

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION,)
)
Plaintiff,) CASE NO. 5:17-CV-913
)
vs.)
)
UNITED STATES DEPARTMENT OF)
THE INTERIOR,)
)
Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. MAE A. D'AGOSTINO
THURSDAY, APRIL 12, 2018
ALBANY, NEW YORK

FOR THE PLAINTIFF:

Zuckerman Spaeder, LLP
By: Michael R. Smith, Esq.
1800 M Street, NW, Suite 1000
Washington, DC 20038-5807
ALSO PRESENT: Meghan M. Beakman, General Counsel,
Oneida Indian Nation

FOR THE DEFENDANT:

U.S. Department of Justice, Environmental & Natural
Resources Division
By: Reuben Schiffman, Esq.
601 D Street, NW
Washington, DC 20044-7611

THERESA J. CASAL, RPR, CRR, CSR
Federal Official Court Reporter
445 Broadway, Room 509
Albany, New York 12207

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 (Court commenced at 2:01 PM.)

2 THE CLERK: Today is Tuesday, April 12, 2018. The
3 time is 2:01 PM. The case is Oneida Indian Nation versus
4 United States Department of the Interior, case number
5 17-CV-913. We're here today for oral arguments regarding
6 the motion to dismiss. May we have appearances for the
7 record, please.

8 MR. SMITH: For the plaintiff, Michael Smith, from
9 Zuckerman Spaeder, and Meghan Beakman, the General Counsel
10 of the Nation.

11 THE COURT: Good afternoon.

12 MR. SMITH: Good afternoon.

13 MR. SCHIFMAN: For the United States Department of
14 the Interior, Ben Schifman.

15 THE COURT: All right. Good afternoon. Let me
16 hear argument on the motion, please. And you have up to
17 30 minutes, you don't have to take the entire 30 minutes if
18 you choose not to, okay, and would you use the podium and
19 keep your voice up, please.

20 MR. SCHIFMAN: Thank you, your Honor. Please
21 excuse my voice.

22 THE COURT: Do you need some water?

23 MR. SCHIFMAN: No, I've got it.

24 THE COURT: Okay.

25 MR. SCHIFMAN: Just allergies, but it's a sign

17-CV-913

1 that spring is actually here.

2 May it please the Court, Ben Schiffman for the
3 United States, Department of the Interior. Your Honor,
4 this case is, at heart, a dispute between two
5 federally-recognized Indian Tribes that have a shared
6 history and, indeed, share similarities in their names.
7 I will refer to the plaintiff Oneida Indian Nation as
8 simply "the plaintiff," for ease, and the Oneida Nation as
9 the Nation.

10 The plaintiff has sued the United States
11 Department of Interior alleging that the Department's
12 approval of the constitutional amendment for the Oneida
13 Nation and subsequent listing of the Oneida Nation's new
14 name on a federally-mandated list was unlawful. Plaintiff's
15 claim should be dismissed for at least two reasons: First,
16 and most significantly, plaintiff has not demonstrated
17 standing. They have not demonstrated a concrete injury that
18 is stemming from the Department of the Interior's action as
19 opposed to the United Nations.

20 THE COURT: I did want to ask you about that. You
21 know, you began your argument by saying that these Nations
22 share a lot, but they also seem to not share a lot and to
23 not want to share a lot. And this issue about injury, I am
24 perplexed by that, because on the one hand, I'm not so sure
25 I see an injury that I can redress, but on the other hand,

17-CV-913

1 in the plaintiff's papers, opposing the motion, they talk
2 about after this name change that -- and for my own clarity,
3 I am going to just call them now the Oneida Nation from the
4 Wisconsin part of the country, that after the name change,
5 that they actually began to question a trademark that the
6 Oneida in New York had obtained and indicated that they felt
7 that the trademark was questionable and that they had some
8 other issues with the name that the Oneida in New York was
9 using. Is that an injury, in and of itself, that the Oneida
10 Nation of New York has to try to defend itself against that?
11 And the second part of my question is: Should the Oneida of
12 New York be really concerned that there's more to come?

13 MR. SCHIFMAN: So that's -- the answer -- I'll
14 answer the first part of the question, I am not sure I can
15 answer the second, about what might be to come, but the
16 first part about the trademark is actually a very
17 interesting nuanced issues, but I think it comes down to
18 whether this Court could do anything about a trademark
19 dispute between two parties that are not before this Court,
20 and the answer is no, it can't. The -- what I'm referring
21 to as the plaintiff, the Oneida Indian Nation, has certain
22 trademarks that the Oneida Nation of Wisconsin -- formerly
23 known as of Wisconsin is alleging have been abandoned and
24 they allege other things as well, that they were established
25 fraudulently, and they bring a variety of challenges to

17-CV-913

1 these trademarks. But, respectfully, to the plaintiff, they
2 agree with the United States in this suit that any
3 proceedings here are, to use their words, irrelevant
4 (indicating quotes) to that trademark dispute.

5 THE COURT: That would be litigated somewhere
6 else?

7 MR. SCHIFMAN: It is, indeed, before the Trademark
8 Board.

9 THE COURT: But did the name change embolden or
10 precipitate the Oneida Nation formerly of Wisconsin -- is
11 that what precipitated the trademark litigation, in your
12 view?

13 MR. SCHIFMAN: I am not sure I'm able to answer
14 what motivated the parties, you know, the Oneida Nation and
15 the plaintiff, to have this trademark dispute. From what I
16 can tell, it seems that a kind of bubbly dispute about how
17 they were going to be referred to is playing itself out in
18 multiple fora, including this Court and the Trademark Court,
19 but I am not sure if I know it was precipitated by the name
20 change or vice versa.

