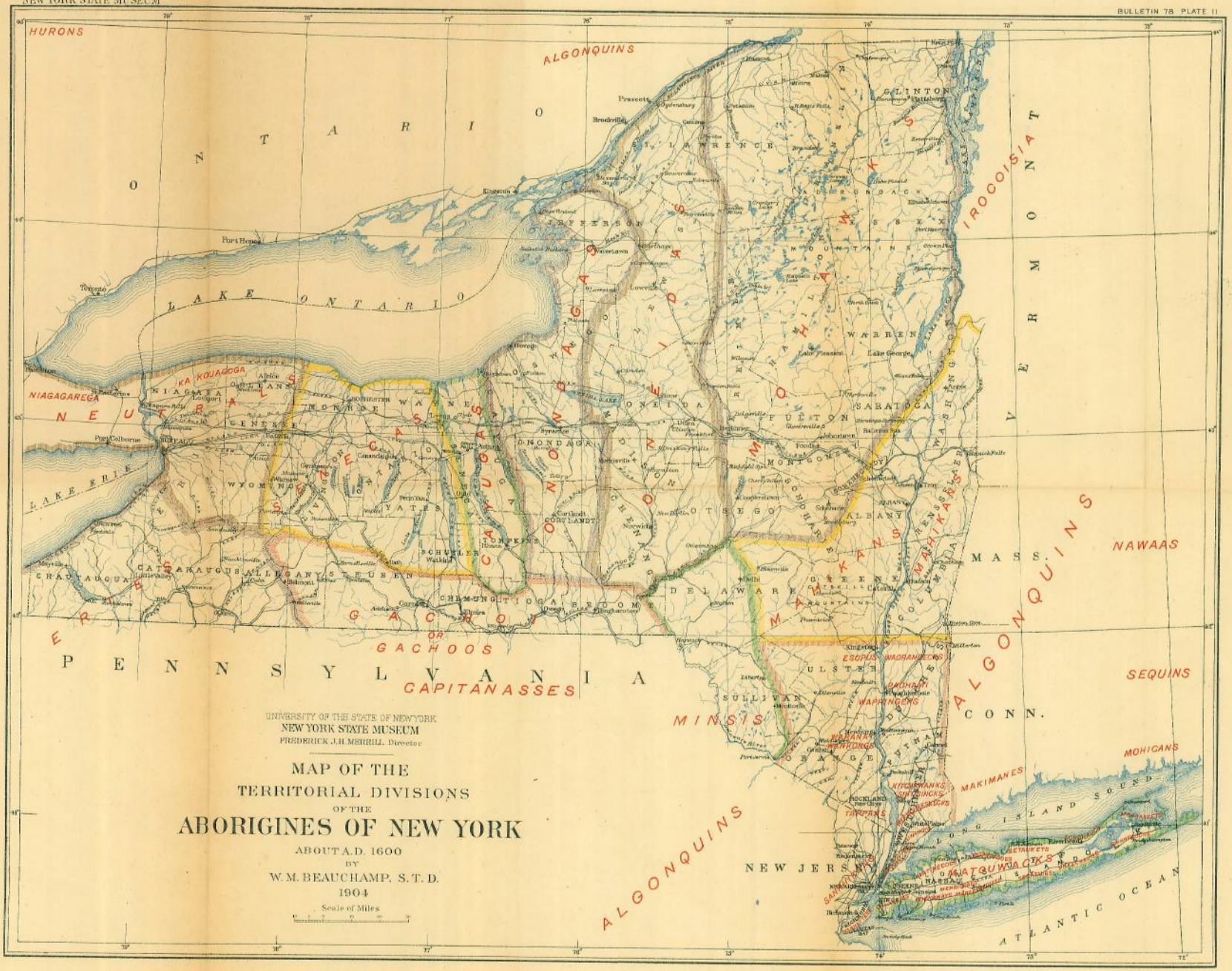
DOCTRINE OF CHRISTIAN DISCOVERY

Tree of Peace by Oren Lyons

- *Taking on the Doctrine of Discovery Conference*
- August 19, 2018
- Joe Heath
- General Counsel, Onondaga Nation

Think back: a vanishing point of reference:



