Cayuga*. This case was brought to the attention of the Northern District of New York Court in the Onondaga case in a Notice submitted by Governor Pataki on August 10, 2010, filed the day following the decision of the Court of Appeals (Civil Docket, 2012: 18). One month later, the court issued its decision.

¹¹⁴ A reserved judgment is usually, but not always, a written judgment, which is given a few days or even weeks after the hearing. In this case, the court’s decision was not issued until after nearly three years.

CHAPTER 14

THE COURTS FIND FOR THE DEFENSE

After more than five years and over 100 pleadings, on September 22, 2010 the court dismissed the Onondaga Nation's case with prejudice.¹¹⁵ The foundations upon which the Onondaga based their claim crumbled with the decisions in *Cayuga*, *Oneida*, and *Sherrill*. Precedent had converted laches into a "convenient shorthand" for the equitable principles that bar possessory land claims. The District Court's opinion even noted that within only a few weeks of the initial complaint, *Sherrill* had altered the legal landscape. The court adopted *Sherrill*'s reasoning that the "disruptive remedy" requested was precluded by the extended lapse of time and dramatic changes to the land. It also relied on *Cayuga*, which also considered late-eighteenth century state treaties and expanded upon *Sherrill* by holding that laches applied generally to "disruptive" Indian land claims (*Cayuga*, 2005). The Second Circuit's 2010 decision in *Oneida* further articulated the scope and application of *Cayuga* (Onondaga, 2010: 10). As a result, despite the limited remedies requested in the Complaint, the perceived "underlying possessory land claims" made the Nation's claim "plainly disruptive" in that it asked the court to overturn years of settled land ownership (*Onondaga*, 2010: 10).

The court's determination focused on the length of time between the historical injustice and the present, the disruptive nature of the claim, and the degree to which it upset the justifiable

¹¹⁵ The standard of review for a Motion to Dismiss requires that a complaint is subject to dismissal for the failure to state a claim upon which relief can be granted (Federal Rules of Civil Procedure, 12(b)(6)). When the court considers this motion, it must accept the allegations made by the non-moving party (here the Onondaga) as true, and "draw all inferences in the light most favorable to the non-moving party" (*In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007)). If a complaint is to survive a motion to dismiss, it must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (*Bell Atlantic Corp. v. Twombly*, 550 US 544, 570 (2007)). A lawsuit dismissed with prejudice means that the court has made a final determination that is based on the merits of the case. Further, and more importantly the plaintiff may not file another lawsuit based on the same grounds.

expectations of individuals so far removed from the injurious events. It took judicial notice of how extensively the area had been developed and populated by non-Indians (*Onondaga*, 2010: 15). It did not even consider any “unreasonable lack of diligence” by the plaintiff in initiating the action (*Onondaga*, 2010: 12). Though the delay between the action and the conveyances may not have been the fault of the Nation, *Sherrill* meant laches must apply (*Onondaga*, 2010: 15). The Nation’s action, being “possessory in nature and sounding in the ejectment of the present owners,” would “dramatically upset the settled expectations of current land owners,” requiring it be equitably barred on its face (*Onondaga*, 2010: 14).

Chief Oren Lyons issued a statement on the dismissal, finding it “a sad day for the American people and the United States . . . a stain on the Constitution of the United States, [and] an insult to the founding fathers of this country” (Lyons, 2012). Further, it was “another disappointment in a long list of disappointments. » Lyons found the court’s reliance on *Sherrill* and *Cayuga* an indicator the court’s low regard for the Nation and offered that the courts, the public, and better policy needed to address the long past of broken promises (Lyons, 2012). The Nation appealed the decision to the United States Court of Appeals for the Second Circuit in February 2012.

Appeal to the Second Circuit

On October 20, 2012, the Onondaga Nation filed its Notice of Appeal (Notice of Appeal, 2012), announcing it in a Washington, DC press conference that detailed the history of diplomatic relations with the United States and the past failings of the federal courts. News of the action was reported across the country (*Sacramento Bee*, February 28, 2012). Counsel Joseph Heath argued that the court’s interpretation of “fairness” and “disruption” did not consider the unfairness and disruption to the Onondaga caused by the state’s unlawful actions,

the care the Nation had taken to ensure that the case was not disruptive, and the Nation's constant efforts to protest the loss of their lands in other venues. The Nation also questioned the use of Discovery, a doctrine that "has resulted in the subjugation, genocide, [sic] relegating indigenous peoples to a subhuman status [was] not justice, and it is not equity" (*Sacramento Bee*, February 28, 2012).

The Nation's appeal argued the district court misread the limited nature and scope of the claim and failed to demonstrate its conclusions were factually supported. It stressed that the Nation was only seeking a declaratory judgment, not a remedy that would dispossess, evict, or eject people from their lands (Brief of Appellant, 2012: 4). The Nation asked for no monetary compensation, restitution, or rent from those tracing their titles to the state or any compensation for the environmental damage. No claims of any kind were asserted against non-corporate, private parties (Brief of Appellant, 2012: 4). The deliberate exclusion of individuals distinguished *Onondaga* from *Cayuga*, *Oneida*, and *Sherrill* (Brief of Appellant, 2012: 53). The Nation claimed its primary objectives were to hold the state accountable for its unjust actions in acquiring Onondaga land and to establish a legal foundation to hold polluters responsible for restoring environmental health (Brief of Appellant, 2012: 4).

What the Onondaga were seeking to gain was title to, as opposed to, possession of the lands in question. Courts, including the Supreme Court, have consistently distinguished between the two (Brief of Appellant, 2012, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); see also *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996)), acknowledging that the law can easily accommodate situations where a state official could retain legal title while the right of possession is bestowed on another party (Brief of Appellant, 2012, citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261

(1997)). The Nation argued that the converse should also be true. It argued for a bifurcated title similar to one which exists between the United States and Native American nations (Brief of Appellant, 2012: 48, citing *Johnson v. McIntosh*, 21 U.S. 543 (1823); see also *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877); *United States v. Alcea Band of Tilamooks*, 329 U.S. 40, 46 (1946)). Further, a declaratory judgment would not have been coercive as it “neither mandates nor prohibits action,” and would only “clarify and settle unresolved legal relations to afford relief from uncertainty and insecurity” (Brief of Appellant, 2012: 50; citing *Perez v. Ledesman*, 401 U.S. 82, 184 (1971) and *Broadview Chemical Corporation v. Loctite Corporation*, 417 F. 2d 998, 1001 (2d Cir. 1969)). The Nation claimed it had specifically asked the District Court to include provisions in the declaratory judgment that would allay such fears (Brief of Appellant, 2012: 52). Unfortunately, this limitation on the relief requested was not included in the Complaint or the Amended Complaint, and did not arise until the Plaintiff’s Supplemental Memorandum in Opposition to Dismiss submitted more than two years after the initial complaint was filed (Civil Docket, 2012).

The Onondaga also reasserted that the relationship between the United States and the Six Nations had long relied on treaties to establish land rights. The 1784 Treaty of Fort Stanwix and the Treaty of Canandaigua promised to protect their lands by preserving the agreed upon boundaries and protecting against illegal purchases by the state. The Trade and Intercourse Act furthered this protection. These laws, along with the U.S. Constitution, expressed the fundamental principle that “Indian relations [are] the exclusive province of federal law” (Brief of Appellant, 2012: 9). In spite of this, the state continued to make arrangements that were “grossly unfair to the Onondagas” and absent the presence of federal commissioners and congressional approval (Brief of Appellant, 2012: 10). In virtually every transaction, the state was aware that it

was negotiating with Native Americans without authority, well aware that such transactions could have no effect pursuant to tribal law (Brief of Appellant, 2012: 10). Additionally, the state often misrepresented that they were leasing, not selling, the lands (Brief of Appellant, 2012: 10).

The Nation further maintained that although the “equitable considerations” from prior cases might limit the relief available, they were never intended as a complete bar to relief. They questioned *Sherrill*’s interpretation of “laches,” that considered too strongly the “long lapse of time” during which the plaintiff failed to assert “sovereign control” over lands, holding that “the passage of time can preclude relief” while neglecting to apply the traditional elements of the doctrine (Brief of Appellant, 2012: 16). *Sherrill*’s definition of “settled expectations” was also argued to be unreasonable (Brief of Appellant, 2012: 15).

The Brief next asserted that *Cayuga* and *Oneida* were wrongly decided (Brief of Appellant, 2012). First, it attacked *Cayuga*’s interpretation of *Sherrill*, arguing that the court applied an equitable defense to an action at law, justifying this action on the “unusually complex and confusing” nature of federal Indian law (Brief for Appellant, 2012: 18). This argument was questionable as it is neither uncommon nor incorrect to assert an equitable defense in an action at law and is permitted by federal judicial code. The Nation further asserted that *Cayuga*, like *Sherrill*, failed to apply the traditional elements of laches. The Nation relied upon the laches definition from *Galliher v. Cadwell*, which considered whether defendants were prejudiced in their ability to defend a suit, whether the state had “unclean hands,” or whether the balancing of equities favored one party over the others (145 U.S. 368 (1892)). The final attack on precedent was aimed at the 2010 *Oneida* decision, which had reduced the language of the prior cases to consider all land rights actions “inherently disruptive,” but only in terms of societal expectations (Brief for Appellant, 2012: 20).

In addition to the court's improper interpretation of legal precedent, the Nation argued that the court also failed to successfully interpret the facts of the case at hand (Brief of Appellant, 2012: 25).- Like *Oneida*, which relied upon whether the defendants had justified expectations that the Nation would never assert its land rights, the court here relied on facts that the defendants settled and developed the land, creating “settled expectations” of unchallenged ownership, which arguably assumes the facts in question. The Brief argued the court should have required evidence linking occupation and settlement to “justified expectations.” Allowing the argument that occupation created justified expectations created “a powerful incentive for holders of disputed title to degrade the land in order to demonstrate a justified expectation regarding their ownership” (Brief for Appellant, 2012: 29). This distinction between occupation and occupation with degradation, while provocative, has no basis in legal precedent.

The Nation also reasoned that the District Court’s “judicial notice” of certain facts was inaccurate. It is appropriate to take judicial notice where the fact is not subject to reasonable dispute because it is generally known within the territorial jurisdiction of the court or capable of accurate and ready determination using sources whose accuracy cannot reasonably be questioned (Federal Rules of Evidence, Rule 201). The Nation asserted that the court mistakenly accepted that the “contested lands” are “predominantly non-Indian today” and have “experienced significant material development by private persons and enterprises as well as by public entities” (Brief of Appellant, 2012: 29). The Brief stressed the continuing presence of the Onondaga Nation in the region. There had been no Onondaga diaspora; rather, they retained “strong and enduring legal, political, cultural and religious ties to large portions of their aboriginal homeland” and expressed these connections through “generations of consistent protest” (Brief of Appellant, 2012: 11). The Onondaga argued factual questions remained relating to the

development of the land (Brief of Appellant, 2012: 31). That the Nation “vigorously contest[ed] the ultimate fact of justified societal expectations” could not overcome the fact that they had ignored the definition of judicial notice (Brief of Appellant, 2012: 31).

The Nation also argued that the District Court failed to accept the allegations of the First Amended Complaint as true for the purposes of the Motion to Dismiss, a requirement of a 12(b)(6) motion to dismiss (Brief of Appellant, 2012: 32). The Nation contended the court could not have accepted the allegations of the Amended Complaint as true and still dismissed the claim (Brief for Appellant, 2012: 33). In failing to accept the allegations as true, the court failed to infer that the Nation’s long history of protest made the Defendants’ expectations that lands would be undisturbed unjustified. Judicial redress had not been an option for the Nation until 1974 and any redress would have been limited by poverty, unfamiliarity with the English language, and inability to secure legal counsel. Because of this, it was asserted that an attempt had been made to resolve claims through diplomacy, but the state refused to participate in a discussion until a claim was filed (Brief of Appellant, 2012: 12).

This argument was flawed for two reasons. First, insufficient factual evidence within the four corners of the Amended Complaint likely harmed the chances of the case surviving a motion to dismiss. Second, it relied on outdated precedent, citing the standards created in *Conley v. Gibson*, which held that a court could dismiss a complaint only if it “appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief” (355 U.S. 41 (1957)). The Supreme Court’s decision in *Bell Atlantic v. Twombly* (127 S. Ct. 1955 (2007)) completely altered the *Conley* standard for evaluating 12(b)(6) motions, creating a new standard of “plausibility” pleading that was intended to discourage discovery abuse and address frivolous lawsuits early on in an action. *Conley* allowed “a wholly conclusory

statement of claim” to survive 12(b)(6) “whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of undisclosed facts’ to support recovery” (*Twombly*, 2007: 561). A motion to dismiss could fail even without any showing of a “reasonably founded hope” of making a case (*Twombly*, 2007: 562).

Twombly requires plaintiffs include “enough factual matter” in their complaints to “nudge their claims across the line from conceivable to plausible” (*Twombly*, 2007: 570). *Ashcroft v. Iqbal* gave district court judges even broader authority to dismiss a case outright (*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)). *Twombly* and *Iqbal* established that district judges must eliminate allegations that are “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” and consider the remaining facts in light of the prevailing legal standard to determine if the claim meets the standard of plausibility (Kilaru, 2010: 910). These decisions make it clear that the facts presented in a pleading (both the quality and quantity) are critical to a claim surviving a 12(b)(6) motion. Arguably, the Nation failed to provide sufficient factual support to state a claim on which relief could be granted and then tried to rectify this on appeal by asserting that the court was wrong in not allowing it to conduct further discovery. The Nation could have contested or differentiated its claim from these two decisions; that the decisions were not acknowledged in the Brief is problematic.

The Brief next posited that the Defendants relied on facts outside of the First Amended Complaint. The Nation had submitted extensive evidence in the form of declarations from expert witnesses and percipient witnesses (Brief of Appellant, 2012: 34). Based on that record (which is not included in the four corners of the Amended Complaint) the Nation argued that the District Court improperly dismissed the Nation’s claim (Brief of the Appellant, 2012: 45). Considering this information in determining a 12(b)(6) motion would have been a violation of

the Federal Rules of Civil Procedure. Finally, the Nation specifically reserved the argument that *Cayuga* and *Oneida* were wrongly decided, preserving the argument for *en banc* or Supreme Court review (Brief of Appellant, 2012: 55).

Response of Appellees (formerly the State and Non-State Defendants)

The non-state appellees filed a joint response on May 25, 2012, arguing that a declaratory judgment required finding the state acquired the land in violation federal law, which would “inherently disrupt the long-settled expectations of state sovereigns, local governments, private enterprises, and individual citizens alike” (Brief of Appellees, 2012: 2). On their face, it was argued, the Nation’s claims were indistinguishable from *Oneida*, *Sherrill*, and *Cayuga*, requiring dismissal based on laches, acquiescence, and impossibility. Further, that the Nation was not responsible for the delay or any consequence was irrelevant in applying laches (Brief of Appellees, 2012: 31, citing *Cayuga* at 279, see also *Oneida* at 126). Dismissal on these equitable grounds would completely dispose of all of the Nation’s claims. The court could also dismiss the claims against the state based on sovereign immunity, and therefore against the remaining defendants because the state is an indispensable party (Brief for Appellees, 2012: 3). They also noted for the first time that the Nation had ceded the majority of the acreage in the 1788 Treaty at Fort Schuyler. The Second Circuit previously determined the state had the right to negotiate this arrangement absent the consent of the United States and notwithstanding the 1784 Treaty of Fort Stanwix (*Oneida*, 1988: 1150), making 95 percent of the acreage in the claim “patently meritless” (Brief of Appellees, 2012: 26).

Addressing the non-Indian character of the region, the Appellees found it was appropriate for the court to take judicial notice of that fact and provided the additional evidence of population numbers from 1838 through the most recent census data (Brief of Appellees, 2012:

27). They claimed that except for those residing on the reservation, that Onondaga have not resided on the subject lands since they were conveyed two centuries prior (Brief for Appellees, 2012: 28). Their discussion of the change in character noted that “the trackless wilderness of the late 1700s has been replaced by today’s cities, towns, roads, businesses, schools, and private residences, which reflect the long established non-Indian character of the land” (Brief of Appellees, 2012: 28). The Appellees stressed that the expectations, which are based on the “legitimate reliance on the passage of time during which the lands have been sold and re-sold by private parties, and by the States’ continuous exercise of sovereignty over the subject lands,” could not be overcome (Brief of Appellees, 2012: 32). The Brief added that land purchases in the contested areas in the precedent cases continued throughout the litigation, which demonstrated that even though individuals and entities were on notice of the claims, it had not influenced purchasers’ or developers’ expectations in owning or acquiring property (Brief of Appellees, 2012: 31).

The Appellees also countered the argument that limiting the requested relief impacted the application of equitable defenses; whatever the relief sought, the underlying claims turn on the determination that 200-year-old transactions were illegal, null, and void” (Brief of Appellees, 2012: 33). The disruptiveness of the claim was not tied to the relief requested, but inherent in the claim of the “underlying premise” of the thing (Brief of Appellees, 2012:34). In other words, to void the treaties would void them for everyone, not only the named defendants, giving the same practical outcome in suing a small number of defendants as a suit against all possible defendants (Brief of Appellees, 2012: 38).

The Appellees next addressed the Doctrine of Discovery, asserting that a claim to title, but not possession, was inappropriate. Under this doctrine, fee title vested in the sovereign while

the Indian Nations retain “aboriginal rights” to use and enjoyment of the land unless or until the sovereign acquired or terminated those rights (Brief of Appellees, 2012: 36). The demand for a declaration of ownership rights, rather than possessory rights, therefore, would be opposed to the concepts established by Discovery (Brief of Appellees, 2012: 36). *Oneida*, they argued, rests on a continuing right of possession and not title as it focused on the “aboriginal rights” including the right to “exclusive possession of their lands” (1985: 234).