21 THE COURT: But the former Oneida Nation of
22 Wisconsin, in my view, does seem to lend credibility to what
23 they're trying to argue in a trademark action by saying, oh,
24 we've been recognized by the United States Government, so
25 too bad for you, Oneida Nation in the New York area, we have

17-CV-913

1 been accepted by the United States Government. And to me,
2 it could reasonably create a concern for the Oneidas of the
3 New York area, that they're going to be facing continued
4 battles now, that's one of my concerns.

5 MR. SCHIFMAN: I certainly understand that
6 concern. As to focus, again, on the trademark dispute
7 before the Trademark Board currently, I think when you read
8 plaintiff's, you know, filings in this case, it is apparent
9 and I wouldn't dispute that the Oneida Nation of Wisconsin,
10 they are referring to their new name that has been approved
11 in their constitution and I think they are in a -- I think
12 it's fair to say they are using that to lend credibility to
13 themselves, but it is, again to use the plaintiff's words,
14 legally, quote, irrelevant. So if the plaintiff did indeed
15 abandon their trademark, it doesn't matter what anyone else
16 is called or if they acquired it fraudulently, it doesn't
17 matter that the Oneida Nation is called the Oneida Nation
18 rather than the Oneida Nation of Wisconsin.

19 So I think -- now, I'm not an expert in trademark,
20 and this was a learning experience for me, but I did dive
21 into the filings in that trademark case and the standards
22 for what it means to abandon a trademark, and if I take out
23 a trademark on my name or anything else and then abandon it,
24 it doesn't matter if the petitioner challenging that
25 trademark is also called my name or is called anything else,

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 so -- and an interesting update before -- so I check --
2 periodically, I check the proceedings in the Trademark
3 Board, and the Oneida Nation formerly known as of Wisconsin,
4 they have actually filed a recent pleading to seek leave to
5 amend their petition to actually remove the references to
6 the United States' recent approval of their new name. So
7 they also seem to recognize the confusion it's created in
8 this court and they're saying, look, we'll strike all that,
9 file a new petition without that and it can just proceed on
10 the merits of, for example, the abandonment claim.

11 THE COURT: In order for the Oneida Nation
12 formerly known as the Oneida Nation of Wisconsin to change
13 their name, was it mandatory that they get the approval of
14 the United States Government?

15 MR. SCHIFMAN: It was, your Honor, and the reason
16 it was is because the Tribe has elected to make it so.

17 THE COURT: And they did so in 1936 when they
18 created their former name, is that what I'm -- am I reading
19 that correctly?

20 MR. SCHIFMAN: The date I would have to double
21 check on, but it is my understanding that when the Tribe
22 originally set up their Constitution, it was common at that
23 time to do it in this way, to allow the federal government
24 to call the elections, certify them, et cetera. It's now a
25 trend for Tribes to remove that requirement as they have

17-CV-913

1 become more able to or desire to do so, and indeed, the
2 plaintiff does not have a requirement that they receive
3 federal approval or calling of elections. So when the
4 plaintiff changed their name to remove "of New York" from
5 their name to amend their constitution, they did not receive
6 federal government approval. However, the Oneida Nation has
7 kept that in. Now, at any time they could change that,
8 presumably, if they follow the correct procedures, but they
9 have not done so at this time.

10 THE COURT: If you don't get U.S. approval, you
11 can't be placed on the list, is that accurate?

12 MR. SCHIFMAN: So I would put it differently, your
13 Honor. I think any change to the constitution, under the
14 Oneida Nation's constitution, has to receive approval. So
15 that could be a change to, say, we are going to have a
16 ten-person board instead of a five-person board, or anything
17 like that. Now, to get on the List, there's no -- so
18 getting on the List is essentially a ministerial task that
19 Interior just compiles this list. Now, where do they get
20 the information of what a Tribe is? They look to the
21 Tribe's documents. So a Tribe can get on the List whenever
22 it receives federal recognition, and the Interior will look
23 to its constitution. So, in this case, the Tribe's name
24 change on the List occurred after the election. So
25 that's -- you're mostly correct, but just to add a little

17-CV-913

1 clarity to it.

2 THE COURT: Before the plaintiff -- pardon me.
3 Before the Oneida Nation formerly known as the Oneida Nation
4 of Wisconsin -- I'm trying to be careful so that this record
5 is not mucked up and that's why I'm saying this -- before
6 they voted to change their name, why wasn't -- or let me
7 rephrase that. Was there any notice to any other Tribes in
8 the country or any opportunity for them to weigh in before
9 that particular Tribe voted?

10 MR. SCHIFMAN: So, I'm gonna take a step back to
11 answer that question. Tribes -- the relationship between
12 Tribes, between the United States and Tribes, is akin to one
13 between governments. So, the procedures -- and indeed,
14 Tribes are referred to as, you know, tribal governments and
15 they have sovereign and certain quasi-sovereign governmental
16 abilities, so in the same way that the United States might
17 receive notice of an Italian election through the news or
18 more formal, you know, announcements in inter-governmental
19 relations, that can occur, and in this case, I'm not aware
20 of such notice occurring, the Tribes sending out particular
21 formal notices to other Tribes, I'm not aware of that.

22 THE COURT: That's a little concerning to me
23 because if Albany, New York, decided next week we are going
24 to change our name to Albany, Georgia, and could do that
25 unilaterally and there were two Albany Georgias, one in

17-CV-913

1 Georgia and one in Albany, New York, I think that, you know,
2 Albany, Georgia, would like to weigh in on that, and I don't
3 see any evidence here, this is not a summary judgment
4 motion, this is only a motion to dismiss, but I'm not aware
5 of any -- I understand that the Tribes are sovereign and
6 each Tribe, apparently, has its own sovereign rules and
7 constitution, but I don't see anything to indicate that the
8 Oneida Indian Nation had a chance to weigh in on that. Am I
9 probably correct?