UNIVERSITY OF THE STATE OF NEW YORK
NEW YORK STATE MUSEUM
FREDERICK J.H. MERRILL, Director

MAP OF THE TERRITORIAL DIVISIONS OF THE ABORIGINES OF NEW YORK

ABOUT A.D. 1600

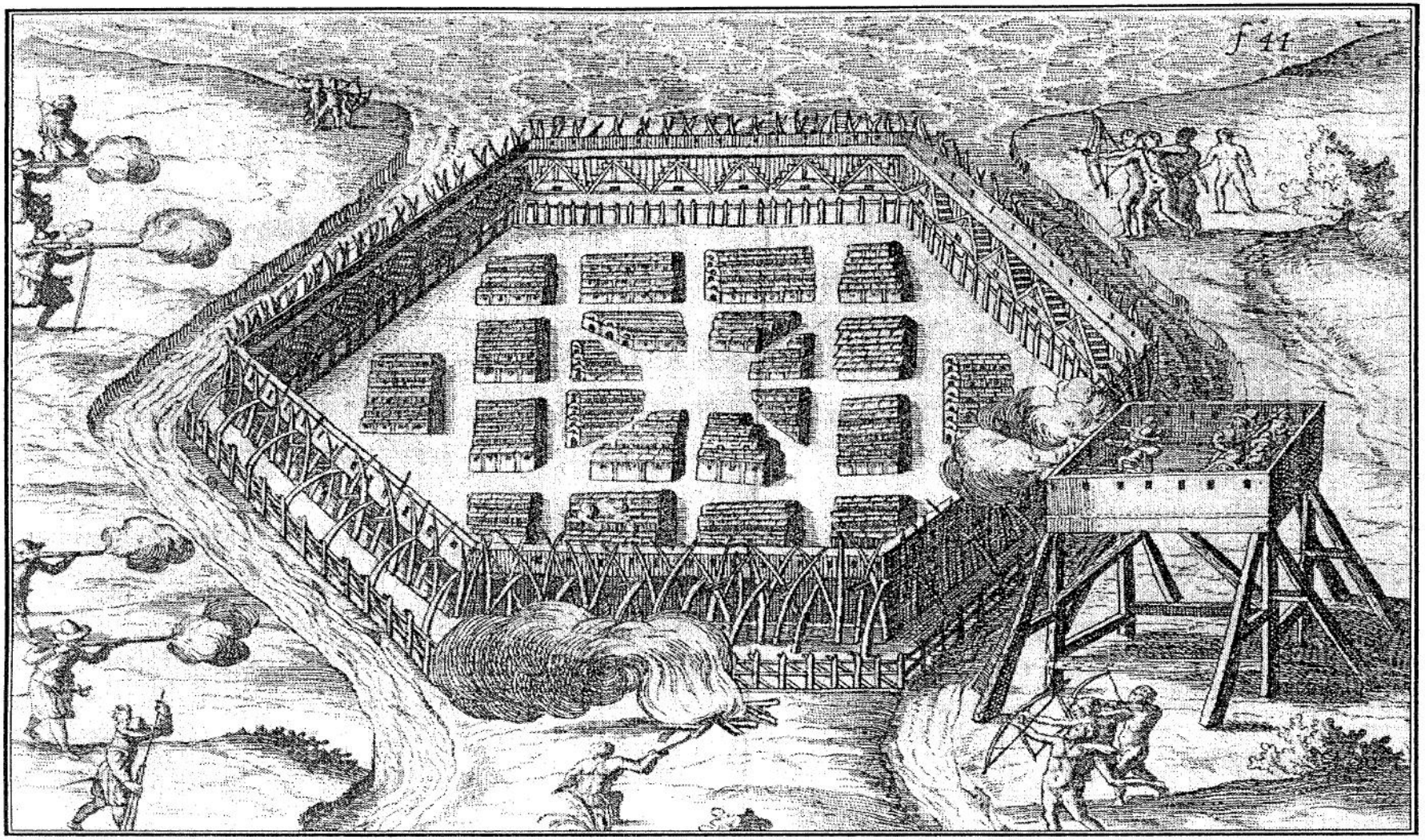
BY

W.M. BEAUCHAMP, S.T.D.