Responding to the Onondaga’s charge that the decision was based solely on the Amended Complaint, the Motions to Dismiss, and facts taken under judicial notice, the Appellees argued that the court had properly disregarded the declarations and historical materials submitted in opposition to the Motions to Dismiss (Brief of Appellees, 2012: 41).¹¹⁶ The Appellees contended that, based on the facts contained within the four corners of the Amended Complaint (i.e. that “the subject land became populated and developed by non-Indians), and recognition that “there are non-Indians now living on the subject land,” that judicial notice of these matters was appropriate (Brief of Appellees, 2012: 42). The remaining evidence (i.e. census data, the existence of counties, towns, cities, roads, businesses, schools, and private residences on the land in question, and New York’s exercise of sovereign control over the land for two centuries) is “generally known in the trial court’s territorial jurisdiction” as required under the Federal Rules of Evidence and as approved in *Sherrill* (Brief of Appellees, 2012: 43). Matters judicially noticed by the court are not considered matters outside the pleadings for the purposes of converting a Motion to Dismiss to a Motion for Summary Judgment (*Staehr v. Hartford Financial Services Group, Inc.*, 547 F. 3d 406, 426 (2004)). Therefore, the court was neither required to convert the motions nor to grant the plaintiffs extended discovery (Brief of

¹¹⁶ The declarations and exhibits submitted by the Onondaga, which accounted for nearly 70% of the papers filed (Brief of Appellees, 2012:44), were not taken into account in the lower court’s decision.

Appellees, 2012: 44). Even if it had considered the “Onondaga’s inappropriate submissions,” precedent required dismissal (Brief of Appellees, 2012:42). The non-state Appellees maintained that “since it is the law of this Circuit that ancient land claims are inherently disruptive and barred by laches, the Onondagas’ evidentiary submissions on these issues are immaterial as a matter of law” (Brief of Appellees, 2012: 45).

The Appellees next addressed the Eleventh Amendment and indispensable party questions left undecided by the lower court. Absent the state’s consent, some Congressional abrogation of immunity, or intervention by the United States, the state should not be brought before a federal court to respond to Indian land claims (Brief of Appellees, 2012: 46). As these exceptions did not apply, immunity could also have supported affirmation and dismissal (Brief of Appellees, 2012: 47, citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)). Precedent also excluded actions to quiet title from the exception created in *Ex Parte Young* (209 U.S. 261 (1997)), allowing suits in federal courts against officials acting on behalf of states to proceed despite sovereign immunity when the state has acted unconstitutionally (Brief of Appellees, 2012: 49, citing *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997)). Thus, the Appellate Court could also affirm and dismiss the plaintiffs’ claim on this alternative claim (Brief of Appellees, 2012: 49). With the state defendants dismissed, the Appellees argued that the claims against the non-state defendants must also be dismissed as the state is an indispensable party (Brief of Appellees, 2012: 50, citing Federal Rules of Civil Procedure 12(b)(7)). Further, the state’s ability to protect its interests could be impaired by a decision in its absence impacting the state’s sovereignty over the claimed lands (Brief of Appellees, 2012: 51). To decide the case without the state would also subject the corporate defendants to “multiple and inconsistent obligations” to “dueling sovereigns” by

compelling them to comply with Onondaga plans for remediation when they are still compelled to follow federal environmental laws (Brief of Appellees, 2012: 53).

Response to Appellees Brief

The Nation responded to the Appellees Brief, asserting that precedent did not require dismissal. The reply brief restated the non-possessory nature of the relief requested and the non-disruptive nature of declaratory judgment, which was not coercive in nature and could be specifically issued so as to avoid any disruptive effects. It also reminded the court of the lack of impact on landowners who were not named in the action as well as the unjustified expectations of the defendants that their title would remain undisputed. The reply brief made a new assertion that a declaratory judgment would “serve a useful purpose in clarifying legal relations between the Onondaga Nation and the State of New York” (Reply Brief of Appellant, 2012). Allowing the claim to be dismissed would not extinguish the Nation’s title to the land protected by the Treaty of Canandaigua or end the dispute over the legality of the state’s actions (i.e. “uncertainty and doubt will persist”). A declaratory judgment would foreclose further controversy (Reply of Appellant, 2012: 10). The Nation also asserted that if the Eleventh Amendment defense were allowed, the state was not an indispensable party and, therefore, the case against the corporate defendants should be allowed because the declaratory judgment requested would not impact the state’s sovereign powers (Reply Brief of Appellant, 2012: 19).

Second Circuit Court of Appeals Decision

On October 19, 2012, the Second Circuit Court issued a ruling by Summary Order affirming the judgment of the district court (*Onondaga*, 2d Cir., 2010). This court similarly relied on *Sherrill*, *Cayuga*, and *Oneida* to define and justify the equitable bar on the recovery of ancestral lands based on laches, citing the length of time between the injustice and the present

day, disruptive nature of the claim, and justifiable expectations of current landowners (*Onondaga*, 2d Cir., 2010: 3). It agreed that “the disruptive nature of the claims is indisputable as a matter of law” and found it irrelevant that the Nation sought only a declaratory judgment. Regarding “settled expectations,” the lower court's judicial notice that the non-Indian character of the region created justifiable expectations to ownership and the district court’s similar recognition of population and development during that stage of litigation eliminated any need for unrestricted discovery to determine whether Syracuse was sufficiently developed over the past 200 years. The courts were merely taking judicial notice of obvious facts, which does not require discovery (*Onondaga*, 2d Cir., 2010: 4). Finally, the court rejected the notion that proof of persistent protests outside of court would except a laches defense, reiterating that even if discovery could establish such protests, equitable considerations would still bar recovery as “similar protestations did not avail the plaintiffs in *Cayuga*” (*Onondaga*, 2d Cir., 2010: 4). Precedent did not deem such an argument as reason enough to overcome laches. The Nation’s claim, although guttering, continued with filing a Petition for Rehearing En Banc.

Petition for a Rehearing En Banc¹¹⁷

The Nation petitioned the Court for a rehearing en banc because the Panel Order (the decision to uphold the District Court) and the Second Circuit precedent that it relied upon conflicted with decisions issued by the Supreme Court in *Oneida* (1985) and *Sherrill* (2005). The cases were claimed as faulty in that they had departed from federal equity practice and Supreme Court precedent requiring the balancing of equities and hardships between litigants before dismissing an entire claim on equitable grounds (i.e. the Onondaga bore too much of the

¹¹⁷ A “rehearing en banc,” or en banc session of the court is one in which a case is heard before all of the judges of the court rather than a panel selected from them. Such hearings are usually held in unusually complex cases or cases that are considered of exceptional public importance (Federal Rules of Appellate Procedure, Rule 35).

burden) (Petition for Rehearing, 2012: 3). The Nation argued that to “secure and maintain the uniformity of the court’s decisions” it was necessary for the full court to hear the decision.

The Nation’s petition relied in part on the Supreme Court’s decision in *Oneida*, where the Court determined that notwithstanding the long passage of time between the historic injustice and the filing of the suit, that Indian nations have a common law right of action for loss of land in violation of the Trade and Intercourse Act (1985: 235). The *Oneida* Court found no applicable statute of limitations or other relevant legal basis for barring the Oneida claim even if equitable considerations could impact the nature of relief available (1985: 253). The Court did not actually rule on laches as a defense, but the dicta noted that “the application of laches would appear to be inconsistent with established federal policy” (Petition for Rehearing, 2012: 5). The Nation also cited *Oneida* to disprove the “disruptiveness” element of the laches defense used, arguing that the Supreme Court was not deterred by any expectations of landowners in the Oneida claim, taking note of the dissenting opinion in which Justice Stevens wrote that the decision “upsets long-settled expectations in the ownership of real property” (1985: 273).

The Petition did not mention that despite the comment in the dissent, the majority opinion never mentioned disruptiveness. The Petition further asserted that *Sherrill* expressly stated it was not meant to overturn *Oneida* and ultimately only addressed available remedies, not rights of action, which meant the Onondaga claim should not have been dismissed (Petition for Rehearing, 2012: 7). To allow the laches defense was also argued as contrary to Congressional intent, which made clear that there was no statute of limitations barring Indian land claims under the Trade and Intercourse Act (Petition for Rehearing, 2012). This argument was tenuous as laches, although similar, is not analogous to a statute of limitations. The former addresses prejudicial delay and unfairness, the latter addresses a specific legally defined period of time

during which a lawsuit may commence.

Finally, the Petition argued that federal equity practice required that courts take into account the disruption and hardship experienced by the Nation as well as the Defendants (Petition for Rehearing, 2012: 10). The Panel's opinion, the Nation argued, was "rigid and one-sided" (Petition for Rehearing, 2012: 11). Equity required consideration of the ongoing efforts the Nation expended seeking redress, even those outside of the courts (Petition for Rehearing, 2012: 10). Citing Supreme Court precedent, the Petitioners argued that "traditional equity practice consists of flexibility rather than rigidity and includes qualities of mercy and practicality" (*Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). The Petition further reasoned that the Supreme Court's definition of laches required proof of a lack of diligence against whom the doctrine is asserted and prejudice to the party raising the defense (Petition for Rehearing, 2012:11, citing *Kansas v. Colorado*, 514 U.S. 673, 687 (1995)). The Panel Order ignored equities favoring the Nation, which arose from the hardships caused by the loss of land despite their diligence in pursuing redress. It failed to consider the severity of the loss to the Nation: being deprived of their traditional hunting, fishing, and gathering sites; losing access to important cultural, burial, and ceremonial sites; and having their sacred lands polluted and degraded (Petition for Rehearing, 2012: 11). Federal equity required these matters be taken into account. The Nation contended there was "indisputable evidence" that the state had deceived the Nation about the nature of the transactions, leading them to believe they were leasing rather than selling their land. It knowingly negotiated with individuals lacking authority to enter into agreements; and the agreements were in violation of federal law due to the absence of congressional authorization (Petition for Rehearing, 2012: 12). Because of the state's injustices, they should be denied the equitable relief of laches (Petition for Rehearing, 2012: 12). In its

final plea, the petitioners noted en banc review was necessary to address an issue of exceptional importance. The Court, unconvinced by the Onondaga's arguments, denied the Petition.

Appeal to the Supreme Court

On December 21, 2012, the Nation's petition for a rehearing en banc of the Second Circuit Court of Appeals decision was denied, leaving them to file a writ of certiorari with the Supreme Court. On October 15, 2013, the Court declined to hear the Onondaga's appeal (*Onondaga Nation v. New York, et al.*, 134 S. Ct. 419 (2013)). The Nation's press release, issued through Onondaga Nation General Counsel Joe Heath, cited the inequities of Indian relations starting with the Doctrine of Discovery through the denial of cert as:

...just another example of the shameful history of broken treaties, land thefts, forced removal and cultural genocide that is the foundation of New York's and the United States' treatment of the Indigenous peoples and nations. Essentially, the courts have ruled that none of these horrible, historic harms matter under US law, because 'it is not fair to raise these problems at this time'. (Onondaga Nation, Press Release, 2013)

Health called the decision "the last step on a shameful path of injustice and inequity which the Supreme Court has engaged in for almost 200 years," closing the door on the prospects of justice for the Onondaga in the U.S. judicial system. The Nation's long struggle ended in a mere two sentences: "Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Justice Stotomayor took no part in the consideration or decision of this petition" (*Onondaga Nation v. New York, et al.*, 134 S. Ct. 419 (2013)).

Despite the failure of the land rights claim, the Onondaga were able to bring attention to their cause. The action received extensive local and national coverage in the press, educating the public about the issues surrounding their loss of land and the inadequacies of how the environment, particularly the Lake remediation, were being addressed. Further, it mobilized community members and experts to address a single subject from multiple perspectives.

The Nation's efforts regarding their rights to the land in question persist. The Onondaga Nation and the Haudenosaunee Confederacy filed a petition with the Inter-American Commission on Human Rights to declare that the failure to hear the action is a violation of international human rights agreements (AP, April 14, 2014). The Nation recognizes that any decision on this petition could take years, and even the government could choose not to respond, they have expressed the hope that their persistence will force the state and federal governments to act. In a statement ironically in opposition to the laches doctrine used against the claim, Onondaga Clan Mother Freida has stated "We're here, we're speaking out and they know where we stand. Maybe you won't write it in history, but we'll know we made this effort, and we're not letting the people down" (AP, April 14, 2014).

There have been instances when the federal government has atoned for past transgressions. For example, in 1980 President Carter signed into law the Maine Indian Settlement Act of 1980 (Public Law 96-420), authorizing \$81.5 million to enable the Passamaquoddy Tribe and the Penobscot Nation of Maine to reacquire 300,000 acres of the 12 million acres of land taken (NARF, 1981). Return of the Black Hills was demanded by the Sioux in *United States v. Sioux Nation of Indians* (448 U.S. 371 (1980)), in which the United States Supreme Court held that the land had been taken illegally and remuneration equal to the initial offering price plus interest—nearly \$106 million—be paid. More recently, in the settlement decision in *Cobell v. Salazar* (Case No. 1:96CV01285-JR, 2009), a case addressing the mismanagement of Indian land trusts, the Obama administration agreed to pay \$1.4 billion in compensation to more than 300,000 plaintiffs and \$2 billion allocated for the repurchase of land distributed under the Dawes Act. This 13-yearlong lawsuit, not unlike the Onondaga case, involved hundreds of motions, dozens of hearings, nearly 200 days of trial proceedings, and

multiple appeals (Fahrenthold, 2009). The outcome in the Onondaga's land rights claim, doomed by the precedent created by *Sherril* and the subsequent cases, has created time-based defenses that would be seen again in *Canadian St. Regis Band of Mohawk Indians v. New York*, 5:82-CV-0783 (2013) in which the District Court for the Northern District of New York again denied a land claim based on the defense of laches.

The cost of such actions, not only in terms of litigation costs (including, but not limited to attorney's fees, expert fees, document preparation fees, filing fees), but also in the unseen cost of litigation (including the individual time spent pursuing claims or personal stress associated with litigation), is substantial. With such costs, the outcome in the Haudenosaunee's various land rights claims could easily be seen as a deterrent. It has also been argued that courts are not necessarily effective agents of social change (Rosenberg, 2008). The federal court system's resolution of the Onondaga case, although certainly "another example of the shameful history of broken treaties," cannot detract from the Onondaga Nation's advancement of its causes of protecting the environment, fighting for sovereignty, and seeking redress for the illegal taking of land.

Litigation like the land rights action can assist in achieving legal and social change by affecting public debate (Schultz & Gottlieb, 1996). In the human rights law sector, strategic litigation, or impact litigation, is used to have an impact beyond the actual outcome of a case as it can help to change law or policy that violates the constitution or human rights norms and can be used to ensure that laws are interpreted and enforced correctly (UN Women, 2016). Using litigation as part of a broader strategy has been used in the past to advance issues of civil and political rights, women's rights, minority rights, and indigenous rights. Strategic litigation can spark policy changes, raise awareness, and encourage public debate. Earthjustice Senior Staff

Attorney Marianne Engelman Lado has recognized that in environmental justice cases, often times communities raise certain issues to bring attention to them as a way to provide points of leverage (Lado, McFarlane, & Philo, 2016).

The Onondaga Nation's claim directed the public's attention towards their struggles for recognition of sovereignty, the recovery of control of their former territory, and to the issues surrounding the pollution and impending remediation of Onondaga Lake. Local and national media coverage in newspapers, magazines, radio, and television provided the Nation and its counsel, Joseph Heath, the opportunity to inform the public on matters to which most of them had not been exposed and to possibly change the opinions of those that had. The Nation's pursuit of justice before the UN has continued to garner public attention.

The Onondaga Nation also remained involved in the ongoing remedial efforts of Onondaga Lake and Creek despite the vast amount of time and resources dedicated to the land rights action. For example, the Nation took part in Onondaga County's efforts to remediate Onondaga Creek. When the 1972 Clean Water Act ("CWA") was amended to require that all sewer systems in the country be upgraded to separate sewage from storm water, the County was under mandate to address the sanitary, storm water, and combined sewer overflow ("CSO") systems that had been polluting Onondaga Creek and ultimately Onondaga Lake for more than a century. When the county proposed its plans to address the sewage contamination of Onondaga Creek and Onondaga Lake, offering a strategy that would disproportionality impact minority and low income communities, the Onondaga Nation offered its assistance to those affected by the county's plans to comply with the CWA and court mandates regarding infrastructure improvements. The Nation spoke on behalf of another group being denied their right to provide public input, in this instance the County government failing to incorporate community input from

low-income and minority communities. Further, the Onondaga advocated for additional research into the distributional disparities in siting remediation projects so that, at the very least, the process would be in compliance with legal standards. Finally, the Nation submitted statements in support of the impacted communities' Title VI Civil Rights Act environmental justice claims against the county.

In addition to its participation in the Creek remediation efforts, the Onondaga Nation, again while embroiled in the land rights action, also played a role in the Onondaga Lake Superfund remediation process. Pursuant to the requirements of CERCLA, Executive Orders on consulting Native Americans, and EPA policies and guidance documents, the Nation was consulted during the planning and implementation process of the Lake's remediation. Although the Nation would assert that the amount and type of consultation as well as the outcome was insufficient, the Nation nonetheless played a role in shaping the remediation process and in directing the dialog surrounding the cleanup efforts by keeping its environmental agenda in the public eye through continuing press coverage.

CHAPTER 15

THE LAKE BECOMES A FEDERAL PRIORITY UNDER CERCLA

For nearly as long as pollution has made its way to Onondaga Lake, individuals have endeavored to prevent further contamination and struggled to clean up what already existed. The Onondaga Nation consistently fought for its remediation, despite having lost ownership and control over the majority of its territory. Local environmentalists, residents, interest groups, and academics offered complaints, solutions, and endless reports on the Lake's status and potential remedial efforts. State and local politicians used the water body as a campaign platform, bombarding constituents with grand promises of bustling shopping areas and marinas in place of decrepit industrial sites. These promises resulted in little more than water quality reports. State and local environmental officials struggled to meet the expectations of an indecisive, noncommittal political climate. Eventually, federal recognition of the Lake and its inclusion in the Superfund program spurred the beginning of the actual remediation process.