10 MR. SCHIFMAN: I believe that from what I've seen,
11 I don't think there was a summit between Tribes that might
12 be effected before the Oneida Nation decided to update its
13 sovereign constitution. And I think it's -- while I
14 certainly understand the concern that Your Honor is
15 expressing, I think it's also very important to recognize
16 the policy, the United States policy of recognizing the
17 sovereignty of Tribes to make their own decisions, so that
18 means they might make decisions that the United States, that
19 I or Your Honor disagrees with, but they must have that
20 power, and that's embodied in the, you know, Indian
21 Reorganization Act, for instance, which set in place a lot
22 of policies that say, Tribes, it is your responsibility to
23 engage -- to govern yourself.

24 So, while I might share the concern that the Tribe
25 should have consulted with other Tribes, there's no legal

17-CV-913

1 framework, frankly, in the Reorganization Act or elsewhere,
2 that would require -- that the United States could require a
3 Tribe or another Tribe could require them to do any
4 particular steps in their governing process.

5 THE COURT: The strange thing to me about that,
6 and I don't -- I have not had a case similar to this, so
7 everything that I read and everything that I'm hearing is a
8 new area, but the strange thing about the argument that you
9 make is that, on the one hand, you point out that the Tribes
10 are sovereign and they have their own constitutions and
11 their own voting powers, and yet, in this case, the
12 sovereign Oneida Nation formerly known as Oneida Nation of
13 Wisconsin wanted the government's approval, even though
14 they're sovereign and they can make their own decisions,
15 right?

16 MR. SCHIFMAN: That's correct.

17 THE COURT: They could have made this name change
18 without reaching out to the government for approval,
19 correct?

20 MR. SCHIFMAN: So that's -- the answer is yes, and
21 I would submit, and we -- in our reply, there are two
22 interesting documents that I attached, I'm sure I could find
23 many more, and those are examples of the Oneida Nation
24 referring to itself as the Oneida Nation going back many
25 decades. So I would submit that the actual, in-reality name

17-CV-913

1 change didn't occur in 2015, the Tribe's been proceeding
2 under the, you know, name Oneida Nation for -- both in its
3 internal, you know, government documents and as it presents
4 itself to the public.

5 There's -- now, I'm not a Green Bay Packers fan,
6 but my understanding is that the football field there,
7 Lambeau Field, there is an Oneida Nation gate and it's a
8 huge display to the public about the relationship between
9 the Oneida Nation, as it refers to itself and has referred
10 to itself for many years, and that sports franchise. So, to
11 my mind, the name change was not -- though it was changed in
12 the constitution, no doubt, you know, several years ago, the
13 actual name change that is, as we submit in our papers,
14 that's causing the confusion is not the name change that
15 occurred in the constitution in 2015, it's just the name
16 change that the Oneida Nation has been doing for years or
17 has been referring to itself for years. And for that
18 reason, there's no way that that could be redressed without
19 the Oneida Nation being a party to this case, which it's
20 not.

21 THE COURT: But even though for years they may
22 have referred to themselves as the Oneida Nation, am I
23 accurate that what appeared on the government List, up until
24 the vote, was Oneida Nation of Wisconsin?

25 MR. SCHIFMAN: That's correct.

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 THE COURT: And that List can be pretty
2 significant, in terms of other people, other agencies, other
3 Tribes trying to look up what's federally recognized as a
4 Tribe, correct?

5 MR. SCHIFMAN: It is an important list for telling
6 the United States which Tribes are qualified for certain
7 governmental benefits or entitlements, but it's not intended
8 to be, you know, a public, you know, accounting of how each
9 Tribe refers to itself. I understand it might have that
10 effect, but the List Act is, by its text, a very discrete
11 act that just requires the Department to make a list and
12 doesn't incur -- it doesn't create any legal effect by doing
13 so. So if I could make an analogy, if the federal
14 government -- if the Congress passed a law saying the
15 Department of the Interior has to keep a list of easements
16 over federal property and they included, you know, on a list
17 certain easements, it would not be the list itself that
18 created the easement, a separate legal document does so, and
19 that's an important distinction because the List Act itself
20 is not -- there are no legal consequences that flow from it.
21 So I think, for that reason, it's quite a clear example
22 where Your Honor could dismiss plaintiff's first claim
23 challenging the List Act as an alleged violation.

24 There are many examples in the brief, I think the
25 most illustrative is from the *Parsons* case, which involved

17-CV-913

1 the self-described "Juggalos," which are listed -- included
2 on a list, I believe, by the FBI, and the Court found, well,
3 that's not -- there's no legal consequence for this being
4 included on a list in that case. Nor is there here. So, I
5 submit to Your Honor that plaintiff's first claim about the
6 List Act, there's just no legal consequence, no final agency
7 action, and that's required to bring a claim under the
8 Administrative Procedure Act, and they cannot point to a
9 legal consequence from just being on the List.

10 THE COURT: If I granted all of the relief that
11 the plaintiff wants, could the Oneida Nation just continue
12 in perpetuity calling itself the Oneida Nation and just
13 refuse to go back and call itself the Oneida Nation of
14 Wisconsin?

15 MR. SCHIFMAN: So, yes, your Honor, I think the --
16 you've hit on the key problem with the plaintiff's redress
17 ability in this case. As is evidenced by the Oneida Nation
18 referring to itself as the Oneida Nation before the
19 Constitutional change and before the List change, we have no
20 reason to suspect that no matter what this Court rules, no
21 matter what process Interior goes through, no matter what
22 notice is given, that they will change the Oneida Nation
23 gate at Lambeau Field, that they will change their website,
24 that they will change their government documents and signs.
25 There's no indication that they will do that. And I would

17-CV-913

1 submit to you that history shows that they weren't doing
2 that. So, for that reason, any confusion that's happening,
3 and I'm sceptical that there is such confusion attributable
4 to the United States at all, which I've indicated and we can
5 discuss further, but to the extent there is confusion, it's
6 not going to stop if the obscure list maintained by the
7 Department of the Interior adds a few words. If plaintiff's
8 golf business is confused with the Oneida Nation's golf
9 business, that wouldn't be because people are consulting the
10 Interior's list, you know, buried on the Department of the
11 Interior's website, it would be because they -- I'm
12 struggling to think of how they actually could be confused,
13 and that's why I think there's a problem with plaintiff's
14 injury, but I guess it would be if they are trying to have a
15 golf tournament in Wisconsin and end up in New York or
16 something, but whatever the injury is gonna be, it's not
17 gonna be as a result of a change to a list.