1904

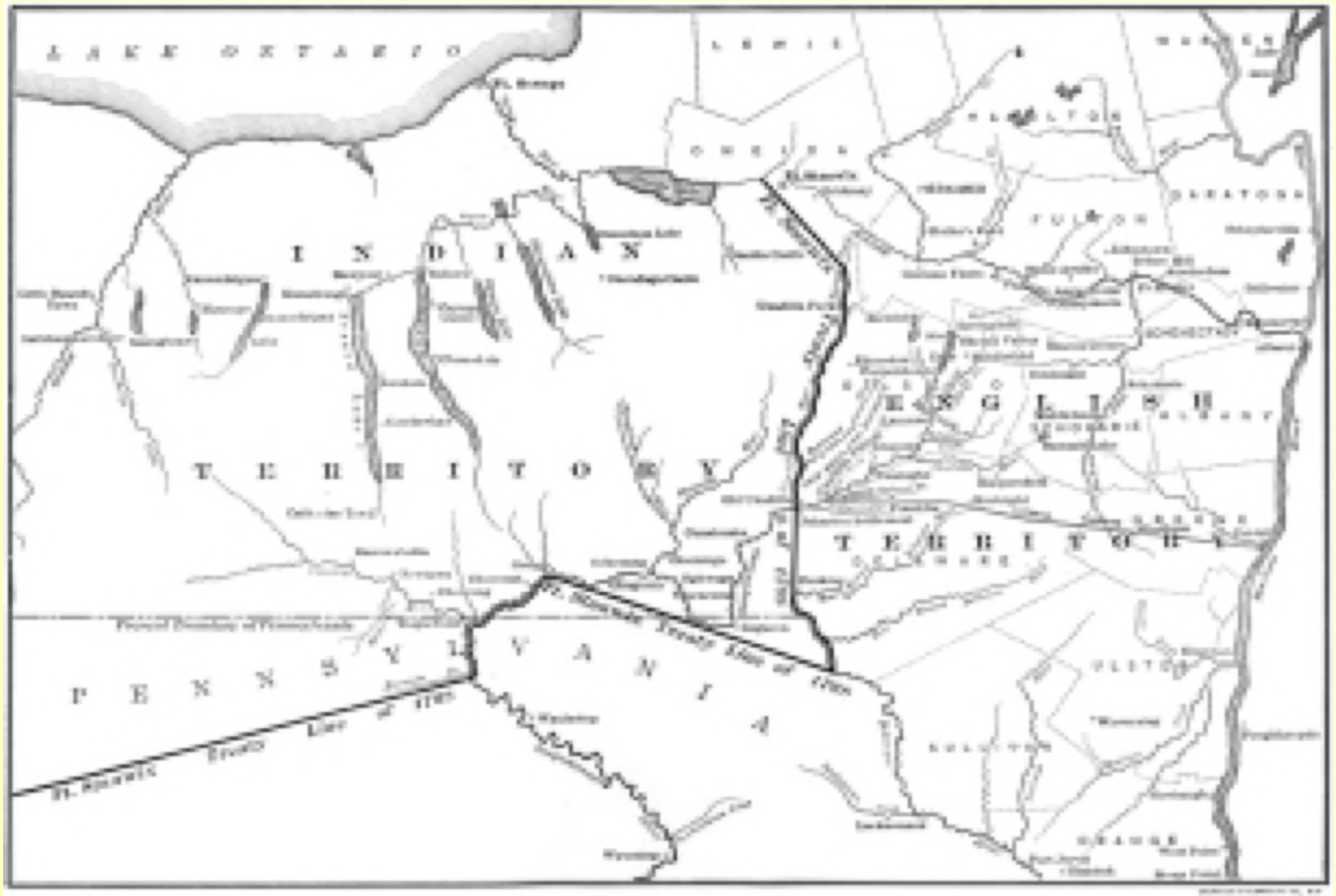
Scale of Miles


Detail of Approximate Area of
Onondaga Nation
Aboriginal Territory
Lake Ontario
N.e.w Yo r.k
Current Onondaga
Resident Territory
Key
Pennsylvania



Champlain's sketch of his attack on the Onondaga fort in 1615, at Lake Onondaga. He tried to capture it with a European siege engine called a "cavalier," while his allies tried to burn the palisade. Champlain thought the attack a failure, but Indians on both sides judged it a highly successful revenge raid. It led to a long period of peace.

1768



THE FACTIES OF NEW YORK IN THE REVOLUTION

1779—Sullivan Clinton Campaigns:

Orders of George Washington to Gen. John Sullivan:

"The immediate objects [of your expedition] are the total destruction and devastation of their settlements, and the capture of as many prisoners of every age and sex as possible. It will be essential to ruin their crops in the ground and prevent their planting more"

HAUDENOSAUNEE TREATIES WITH THE UNITED STATES:

- 1784 Treaty of Fort Stanwix,
- 1789 Treaty of Fort Harmor; and
- 1794 Treaty of Canandaigua:
  - *Article II: "The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs."*

Fletcher v. Peck, 10 US 87 (1810)

"What is Indian title? It is a **mere occupancy** for the purpose of hunting. It is not like our tenures, they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. **It is not a true and legal possession**. It is a right **not to be transferred, but extinguished**.

The Europeans found the territory in possession of a rude and **uncivilized** people, consisting of separate and **independent nations**. They had no idea of property in the soil, but a right of occupation. A right not individual but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the land."