Rigorous efforts addressing the contamination of Onondaga Lake came as a result of its listing as a Superfund site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). This law authorizes the federal government to respond to hazardous substances that are in or may end up in the environment, created prohibitions and requirements regarding closed and abandoned hazardous wastes sites, and established liability for the polluting individuals and organizations. With such requirements in place, the process of remediation—from the initial site investigations through the completion of the cleanup—and the roles of stakeholders became definable. The structure of the law and the process determined appropriate for Onondaga Lake's recovery joined federal and state governments, the responsible corporation, the Onondaga Nation, the community, and experts in the rehabilitation process to varying degrees. For nearly a decade, federal and state

environmental agencies would investigate and analyze the Lake and assess the relative merits of proposed remedies, culminating in a Record of Decision signed in July 2005. This protracted process, however, would meet with disapproval from members of the community impacted by the selected remedy and receiving particularly strong objections from the Onondaga Nation.

The Comprehensive Environmental Response, Compensation and Liability Act

A wider awareness of the environment began to emerge in the 1960s as focus slowly shifted from resource management intended to foster a growing economy towards the cleanup and control of pollution produced by an industrialized nation. Increasing levels of education and exposure to environmental degradation began to foster a broader, less elitist interest in the natural world (Silveira, 2001). In 1978, public interest was riveted by the increased rates of cancer and birth defects resulting from toxic chemicals buried under the Love Canal neighborhood near Niagara Falls. The recognition of the problem led 833 families to abandon their homes (Cole & Foster, 2001). The Love Canal directed attention to these environmental crises, beginning a wave of grassroots efforts to protect environmental health. Whereas the Love Canal provided a suburban view of environmental contamination, the “Valley of the Drums,” a 23-acre toxic waste site in Bullitt County, Kentucky. The site, named for more than 100,000 drums of toxic waste that had been delivered to the site since the early 1960s, caught fire, burning for more than a week in 1966 (Burko, July 8, 1980). After the fire, the conditions of the drums deteriorated, spilling their contents onto the ground and into a nearby creek. The Kentucky site gained public attention in 1979 when the EPA’s immediate response was needed to address more than 140 toxic chemicals that had leached into the creek, providing members of Congress with another justification for the proposed Superfund.

Contamination from industrial chemicals and wastes plagued waters across the country.

The Cuyahoga River in Cleveland, Ohio, for example, became so polluted that it caught fire in 1936, 1952, and 1969 (NOAA, 2008).¹¹⁸ Lake Erie, the outflow point for the Cuyahoga, was not the only Great Lake suffering from severe contamination. The Lakes were considered one of the most abused water bodies in the country as a result of intensive industrial, agricultural, and municipal uses that left oil and debris, algal mats, dying fish, and closed beaches (EPA, 1980). Fish consumption from the Lakes had resulted in higher levels of PCBs in individuals eating from the contaminated waters. A 1978 Great Lakes Water Agreement between Canada and the United States sought to address the contamination and "to restore and maintain the chemical, physical and biological integrity of the waters of the Great Lakes Basin Ecosystem" (Environment and Climate Change Canada, 2013). At this point, however, the only federal laws in place to address the contamination, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Insecticide, Fungicide, and Rodenticide Act, and the Clean Water and Clean Air Acts, were insufficient to address the contamination seen in the Great Lakes or Onondaga Lake.

Prior to the high visibility of the Love Canal disaster, the white, middle and upper-class individuals were not generally aware that toxic contamination existed in housing areas. To be poor, working-class, or a person of color in the United States, however, had brought the burden of bearing a disproportionate share of environmental problems (Bullard, 2000). Environmental justice efforts can be traced back to the Civil Rights and environmental movements of the 1960s, evolved with the enactment of the National Environmental Policy Act and the President's Council on Environmental Quality's acknowledgement that racial discrimination adversely impacts environmental quality, and gained attention with the filing of *Bean v. Southwestern*

¹¹⁸ The burning Ohio River is often credited with setting in motion the enactment of the Clean Water Act in 1972 (NOAA, 2008).

Waste Management Inc. (482 F. Supp. 673 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986)), the first civil rights suit challenging the siting of a waste facility. These events, in concert with disasters like Love Canal, all contributed to the creation of the Superfund program.

CERCLA, commonly known as Superfund, creates federal authority to perform or compel performance of the remediation of sites contaminated by hazardous substances (CERCLA, 1980). The law establishes a framework for determining liability for the financing of and participation in the cleanup process. It defines the degree of contamination and the substances required to trigger the law and outlines the nature and scope of cleanup programs undertaken. Additionally, it establishes a National Contingency Plan that governs the selection and implementation of remedies (Switzer and Gray, 2008).¹¹⁹ Beyond clarifying and mandating clean-up requirements, CERCLA establishes information-gathering authority and reporting requirements. The 1986 Superfund Amendments and Reauthorization Act (“SARA”) created more discernible statutory cleanup standards, settlement provisions, and extended roles for state and public involvement (SARA, 42 U.S.C. §§9601). Essentially, these amendments required that every site be addressed as if it were as serious as the Love Canal. Further, if the responsible parties refused to pay, the government could complete the cleanup itself and bill companies for up to three times the cost

¹¹⁹ The Superfund law was enacted on December 11, 1980, just as Ronald Reagan was entering office (42 U.S.C. 9601 *et seq.*). CERCLA faced a rocky start under Reagan’s administration as “the combination of scarce resources, insufficient expertise, local politics, and industry economic blackmail” meant that enforcement was difficult (Shabecoff, June 13, 1981). At this time, New York State was also attempting to advance its own toxic waste cleanup program although it too was hindered by limited financing (Gargan, January 15, 1984). Onondaga Lake was not included on either the priority list of the federal government or that of the state government. Early enforcement of CERCLA was uneven. The reporting requirements of CERCLA and SARA did, however, gradually influence corporate behavior. Many of the nation’s largest corporate entities undertook campaigns to reduce emissions and alter some processes to make them more environmentally sound. Regulators used data in an attempt to persuade companies to reduce pollution voluntarily, and private advocacy groups were better able to keep watch on their corporate neighbors (Holusha, October 13, 1991). Awareness of and media exposure to environmental hazards increased as a result.

The Superfund Remediation Process

The Superfund process begins when the EPA learns about a potential hazardous site, which can occur in a number of ways such as from a reported incident, a planned search to discover a site, or even a phone call (EPA, 2016). The agency then reviews the site to determine what needs to be done by collecting information, inspecting the site, and speaking to community members to see how it impacts the public and the environment. This initial review allows the EPA to decide if the site requires action. The agency will determine whether the site may be cleaned up by state agencies or other programs, or if the site rises to the level of contamination that meets the statute's standards for federal action.

Superfund's multiphase cleanup process begins with a preliminary site assessment and investigation by the EPA to determine potential threats to people and the environment. At this point, the agency seeks to determine if hazards need to be immediately addressed and whether additional information must be gathered. This initial site investigation employs air, water, and soil testing of existing hazardous substances to determine whether any releases may pose a threat to human health. Based on this information, the EPA considers whether a site should be listed on the National Priorities List ("NPL"), a list of the most polluted sites identified for long-term cleanup. After a site is placed on the NPL, the nature and extent of contamination, potential types of technologies to treat contamination, and estimated costs for remediation are assessed during the Remedial Investigation and Feasibility Study ("RI/FS") phase.

Before beginning the RI/FS, the EPA must initiate communication with the community; community engagement must continue throughout the process. This community participation, which is separate from the consultation requirements between the agency and Native Americans, is defined by a Community Involvement Plan ("CIP"), which is created with the community's

input. The EPA must also establish an information repository, establish an administrative record, and keep the community informed using public notices, local media, and public meetings throughout the process.

During the remedial investigation (“RI”), the EPA (or its lead or support agency) collect data on site conditions, determines the nature of the waste, assesses risk to human health and the environment, and evaluates the potential performance and cost of treatment technologies that are being considered. The feasibility study (“FS”) is used to develop, screen, and evaluate potential alternative remedial actions. The RI and FS are conducted simultaneously. Using the RI/FS findings, a Proposed Plan for remediation, which is subject to public comment, is released. Regardless of whether the Plan is altered to address these concerns, the agency must create a Responsiveness Summary to formally respond to public comments.

The agreed upon plan is finalized in a Record of Decision (“ROD”) that explains the selected cleanup alternatives. The ROD includes the site’s history, a site description, site characteristics, community participation plans, enforcement activities, past and present activities on the site, lists of contaminated media and contaminants present, a description of the response actions, and the selected remedy. The public must be notified that the ROD is available to the community for inspection and the community involvement plan (“CIP”) must be amended to be consistent with the ROD.

The ROD phase is followed by the Remedial Design and Remedial Action phase (“RD/RA”), during which the EPA prepares for and completes the majority of the site cleanup. The community must be informed throughout the process through public events, newsletters, fact sheets, and presentations. When remediation and construction are complete, operating and maintenance provisions are initiated for long-term cleanup technologies, the EPA initiates

regular reviews of the site and imposes enforcement provisions to minimize any remaining potential for human exposure. The site can then be placed on the construction completion list. Even after this point, there may still be requirements for periodic activities to continue at a site as a part of the Record of Decision's Operations and Maintenance procedures. This could require anything from operating groundwater treatment systems to examining contamination caps. If any waste remains at the remediated site that limits the use of a property, there must be an EPA assessment of the site every five years after the completion of construction to ensure that the remedy continues to be protective of human health and the environment. The EPA may then finally initiate a process to delete the site from the NPL after a public notice and comment period. Even after delisting, however, the agency is tasked with continuing to work with communities to help return the site to productive use. Further, after a site is deleted from the NPL, the state and the responsible party may be required to continue its operations and maintenance duties. If this is the case, then evaluations of those activities will be completed every five years.

Tribal Involvement and Consultation Under CERCLA

Unlike some other pollution control statutes that allow tribes to seek treatment as a state, CERCLA automatically treats tribes as states (CERCLA, 42 U.S.C. 9626(a)). This applies to the notification of the release of hazardous substances, consultation on remedial actions carried out by the federal government, access to information, health authorities, and some aspects of the National Contingency Plan (Cohen, 2005: 801). The EPA has also required that tribes be treated as states for purposes of determining the "applicable or relevant and appropriate standards" of remedial work, which may include tribal water quality standards (42 U.S.C. 9262(d); National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8741 (1990)).

Additionally, the federal trust responsibility means that the EPA must consider tribal interests in conducting activities to ensure its actions protect tribal treaty rights. Pursuant to section 104(c)(2), the agency must consult with affected tribes before determining the appropriate remedial action. Section 104 also allows the EPA to enter into cooperative agreements with tribes to complete or participate in response activities, though EPA retains final authority.

Tribal consultation is mandated throughout the CERCLA remediation process. The government-to-government consultation is a separate requirement from community involvement, which is also mandatory under CERCLA and may also include input from members of the tribal community. Since 1984, it has been the EPA's policy to work directly with tribal governments on a one-to-one, government-to-government basis (EPA, 1984). This initial policy suggested that in order to comply with the federal trust responsibility, the agency address tribal concerns and interests whenever its actions might affect reservation environments. In Executive Order No. 13175 (2000), "Consultation and Coordination with Indian Tribal Governments," the federal government, and therefore the EPA, continued to recognize the government-to-government relationship, requiring federal agencies obtain meaningful and timely input from tribal officials regarding regulatory policies or actions that have tribal implications.

Statutory mandates for consultation requirements are unfortunately vague, but have been somewhat clarified through agency guidelines. These guidelines, however, do not have the force of law. Consultation, according to the EPA's guide to working with tribal governments at Superfund sites, requires "meaningful and timely" communications between the agency and tribal government officials when developing actions that impact tribes (EPA, 2006: 5). This should include information sharing, the review of tribal views, consideration of tribal views in decision-making, and respect for tribal self-governance and sovereignty. Consultation is also

intended to occur early enough in the remediation process for the EPA to actually consider the input and to communicate the outcome (Kloeckner, 2012).

Consultation under EPA policy is triggered when the agency takes some action that might affect tribal interests. Whereas Executive Order 13175 implicates consultation requirements when there are “tribal implications” and “substantial direct effects,” the EPA’s policy suggests consultation is necessary when the agency’s actions “may affect tribal interests” (EPA, 2006: 5). Actions implicating the involvement and input of tribal governments might entail the creation of rules, regulations, guidance documents, or directives; budget and priority planning development; in legislative comments; permitting; civil enforcement and compliance monitoring actions; response actions and emergency preparedness; state or tribal authorizations or delegations; and EPA activities in the implementation of treaty obligations (Kloeckner, 2012). Native American interests are also “affected” where treaties cover the area of the site or the land is held in trust for the tribe, when tribal members use resources from the impacted zone, where the tribe is a Natural Resource Trustee of the affected resource if the affected area is within a tribal historic area or is a tribally important landscape, or where the affected area is linked ecologically, culturally, visually, or hydrologically to tribal resources or uses (Neumann, 2012). A site may be “of interest” even if it is not located on reservation territory or where tribal members no longer live if, for example, it is a site where the tribe historically resided or a treaty right to engage in uses such as hunting or fishing.

Timing requirements for consultation are also not clearly established in the statute, however, guidelines suggest that during the early phases of the planning process, if the EPA believes its undertaking may impact tribal interests, the agency should send a letter to the appropriate tribal government to consult or initiate consultation. Tribes may also request to

begin consultation at this point (EPA, 2011). Tribal governments then provide input through face-to-face meetings, video, or telephone conferences, and through written communications, all of which must be considered by the agency. The agency should then provide the tribe with feedback explaining how its input was considered in the final action.

The CERCLA Process Begins at Onondaga Lake

Onondaga Lake was added to the New York State Registry of Inactive Hazardous Waste Disposal Sites on June 23, 1989. All 50 states, Puerto Rico, and the District of Columbia have their own Superfund cleanup programs with parameters for staffing, funding, expenditures, cleanup standards and activities, brownfields, long term stewardship, and institutional controls (ELI, 2002). These programs address sites that are not on the National Priorities List, but are contaminated by hazardous substances. Because these sites are not eligible for federal Superfund money, the state, responsible parties, or volunteers fund these efforts (ELI: 2002: 7).¹²⁰ Four days after the state listing, New York filed suit against Allied-Signal Inc. as the responsible party to compel the company to remediate Onondaga Lake, its tributaries, and related upland sites to recover any response costs incurred or to be incurred by the state in addressing the contamination under CERCLA (*State of New York and Denise M. Sheehan v. Allied-Signal*, No 89-CV-815 (N.D.N.Y. 1989).

Three of the company's facilities had produced product lines whose toxic components and byproducts contaminated Onondaga Lake. Its main plant, which operated from 1881 to 1986, produced soda ash-related products (ROD, 2005: 4). From 1917 to 1970 the facility produced benzene, toluene, xylenes, and naphthalene, all resulting in the release of ionic waste constituents, as well as Solvay waste, BTEX, chlorinated benzenes, PAHs, and PCBs. The

¹²⁰ Generally, states spend substantially more money on non-NPL site remediation (ELI, 2002: 8).

Willis Avenue Plant produced chlorinated benzenes, hydrochloric acid, and other chlor-alkali products, all resulting in the release of mercury, BTEX, chlorinated benzenes, PAHs, PCBs, and dioxins/furans from 1918 to 1977. The Bridge Street Plant manufactured chlor-alkali products from 1953 through 1979 and hydrogen peroxide from 1956 to 1969, resulting in the production of mercury, PCBs, and xylenes (ROD, 2005: 4). This waste was disposed of in the Semet Residue Ponds, Geddes Brook, Ninemile Creek, the Solvay waste beds, and directly into Onondaga Lake (ROD, 2005: 6). The operations' chemical waste and construction and demolition debris were also disposed of at the Mathews Avenue Landfill and the Willis Avenue Ballfield site (ROD, 2005: 7). On March 16, 1992, the U.S. District Court for the NDNY entered an interim consent decree providing for a Remedial Investigation and Feasibility Study ("RI/FS") to address existing pollution and the threat of future contamination (Consent Decree Between New York and Honeywell International, Inc., 2006).

Onondaga Lake Management Conference

In 1990, Congress created the Onondaga Lake Management Conference ("OLMC") to address restoring the ecological health and recreational use of the Lake (Public Law 101-596 § 401, 1990). Senator Daniel Patrick Moynihan sponsored legislation creating the OLMC, a consortium of scientists, engineers, and government officials that would address the Lake's pollution. The group was established under the Great Lakes Critical Programs Act of 1990 (104 Stat. 3000), which amended the Federal Water Pollution Control Act and created water quality standards, anti-degradation policies, and implementation procedures for remedial efforts for the Great Lakes and created Management Conferences for Lake Champlain and Onondaga Lake. The OLMC received \$1.25 million in federal funds for research and remediation, which included developing a comprehensive revitalization, conservation, and management plan recommending

priority corrective actions and compliance schedules, and coordinating the implementation of the plan with the state, Army Corps of Engineers, EPA, and all local agencies, governments, and other groups participating in the management conference (Public Law 101-596, §401, 1990).

The Lake had not yet been placed on the National Priorities List because it was not a designated source of drinking water, an initial requirement under CERCLA (*The New York Times*, May 5, 1993). When the 1990 criteria for listing was expanded, however, the EPA could finally review the site again, and in 1993 Onondaga Lake gained the attention of those compiling listings of Superfund sites (*The New York Times*, May 5, 1993). As part of implementing the *Sheehan v. Allied Signal* Consent Decree, the EPA and the DEC entered into a cooperative agreement as provided for in CERCLA, Section 9604(d), agreeing that the New York Department of Environmental Conservation (“DEC”) would operate as lead agency in the remediation (Consent Decree, 2007). At this time, the estimated cost of restoring the Lake was \$834 million over twenty years. This was more money than the county’s entire annual budget and, as became obvious, woefully short of the actual cost.