18 THE COURT: It does create a little confusion. I
19 keep having to look down and to look at my notes to try to
20 get the name straight. Like when it was Oneida Nation of
21 Wisconsin, I knew it was the Oneidas that moved to
22 Wisconsin, but now the one from Wisconsin is just called
23 Oneida Nation and the one in New York is Oneida Indian
24 Nation, is that correct?

25 MR. SCHIFMAN: That's correct.

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 THE COURT: That's a little confusing. You have
2 five minutes left and you can say anything that you want to
3 try to persuade me to grant your motion.

4 MR. SCHIFMAN: Thank you, your Honor. So we've
5 definitely touched upon what I think is the largest problem
6 that plaintiff's have and what I think should be Your
7 Honor's focus in this case, because if there is no standing,
8 then plaintiff's really should not be pursuing relief in
9 this court, they should work out the issue, frankly, between
10 the two sovereign governments. They have had disputes
11 before, sometimes they work it out, sometimes they can't,
12 but this should be resolved between them. And further, it
13 should be resolved and, indeed, is being resolved in some
14 way before the Trademark Board. And I've indicated in my
15 brief that the Administrative Procedure Act does not provide
16 for review of everything the government does. If there's
17 relief available in another court, it does not provide for
18 review. So I think that's an important aspect that Your
19 Honor could consider, that to the extent that the Oneida
20 Nation is infringing on some trademark or harming a
21 trademark or something, the proper venue for that is before
22 the Trademark Board or in some other suit, but it's not
23 against the United States Department of the Interior, which
24 has no ability to effect that kind of trademark issue.

25 So, I'll close, your Honor, with just a quick

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 summary of the standing problem that we've been primarily
2 discussing and that is to the extent confusion in a general
3 sense can even be an injury, and I submit that it really
4 can't without tying it to a specific concrete business
5 injury, for example, like the *D'Avoilio* case cited in the
6 brief, to the extent plaintiffs even have an injury, it's
7 not attributable to the United States. The plaintiff chose
8 to drop "New York" from their name, the Oneida Nation from
9 Wisconsin dropped "Wisconsin" from their name; that's
10 confusion, but it's not caused by the United States.

11 And then finally, as we've been discussing, your
12 Honor, no matter what the outcome is from this case, the
13 Oneida Nation can refer to itself however it wants, it's a
14 sovereign government, it's been referred to as the Oneida
15 Nation and all indications are that it will continue to do
16 so. So where relief is speculative as to whether they will
17 change their behavior, there's no standing. So for that
18 reason, plaintiffs claim should be dismissed.

19 THE COURT: All right, thank you. Mr. Smith.

20 MR. SMITH: Good afternoon, your Honor, Michael
21 Smith for the plaintiff, the Oneida Indian Nation.

22 Let me go through a few of the things you raised
23 very quickly, then move on to some other points. It's
24 really striking that the Department and the Court both begin
25 by noting the difficulty referring to these parties by the

17-CV-913

1 currently-existing names and needing to revert to the former
2 names so that we know who we're talking about. I think that
3 underscores the central problem in the case.

4 The -- you asked, your Honor, about whether -- how
5 the harm can be undone. That's an important question.
6 These, as you noticed, are Tribes that are competitive and I
7 think it's fair to say, at times, hostile. The Oneida
8 Indian Nation, which has brought this suit, has a certain
9 time period in which to challenge the decisions that were
10 made and is always open to allegations of laches. We know,
11 and this is not in the complaint, but I don't think there's
12 gonna be any dispute about it, that the Wisconsin Tribe has
13 bought land in New York on the Reservation in order to try
14 to claim an interest in it. The Wisconsin Tribe has
15 asserted, under the Native American Graves Protection Act, a
16 federal statute that does just what it sounds like it does,
17 it protects the cultural --

18 THE COURT: Have they done that since they changed
19 their name or was that before they changed their name to
20 take the Wisconsin out?

21 MR. SMITH: They have taken these actions, but the
22 point of the federal approval of the name change is an
23 effort to garner a federal imprimatur or legitimacy for the
24 status that they claim. The -- most of the issues we've
25 been discussing so far today are resolvable on one small

17-CV-913

1 piece of evidence that's in the complaint. The -- it's
2 quoted at length. Once the Wisconsin gained the federal
3 approval, the federal imprimatur, they wrote a letter to the
4 Oneida Nation in New York and said we are federally
5 recognized as the Oneida Nation, you are not, and you can
6 never ever use that name. That has nothing to do with the
7 trademark proceedings themselves. It is a demand from the
8 Wisconsin, it's an assertion of increased rights and
9 diminished legal rights, it's clearly based in terms on the
10 federal approval. And --

11 THE COURT: Do you really think any judge would
12 use the fact that the government recognized the name change
13 and put the new name on the List, do you think that would be
14 dispositive for any judge of who owns what and how much they
15 own and when they owned it? Because I understand that your
16 concern on behalf of your client is because these two
17 Nations are not in harmony that the Oneida Nation may, at
18 some point, and there may be evidence of it already, that
19 they're coming forward and saying to the Oneida Indian
20 Nation, hey, you may think that's yours, but it's really
21 ours, and just wait because we're coming for more. But
22 would any judge really sit on the bench and say, well, I
23 find that the Oneida Nation has the backing of the United
24 States Government, they put that name on the List,
25 therefore, okay, Oneida Nation, you can lay claim to the

17-CV-913

1 golf course, the casino, whatever. I mean is that really
2 feasible?