Johnson v. McIntosh, 21 US 543 (1823)

"The Indians were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but **their rights to complete sovereignty, as independent nations, were necessarily diminished**, and . . . **Discovery gave exclusive title to those who made it.**

[T]he different Nations of Europe . . . Asserted the **ultimate dominion** to be in themselves; and claimed and exercised, as a consequence of this **ultimate dominion**, a power to grant the soil, while yet in possession of the natives."

Johnson v. McIntosh—2:

"However extravagant the pretension of converting the discovery of inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned." (id., at 591.)

Tee-Hit-Ton . US, 348 US 272 (1955)

"Every America schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." (*Id.*, at 289-290.)

ONONDAGA NATION'S LAND RIGHTS ACTION Timeline:

1) March 11, 2005—Complaint filed in District Court;
2) March 29, 2005—*Sherrill* decision by Supreme Court;
3) July 26, 2005—dismissal of Cayuga land claim by 2nd Circuit;
4) August 2010—dismissal of Oneida land claim by Circuit;
5) October 12, 2012—Columbus day—oral argument in Circuit & dismissal on October 19th;
6) October 15, 2013—denial of Certiorari by Supreme Court;
7) April 14, 2014—filing Petition in OAS Inter-American Commission on Human Rights vs. US;
8) April 8, 2015—administrative response from Commission;
9) March 29, 2016—submission of Case Study to International Law Association's Comm on Rights of Indigenous Peoples;
10) September 29, 2016—Information Request from IACHR;
11) Our Response filed October 13, 2017.

PETITION TO O.A.S. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Charging the United States with human rights violations:

- For the illegal taking of Onondaga lands, in violation of treaties;
- Because the United States court provide no remedy for treaty violations;
- For the environmental destruction of Onondaga lands and waters;

Issues with IACHR: under funded and under staffer, and decision is not binding on United States.

City of Sherrill v. Oneida, 544 US 197 (March 29, 2005)

Footnote # 1:

"Under the doctrine of discovery, "fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States." (*Id*., at 203)

*Cayuga Indian Nation v. Pataki,*413 F. 3d 266, (2nd Cir. June 28, 2005)

"We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can in appropriate circumstances, be applied to Indian land claims, **even when such a claim is legally viable and with in the statute of limitations**. . . .

One of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable to other areas do not translate neatly to these claims."

Oneida Indian Nation v. County of Oneida, 617 F. 3d 114, August 9, 2010

"We have used the term laches here, as a **convenient shorthand** for the equitable principles at stake in this case, but the term is somewhat imprecise for the purpose of deciding those principles. . . .

The Oneidas assert that the invocation of a purported laches defense is improper here because the defendants have not established the necessary elements of such a defense. This omission is not ultimately important, as **the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches."**

Onondaga Nation v. NY, 500 Fed. Appx. 87 (Argued October 12, 2012, decided October 19, 2012.)

"This appeal is decided on the basis of the equitable bar on recovery of ancestral lands in *Sherrill*, and this Court's cases of *Cayuga* and *Oneida*.

Three specific factors determine when ancestral land claims are foreclosed on equitable grounds: (1) **the length of time** between an historic injustice and the present day; (2) the **disruptive nature** of claims long delayed; and (3) the degree to which these claims **upset the justifiable expectations of individuals far removed from the events** giving rise to the plaintiffs' injury."

Ottawa Tribe of Oklahoma v. Logan, 577 F. 3d 634, (6th Cir., 2009).

1795 Treaty or Greenville & 1805 Treaty of Fort Industry: "*the Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States . . . . "*

BUT THEN:

"We hold that, because the Tribe, under these treaties, retained **at most a right of occupancy** to the lands in Ohio, and that this right was extinguished by **abandonment**, any related fishing rights it may have preserved were similarly extinguished when the Tribe removed west of the Mississippi." *Id.* At 634 (Emphasis added.)

White v. University of California, 765 F. 3d 1010, (9th Cir., 2014):

"Aboriginal interest in land generally is described as a tribe's right to occupy the land. It is not a property right, but "amounts to a right of occupancy which the sovereign grants and protects against the interests of third parties." That right, which is residual in nature, comes from the legal theory that **discovery and conquest gave the conquerors the right to own the land** but did not disturb the tribe's right to occupy it. " *Id*., at 1015. (Emphasis added.)

Geneva Switzerland, 1977

May 4, 2016

Cayuga Nation Canandaigua Treaty Reservation--2018

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Law review articles:

10 Albany Gov't Law Review 112 (2017);
37 American Indian Law Review 351 (2013); &
46 Buffalo Law Review 1011 (1998).

Onondaga Nation: **www.onondaganation.org**