The same year the Lake made it onto the National Priorities List, the OLMC released its Onondaga Lake Management Plan, which contained specific recommendations to achieve a cleaner lake and increased use by the public (OLMC, 1993: 2). The Plan included the elimination (or at minimum, reduction) of phosphorous and ammonia released from Metro; the bacteria, floating debris, and other pollutants from the Combined Sewer Overflows; the mercury and other pollutants from the Allied-Signal waste beds; and sediment from the Tully Valley mud boils.¹²¹ It also provided for habitat restoration and an increase in accessibility to the lake for

¹²¹ Residents in the 1990s claimed that the company's brine mining changed valley geology. Allied had pumped water into underground salt deposits to make the brine for its Solvay soda ash plant. The residents maintained that once the mining stopped, mudboils began to worsen (Weiner, July 19, 1992:

public activities and commercial development. A Citizens Advisory Committee provided input on public expectations (OLMC, 1993: 3). The Plan recognized the Lake's fundamental problems and identified the obstacles that the public and the press had complained of for years (OLMC, 1993: 8). Conference members were hopeful that, in spite of the centuries of damage, the increasing community-wide interest in remediation would speed up the recovery process (OLMC, 1993: 31).

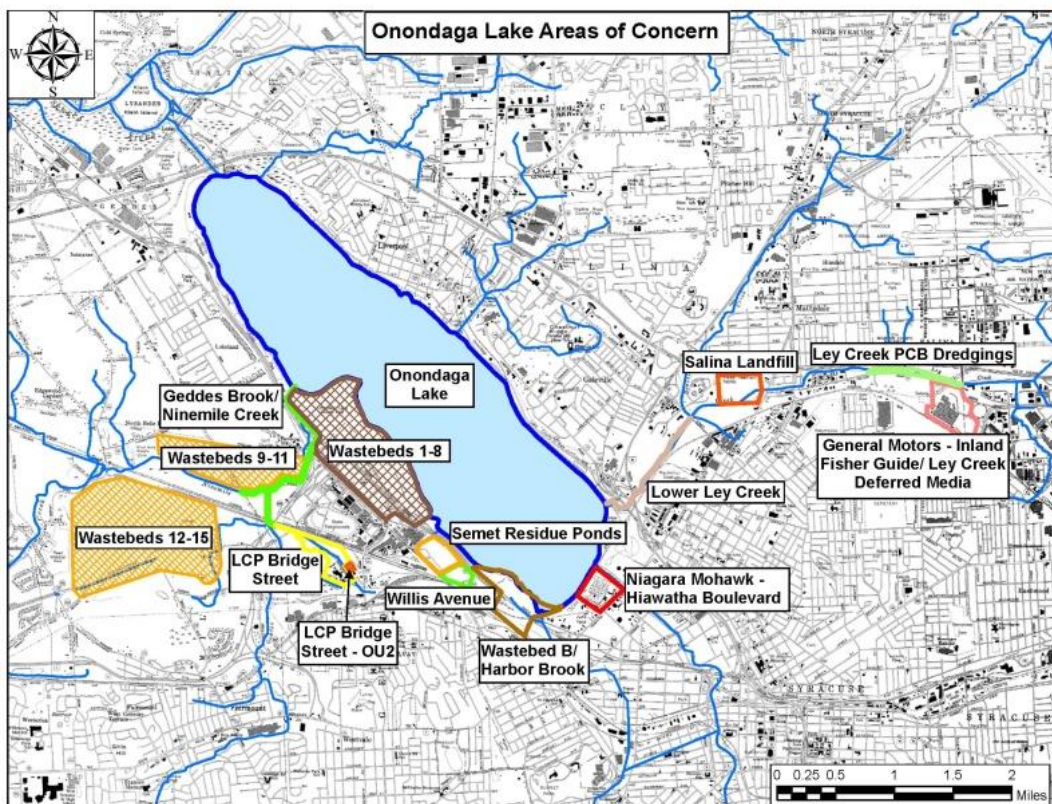


Figure 8. Onondaga Lake Superfund Site including the Lake bottom and upland subsites that have contributed to the pollution of the Lake (NYDEC, 2012).

B5), but the company accepted no responsibility for the increasing problems. The sediment loads created by the mud volcanoes negatively impacted fish, plant, and macroinvertebrate habitats (USEPA, 2010, 3). The OLMC created a Mudboil Working Group (Kappel and McPherson, 1998:1:2).

Onondaga Lake is both a federal and a state Superfund site (a relatively uncommon occurrence). The Lake and the upland areas that contribute or had contributed to its contamination were all added to the NPL (Onondaga Lake Proposed Plan, 2004) (see Figure 8). The Onondaga Lake Superfund site eventually included not only the lake bottom, but also a dozen subsites around the lake and along its tributaries. Onondaga County officials, already committed to remediating the sewage treatment facilities and therefore interested in sharing cleanup costs, welcomed the designation. Although locals were positive about the listing, they were skeptical in the face of the limitations of the Superfund program. One editorial from *The Post-Standard* quipped, “If you’ve liked the bureaucracy surrounding the lake cleanup so far, you’re going to love Superfund (*The Post-Standard*, December 17, 1994: A8).

The Superfund designation came at a time when new and increasingly disturbing information was being released. When a site is added to the Superfund National Priorities List, mandatory health assessments must be completed. Assessments of Onondaga Lake concluded it was a "public health hazard," the only one in the state (Andrews, January 5, 1995: B3). The State Department of Health concentrated its research primarily on the risks of eating contaminated fish, documenting what people already knew about the Lake where fishing had been banned decades prior. The report further detailed mercury laden sediments and odors from the tar beds on the Lake’s west shore were labeled as never having been “properly characterized” (Andrews, January 5, 1995: B3). The report pronounced that there was insufficient data to draw conclusions about the health implications of exposure to soil, air, waterfowl, or sediments in the Lake’s outlets. The Department of Health recommended measures to notify the public about the dangers associated with eating fish from the lake as the risk of developing cancer from ingesting a half-pound of fish per week from the lake were “very high” (Andrews, January 5, 1995: B3).

Designation as a NPL Superfund site meant that research on the Lake would become even more in-depth and costly, involving a significantly larger group of individuals and institutions and covering a larger area of concern. Twenty-six local industries and the town of Salina (all within a 50-mile radius of the lake) were required to provide the EPA with information regarding the entire history of each company's waste disposal practices to assist in determining and ruling out any sources of pollution and to single out potentially responsible parties (Arnold & Emmons, March 11, 1995: C1). This process, which is routine for sites placed on the NPL, angered and frustrated the local industries. For example, the vice president of Bristol-Myers-Squibb Co. complained that the EPA's request would cost upwards of \$1 million, require an enormous amount of time, and result in the company submitting tens of thousands of pages (Arnold & Emmons, March 11, 1995: C1). Industries were not the only one's frustrated by the prospect of more studies. The Salina Town Supervisor noted "They've studied this lake all my life, and I'm 44 years old. They've studied, studied, studied. So far, the only people benefiting from these studies are the lawyers and engineers. Now's just one more thing" (Arnold & Emmons, March 11, 1995: C1).

In 1999, Section 573 of the Water Resources Development Act (1999) replaced the OLMC with the Onondaga Lake Partnership ("OLP") (ongov.net, 2014). The OLP sought to "promote cooperation among the parties managing the environmental issues of Onondaga Lake and its watershed, and [to coordinate] the development and implementation of projects to restore, conserve, and manage Onondaga Lake" (ongov.net, 2014). The Partnership was comprised of six local, state, and federal agencies including the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the New York State Department of Environmental Conservation, the New York State Attorney General's Office, Onondaga County, and the City of

Syracuse (Onondaga Lake Partnership, 2010: 6). Like the OLMC, it developed and sought to implement actions consistent with the Onondaga Lake Management Plan, the Amended Consent Judgment, and the requirements of CERCLA (Onondaga Lake Partnership, 2010: 6). The same year as the OLP replaced the OLMC, Allied-Signal acquired Honeywell, Inc., using the more recognizable name after the acquisition (Honeywell, 2016).

Honeywell completed the Remedial Investigation (“RI”) in 2002, a decade after the initial Consent Decree compelled the company to conduct the study under the direction of the DEC (EPA, Onondaga Lake Proposed Plan, 2004). Over 6,000 samples of sediment, water, zooplankton, benthic macroinvertebrates, and fish were collected in and around Onondaga Lake and chemically analyzed to determine the proper remediation action required (EPA, Onondaga Lake Proposed Plan, 2004). The investigation also identified and assessed the distribution of contaminants in the water, sediment, soil, and biological tissue, evaluated impacts on human health, and gauged ecological risk. Findings indicated that mercury contamination permeated the entire Lake, though the most elevated concentrations were located at the Ninemile Creek delta and in the sediments and wastes along the southwestern end. This contamination area, referred to as the In-Lake Waste Deposit (“ILWD”) was a product of calcium carbonate and other waste deposits discharged from various industrial operations from companies to which Honeywell is the successor in liability (Onondaga Lake Proposed Plan, 2004: 2). Other contaminants including benzene, toluene, ethylbenzene, xylenes (BTEX), chlorinated benzenes, polycyclic aromatic hydrocarbons (PAHs), polychlorinated biphenyls (PCBs), and polychlorinated dioxins and furans were present throughout the Lake, but concentrated primarily in the ILWD at a sediment depth of nearly 25 feet. Contamination at all levels and all points of the Lake presented a risk to its ecosystem. Contaminants were also reaching the Lake through groundwater via

plumes of contaminants beneath subsites including the Wastebed B/Harborbrook site, Willis Avenue, and the Semet Residue Ponds (EPA, Onondaga Lake Proposed Plan, 2004: 2).

Remediation sought to eliminate or mitigate significant threats to the public health and environment created by waste disposal using proper scientific and engineering principles (Onondaga Lake Proposed Plan, 2004). The plan to remediate the Lake would need to address identified “acute risk” areas where the sediments exceeded the cleanup criteria (EPA, Onondaga Lake Proposed Plan, 2004: 3). The proposed plan, which would be subject to an extensive period of public notice and comment, included provisions for dredging and capping sediment, oxygenation of the lower levels of the Lake, water treatment, extensive habitat restoration, and monitoring programs.

In 2004, the state announced it would require Honeywell to conduct a \$448 million cleanup (Urbina, November 29, 2004). The feasibility study (“FS”) identified and evaluated remediation alternatives and proposed a plan to dredge up to 2.65 million cubic yards of contaminated sediment, transport that waste to a sediment consolidation area (“SCA”) in Camillus, New York, and cap the remaining wastes on the lake bottom. The DEC determined Honeywell’s plan was sufficiently “protective of human health and the environment (*Camillus Clean Air Coalition v. Honeywell International, Inc.*, Motion to Dismiss, 2013: 5).

Perceived Benefits and Risks of Remediation

The proposed benefits that would accrue and the risks reduced by dredging sediments from the Lake were substantial. Removing contaminated sediments would significantly reduce the presence of toxic chemicals in the lakebed, leaving lower volumes and masses of waste and significantly lower concentrations of chemicals beneath the cap (TAMS/Earth Tech, 2005: 11). Dredging would also improve the geotechnical conditions allowing for greater cap effectiveness,

a reduced likelihood of failure, and longer term reliability and permanence of the remedy.

Proposed dredging focused on the area of the Lake subject to the erosive forces of wave action, flooding, ice scour, and anchor drag, making the potential for resuspension of contaminants high.

Dredging and capping would eliminate the direct exposure of biota (particularly the benthic invertebrates in the deepest levels of the lake and at the base of the food chain) to the contaminants in the sediments. It would also prevent the release and redistribution of those contaminants into the water column that could create an additional risk of exposure (NYDEC, & EPA, Comment and Response Index, 2005: 18). In some areas of the Lake, the removal of non-aqueous phase liquids (“NAPLs”) and hot spots was also necessary to ensure cap effectiveness. Dredging was also required to preserve the surface area of the Lake, helping to preserve and improve the littoral zone habitat (littoral = lakeshore) and improve lakeshore stability. The poor lakeshore habitat created by high toxicity levels and physical instability would be more supportive of plants and animals after removing contaminants and replacing them with appropriate habitat materials.

An acknowledged risk of removing the sediments from Onondaga Lake was that it was taking contaminants from one location and moving them to another. The plan did require refining these sediments by removing the NAPLs to an offsite treatment process to an approved facility. This also satisfied CERCLA’s preference for treatment over mere containment. Dredging would admittedly have short-term water quality impacts as the disturbance of sediments could re-suspend solids. Modern dredging equipment, targeted dredging practices, and the use of a silt curtain, however, would be used to guard against contaminants entering the water column (TAMS/Earth Tech, 2005: 20). Capping the remaining contaminated sediments, the eventual recolonization of the benthic community, and habitat enhancements would affirm

the long-term negative impacts of dredging were minimal (TAMS/Earth Tech, 2005: 20).

Remediation plans under CERCLA must meet the standards of state and federal law. Plans must provide assurances that the risks associated with cleanup are limited. New York State's requirements for remediation efforts are some of the strictest in the nation. The plan needed to meet the substantive requirements of permits associated with disturbing state regulated wetlands (*Inactive hazardous waste disposal site remedial program*, 6 NYCRR Part 633) and navigable waters (*Inactive hazardous waste disposal site remedial program*, 6 NYCRR Part 608; Onondaga Lake Proposed Plan, 2004). The DEC was also required to coordinate the remediation of the lake bottom with the remediation of the remaining contributing upland sites.

At various points during the process, concern was expressed over the sufficiency of the program for “cleaning” the Lake. Some believed the plan, which left many contaminated sediments in place, was merely a band-aid. Many Syracuse residents, environmental groups, and particularly the Onondaga Nation wanted the Lake completely restored regardless of time or cost. Capping certain portions of the Lake was seen as covering up the problem, not treating it (TAMS/Earth Tech, 2005: 19). There were also concerns about the limited portion of the program that addressed the deeper, profundal zone. The proposed plan alleged that these deeper sediments were considered sufficiently contained, so not as subject to resuspension as those in shallower waters (Comment and Response Index, 2005: 101). Removing profundal sediments would also not only cost a great deal more, which undermined cost-effectiveness, but would also require larger disposal sites or alternative treatment methods (TAMS/Earth Tech, 2005: 25). The proposal to oxygenate the lake was also questioned as it might detract from remediating the mercury that came from industrial contamination and not from anoxic conditions (NYDEC, & EPA, Comment and Response Index, 2005: 17). The technique was further criticized as merely a

short-term, untested solution. The EPA and DEC, however, claimed the strategy was soundly based on case specific research and only used a small portion of the total funds dedicated to cleanup. The EPA and DEC asserted that the proposed remedy provided the best balance of tradeoffs when interpreted in the context of CERCLA's requirements and those set forth by the National Contingency Plan evaluation criteria (TAMS/Earth Tech, 2005: 19). The best solution was the prevention of additional exposure; any lingering contaminants were to be addressed by monitoring systems and CERCLA's mandatory five-year reviews to ensure the remedy continued to be protective of human health and the environment (TAMS/Earth Tech, 2005: 19).

As a mandatory part of the process, the EPA also evaluated the proposed plan as part of an internal review process before the National Remedy Review Board ("NRRB") and considered public input (NYDEC, Public Meeting, 2005: 8). The NRRB review, a program that began as part of 1995 Superfund administrative reforms, considers proposed response actions prior to their being issued for public comment. The Board evaluates proposed remedies for consistency with the National Contingency Plan and other Superfund policy and guidance (NRRB & Griffith, February 8, 2005). It then makes advisory recommendations to the appropriate regional decision maker, in this instance the DEC. These recommendations are intended to receive substantial weight, though other factors like public comment or technical analysis are also considered. The EPA requested that the Onondaga Nation, Honeywell, and the Atlantic States Legal Foundation ("ASLF") submit comments to the NRRB prior to the Board's meeting with the DEC. The Nation's dissatisfaction with the proposed remedy and the process was expressed through submissions and presentations to the NRRB. Its sentiments were mirrored by the public during the comment period. The DEC and EPA response, unfortunately, would provide little satisfaction to either.

The National Remedy Review Board, Onondaga Objections, and Public Comment

Between November 29, 2004 and March 1, 2005 and again on April 1, 2005, the EPA, DEC, and Honeywell solicited public input on the proposed plan, reviewed the NRRB's recommendations, and evaluated the DEC and EPA New York Regional office's response. Final remediation plans are required to consider public input to ensure that community concerns are considered. A major component of CERCLA is the statute's extensive participation provisions that are intended to assure the public a role in the remediation of Superfund sites (Spyke, 1999: 284). The law requires not only that the public be informed about the proceedings, but provided the opportunity to comment on proposals. The EPA must also respond to significant comments, criticism, and new information provided by the public. From the creation of information repositories to the holding of public meetings, CERCLA has been considered one of the environmental laws with more "generous participation provisions" (Spyke, 1999: 285). Unfortunately, public satisfaction with the law has been nominal, with individuals believing public values have not been incorporated into the cleanup process (Folk, 1991). Administrators, who have found the participation requirements costly and time consuming, fear that the participants are poor judges of acceptable levels of environmental risks.

Tribal participation in the Superfund remediation process has also proven unsatisfactory. Although the EPA has made efforts to improve the role of tribes since 1998,¹²² the failure to successfully implement plans to enhance tribal roles, limited participation from leadership, a failure to establish clear program goals, and a failure to include regional offices in the process

¹²² The EPA's improvements to Indian policy in the Superfund process included the 1998 "Plan to Enhance the Roles of States and Tribes in the Superfund Program," an action plan to address tribal issues raised in a 1998 national forum on impediments to tribal waste programs, known as the Albuquerque Forum; and through the establishment of the Tribal Association on Solid Waste and Emergency Response ("TASWER") (Thompson & Kwok, 2004).

have hindered advances (Thompson & Kwok, 2004). Specific criticism has been lodged that the EPA fails to account for tribal cultural values and use of natural resources for spiritual and cultural practices. Further, EPA guidelines continue to suggest that tribes should be involved early in the process. The Nation's complaints regarding the remediation process at Onondaga Lake confirm, however, that tribal involvement in the CERCLA process remained flawed.