3 MR. SMITH: Your Honor, I think what I can tell
4 you is that the Wisconsin Tribe has asserted and will assert
5 increased rights based on it and I can't tell you how a
6 judge will rule. We're talking about standing here and
7 that's all we're talking about. The Second Circuit said in
8 *LaFleur* that all you need is an identifiable trifle for it
9 to be sufficient harm. Well, when you receive a demand
10 letter from a lawyer that says never ever call yourself the
11 Oneida Nation, when that's your historic name and cultural
12 identity and patrimony, that's a stunning development.

13 THE COURT: Is that the harm that you want me to
14 redress? 'Cause I need to find harm, not --

15 MR. SMITH: The harm that would be redressed in
16 this case, just focusing on that particular thing, is that
17 the Wisconsin would no longer be able to claim federal
18 imprimatur or approval. In fact, it would go further. If
19 this case goes back to the Agency, for no purpose other than
20 to consider what they declined to consider before, the full
21 picture, the harm to the Nation, it's reasonable to believe
22 that we may never be back here again.

23 One of the problems in this case is that this was
24 a decision originally made in the Midwest Region without
25 consultation with what's called the Eastern Region. In

17-CV-913

1 other words, the bureaucrats in the Midwest know the Tribe
2 out there, the bureaucrats in the East know the Tribe here,
3 there was no discussion. There was some discussion about
4 notice to the Tribe and a tribal summit. That's not what
5 this is about. This is not about the Wisconsin's behavior.
6 This is about the behavior and decisions of the federal
7 government. The notice that was not given was notice that
8 the federal government did not give, and the chance to plead
9 our case, if you will, was a chance that the federal
10 government did not give. It's the federal decision that we
11 would like to undo and can be undone either by a ruling that
12 it's illegal or by a remand to actually consider the whole
13 picture here fairly. Because if the federal government
14 withdraws the approval of the constitutional change and no
15 longer recognizes the new name, 'cause that's what this List
16 is, it's a federal recognition, the Wisconsin will no
17 longer be able to exploit those. And, you know, it's not a
18 question of whether the exploitation of those will always
19 carry the day on every issue that can be imagined. It's
20 enough to believe, I think, for purposes of standing and
21 harm and the identifiable trifle harm that we're supposed to
22 show, that the Wisconsin desperately wanted the approval
23 and, having gotten it, they then instituted legal
24 proceedings, invoked the approval and sent a letter invoking
25 the approval. My client is spending money to deal with

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 that. There's authority that that, in itself, is enough.
2 But I think that's actually subsaturated to the threat
3 that's posed by the assertion or the implication of the
4 federal rights.

5 There's one -- I gave this to Mr. Schiffman before
6 the hearing. In our papers, we attached a suspension order
7 from the TTAB, the Trademark Trial and Appeals Board, that
8 suspended all of those proceedings because they made a
9 judgment that they needed an answer from this Court first.
10 After the entry of the order, which we already gave Your
11 Honor, the TTAB issued a new order confirming the suspension
12 and further explaining that in light of the Wisconsin's
13 invocation of federal rights and federal approval of their
14 name, that they wanted to wait until the conclusion of this
15 proceeding, indeed to the conclusion of appeals from this
16 proceeding.

17 If Your Honor doesn't mind, I'd like to hand it
18 up --

19 THE COURT: Sure.

20 MR. SMITH: -- (indicating). For the record, so
21 that it's clear, this is an order dated February 22, 2018,
22 from the United States Patent and Trademark Office,
23 Trademark Trial and Appeals Board.

24 THE COURT: Mr. Smith, if the U.S. Patent and
25 Trademark Trial and Appeals Board denies the petition to

17-CV-913

1 cancel the trademarks, would this action become moot --

2 MR. SMITH: No.

3 THE COURT: -- in your view?

4 MR. SMITH: No.

5 THE COURT: Why not?

6 MR. SMITH: We have clearly alleged in the papers,
7 and in my mind maybe the most serious harm, the federal
8 government's approval -- the federal government approved
9 giving our name to that Tribe, okay, that's the clearest I
10 can say it simply. That approval affects the political
11 status and cultural identity of my client. The Oneida
12 Nation has been time immemorial in New York. The Oneida
13 Nation has not been in Wisconsin except from about 1850.
14 They were called the Oneidas in Green Bay in the treaty that
15 recognized them and they have been called on the federal
16 List forever the Oneida Tribe of Indians from Wisconsin.
17 Two distinctions: Tribe Wisconsin, we are Oneida Nation in
18 New York. So when people refer to the Tribe and Nation,
19 they know what they're talking about, as Your Honor has
20 found it necessary to do. That history is not irrelevant
21 either. It's the long history of doing that that, in part,
22 causes some of the confusion.

23 But your specific question is what other harm is
24 there? There is harm in the political diminishment that
25 occurs when the federal government recognizes that the other

17-CV-913

1 Tribe can now be and use our name. Indian law in this
2 country is -- substantially orbits around the proposition
3 that the federal government has plenary authority with
4 respect to Indian Tribes and it's the federal government
5 that recognizes Indian Tribes, and although this is more
6 often than not a source of frustration for Tribes, many
7 times those rights are reflected in the eyes of the federal
8 government. When the federal government sanctions, approves
9 giving your name to another Tribe, in Indian country that
10 becomes a legitimate name and changes the name of that
11 Tribe. You'll see in the complaint the Wisconsin
12 essentially admitted the intention here, much like in the
13 Lanham Act cases, when you see a predatory intention to copy
14 a name, the harm can be easily assumed.