Information regarding the proposed plan was made available to the public at numerous locations during the comment period. The DEC also conducted a public availability session where it reported its remedial investigation findings. The public also had access to information through publication in the Administrative Record and by placing information repositories at the NYSDEC Region 7 Office, the NYSDEC Central Office, the Onondaga County Public Library Syracuse Branch, the Atlantic States Legal Foundation, and libraries in Camillus, Liverpool and SUNY ESF (ROD, 2005: 8). Honeywell also published notice in the *Syracuse Post-Standard* and held a series of informal availability sessions and formal public meetings at the New York State Fairgrounds (ROD, 2005: 8).

Discussions also occurred between the DEC and the Onondaga County Legislature's Environmental Committee, the Onondaga County Department of the Environment, the Onondaga Lake Partnership, the Atlantic States Legal Foundation, local scientists from the Upstate Freshwater Institute, professors from SUNY ESF, officials from the Town of Camillus (site of the SCA), the Citizens Campaign for the Environment, the Sierra Club, and the Central New York Air and Waste Management Association (ROD, 2005: 9). In addition to the mandated notice and comment period, the DEC supported a series of five expanded outreach program meetings to consult with the Onondaga Nation. Input regarding the remediation plan was substantial. Residents, local officials, and the Onondaga Nation expressed concerns regarding

the sufficiency of the remediation.

The Onondaga Nation's Comments on the Proposed Remediation Plan

The Onondaga Nation first submitted comments to the National Remedy Review Board on February 8, 2005, asserting that the EPA and DEC failed to sufficiently consult the tribe regarding the proposed remedy (NYSDEC & EPA, Comment and Response Index, 2005: 1). Pursuant to the 1984 EPA Indian Policy, Executive Order 13175, and CERCLA consultation requirements, the Nation's role in creating a remediation plan should, arguably, have been more substantial. CERCLA provides specifically for tribal roles in the process. According to the statute, tribes may play the role of lead or support agency, tribal law may be applicable or relevant to the process, and tribal interests must be considered (CERCLA, 1980). The EPA's own consultation policy requires tribal involvement when a project may affect tribal interests (EPA, 1984). Executive Order 13175 deems consultation appropriate when the action has "tribal implications" and "substantial direct effects" (Executive Order 13175, 2000). Because of these requirements, tribal consultation is needed if there is a federal action being taken or a decision being made where tribal interests may be affected such as in CERCLA remediation efforts. Tribal interests have been considered "affected" where a tribal treaty covers the area where a site lies, where tribal members use resources from the area impacted, where tribes are Natural Resource Trustees of the affected resource, where the affected area is within a tribal historic area or traditional cultural property, or where the area affected is ecologically, culturally, visually, or hydrologically linked to tribal resources or uses (Dailey, et al., 2015). For the Onondaga Nation, Onondaga Lake met all of these requirements. Further, in 1992, when the EPA published a guidance manual for regional site assessors in using the CERCLA Hazardous Ranking System, numerous tribes complained that the guidance manual failed to include provisions considering

exposure scenarios and resource uses unique to tribal populations and therefore underestimated the actual risks to these populations (Marten Law, 2007). In 1998, after meeting with numerous tribes, the Assistant Administrator of the EPA's Office of Solid Waste and Emergency Response agreed to reexamine the HRS guidance to consider traditional lifeways. It was not until a 2004 report that the EPA's Inspector General concluded that "due to the subsistence lifestyles, spiritual practices, and other cultural behaviors, tribes have multiple exposures from resource use that could disproportionately impact them" (Office of the Inspector General, 2004). It was recommended that the risk assessment guidelines consider cultural practices in assessing Superfund sites (Marten Law, 2007). Unfortunately for the Onondaga Nation, the amendments would not be implemented until March 2007, three years after its comments were submitted to the NRRB (Woolford, March 20, 2007). Regardless of the delay in determining that traditional lifeways required consideration as part of the EPA guidelines, the Nation still had numerous reasons to raise concerns about the Onondaga Lake remediation plan process and the lack of proper consultation.

First, the agencies involved in the process had failed to incorporate the cultural and spiritual significance of the Lake to the Onondaga people or to consider the specific environmental and health concerns of the Nation (Heath, February 8, 2005). The Nation further faulted the EPA for acting in violation of the agency's Indian Policy and the federal trust responsibility. It called into question the agencies' efforts to respond to the 1998 call to adequately involve Indian nations in the Superfund process. The Nation asserted "numerous requests" were made to meet and consult for "several years" prior to the released of the proposed remediation plan for the Lake and various upland sites, however, no consultation meetings occurred until November 22, 2004, only days before the DEC announced the plan. The Nation

did hire outside environmental counsel and a toxics expert to review the data that had been compiled from the first November meeting, but there was insufficient time to complete the study before the notice and comment period opened. Further, when the Nation submitted letters to the DEC regarding the upland sites, the agency failed to respond.

In addition to the consultation problems raised, the Nation argued that it attaches sacred, historic, archaeological, and cultural significance to the Lake and its surroundings that were to be disturbed and impacted by the proposed remediation plan pursuant to the regulations of the National Historic Preservation Act (36 CFR 5 800.3(f)(2)). It contended that there were sites within the area being remediated that would be impacted that were eligible for listing on the National Register of Historic Places.¹²³ This argument would not have gained support, however, as cultural resource surveys that were completed later in the process would not find any Haudenosaunee sites that were eligible for listing. Based on sacred, spiritual, historic, archaeological, treaty-based interests, and environmental interests in the Lake, the Nation argued that the DEC's proposed remedial alternative inadequately cleaned up the Lake and would only result in the permanent contamination and degradation of the Lake from the continued release of pollutants (Heath, February 8, 2005). Finally, the Nation indicated in a presentation before the NRRB that its people traditionally relied on fish as an integral part of their diet and pointed towards anecdotal evidence that people continued to consume fish from the lake in spite of the existing fish consumption advisory (NRRB & Griffith, February 18, 2005).

¹²³ According to the Nation's Comments, there were sites in the Area of Potential Effect that were "associated with events of pre-colonial Onondaga history, which made significant contributions to the broad patterns of Onondaga and American history; associated with the lives of pre-colonial Onondagas and Haudenosaunee, who are significant to the Onondaga and the American past; contains archeological evidence of pre-colonial structures that embody the distinctive characteristics of that period; and contains archeological evidence that has yielded, and is likely to yield, information important to prehistory and history (Heath, February 8, 2005).

Although the Nation contended the remedy selection process showed an “utter disregard of the interests of the Onondaga Nation,” a formal action raising this claim was never brought. That the state and federal agencies failed to comply with the law was asserted in the Notice of Intent to Sue in the Nation’s land rights action (NYDEC & EPA, Comment and Response Index, 2005: 3). When the Nation filed its claim, however, the limited resources available for litigation were directed to the land rights action, leaving the Nation to contend with the state and federal environmental agencies actions while it fought to reclaim its sovereignty and its land.

The DEC and the EPA’s response to the Onondaga’s complaints were simply to claim that, since November 2004, the Nation had participated in numerous technical discussions in creating the proposed plan and that additional meetings were anticipated. After addressing the asserted insufficiency of the remediation and the failure to consider upland sites’ remediation in the proposed plan, the Nation received no substantive response from the agencies. The EPA and DEC did assure the Onondaga that a cultural resource analysis of those areas where archaeological resources might be present would be conducted. After reviewing the proposed plan and information provided by the EPA Region 2 Office and consulting with representatives from the DEC and the Onondaga Nation, the NRRB completed its review, submitted written recommendations and made them publicly available (TAMS/Earth Tech, 2005: 2).

Public Comments Indicate Further Concerns with Remedial Efforts

Public comment from numerous groups including the Upstate Freshwater Institute, Onondaga County, Syracuse University, and SUNY ESF questioned the process (TAMS/Earth Tech, 2005: 10). The response to the proposal was generally positive, although some felt the plan was too aggressive or not aggressive enough (TAMS/Earth Tech, 2005: 11). Locals also expressed concern regarding the standards used to measure water quality and to determine when

Onondaga Lake was “clean and safe” (NYDEC & EPA, Comment and Response Index, 2005: 66). The EPA tried to reassure those concerned by explaining the detailed methodology to be used to measure toxicity and contaminant levels, addressing everything from sediment to fish tissues (NYDEC & EPA, Comment and Response Index, 2005: 67).

The Camillus Town Supervisor questioned whether the siting of the SCA in her town was the best choice, raising uneasiness about odors, noise, safety, and traffic generated as a result of the program as well as negative impacts on the viewshed (NYDEC & EPA, Comment and Response Index, 2005: 11). She was assured that the community would be involved in the continuing planning process. Other residents also insisted that removing pollutants only to dump them in an SCA, where there was a possibility that they might seep into groundwater, was simply “moving the problem elsewhere” (NYDEC & EPA, Comment and Response Index, 2005: 67). Agency representatives promised that the materials deposited in the SCA would be completely isolated from the environment using a cap and impermeable liner to prevent seepage (NYDEC & EPA, Comment and Response Index, 2005: 67). Residents also raised questions about health concerns for people living nearby and children playing by the SCA. The design, the agencies promised, would comply with state and federal requirements and would prevent human exposure in surrounding neighborhoods. Precautions would also be taken during construction to protect the public from exposure, and monitoring during and after would provide additional safety (NYDEC & EPA, Comment and Response Index, 2005: 70). Additionally, an odor mitigation plan would be created based on sampling and analysis of sediments transported to the SCA (TAMS/Earth Tech, 2005: 22). The mitigation plan and monitoring process would include variables such as air, water, and groundwater quality, noise levels, and potential odor emissions. Monitoring systems and technological backup systems were also promised in the eventuality that

a pipe might burst (TAMS/Earth Tech, 2005: 41).

The Atlantic States Legal Foundation (“ASLF”) raised misgivings that the human health risk assessment failed to take special consideration of the populations most at risk: those who might ignore the fish advisory, immigrants, economically disadvantaged people, and the Onondaga Nation (NYDEC & EPA, Comment and Response Index, 2005: 45). It also believed the Nation's spiritual, cultural, and dietary resource losses needed to be part of the risk analysis. The agencies insisted that these issues were considered within the scope of the RI/FS, and that the Proposed Plan was broad enough to capture the concerns of all potentially impacted persons.

After reviewing comments received from the region, state, and the Onondaga, the NRRB suggested a series of improvements to the proposed remedy, some of which addressed the Onondaga Nation’s concerns. The proposed plan, the Board contended, needed substantial clarification regarding the selection of certain remedies, as much of the proposed plan failed to justify choices based on quantifiable data, to connect decisions made to the remediation goals for the site, or to provide adequate cost estimations. Further assessments of certain remedies were suggested, as well as additional plans for monitoring and assessment at the end of the process, which were excluded from the initial proposal. The Board also faulted the proposal for failing to quantify the human health and ecological risk reductions, suggesting that the ROD should include such clarification to show how the preferred alternative best met the remedial action objectives (NRRB & Griffith, February 18, 2005). Additional information was also needed regarding current fish consumption, both to improve the effectiveness of existing fish consumption advisories and institutional controls, and to better gauge the importance and degree of action that needed to be taken. Regarding the Nation’s assertion that the consultation process had been insufficient, the Board suggested an extension of the comment period and encouraged

“an open dialogue among all parties.”

Following the period of notice and comment, the EPA and DEC issued a joint Record of Decision for the site in July 2005. Although some revisions were made to clarify the selected remedy based on the NRBB recommendations, nothing substantial was done to address the Nation’s concerns regarding consultation. Efforts to restore Onondaga Lake had become “substantial and widespread” by 2005 (NYDEC, Public Meeting, 2005: 20). Federal and local funds outside of Superfund dollars had already been dedicated to projects addressing non-point pollution, habitat improvement, trail development, and other projects (NYDEC, Public Meeting, 2005: 20). County efforts to upgrade the municipal wastewater system were also underway (with help from state and federal partners). County officials, though they acknowledged that the proposed plan was not perfect, pronounced that it was “time now to move forward without delay,” (NYDEC, Public Meeting, 2005: 21). The Nation, unsatisfied with the response to their concerns about the process, filed its land rights action and continued to raise its concerns about the remediation in the press.

CHAPTER 16

SUPERFUND REMEDIATION

After over a decade of conducting studies and nearly a year of reviews, public comment periods, and limited tribal consultation, in 2005, the EPA and DEC released the Onondaga Lake Bottom Subsite Record of Decision (“ROD”) (ROD, 2005). The ROD’s mandate was not to restore the Lake to pre-contamination status, but “to enhance the quality of the lake and lakeshore for recreational and commercial uses” to a point where it could be enjoyed by the community again (ROD, 2005: 27). The ROD adhered to CERCLA's mandate that the proposed remedy be protective of human health and the environment, meet a standard of control over the contaminants that fall within legally acceptable parameters, be cost effective, and provide a permanent solution and alternative treatment technologies to the maximum extent practicable (CERCLA, 1980). Although some progress would be made on the Lake, the Onondaga Nation would continue voice its objections over the lack of their involvement in the process and the choice of a remediation plan that merely met the legal requirements of the statute. Despite these objections, however, some progress may be inferred from the improvements made to habitat and the return of some native species.

The Selected Remedies for Onondaga Lake

The chosen remedies targeted those areas of Onondaga Lake where the level of sediment contamination was in excess of acceptable levels (2.2 mg/kg), the overall concentrations of contaminant levels in the Lake, and mercury concentrations in fish tissue. The final plan would accomplish the following:

- Dredging 2,653,000 cubic yards of contaminated sediment;

- Dredging contaminants in hot spots;
- Covering 425 acres of contaminated sediment with an isolation cap and an additional 154 acres of deeper sediment with a thin-layer cap;
- Utilizing a hydraulic control system to prevent the migration of contaminants into the lake from groundwater from upland areas;
- Off-site treating and disposal of the most highly contaminated materials in a Sediment Consolidation Area (SCA);
- Treating of water impacted by the dredging;
- Implementing a lake-wide habitat restoration plan;
- Evaluating the effectiveness of oxygenation to address high mercury concentrations in anoxic parts of the lake;
- Monitoring the natural recovery process;
- Implementing controls that mandate the notification of the appropriate governmental entities when permits are required to activities impacting the remediation process;
- Implementing short and long term monitoring and maintenance of the process;
- Completing necessary Cultural Resource Assessments (ROD, 2005: iii).

The ROD also provided for habitat enhancement in areas where contaminants did not rise to the level of requiring remediation, but where habitat had been impaired by identified environmental stressors. This action was mandated by the state (ROD, 2005: iv). The program had to be certified annually to demonstrate that institutional controls were in place and that the remedies were being performed as required. Because some contaminants remained on the site above levels that allowed unrestricted exposure to site media, CERCLA mandated a site review once every five years and required any additional remedial actions be implemented to remove, treat, or

contain the remaining contaminated sediments (ROD, 2005: iv). These five year reviews are ongoing even after the remediation is complete. If additional actions are required to address the remaining contamination, or other problems arise after the chosen remediation efforts, Honeywell remains liable.

The ROD indicated that “the lake is a sink for essentially all contaminants” (ROD, 205: 19). Although mercury (including methylmercury) was the primary human health hazard identified, sixty other chemicals were identified as Chemicals of Potential Concern, three of which had toxicity levels concentrated enough to be of significant concern to human health, all of which were at levels in excess of EPA safety guidelines (ROD, 2005: 31). Exposure to these chemicals was possible for current and future recreational users of the Lake and future construction workers that were to remediating the site (ROD, 2005: 28). However, fish consumption was recognized as the primary vector for health problems relating to the toxic levels of contaminants (ROD, 2005: 29).

A baseline ecological risk assessment conducted during the RI/FS phase, which evaluated ecosystems and species at risk and overall ecological effects, indicated that toxicity levels at every trophic level of the Lake (i.e. in every part of the food chain) were high enough to cause damage to the animal and plant life (ROD, 2005: 33). Recognizing the risks associated with such toxicity, the ROD established Remedial Action Objectives specific to addressing human health and the environment, including: eliminating or reducing of the methylation of mercury; eliminating or reducing release of contaminants from sediments; protecting human health, fish, and wildlife; and achieving an acceptable surface water quality standard (ROD, 2005: 35). The chosen indicator of achieving these Remedial Action Objectives was a visible reduction of mercury levels in fish tissues within a decade of project completion (ROD, 2005: 81).

The Remediation Consent Decree

One year after the ROD, Honeywell and the DEC entered into a consent decree¹²⁴ requiring that the corporation fund and conduct the proposed remedy (*Camillus Clean Air Coalition v. Honeywell International, Inc.*, Motion to Dismiss, 2013: 5). The 2007 Consent Decree established Honeywell's responsibilities and explained requirements for coordination with the state, the EPA, and the public. Pursuant to the earlier cooperative agreement between the state and the EPA, the DEC retained oversight authority over the remediation. The state was, therefore, responsible for establishing the terms by which Honeywell was obligated to design and implement the ROD (Consent Decree, 2007). By complying with the Consent Decree, Honeywell was not admitting guilt. Technically, accepting responsibility as the potentially responsible party only meant the parties could avoid potentially costly and time-consuming litigation. Honeywell would implement and fund the remediation, would do so in compliance with all appropriate federal, state and local laws, and would reimburse the state for all costs incurred in the process (Consent Decree, 2007: 6).

Within 150 days of filing of the Consent Decree, Honeywell was required to prepare and submit a Remedial Design Work Plan ("RDWP") to the state. The RDWP created a structure and time frame to implement the ROD and set requirements for monitoring, maintenance, and record keeping, requiring these throughout the process (Consent Decree, 2007: 9). It also established contingency plans in the event that any aspect of the plan failed. At the completion of each phase of the process, Honeywell and state representatives would conduct pre-final inspections to ensure ROD compliance. Honeywell was required to address whatever corrective measures the state required within a settled timeframe. "As-built" drawings, construction

¹²⁴ A consent decree is a legal document issued by a judge that formalizes the agreement between the EPA and the responsible party.

documents, final engineering reports, and a certification by an engineer needed to be provided to the state at the completion of each stage (Consent Decree, 2007: 12). The state would notify Honeywell that construction had been completed after the requirements were met (Consent Decree, 2007: 13). The state could request that Honeywell change any element of the Remedial Program at any point in the process if the changes were consistent with the ROD, did not materially expand the scope of the remedy, and were consistent with the scope of work agreed upon by the company, the state, and the EPA (Consent Decree, 2007: 13). In the interest of keeping the process transparent, the company was required to file monthly progress reports and allow state and EPA representatives to attend all meetings held regarding the project (Consent Decree, 2007: 15).

Violations of the Consent Decree carried stipulated penalties. The state could also seek an enforcement order from the District Court to compel Honeywell to meet its obligations (Consent Decree, 2007: 20). The largest deterrent, however, was that the state retained its rights under CERCLA to undertake the remediation project itself and then hold Honeywell liable for the full cost (CERCLA, §9614(a); NYECL 27-1212(5)(a)). Nothing in the Consent Decree limited the state's ability to bring claims for natural resource damages or nuisance. Finally, the Consent Decree provided that the agreement would only terminate when the state issued a written determination that the company had completed all phases of the Remedial Program, including an Operations Monitoring and Maintenance program (Consent Decree, 2007: 44). Honeywell finally released its RDWP and a draft Community Participation Plan in 2009 (Parsons, 2008).

Community Participation Plan

Continued public involvement in the remediation process was required during the design and construction phases of the Onondaga Lake Bottom. The Citizen Participation Plan required

the DEC to release fact sheets, hold public availability sessions for milestone projects, create websites for information distribution, publish an electronic newsletter, and release an annual summary of activities to inform and engage the public throughout the process (NYDEC, March 2009: 5). To gain the public's input, the DEC and Honeywell committed to creating Community Participation Working Groups consisting of public officials, community leaders, citizens, conservation and environmental group leaders, and technical experts who would meet throughout the process to discuss its progress and provide a forum for input (NYDEC, March 2009: 6). Additionally, the DEC coordinated outreach with interested groups in the community (NYDEC, March 2009: 7). An analysis of the CPP indicated that the demographics of participants in the Citizen Participation Working Group claimed to be representative of the region's geographic diversity, spanning in age from 35 to 70. The Working Group was also chaired by a woman. However, only one woman from the Onondaga Nation was involved "briefly" and the racial composition of the group was uniformly white (O'Leary, 2011). As a part of "stakeholder outreach" the DEC and EPA claimed that they would continue to consult on a government-to-government basis with the Onondaga Nation. These measures were regularly evaluated to ensure that they "provide[d] communications and dialogue with the public that are open, transparent and proactive" (NYDEC, March 2009: 3).

The Sediment Consolidation Area

After years of studies and investigations, the DEC, the state Department of Health, and the EPA selected the Camillus site at the former Solvay Wastebed 13 as the site for the Sediment Consolidation Area based on accessibility, estimated capacity, current and future site use, geotechnical considerations, and distance from the community (Parsons, April 2011: ES-2). The DEC's approved health and safety measures were also incorporated into the SCA plan to protect

the Camillus community (Consent Decree, 2007: Exhibit 5). Additionally, the DEC approved a Quality Assurance Project Plan for an Air Quality Monitoring Program for the SCA (Consent Decree, 2007: Exhibit 6).

Sediment removed from the Lake was held in geotextile tubes to dry (ROD, 2005). After dredging ended, these tubes and the containment area were overlaid by a vegetative cover, a topsoil layer, two feet of protective soil, a geomembrane cover, and a grading layer to conceal the containment area and prevent precipitation from disturbing the site. Preventing water from entering the containment area reduced the risk of water leaching out. The SCA was designed not to be visible from the surrounding neighborhoods, leaving existing trees and vegetation in place around the perimeter. The SCA was also designed with several redundancies to make certain that the containment was permanent. The SCA enclosed the contaminated sediments in an engineered, containment cell where they could be maintained and monitored to protect human health and the environment and constructed and operated in a manner that would not impact groundwater. The most highly contaminated sediments are not stored at the SCA but contained behind a lakeshore barrier wall during dredging and collected in recovery wells for offsite disposal (NYSDEC, April 2010: 3).

Honeywell sought to work with the Camillus community and its leaders to create acceptable SCA work plans (Parsons, April 2011: 2-1). For example, the plan addressed community concerns over odors, choosing geotextile tubes rather than settling basins. Honeywell also insisted it incorporated local input into site selection to minimize impact on the community and to provide the maximum buffer distance from nearby residential and public facilities (Parsons, April 2011: 2-2). Letters to the editor flooded the local Syracuse paper regarding the actual safety of the SCA, although the agencies asserted that these fears were

unwarranted.

Pre-Dredging Baseline Evaluations

In 2008, Honeywell authorized baseline monitoring to document lake conditions before dredging and capping began to facilitate evaluation of the effectiveness of the remedy. Measurements were taken of zooplankton, fish, benthic invertebrates, and littoral water samples throughout the remedial design phase until the cleanup started in 2012 (Parsons, December 2011: 1-1). Water samples were examined for total suspended solids, fixed and volatile suspended solids, inorganic carbon, calcium, and total mercury (Parsons, December 2011: 2-5). The data gathered were intended to serve two purposes: to establish baseline chemical and physical conditions of the Lake through sport and prey fish sampling and to provide additional data by sampling other biota to assess variability in mercury concentrations (Parsons, December 2011: Table 1). Sampling also assessed optical water quality parameters (i.e., turbidity/water clarity) near the proposed remediation areas during natural forcing conditions such as tributary runoff, wind-driven waves, and typical lake currents to determine how these conditions impact water quality (Parsons, October 2011). Finally, phosphorus and inorganic nitrogen were monitored to provide information on phytoplankton nutrients and the existence of potentially toxic forms of nitrogen (Parsons, October 2010: 2).

The Final Remediation Plan

The plan for addressing contamination at Onondaga Lake was finalized in late 2011 when Honeywell released its Onondaga Lake Sediment Management Final Design. It detailed the process by which dredged sediments would be pumped through a double-walled pipe to the SCA, how those sediments would be dealt with when deposited there, and how water from the sediments would be separated, treated, and moved to the water treatment plant (Parsons,

September 2011). The remediation provided jobs for more than 500 Central New York scientists, engineers, and skilled craft laborers who worked with Honeywell on the lake bottom and upland sites. Local experts were also hired to assist in the remedial design, including researchers from SUNY-ESF, Syracuse University, and the Upstate Freshwater Institute, as well as engineering firms Parsons, O'Brien & Gere, and Anchor QEA (Parsons, March 2012: 3).

Dredging was designed to remove sediments from the In-Lake Waste Deposit to achieve the approved level of contamination and to create a habitat promoting post-capping elevation level. The final dredging plan ensures that there is no loss of lake surface area as a result of either dredging and cap placement. The plan also had to ensure that submerged aquatic vegetation did not disrupt operations (Parsons, March 2012: 5-12). Managing aquatic plants required mechanical removal, chemical control using herbicides, or a combination of the two.

The selected sediment cap was structured in 4 layers: a mixing layer, a chemical isolation layer, an erosion protection layer, and a habitat layer. These were designed to safeguard water, soil, and air quality. Remediation of the deeper profundal zone, where capping was not considered feasible, incorporated using nitrate additions to minimize methylmercury production and its bioaccumulation in fish (Coin, October 13, 2013). Adding nitrate to the water benefited a type of bacteria that crowded out other methylmercury producing bacteria and helped the mercury bind to iron in the bottom muck. It was believed to be a cost-effective way to control mercury in the parts of the Lake that could not be dredged or capped.

The final remediation plan also addressed the protection of cultural resources. Early assessments indicated that Onondaga Lake and the surrounding area had a "rich historic tradition that required Honeywell to take due care in cultural resources management during the remediation efforts" (Parsons, 2008: 2-9). Cultural resource management experts from the

Public Archaeology Facility of SUNY Binghamton predicted the lake bottom would hold resources representative of the early days of Solvay and Syracuse. Whether the area around the shoreline and adjacent sites still contained cultural resources from the Onondaga Nation or other ancestral people was questionable as the Lake level continuously fluctuated. Research including literature reviews, field study, and design-related investigation activities (e.g., geophysical survey and underwater diving) were part of multiple investigations made into cultural resources at Onondaga Lake (Hohman, 2004).

For example, in 2005, CR Environmental, a firm from Falmouth, Massachusetts, used remote sensing to survey the lake bottom. It also used recording side scan sonar, magnetometer, bathymetry, and sub-bottom profiler data to support the research required for the remedial design effort (Parsons, January 2010: 2). Remote sensing data, previous archaeological surveys, archival information, and aerial imagery suggested fifty-two potential areas in and around Onondaga Lake with potentially historic or archaeological resources meeting the National Register's requirements for listing eligibility. These included wrecks, shoreline infrastructure (such as docks, piers, footings, navigational aids or pipelines), an iceboat, an aircraft, and additional "inconclusive anomalies" (Parsons, January 2010: 4). Twenty-eight of these resources sat within 100 feet of the anticipated remediation area (Parsons, January 2010: 5). The National Register eligibility of the resources was evaluated and recommendations were made for listing (Parsons, January 2010: 6).

The known pre-contact and contact period resources near the Lake's shoreline would not be affected by the in-lake remediation activities. Because the lake water levels likely fluctuated for thousands of years, however, pre-contact resources that would have been on what was the lakeshore may have been submerged on the lake bottom and within remediation areas (Parsons,

January 2010: 8). To address this possibility, the plan required analysis of geophysical data and sediment cores, as well as shoreline testing from north and south of the confluence of Nine Mile Creek and Onondaga Lake (Parsons, January 2010: 12).

As a part of the cultural resources assessment, the EPA was responsible for initiating government-to-government consultations with the Onondaga Nation in compliance with its National Historic Preservation Act responsibilities (36 CFR Part 800.4(a)(b)). A statement issued by the Onondaga Nation addressed the significance of the Lake as their homeland “since the dawn of time” and as the “spiritual, cultural and historic center” of the Confederacy (Parsons, January 2010: 13). The Nation asserted that building homes and communities, fishing, hunting, trapping, collecting plants and medicine, planting crops, performing ceremonies, and burying their ancestors had occurred on or around the Lake since time immemorial. Cultural resource reports completed by the Lake Champlain Maritime Museum (“LCMM”), another contract archaeology firm hired by Honeywell, concluded that the potential to uncover or disturb anything other than natural resources or resource procurement and processing stations along the lakeshore was unlikely since land modifications over time would already have impacted any archaeological remains (Parsons, January 2010: 54). The report recognized that post-contact resources in Onondaga Nation settlements were located primarily southeast of the Lake excepting the village of Kaneeda and a handful of Native American cabins along the west bank of Onondaga Creek. Because dredging was anticipated in this area, the LCMM, advised additional research. Other than the Nation’s assertion of the significance of the area, there was no recognition that any Haudenosaunee resources existed or required protection from the remediation efforts.

This additional research clarified what resources existed, confirming that archaeological sites remained on the lake bottom, well preserved and partly or wholly buried. It was suggested

that Honeywell proceed by tailoring remedial actions to minimize adverse effects and address issues of data recovery on anomalies at sites still in question. Findings in 2011 indicated twenty sites as eligible for the National Register of Historic Places, 18 ineligible culturally derived features, three anomalies that were non-cultural, 15 unidentified, and four identified, but unevaluated (Parsons, October 2011). The report offered ways to reduce adverse effects to these sites during the cleanup process and to recover data in the event that there was an unavoidable negative impact. Archaeologists recommended that the anomalies that they were aware of be marked with seasonal float balls to help workers avoid adverse impacts during the remedial work. Additionally, the shoreline stabilization plan needed to be adapted to avoid impacts to known cultural resources (Parsons, October 2011).

The LCMM proposed a Syracuse Maritime Historic District for the National Register comprised of seven wooden boats of varying types, six areas of marine infrastructure, and three rock mounds (Parsons, October 2011:54). This proposed district would provide information about boatbuilding skills and techniques from the period of significance. The remediation program's potential to impact fourteen of the proposed district's contributing sites required that sediment removal and capping be set back far enough so as not to destabilize any contributing features (Parsons, October 2011: 98). Because dredging and capping would limit the accessibility of the sites for further studies, archeologists proposed data recovery where possible (Parsons, October 2011: 98). Recovery, however, was limited by the potential disturbance of contaminants that would increase the toxic areas of the lake or exposure of researchers to harmful substances (Parsons, October 2011: 99). National Register nominations were also proposed for two spud barges, a rock scow, and a canal boat (Parsons, October 2011: 176).

The New York State Historic Preservation Office and the EPA agreed to the proposed

maritime historic district, giving the wrecks and artifacts within the district the limited protections associated with listing on the National Register of Historic Places (Moriarty, February 3, 2012). The potential that the wrecks would be adversely affected by the cleanup remains was mitigated through first documenting the vessels through measurements, photographs, and video recordings. The sunken boats were covered by the capping material, leaving little, if any, of the vessels visible post-cleanup, but capping material would not damage such large and strongly built boats. It was suggested that the capping material would actually protect the wrecks from damage caused by waves and ice. The added documentation process was not intended to delay the cleanup project or add to its cost (Moriarty, February 3, 2012).

Surrounding the 58-acre Syracuse Maritime Historic District, Honeywell established a buffer zone that offset dredging at least twenty-five feet from the boundaries of each target within the site and a cap was placed over each target area (Parsons, March 2012: 7). Shoreline stabilization efforts were also undertaken to protect the two spud barges in shallower water subject to natural erosion. A rather delicate, partially buried wooden canal boat was left completely alone as to cap it could result in the collapse of its still-intact deck (Parsons, March 2012: 7-16).

Honeywell also established a Community Health and Safety Plan. With oversight from the DEC, the EPA, and the New York State Department of Health, its strategy met the health and safety requirements for the activities set forth in the Final Plan (Parsons, May 2012). If an incident occurs during the remediation, procedures meeting federal emergency response standards were in place (Parsons, May 2012: 4). Public involvement and education regarding the emergency plan was accomplished through a remediation website, notices, listserves and mailing lists, citizen inquiries, reports, and response to document requests, and through designated

community liaisons (Parsons, May 2012: 39). A system was also put in place to direct the appropriate information and responses from the project's own Emergency Response Team ("ERT") and to local emergency responders (Parsons, May 2012: 4). Finally, mitigation measures were considered for the potential hazards in every element of the work process and were implemented to reduce identified hazards. Response actions were also developed in the allegedly unlikely event that an incident might occur (Parsons, May 2012: 8). Environmental quality was constantly monitored from the lakeshore and at the SCA during the remediation. Additionally, the company exercised "best management practices" to minimize any potential emissions or odors from the water (Parsons, May 2012: 16).

A substantial portion of the project was dedicated to habitat restoration of wetland and upland vegetation, aquatic vegetation, fish communities, benthic macroinvertebrate communities, and wildlife. Initial habitat evaluation and monitoring began 2012 by observing fish populations (Parsons, June 2012: 1-1). Data was collected from 40 fish species at ten locations over the Lake that indicated the presence of mercury, PCBs, DDT, hexachlorobenzene, dioxins, and furans in fish tissue (Parsons & Anchor QEA, August 2013: 4-1). Similar findings of mercury were present in zooplankton sampling results (Parsons & Anchor QEA, August 2013:4-3). Identical evaluations of these populations occurred in 2014 (Parsons and Anchor QEA, July 2014).

Habitat remediation was anticipated to increase the size, diversity, and function of shoreline and upland wetlands and improve connectivity between wetlands and the Lake. Remediation also promoted pike spawning in adjacent wetland areas and created conditions that support transient cold water fish (e.g., brown trout) and other game fish (e.g., bass). Habitat enhancement also supports environments that did not exist in the Lake, such as floating aquatic plants, while discouraging the ingress of invasive species. Conditions were also created to

support a variety of native and culturally significant species of fish, plants, and animals. Restoration activities were anticipated to be completed in 2016 (Parsons, March 2012: 3).

Throughout the process, a water quality management and monitoring program was implemented to prevent, identify, and address negative water quality impacts resulting from disturbing sediment and capping, measuring levels of suspended sediments and release of dissolved contaminants. When construction was complete, Honeywell was charged with maintaining and monitoring the long-term effectiveness of the remediation efforts. This included ensuring that the cap remained physically stable and chemically protective (Parsons, March 2012: 10-1). Cap integrity was checked periodically throughout the process as well as after specific events such as particularly strong wind or wave action, tributary inflow, ice scour, or seismic events based on EPA recommendation (Parsons, March 2012: 10-1). This monitoring continued after the completion of the cap as well and is required as part of the monitoring which occurs at the remediated site in five year intervals. Habitat monitoring is used to assess the capped areas to make sure that the habitat-related goals of the remediation have and continue to be met and provided data as to whether maintenance activities were necessary (Parsons, March 2012: 10-2). Honeywell must further monitor water depth and habitat layer thickness. Biological monitoring of vegetation, wildlife, fish, and macroinvertebrates to determine the effectiveness of the cap placement is also required (presence, survival/expansion of the population, and toxicity levels).

Planning Ends and Remediation Begins

During the Superfund remediation planning process, decreases in sewage pollution from the county's improvements to the Metro sewage treatment facilities and infrastructure, particularly the combined sewer overflows, had already led to significant changes in lake

conditions (Weiner, September 27, 2008). The Upstate Freshwater Institute's Steven Effler said of the County's progress alone:

If you look nationwide and worldwide, this is right up there among the most dramatic changes ever recorded for a lake . . . It's really outstanding... Now it gives the community a chance to consider using the lake as a great resource, rather than just as a receptacle for waste. I think it will continue to get better. (Weiner, September 27, 2008)

Before the first dredging barge arrived on Onondaga Lake, phosphorous levels had dropped to the lowest ever recorded.¹²⁵ Area residents were relieved and excited at the start of the removal of contaminants in June 2012. Honeywell's general counsel boasted, "We will return Onondaga Lake as a healthy, sustainable asset for future generations" (Coin, June 1, 2012b).