15 Here, when the Midwest Region wrote to the
16 Wisconsin and said, you know, this is gonna cause a lot of
17 confusion, the Wisconsin said two things: One, we
18 recognize that concern, I think it's pretty clearly an
19 admission that it's true, but the name we want to assume is
20 more reflective of our true political identity, okay.
21 That's what this was about. This wasn't just about golf
22 tournaments. This is about the identity inherent to the
23 Tribe. The complaint is not that the Wisconsin wanted to
24 assume my client's name. The claim is that the federal
25 government let 'em do it, approved it and then absorbed it

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 for federal policy as the federally-recognized name of the
2 Tribe.

3 THE COURT: Right.

4 MR. SMITH: That's not about Tribal conduct,
5 that's about federal government conduct.

6 THE COURT: But even if the government had not
7 approved it, as I said to Mr. Schiffman, the former Oneida
8 Nation of Wisconsin could still hold itself out almost in
9 perpetuity as the Oneida Nation after they voted on it,
10 after their Tribe and their people, who have the power to
11 vote, voted on it. It may not have been on the federal
12 List, but they still could have called themselves the Oneida
13 Nation forever, right?

14 MR. SMITH: Well, maybe, but I'm not sure that's
15 exactly right. First of all, the Tribe had a clear option.
16 The statute, Section 5123, authorizes the Tribe to vote on
17 its own and without having a federal election and without
18 federal approval to have a constitution. It's always been
19 that way. The federal law gives clear choice. That's what
20 the *Thomas* case in the Seventh Circuit says. It goes on
21 some to say that that means it's a federal role, not a
22 tribal election. In fact, the Circuit said this is not a
23 tribal election at all, it's a federal election, solely
24 controlled by the Department of Interior and the decision
25 made here is a federal decision. So they could have

17-CV-913

1 proceeded differently but did not. Why? Because they
2 wanted the federal approval. They then claim that gives
3 them greater legal rights and, apart from those legal
4 rights, a different political status, a different identity,
5 or as they said, truer to out political identity.

6 The second point is they did not do the things
7 they are now doing before the federal approval. There is
8 not a similar letter asserting greater legal rights. That
9 was all based on an invocation of federal approval. The
10 government, in the reply, attached a few documents, one of
11 which, for example, is an agenda for a 1998 meeting in which
12 the Wisconsin Tribe refers to itself as the "Oneida Nation."
13 This is really a perfect example. It was a meeting
14 concerning their new compact, an amendment of their gaming
15 compact with the State of Wisconsin. The little document
16 that they generated is an agenda for the meeting. They put
17 "Oneida Nation" on it. The compact, that the meeting is
18 about, is with the Oneida Tribe of Indians of Wisconsin, you
19 can see it online. It's a perfect example of the difference
20 that federal approval makes.

21 Now, the next time they do an amendment to that
22 compact, the State will make it with the Oneida Nation. But
23 the State would not deal with the Oneida Nation, that was
24 not the recognized name, only with the Tribe of Wisconsin.
25 Federal agencies will not deal -- would not deal with the

17-CV-913

1 Oneida Nation. Until this change occurred, all federal
2 agencies dealt with the Oneida Tribe of Indians of
3 Wisconsin.

4 THE COURT: So what you're telling me is that
5 unless the government accepts the name and puts it on the
6 List, other governments and states don't recognize it?

7 MR. SMITH: Correct.

8 THE COURT: So, in other words, if the government
9 had not put the new name on the List, there could be no
10 contracts or governmental agreements with the Oneida Nation;
11 is that true?

12 MR. SMITH: Yes. The purpose of the List is to
13 tell other federal agencies, and I think, by extension, the
14 United States Courts, who you're dealing with. It is a
15 recognition of who the entity is, and there's no question
16 that federal agencies would not use a name other than those
17 on the List. Although sometimes there's some variance,
18 courts use the names that are on the List, states use the
19 names that are on the List. I'm pretty sure that lenders
20 would not lend \$50 billion to an entity that was not named
21 as on the List. The List defines -- because federal law and
22 the power of the federal government defines what Tribes are,
23 the List recognizes those Tribes and defines who they are.

24 THE COURT: Does the List also give their former
25 name? In other words, would the List say Oneida Nation

17-CV-913

1 formerly known as the Oneida Nation of Wisconsin?

2 MR. SMITH: That's what the List is doing now
3 temporarily to try to deal with the problem, but that's not
4 a forever thing and it doesn't --

5 THE COURT: Isn't that helpful, though?

6 MR. SMITH: No.

7 THE COURT: Because I was -- in looking at the
8 List, I saw Seneca Nation of Indians previously listed as
9 the Seneca Nation of New York, and then I saw Seneca-Cayuga
10 Nation previously listed as the Seneca-Cayuga Tribe of
11 Oklahoma. Does that help legally?

12 MR. SMITH: It doesn't change the ability of the
13 Wisconsin to assert greater legal rights, you know. If you
14 could issue an order that their assertion of legal rights
15 will never be recognized or have any effect, maybe that
16 would help, but you can't.

17 THE COURT: Of course not.

18 MR. SMITH: And we can't know what the impact of
19 that is. We know it meant enough to them to achieve that
20 status and that they have quickly asserted that they have
21 greater legal rights. It also is the case that the fact
22 that the List includes "formerly known as," it doesn't
23 change a hair the political diminishment and
24 misappropriation of cultural identity that comes when the
25 federal government sanctions giving that Tribe our name.

17-CV-913

1 None of that changes.

2 And the fact is the states, the federal
3 government, lenders, anybody who is in a responsible
4 relationship, nobody is gonna lend a lot of money or do
5 anything that's official except in the officially
6 federally-recognized name. That's the way it's always been,
7 and you know, the idea -- fundamentally, what's wrong here
8 is that we're at the pleading stage of this case, it's an
9 APA case, which is decided on an administrative record,
10 usually on cross-motions for summary judgment. The
11 government's motion really advances all of that to this
12 stage. The only question at this stage is are there
13 plausible allegations of harm that are sufficient to measure
14 to the -- as I said, the sort of identifiable trifle
15 standard. I think we are so far beyond that, that's the
16 question at this stage. We don't have an administrative
17 record. The Court can't look into what actually happened.
18 We have something that I think underscores the need for it.
19 Through FOIA, we were able to get a couple documents the
20 Court now has.

21 The government here, in its motion, would wash its
22 hands of all involvement here and say that they didn't
23 really make a decision and, if it did, it didn't really have
24 consequences. But we know the Midwest Region had a document
25 describing the harm that would occur if that name was

17-CV-913

1 changed, and we most recently got a document that we
2 submitted, I think at the end of last week, showing that the
3 Department in Washington does have at least a four-step
4 written set of requirements in order to make a decision
5 about a name change. That document shows that the decision
6 was made, I think common sense says that the decision was
7 made. The government says that may be ministerial, the
8 list. The government would not ever deny the authority to
9 reject a name offered by a Tribe. You can make up any
10 hypotheticals you want, but there are names that -- the
11 government is not gonna agree to list the Apache as the
12 Oneida. The government is not gonna agree to make other
13 changes. Most important, they're not gonna agree that they
14 lack the authority to make a decision. So if the key --
15 this is not about Tribal decisions; it's about the
16 government's decision, it's about the effects of that
17 decision, and we already have documents that will be in the
18 administrative record to indicate that a decision was made
19 and it had consequences. And it's, I think, ill-advised to
20 resolve the case without even knowing what's in the
21 administrative record.

22 THE COURT: You think it's too early, but you
23 think you need discovery, and you also obviously believe
24 that the plaintiff sets the -- the complaint sets forth
25 sufficient facts to state a plausible claim; that's, in

17-CV-913

1 essence, what you're telling me?

2 MR. SMITH: I think -- well, the latter for sure,
3 I think many times over. It's a carefully-drawn complaint.
4 The question is are there plausible factual allegations that
5 will permit inferences that are sufficient to sustain it,
6 particularly in the standing area, that's the question. The
7 courts are clear that at this stage of the case, the
8 complaint is accepted at true, if there are plausible
9 allegations, and all inferences are drawn to suggest that
10 they are sufficient to meet standing requirements.

11 As to discovery, you know, APA cases are usually
12 done -- not always -- without discovery, and whether there's
13 any need for discovery usually depends on a view of the
14 administrative record. There are some issues that can
15 arise, but, most of the time, these cases are decided on
16 cross-motions for summary judgment just based on the
17 administrative record, that's how APA cases proceed, unless
18 there's something special.

19 Here, the motion to dismiss would permit a view of
20 the administrative record and would subject well-pleaded
21 allegations to the -- to really sort of sceptical scrutiny
22 that I think is not appropriate. There's far more here than
23 the kind of credible allegations that would be sufficient.
24 We actually have the documents that show the federal
25 government made a decision and we have documents from a

17-CV-913

1 Region that shows the harm. We have documents from the
2 Wisconsin where they're asserting as a weapon, and to use a
3 phrase that's now being used a lot in the news, they sort of
4 weaponized the federal approval and have demanded, you
5 know -- it's really hard to exaggerate how stunning it is to
6 get a letter from a lawyer that demands you never use your
7 name again. That -- for purposes of standing, that's
8 mammoth harm. The issues in the case are ultimately gonna
9 be different, they're gonna be was there a decision -- look,
10 the federal government doesn't really suggest that if there
11 was a decision being made, that it was not arbitrary and
12 capricious to make it without considering the interests of
13 the Oneida Nation in New York.

14 There are a number of angles that you can come at
15 this case with, but the central one and most important one
16 is that the decision here -- maybe it's true that the
17 federal government could do what it did, I mean make this
18 decision to give our name to them, I don't think so, but
19 just allowing it for the sake of the argument, the central
20 issue is should -- before doing that, should there be a
21 process where they consider all the facts.

22 THE COURT: I mean, I don't know, is there
23 anywhere written guarantees of substantive or procedural
24 due process in this process of approval? That's question
25 number 1.

17-CV-913

1 And question number 2, can you point me to any
2 similar case to this one that's already been litigated that
3 I could take a look at? Is there another case?

4 MR. SMITH: Number 2 is the federal government has
5 never done this.

6 THE COURT: What was that?

7 MR. SMITH: The federal government has never done
8 this this way. There's a case, for instance, involving the
9 Wyandots cited, but it makes a nice distinction or contrast
10 to Your Honor's question. The Wyandots, I won't get this
11 exactly right, but for illustrative purposes, the Wyandots
12 changed their name from the Wyandots of Minnesota, for
13 example, to the Wyandots of Kansas to make it clear that
14 they were not the Wyandots of Minnesota. I'm sure I have
15 got the states wrong. There was a name change there and the
16 List was changed to increase the distinction between the
17 Tribes. There are Tribes where, for instance, I think we
18 had the Cayuga Nation of New York change their name to the
19 Cayuga Nation, but they weren't copying another Cayuga
20 Nation, it did not create uncertainty.

21 THE COURT: Whoever approved this, were they
22 having a bad day? I mean, did they just say "okay?"

23 MR. SMITH: I think what happened -- there are a
24 couple of things; one, and there's an allegation in the
25 complaint that as far as anyone can discern, the Assistant

17-CV-913

1 Secretary of the Interior under whose authority the List was
2 published was a member of the Wisconsin Tribe who would have
3 voted in the election to change the name.

4 THE COURT: I saw that in your papers.

5 MR. SMITH: And I mean that -- there's that. Was
6 someone having a bad day? We have to see the administrative
7 record to know. But I think no consideration at all was
8 given. I think what happened -- that's why, as a matter of
9 common sense, I think where this ought to head, past this
10 point, is a remand to the agency to simply consider the
11 facts. The government's motion to dismiss remarkably
12 corroborates there was no consideration of the evidence.