When dredging began in spring 2012, operations were underway 24 hours per day, six days a week (NYSDEC, October 4, 2012). By September, complaints of off-site odors from residents near the SCA in Camillus were issued; Honeywell immediately investigated the problem. The State Department of Health, the EPA, and the DEC reviewed air monitoring data from the SCA to ensure that the odors were not emanating from VOCs. Chemical levels were deemed too low to warrant concern and source of the odors was not found. In keeping its promise to the community to address nuisance odors, however, the company temporarily suspended dredging, installed an odor control misting system, reduced the amount of standing water in the active water basin, installed a cover system on active work areas in the water basin, captured vapors using a carbon filtration system, and covered the geotextile tubes in the dewatering system with plastic when they reached capacity (NYSDEC, October 4, 2012). The measures taken to curb the nuisance odors were moderately effective though area residents continued to report occasional problems. As the year drew to a close the company indicated that it recognized the

¹²⁵ Changes in water treatment at Metro, which removed more phosphorous and ammonia from the water, released a less damaging form of ammonia nitrates into the lake, actually decreased methyl mercury production (Weiner, September 27, 2008).

need to explore additional mitigation measures (NYSDEC, November 2012).

In December 2012, Honeywell began removing some of the most toxic pollutants from the soil along the Lake's shoreline (Riede, January 8, 2013). Chemicals too toxic to go to the Camillus SCA were drained into trucks and driven to the Clean Harbors hazardous waste facility in Baltimore, Maryland. Honeywell's efforts also incorporated visual enhancements including planted trees and grass on a three-acre stretch of land along the southwestern shoreline off the westbound lanes of Interstate 690, a route passed by thousands of motorists per day (Moriarty, May 6, 2012). The company cleared Semet Hill (a three-acre site) of non-native vegetation and planted more than fifty species of native grasses and 100 trees along the highway as part of the project (Mariani, June 16, 2011). The western shoreline was also covered with over 100,000 native plants over 30 acres and ten acres of wetlands along the shore restored to support shorebird habitat (Honeywell, 2016).

Additional odor control measures were implemented at the SCA in 2013 (NYSDEC, April 8, 2013). Residents of Camillus living in proximity to the site continued to call the Honeywell hotline to register complaints. Some found the odor so noxious that they called the local police. One resident described it as a "Really bad, flammable, chemical, eye-tearing, choking, can't-stay-outside-in-it, can't-breathe odors" and added that even when the smell was not at its most potent, residents were still forced to tolerate a "very strong mothball odor" (Riede, October 1, 2012). DEC's regional director suggested that smell was naphthalene, one of the contaminants being pumped out of the Lake but assured people that air quality was being closely monitored and there were "no indications that there are any health concerns here" (Riede, October 1, 2012). In a letter to the DEC regional director, Camillus's Town Supervisor indicated that residents were "frightened for the health of their families" and claimed that this confirmed the town's initial

fears over the placement of the SCA in its backyard (Riede, October 1, 2012). Residents conceded that Honeywell was responsive to their complaints, though some compared the potential for danger from the site to the disaster at Love Canal (Finkle, February 8, 2013).

In 2013, eight years after the release of the initial proposed plan to remediate the lake bottom, Plaintiffs in *Camillus Clean Air Coalition et al v. Honeywell International, Inc.* sought to enjoin Honeywell from pursuing the already agreed upon remediation of pumping Onondaga Lake dredge onto a site near their neighborhood (*Camillus Clean Air Coalition et al v. Honeywell International, Inc.*, Camillus Motion to Dismiss, 2013). The Plaintiffs sought injunctive relief to prohibit the company from continuing to transport dredged sediment to the SCA and to require the use of additional air monitoring technology (Camillus, Motion to Dismiss, 2013: 7). The complaint requested compensatory and punitive damages for alleged injuries suffered due to the sediment already disposed of in the SCA (Camillus Motion to Dismiss, 2013: 7). Residents expressed their concerns about the health impacts of the contaminated sediments, claiming that they suffered from nausea, sinus and nasal burning and irritation, tingling sensations, severely dry and itchy skin, persistent coughing, and severe asthma attacks (Coin, May 15, 2013a). The claim asserted that the air monitoring techniques employed by the company were insufficient and that Honeywell failed to employ "reasonable care" when dumping the hazardous material. Until such time that a state-of-the-art monitoring system could be constructed to sufficiently provide for the safety of town residents, the plaintiffs requested that all dumping stop.

The DEC asserted that the system in place was comprehensive and met state and federal requirements for "health-based limits" (Coin, May 15, 2013a). Honeywell filed a motion to dismiss the Plaintiffs' claims for injunctive relief and the state filed an amicus curia motion to

support Honeywell's motion to dismiss in May 2013 (Camillus Clean Air Coalition v. Honeywell International, Inc., Decision and Order, 5:13-CV-365 (N.D.N.Y. 2013). The court immediately denied the plaintiffs' initial request for a preliminary injunction. Very shortly after, the complaint was dismissed without prejudice, leaving the option for the Camillus Clean Air Coalition to pursue their claim for damages when Honeywell completed the lake restoration project (Coin, May 15, 2013b).

Even though Honeywell prevailed, legally the company still took measures to address concerns, demonstrating their attempts to be flexible in creating a process that efficiently and effectively cleaned up Onondaga Lake (McAuliffe, September 12, 2013). In September 2013, the company modified the SCA plans due to problems with periodic temporary shutdowns at Metro that forced dredging and SCA Water Treatment Plant operations to shut down until Metro's system capacity was restored. These constant delays impacted the "productivity, continuity, and efficiency" of the dredging. Honeywell proposed this could be remedied by using the existing temporary onsite effluent storage rather than stopping the process completely, allowing the company to maintain its schedule (McAuliffe, September 12, 2013). The company proposed constructing facilities consistent with state laws and with the state's approval that would increase the functionality of the water treatment and dredging processes.

Additional Changes to the Process

Revisions to the remediation process were constant although changes did not necessarily result in improved efforts. Some alterations to the ROD have reduced the actions taken to restore the lake. For example, in August 2014 the dredging process was altered when geotechnical analysis revealed that removing sediment along the southeastern shoreline might result in shoreline and rail line instability as a result of the potential shifting of the ground under

existing and utilized lines (three active railroad lines are located along the shoreline immediately adjacent to areas where dredging is planned) (NYSDEC & USEPA, August 2014). Agencies provided and then dismissed a series of possible alternatives, instead revising the 2005 plan to create a “buffer zone” where no dredging or capping would occur. Rather than removing a substantial amount of contaminated sediment, remediation would consist of improving habitat and promoting the natural recovery of the sediments in the buffer zone.

There were some surprise successes though. The third year of the three-year nitrate addition pilot test was completed successfully in 2013. The program met its objective: to demonstrate the ability to maintain nitrate concentrations in the hypolimnion (i.e., water deeper than 30 ft.) at levels sufficient to inhibit release of methylmercury from lake sediment to the overlying waters during summer stratification. The success of the pilot study came as a welcome surprise, as indicated by the local news’ statement that “A homegrown, cobbled-together experiment to cut mercury levels in Onondaga Lake is emerging as one of the most stunning successes of the \$1billion cleanup. The pilot study indicated that concentrations of methylmercury in the water were so low that they were comparable to "concentrations observed in pristine, uncontaminated lakes” (Coin, October 13, 2013). As a result of adding nitrate, methylmercury concentrations measured in deep waters were lower than any prior year on record

In the midst of all the manmade efforts to repair the damage done to Onondaga Lake, the waterbody is also in the slow process of healing itself. "Natural recovery" has resulted from the gradual burial of contaminated sediments over time (Parsons and Anchor QEA, September 2014). It is ongoing in nearly two-thirds of Onondaga Lake at depths in excess of thirty feet (nearly 65% of the lake’s surface area) where waters thermally stratify (Parsons and Anchor QEA, September 2014). New sediment enters the Lake from tributaries and as direct runoff,

covering contaminated sediments. Benthic macroinvertebrates (e.g. worms) also aid in natural recovery as they increase the extent of vertical mixing of the sediment (Parsons and Anchor QEA, September 2014:2). Honeywell is required to monitor natural recovery processes in the lake in three-year increments. Monitoring samples mercury and follows the progress of the manmade and natural recovery of the Lake (Parsons and Anchor QEA, September 2014: 1).

Onondaga Objections Persist

The Onondaga Nation's objections to the remediation efforts persisted throughout the process and after its completion. The Nation used its land rights action and the publicity surrounding it to express its opposition to the remediation efforts as the action itself intended to address environmental inequities in fighting for the "rights to enforce a real cleanup" (Onondaga Nation, October 11, 2007). As the governments addressing cleanup efforts remained unresponsive to the Nation's concerns and as the success of the land rights action was limited by increasing political and legal changes, the Nation kept the issues surrounding the watershed in the public eye by promoting its cause in the press, through community outreach, and through working relationships with environmental groups off the reservation. What began as casual conversations about the action and the environmental efforts evolved into working groups on the reservation, meetings, and other community gatherings addressing the Lake cleanup (Kimmerer, 2008). Area residents, and groups such as Neighbors of the Onondaga Nation and the Partnership for Onondaga Creek, in support of the land rights action, demonstrated outside the courthouse with signs that read "Proud Neighbor of the Onondaga Nation" and "Clean Up Onondaga Lake" (Onondaga Nation, October 11, 2007). Representatives from these groups, as well as the Onondaga Environmental Institute, and researchers from SUNY ESF met often to discuss remediation efforts, community outreach, and strategies at the Firekeepers Restaurant on

the Onondaga Reservation. A Center for Native Peoples and the Environment was established at SUNY ESF to teach students and community members about environmental issues from the perspective of the Haudenosaunee and using the philosophy of the Thanksgiving address. Courses offered through this Center are often co-taught by faculty and members of the Nation (Kimmerer, 2008).

The Nation has consistently supported the notion that the remediation efforts were insufficient. Chief Powless likened the chosen solutions to “prescribing a Band-Aid for cancer” (Kimmerer, 2008). When the county was promoting the success of its efforts at addressing the sewage problems, the Nation reminded the public that even with the county’s progress in addressing Metro and the CSO’s inadequacies, swimming and fishing remained restricted on the Lake and the water remained unpotable (Onondaga Nation, October 17, 2005). When the DEC and other local officials boasted of the progress on the Lake and when Honeywell announced it had finished its dredging, the Nation reminded the public that the remediation had left more than 80 percent of the contaminated sediments at the bottom of the Lake (Onondaga Nation, January 14, 2015). The Nation further stressed the need for a completely revitalized lake to help rebuild the regional economy (Onondaga Nation, October 11, 2007). The Nation’s message also focused on the need to make environmental decisions on behalf of generations to come, however, its disdain for the actions of “Albany politicians” in addressing Onondaga Lake was offered on behalf of all the people of Central New York whose land and health were being negatively impacted (Onondaga Nation, October 12, 2006).

In 2010, the Nation released its own “Vision for a Clean Onondaga Lake,” which followed the format of the Haudenosaunee Thanksgiving Address that honors all the aspects of the Earth (Onondaga Nation, 2010). Among other things, the Vision calls for the removal of the

contamination from the Lake and surrounding land so that the water is clean enough to drink and the fish safe enough to eat, both of which would strengthen the Haudenosaunee culture and begin a healing between the Six Nations and their neighbors. The Nation envisioned a remediation that would remove contaminated soil, utilize green infrastructure, abate mudboils, address point and non-point source pollution, utilize native plantings, and restore wildlife habitat and wildlife. To accompany the release of its Vision, the Onondaga, in partnership with local environmental group, Neighbors of the Onondaga Nation, presented the Vision in a lecture called “Sacred Waters” as part of a series called “Onondaga Land Rights & Our Common Future.” Chief Jake Edwards (Onondaga), an environmentalist, and Henry Lickers (Seneca) directed a lecture and panel discussion that included the Onondaga County Executive, the Director of Planning and Sustainability for Syracuse, faculty from SUNY ESD, and representatives of the Onondaga Environmental Institute. Lickers, a biologist, had worked closely with the Onondaga to develop the Vision. The series in general, and the lecture addressing Onondaga Lake specifically, drew large crowds (Syracuse Peace Council, 2012).

The Nation has also continued to represent that the consultation process has been a failure, claiming that most Onondaga comments have been ignored aside from small changes such as increasing the number of native plantings on reclaimed sites (Onondaga Nation, January 14, 2015). Further, the Nation was not invited to the September 3, 2014 celebration of Honeywell’s early completion of the dredging process. When the Supreme Court declined to hear the Nation’s land rights action, and it continued to pursue justice in the international community by filing a petition against the United States with the Inter-American Commission on Human Rights in 2014, the notion that the Onondaga were fighting for greater access and control of their former territory, particularly to address the industrial pollution in the Lake, was still at

the forefront of the fight (Onondaga Nation, April 15, 2014). When 40 local Syracuse politicians and celebrities jumped in Onondaga Lake to swim at the “Clean Lake Party in the Park” in July 2015, 20 Onondaga youth protested on the lakeshore to remind people that “the lake itself is hurting” and remained contaminated with mercury, PCBs, pesticides, chlorinated benzenes, BTEX compounds, naphthalene, and other volatile organics and chemicals left behind by the insufficient remediation (Onondaga Nation, July 24, 2015). After the cap covering the toxic waste at the bottom on the Lake failed, Tadodaho Sid Hill claimed that the remedy selected had always been “a cover-up, not a clean-up” (Onondaga Nation, January 29, 2016). Hill warned that the cap was destined to fail again in the future because the lake bottom remains unstable. He further chastised the county for its construction of an amphitheater on the Lake’s shoreline atop a former wastebed with minimal restrictions in place to prevent concertgoers from potential exposure, calling officials “more committed to public relations victories than a true reclamation of the lake” (Hill, June 11, 2016). Ultimately, as Hill noted, the Nation’s stance has consistently been that a “slightly less polluted lake” is not a clean one.

Conclusion of Dredging

The Onondaga Lake remediation has become the largest environmental remediation dredging project in the history of New York State and among the top five in the country. In addition to repairing the Lake, it has resulted in "a billion-dollar infusion of cash that brings a healthy bottom line for associated companies and means employment (Andrews, September 6, 2012). Honeywell encouraged its subcontractors to hire and purchase locally, wanting “people who live and work here [as they] bring a special sense of pride and commitment to the important work of achieving a sustainable and successful lake cleanup” (Andrews, September 6, 2012).

Honeywell made progress on its dredging program quickly. Phosphorous levels

dramatically decreased by half, reaching levels lower than those in Oneida Lake and several Finger Lakes (Coin, April 10, 2014). The amount of algae in the Lake also fell dramatically to a third of what levels were from 1998 through 2005 as a result of the county's water treatment plant and projects. In early November 2014, to the resounding applause of over 100 people gathered on the shore of Onondaga Lake, Honeywell's Project Manager John McAuliffe announced that dredging was complete (Coin, November 3, 2014). Dredging reduced mercury levels by 95%, which when combined with the County's \$500 million investment in the sewage treatment plant to reduce bacteria levels, has left a lake that is allegedly safe enough for swimming (Coin, November 3, 2014). By contrast, residents of the Camillus neighborhood where the SCA is located continue to assert that the fumes from the project are making them sick, an accusation which has created an entirely new environmental justice problem (Coin, November 3, 2014). As the dredging process drew to a close Camillus residents continued to move forward with a lawsuit that was put on hold until Honeywell completed dredging (Coin, November 4, 2014).

The Onondaga Nation also remains disappointed (Coin, November 3, 2014b). Joseph Heath, the Nation's counsel, released a statement on the day of the announcement that dredging was complete, stating:

The Onondaga Nation does not find anything to celebrate as the sacred lake and its shore areas remain heavily polluted and toxic... we are left with Band-Aid measures to try to hold the toxins in place and cover them up... How long will these caps protect our children and grandchildren? The fish are not edible and the lake is not swimmable. (Coin, November 3, 2014b)

Although a great deal of work remains, it is important to recall that before remediation was undertaken, Onondaga Lake was once considered "most polluted lake in America." A winter traveler to the shores of Onondaga Lake may now have the good fortune of observing bald

eagles. Onondaga Faithkeeper Oren Lyons opines that to see the bird is “the best of all good luck” (Kirst, 2014). The number of eagles rose steadily with only twenty observed in 2011 (Kirst, 2011), but as many as thirty-nine in 2014 (Kirst, 2014). In 2015 the Director of Audubon New York Erin Crotty commented, "It's a tremendous comeback story . . . a symbol of modern environmental management that when . . . you do clean up a degraded environment, it can come back” (Downing & Briguglio, 2015).

Fisheries have also started to make a comeback at Onondaga Lake. Reductions in phosphorous, ammonia, and algal growth as well as increased levels of dissolved oxygen have positively influenced the recovery of marine life with over sixty-five documented species of fish in 2010 up from only nine to twelve recorded in the 1970s (Onondaga Lake Partnership, 2010: 27). Plant life in and around the Lake and its tributaries has also recovered with the amount of aquatic plant cover increasing four-fold from 2000 to 2009 (Onondaga Lake Partnership, 2010:29). The decreased levels of phosphorous have led to decreased numbers of and less intense algal blooms; the increased levels of sunlight allowed to penetrate the water’s surface have allowed aquatic plants to reach depths of up to six meters. The increased aquatic plant communities have also contributed to the rise in diversity and size of fish populations, providing food and shelter to both aquatic animals and insects. Finally, the increasing numbers of plants along the shoreline have reduced erosion around both the lake and on the banks of its tributaries.

Even as the completion of dredging was announced, a substantial amount of work remained on the lake and at the surrounding upland Superfund subsites. Between 1998 and March 2015, cleanup remedies were selected for 10 of the subsites. The New York State DEC is the lead agency for all of the subsites except one at Lower Ley Creek. As of September 2016, progress on these sites varied from still in the planning phase to completion (EPA, 2016).