13 THE COURT: Okay. You have five more minutes, so
14 if there's anything else that you think would be helpful to
15 me in deciding this motion to dismiss, now is the time to
16 give it to me.

17 MR. SMITH: Well, I'll give you a couple thoughts
18 about some of their technical points in the event it's
19 helpful to you. There is an argument that the List Act --
20 and remember there are two issues here: There's the List,
21 but also the approval of the constitutional change. The
22 argument is that the List Act has no law to guide it.
23 There's no ascertainable standard under which you can
24 evaluate the claim; therefore, it's discretionary and not
25 subject to APA review.

17-CV-913

1 First of all, the government does not claim to
2 have made a discretionary decision, so it's an awkward
3 argument at best. The government says this was ministerial,
4 we had an empty mind because we are supposed to have an
5 empty mind, we are just a vessel or pass-through. So
6 arguing that the List Act is discretionary seems to me
7 awkward because there was no claim of discretion.

8 Secondly, it sort of assumes the merits of the
9 dispute. There is a dispute here you'll decide on the
10 merits about whether the government has an obligation to
11 make a decision. They say they didn't make one. If they
12 had an obligation to make one, I think the case is over.
13 That's an issue you'll decide on the merits.

14 Also, the List Act, the claim they make regarding
15 discretion relates to a provision of the APA, 701(a)(2),
16 that excepts from APA review matters where a statute commits
17 it to the discretion of the agency. There's no argument
18 here that there's any textual commission of this issue to
19 the discretion of the agency. The argument is the statute's
20 very broadly worded and there are some cases that would
21 suggest that that achieves the same effect. But the
22 statute's not broadly worded. This is a mandatory statute.
23 It says, in effect, the Secretary shall publish a List
24 annually.

25 Clearly, you can bring an action to enforce that

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 mandatory obligation. But there's more. The statute is not
2 just the part of 5131 that's codified in the U.S. Code. The
3 statute's the entire Public Law, which we cite in the brief.
4 As with public laws, over and over, the entire Public Law is
5 not codified, and this Public Law also says that the listing
6 decision is a function of the trust obligation to Indian
7 Tribes and that the List has to be, quote, accurate. So,
8 there are plenty of guides to the exercise of decision
9 making-authorities, it's not purely discretionary.

10 Also, the government cites a case which says that,
11 for example, informal guidance is enough, informal agency
12 guidance is enough to take a matter outside of the
13 discretionary realm. Well, we've just provided Your Honor
14 with a four-part guidance that the agency actually uses that
15 we were able to obtain.

16 On the issue of the Zone of Interest, this is an
17 argument that relates only to the approval of the
18 constitutional change. That statute clearly has provisions
19 in it that require that the change not be contrary to law
20 and that it not discriminate against other Tribes. Both of
21 those are provisions in the statute under which my client
22 clearly has an interest.

23 Also, the government says, well, that statute,
24 that thou shalt not discriminate against Tribes, that only
25 applies to discriminating based on the method of

17-CV-913

1 recognition. The *Akiachak* case that the government cites
2 says that's not true -- I shouldn't put it that way -- but
3 that's not accurate, the provision has to be taken at face
4 value and applied more broadly than that.

5 So the last point I'll give you is the Zone of
6 Interest analysis, I think I finally came to understand it
7 yesterday; what the Supreme Court has really said in cases
8 like NCUAC, National -- whatever it is, NCUAC, is here's how
9 you look at it: You ask does the statute constrain agency
10 decision making? So, in that case, for instance, it was
11 agency decision making about -- maybe it was banks. If it
12 does, any party that's affected and has -- any party who
13 claims there's a violation of those constraints and is
14 affected is within the Zone of Interest of the statute, so
15 that if a statute regulates banks and the government, in
16 regulating the banks, violates the statute, to the detriment
17 of other types of businesses, those competitor businesses
18 who are harmed by the violation are within the Zone of
19 Interest of the statute.

20 So, I guess I would just end where I was early at
21 the beginning. We are in the pleading phase of a case with
22 a detailed complaint and detailed evidentiary support
23 attached to the complaint. The -- these cases are resolved
24 on the administrative record and the issues on which the
25 government would have the Court resolve the case all have

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY

17-CV-913

1 exceptionally low thresholds. The standing threshold, these
2 other issues about the discretionary exception, which the
3 Court said is extremely narrow, and all of those thresholds
4 are met, and then some, by the detailed allegations in the
5 complaint and the documents that support 'em, and I think
6 more than adequate to suggest that the parties ought to move
7 on to doing the two things you do in any APA case: Examine
8 the record and file a motion for summary judgment.

9 THE COURT: All right, thank you. As I said to
10 you informally, I will carefully take into consideration the
11 oral argument, both sides did a nice job on that, it was
12 helpful to me. I will again review all of the submissions
13 and, as soon as I can, I will get out a written decision. I
14 hope everyone has a safe trip back to DC. Thank you.

15 (This matter adjourned at 3:00 PM.)

16 - - - - -
17
18
19
20
21
22
23
24
25

1 CERTIFICATION OF OFFICIAL REPORTER

2
3
4 I, THERESA J. CASAL, RPR, CRR, CSR, Official
5 Realtime Court Reporter, in and for the United States
6 District Court for the Northern District of New York, do
7 hereby certify that pursuant to Section 753, Title 28,
8 United States Code, that the foregoing is a true and correct
9 transcript of the stenographically reported proceedings held
10 in the above-entitled matter and that the transcript page
11 format is in conformance with the regulations of the
12 Judicial Conference of the United States.

13
14 Dated this 30th day of April, 2018.

15
16 /s/ THERESA J. CASAL

17 THERESA J. CASAL, RPR, CRR, CSR

18 FEDERAL OFFICIAL COURT REPORTER
19
20
21
22
23
24
25

THERESA J. CASAL, RPR, CRR
UNITED STATES DISTRICT COURT - NDNY