Wetlands restoration, shoreline improvements, lake bottom habitat layer improvements, and enhancements to the southwest shoreline with the planting of more than 100,000 plants and trees (predominantly native species) were anticipated to be completed by 2017 (Coin, 2015).

In early 2014, Onondaga County announced plans to construct an amphitheater complex on the lakeshore as part of a community revitalization effort. The Onondaga County Lakeview Amphitheater and Community Revitalization Project started in March 2015 and was completed in late summer 2015 (EPA, 2016). The Nation voiced objections to this project at every phase. Despite the limitations that remain on use as a result of the less than complete cleanup (i.e. lingering contaminants, persistent disagreements between state and federal officials on the safety of swimming, and continued advisories against the consumption of fish from the still-polluted waters), the Nation is seeking to reestablish traditional uses on and around the Lake, including hunting, fishing, gathering medicinal and food plants, and engaging in ceremonial uses of the area. Unfortunately, Honeywell's cap has failed three times since 2012 (Coin, March 24, 2016). Since work began, 7.25 acres of the cap have given away, causing toxic muck to slide down deep slopes of the southern lake bottom, contaminating an additional 40 acres. These failures raise substantial questions about whether the remediation will work in the long run.

CONCLUSION

Nature is always lovely, invincible, glad, whatever is done and suffered by her creatures. All scars she heals, whether in rocks or water or sky or hearts.

John Muir

When the Haudenosaunee Confederacy was formed, Deganawida travelled among the five tribes who were embroiled in wars and blood feuds; throughout the region “everywhere people were abusing one another” (Wallace, 1994: 10). The Peacemaker, accompanied by Hiawatha, traveled among the Five Nations to persuade them to adopt a “plan for peace and a good mind on the earth” (Wallace, 1994: 11). A peace between these discordant parties was ultimately negotiated on the shores of Onondaga Lake, where the newly formed Confederacy planted a Tree of Peace to give power and permanence to the union (Wallace, 1994: 27). Centuries later, it is again on the shores of Onondaga Lake that conflicting parties have come together to reach some consensus. The battles of this century, though not bloody, were nonetheless bitter and fought for high stakes. These altercations played out in courts of law, the media, and courts of public opinion.

Disagreements were again between governments: between different nations with the Onondaga Nation and the United States, as well as internal struggles between the United States' federal, state, and local governments. These conflicts stemmed from opposing ideas on property ownership, sovereignty, authority, pollution, remediation liability and standards, and public participation and consultation requirements. After nearly a century of environmental neglect and decades of political and legal turmoil over Onondaga Lake, when the dust again settled, what remained was, admittedly, a still less than pristine body of water. Although substantially improved, it is less the physical rehabilitation of the Lake that is impressive than the process by which it has started to return to life that makes the Onondaga Lake a significant case study.

Arguably, the degradation of Onondaga Lake resulted from a failure to acknowledge the interconnectedness of different aspects of the environment. Its restoration involved embracing this concept. The same can be said of the legal aspects of the remediation process. It was the integration of various processes—when all levels of government and all stakeholders came together—that led to the progress that has been made thus far. This research has attempted to integrate the many laws and legal precedents used to direct the cleanup within the wider context in which they operate. It also sought to direct attention to the limitations of the law in achieving a complete remediation of the Lake as a result of the courts’ interpretation of federal Indian law as well as agencies narrow reading of the requirements of environmental laws.

The work provides a nearly complete story—a beginning, middle, and nearly an end—of the death and life of Onondaga Lake. It provides a history of how the Lake came to be taken from its original stewards and then disintegrated into one of the most toxic sites in the country. It then examines the actions of various stakeholders attempting to control or at least influence the Lake’s remediation. Finally, it considers the physical processes used to restore the ecology of this once foul place. This has been accomplished in three parts.

It first identified the events leading up to the remediation of Onondaga Lake, illustrating the actions that caused the Onondaga Nation’s to lose control over their territory through unfair treaty negotiations with the United States as well as ill-fated, often illegal land dealings with New York State. It further explained how this loss was followed by over a century of “progress”—development, industry, and population growth—that resulted in the Lake earning the moniker of “most polluted lake in the country.” Finally, it introduced the actions that would be taken by various parties to repair the years of damage to the neglected site.

Next it considered the Onondaga Nation’s land rights action. The unique nature of the

Onondaga's claim, which incorporated environmental considerations and named corporate defendants. Although the claim was unsuccessful in that it was dismissed with prejudice, an argument was made that it still played a substantial role in the remediation of Onondaga Lake by directing attention to the Nation's specific complaints regarding the environment, raising community awareness about the issues faced by the Onondaga, and forcing a recognition that the Nation was owed a role in the remediation process.

Finally, it examined the Superfund remediation process. In particular, it addressed how extensive a process was required to formulate a cleanup strategy. It further explained the parties involved in the effort, the purpose and extent of their participation, and the objections raised to the process along the way by both the Onondaga and the community. Lastly, it explained the undertaking of the remediation, the progress that has been made, and what remains to be accomplished to complete the task at hand. Each section taken separately provides a thorough look at how environmental laws are implemented and how legal decisions impact the process of remediating a polluted site. Comprehensively, however, they demonstrate how these individual elements intrinsically fit together to reach a successful conclusion.

Implications of the Research

The literature addressing the diverse issues of native land claims, environmental contamination, and the procedures and processes associated with remediation is extensive. Many studies exist which address how it is that Native Americans were stripped of their land as a result of unfair dealings between governments (See e.g. Watson, 2012; Sutton & Beales, 1985; King & Roth; Zellen, 2008). In this era of growing fascination with and concern for the environment, an even larger body of knowledge exists detailing case studies of the degradation of the environment (See, e.g., Fagin, 2015; Buzbee, 2014; Crane, 2011; and Sullivan, 2008). A subset

of this literature focuses specifically on examples of environmental degradation of Native American land (See e.g. LaDuke, 1999; Eichstaedt, 1994; Pellow, 2002; and Erikson, Vecsey, & Venables, 1980). Work regarding the laws and processes for remediating such sites is also widely available (See, e.g., Falk, Palmer, & Zedler, 2006; Doyle & Drew, 2008).

This research endeavors to integrate these divergent stories into one to demonstrate how each of these aspects, which have separately impacted the land, the environment, and people, implicate one another. It illustrates how the law in action, despite what might be contained within the four corners of a statute, cannot operate without the collaboration of multiple parties. It demonstrates how it is that a large-scale federal environmental remediation project cannot be considered separately from an invalid 18th-century treaty. It emphasizes that the legal and technological aspects of the rehabilitation of the environment cannot be accomplished without either due consideration of public wants and needs or public participation. Further, it embodies the idea that environmental law, just as the environment itself, is interconnected.

The synthesis of these stories will assist those moving forward in similar large-scale environmental projects to understand the larger picture associated with such an undertaking. It consolidates the laws implicated in such efforts, the parties involved, and the processes and procedures used. Whereas an examination of the Superfund law, or even a simple CERCLA case study would be helpful, this research goes beyond such an isolated explanation of an application of this single environmental law to demonstrate that its implementation requires much more than what the statute dictates. Further, the research demonstrates how the remediation of the environment entails addressing all aspects of the environment and all the contributing factors of pollution by demonstrating that multiple laws and court decisions addressing multiple pollutants and incorporating multiple solutions are required for any

meaningful progress to be made. For example, had the remediation of Onondaga Lake only been a response to the requirements of Superfund, the Lake would remain an unsafe, phosphorous-laden, sewage-filled, anoxic body of water covered in algae. It was only through combined efforts that improvements transpired. The Onondaga Lake case study, therefore, suggests a system by which key players can work together in the future at similarly situated sites. It also addresses the limitations in and the need for an expanded role for tribal participation in decision making and local partnerships.

Potential Future Research

This research has provided an in-depth look into how it is that the law has impacted the outcome of the remediation of a polluted urban lake. It has examined how it is that federal and state laws and litigation have directed how the remediation process was undertaken, the degree to which cleanup occurred, and the role that various parties played in the process. Additional research surrounding Onondaga Lake might go beyond such considerations and address community perceptions of the remediation process and its outcome, how the Onondaga Lake project compares to similar remedial efforts, and how the cultural losses associated with the environmental degradation of the Lake, those which cannot be addressed simply by dredging and capping past mistakes, might be evaluated and compensated for.

Although this research has provided some investigation of community involvement in the remediation process as a required party in the Superfund process and through the Onondaga Nation's land rights action, additional research considering community perceptions of these actions and the end results would provide insight into public opinion on the effectiveness of the legal process. Understanding the community's conclusions regarding the process would also provide insight into the public's understanding of the role that these laws intend for them to play.

Their attitudes regarding the outcome would give some indication of their understanding of what protection and redress these environmental laws actually provide.

As the most polluted lake in the country, Onondaga's industrial contamination and Superfund remediation was compounded by municipal sewage contamination, which was addressed at great expense by a county-run remediation process mandated under the Clean Water Act. The Lake's significance to the Onondaga Nation further required the involvement of this additional government in the remediation efforts. This combination of problems forced a variety of individuals and institutions to work together to produce a result that has earned national attention for its innovation and success. An analysis of how Onondaga Lake's cleanup compares to other, similar undertakings would provide insight into a number of issues such as the whether the success stems from the application of the laws at hand or is merely a happy accident resulting the work of a group of unusually dedicated individuals. Further research into how Onondaga Lake's remediation compares to other sites would also help demonstrate the shortcomings of the project associated with limitations that existed in the regulations at the time the process began, in the technology utilized, and in the parties involved.

Comparisons between sites could take different forms. First, the cleanup process in Syracuse could be compared to the process undergone at other urban lakes. Onondaga Lake might be matched to other Superfund sites like Torch Lake in Michigan's Upper Peninsula or Tar Creek in Oklahoma. Onondaga Lake was named as a Superfund site after Torch Lake, but before Tar Creek, making a comparison of the various processes a method of analyzing how the evolution of CERCLA has improved (hopefully) the cleanup process. An alternative comparison might be Powderhorn Lake in Minneapolis. Though not a Superfund site, it suffers a similar fate to Onondaga in that trash floats on the lake's surface, its shoreline is eroding, and fertilizer and

animal waste running off from the surrounding neighborhood have caused frequent algae blooms (Minnesota Pollution Control Agency, 2013). After the state had placed the site on its impacted waters list, government agencies, residents, neighborhood groups, and nonprofits all became involved in addressing the environmental degradation, particularly stormwater runoff. A comparison between Onondaga Lake and a site like Powderhorn could provide valuable information on the strengths and weaknesses of state programs, the successes and failures of different local efforts, and demonstrate the most efficient and effective features that might be incorporated into similar undertakings.

What might be more interesting, however, would be to see how the undertaking at Onondaga Lake, which has proved unsatisfactory to the Onondaga Nation, holds up to a remediation in which Native Americans have played a more central role. For example, the case at hand could be contrasted with the Superfund remediation of Tar Creek in Oklahoma. At this site, a cooperative agreement was entered into to perform the remediation of contaminated properties within the Tar Creek Superfund site in June 2014. This agreement was noteworthy as the parties involved included the State of Oklahoma, the U.S. Environmental Protection Agency, and most significantly the Quapaw Tribe. This will be the Tribe's second Superfund clean-up project following rapidly on the heels of its success at the "Catholic Forty," another property at Tar Creek. The "Catholic Forty" marked the first site in the history of the Superfund program where a tribe led and managed the cleanup (Quapaw Tribe of Oklahoma, Dec. 19, 2013). This site is culturally and historically significant to the Quapaw Tribe, who wanted the land remediated and to retain its historic significance (Quapaw Tribe of Oklahoma, Dec. 19, 2013). Their desire to preserve such aspects of integrity made the Tribe particularly well-suited to remediate the land as their heightened sensitivity and personal interest in its significance made

them considerate of the potential negative impacts of the damage or removal of historically significant structures or artifacts. According to Quapaw Chairman John Berreyng, the Tribe “completed the first clean-up less expensively and better than previous efforts... Our goal is to make this land useful and productive again. We live here, and we care about the outcomes, so we are very pleased to have these two new agreements in place” (Quapaw Tribe of Oklahoma, June 4, 2014).

The EPA has attempted to improve tribal involvement in Superfund over the years. In the late 1990s and early 2000s, EPA undertook a series of reforms to the program within the existing statutory framework of Superfund, which acknowledged the dire need for State and Tribal participation, created guidelines for working with tribes (EPA, HRS Guidance Amendments, 2007). In 2007, the agency also added a requirement that Superfund site assessment personnel consider the health and environmental concerns unique to tribal populations and tribal resource uses when scoring sites under the Hazard Ranking System (EPA, HRS Guidance Amendments, 2007). Despite the Agency’s efforts, it was not until 2013 that a tribe finally gained an opportunity to lead and manage a cleanup program, leaving the effectiveness of these efforts in question. Currently 70, or close to five percent, of federal Superfund sites designated for priority treatment are classified as of “Native American Interest,” including Tar Creek and three other sites in Oklahoma (Superfund Site Information Database, 2016). For the Quapaw this remediation represents a major step towards cleaning up the pollution left over from mining operations on their land; for the Superfund process it signifies a step forward in guaranteeing Native Americans participation in cleanup of land significant to them.

The Quapaw, however, are operating in a significantly different regulatory environment than the Onondaga were. As the Onondaga Lake remediation process was unfolding, the EPA

was in the process of improving its relationships and consultation processes with tribes. Although the Nation's participation in the process did improve in time, the limitations of the remedy and their role in the cleanup left the Nation unsatisfied. The lack of participation afforded them in the Superfund remediation combined with the failure of the land rights action spurred the Onondaga to seek assistance in the international community. Considering the two cases together might demonstrate the benefits of providing direct control to the impacted Native American nation over the remediation of a site of cultural and spiritual significance.

Difficulty already arises in the valuation of the loss of natural resources at Onondaga Lake, a process that the Onondaga and the community still seek to accomplish in fulfillment of the Natural Resources Damages Assessment. The Onondaga Nation have remained less than enthusiastic about the cleanup, reminding those individuals who were perhaps overly excited about the result that "They're crowing about an achievement that's less than 20 percent of what should have been done" (Coin, April 21, 2014). However, the Onondaga Nation has consistently asserted that no amount of money could ever compensate for their losses. Joseph Heath, the Nation's counsel, has questioned: "How do you put a money value on losing a sacred lake, losing a place where you could swim and eat fish? The Onondaga are being asked to put a dollar value on spiritual and cultural losses. I don't know how we're going to do that" (Coin, May 19, 2014). According to Snyder, because economic impacts are assessed using western economic concepts and judicial systems, it is difficult to figure out the monetary value of cultural loss because it is too limiting (Engelbrecht, 2005: 1). To define what "cultural loss" means is difficult is it incorporates both the loss of possessions (which is more easily quantifiable) as well as the loss of kinship or belonging. In cases like this one, the loss of Onondaga Lake, both in the outright title and through environmental degradation, has the added burden in valuation that the land is not

fungible. To the Onondaga, it cannot simply be replaced as one property for another “similar” property because the land is more than just earth. Snyder further notes that “many of the benefits and costs tied to the natural world, including the benefits of global biodiversity, forest health, wilderness, outdoor recreation, scenic beauty, and sense of place, are non-priced” (Engelbrecht, 2005: 4). Engelbrecht argues that “Spirituality cannot be dug up, mapped, catalogued, or quantified in the manner archaeologists traditionally use to deal with data” (Engelbrecht, 2005: 4), leaving the question open as to how the loss of something inalienable can be determined. As the state of the art in economics now exists, there is an inability to measure some values in economic terms. Further, even suggesting compensation for the loss of what is perceived as “sacred” is considered taboo (Waytz, 2010). Psychologists researching sacred values and their role in negotiations have indicated:

Not only are people unwilling to compromise sacred values for money- contrary to classical economic theory’s assumption that financial incentives motivate behavior- but the inclusion of money in an offer produces a backfire effect such that people become even less likely to give up their sacred values compared to when an offer does not include money. People consider trading sacred values so morally reprehensible that they recoil at such proposals. (Waytz, 2010)

Despite these difficulties, the constraints imposed by the American legal system requires that such determinations are made. CERCLA does make a provision for “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss” (CERCLA, §107(a)(a)). However, in Superfund, natural resources are defined as “lands, fish, wildlife,...belonging to, managed by, held in trust by, appertaining to or otherwise controlled by” the United States, State, Indian Tribe or Foreign Government (CERCLA §101(16)). This excludes the loss of man-made items such as historic structures, artifacts, or archaeological resources. Other environmental laws have similar constraints.

Some research has been completed regarding the valuation of cultural goods, services, and

assets in the wake of disasters (See, e.g., Choi, Ritchie, Papandrea, & Bennett, 2010). Others have proposed using contingent valuation modes (See, e.g., Graben, 2012; Jentoft, Minde, & Nielsen, 2003). Additional research on the cultural losses suffered by the Onondaga Nation would require a deeper look at social indicators of the significance of the site, ethnographic research to aid in determining value, and some estimate of cultural imbalance and power struggles associated with the loss of title and the restrictions of use resulting from environmental contamination. Such information would be helpful in creating a meaningful evaluation of the losses suffered by the Nation in the Natural Resources Damages Assessment.

The example of Onondaga Lake is, in a sense a microcosm of the history and trajectory of the country. The Nation's struggle for sovereignty and land rights is only one of many across the United States. Sadly, the environmental injustices faced by the Nation while addressing pollution are nearly as commonplace as the ubiquitous contamination itself, which has been suffered at the hands of careless industrial practices and municipal oversight. And yet, however divided the interests of the varied stakeholders were going into the process, the outcome in this Central New York case study has indicated great promise for those who learn from both the mistakes and triumphs of this remediation effort. It is with cautious optimism that one may observe the progress and public participation that have occurred at Onondaga Lake.

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