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Rebecca Chapman

University at Buffalo School of Law, rc82@buffalo.edu

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Protecting Our Spaces of Memory: Rediscovering the Seneca Nation Settlement Act Through Archives*

Rebecca Chapman**

Archival spaces act as collective memory, and the need to preserve and protect those spaces is critical for understanding historical events. To illustrate the idea of archival space as a space of memory, this article looks at the Seneca Nation Settlement Act, which is more fully understood through the use and interpretation of archival materials.

Introduction	174
Passage of the Seneca Nation Settlement Act: The 1990s	174
Mechanics of Passage	174
Terms of Passage	175
Public Perspective	178
Using Archives to Bridge the Disconnect Between the Act and the Public's Perception	178
Digging Through the Past to Answer Present Questions: One Archival Space of Memory	179
Beginning the Archival Journey into the SNSA's Passage: The 1700s, Great Britain, New York State, and the Non-Intercourse Act	180
Seneca Nation in the 1800s: The Ogden Years	183
Seneca Nation in the 1800s and Early 1900s: The Vreeland Years	185
Everett Commission: 1919–1922	189
<i>United States v. Forness</i> and the Spite Bills: 1940s–1950s	191
Indian Claims Commission: 1960s–1970s	193
Environmental Challenges and Land Claims: 1970s–1990s	194
Rehabilitating and Restoring the Public Memory by Promoting Archival Spaces. . .	196
Conclusion	202
Exhibit A: Timeline of Events.	204
Exhibit B: Maps, 1797–1804	205

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** Senior Assistant Librarian, Outreach Liaison for Undergraduate Legal Research and Indigenous Studies, Charles B. Sears Law Library, University at Buffalo, SUNY, Buffalo, New York. The article was the winning entry in the 2020 AALL/Lexis Call for Papers, Student Division.

Introduction

¶1 Archival spaces serve as a society's collective memory. They inform us of our past and our present when our memory falls short. A case in point is the Seneca Nation Settlement Act (SNSA).¹ A journey through archival sources explains why and how the SNSA came about, illuminates a disconnect between the Act's substance and the public's perception of it, and illustrates the continued need to support and protect archives as spaces of memory.

¶2 Legislative materials about the SNSA outline congressional review of the bill and what appeared important to congressional leaders around 1990. Yet to appreciate the need for the Act and the reasoning behind its terms, and to paint a complete picture of the Act in its historical context, we must immerse ourselves in the archival history of Seneca land disputes and treaty rights.

¶3 Our archival journey begins in the 18th century with relations between the Seneca Nation, Great Britain, and the colony of New York. The journey continues with two different aspects of the 19th century: the Ogden years and the Vreeland years. Next, we move to the Everett Commission's review of and conclusions about land claims at the beginning of the 20th century. The journey then brings us to the 1940s and 1950s to consider federal legislation favoring New York State, after which we focus on the 1960s and 1970s and the federal government's actions involving the Kinzua Dam and the Indian Claims Commission. Finally, the last 20 years of our journey review Seneca environmental disputes and some land claim litigation.

¶4 After using the review of Seneca land claims to illustrate how archives serve as memory spaces, the discussion turns to preserving and protecting archival spaces, which fill an important, but often overlooked, role in our memory. This article delves into the concept of memory spaces and ideas that can be used to further protect and preserve these spaces.

Passage of the Seneca Nation Settlement Act: The 1990s

Mechanics of Passage

¶5 The speed at which the SNSA passed through the legislative process gives us some idea what Congress thought about it. The SNSA began life as H.R. 5367 with New York representatives Matthew McHugh and Amory Houghton as co-sponsors. The bill had 38 House representatives sponsoring its passage. The bill started out in review with the Committee on Interior and Insular Affairs, which conducted hearings in September 1990. Less than two weeks later, the committee insisted on amendments. The amended bill went out of committee for House consideration on October 10, 1990, under H.R. Rep. No. 101-832. Ben Nighthorse Campbell, the House representative from Colorado,

1. Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, 104 Stat. 1292, <https://www.congress.gov/bill/101st-congress/house-bill/5367/text> [<https://perma.cc/Z84Q-4SAS>].

moved to pass the amended bill in the House. The House debated only 40 minutes before passing the SNSA onto the Senate.

¶6 The Senate took up the bill on October 12, 1990. It passed the Senate without amendment on October 16, 1990, and went to the President for signature on October 24, 1990. President George H.W. Bush signed the bill into law less than two weeks later.

Terms of Passage

¶7 The law provides a brief statement at its beginning conveying the political climate and the reason for its passage: “Disputes concerning leases of tribal lands within the city of Salamanca and the congressional villages, New York, have strained relations between the Indian and non-Indian communities and have resulted in adverse economic impacts affecting both communities.”²

¶8 In subsequent paragraphs, however, the Act’s explanation of what events led to its passage are anemic.³ The Act focuses on leases awarded in the 1870s and judgments

2. *Id.* § 2(a)(1).

3. *Id.* § 2(a)(2)(A)–(E).

awarded to the Seneca Nation for land claims brought before the Indian Claims Commission.⁴ Little else is provided for historical context. The law states:

In 1952, the Seneca Nation filed a claim with the Indian Claims Commission against the United States for use of improper lease fees, and in 1977 a settlement was reached regarding such claim, providing for payment of \$600,000 to the Seneca Nation covering the period beginning in 1870 to the end of 1946.⁵

¶9 The law agrees that the lease payments given to the Senecas were inadequate and refers to the leases' expiration in 1991.⁶ Thus, Congress passed the SNSA to continue leasing arrangements under a more equitable structure, to promote healing between local groups, and to settle past "inequities" on behalf of the Seneca Nation.⁷

¶10 To cure the "inequities," the Act offers that the Senecas enter into new lease arrangements with the city, the congressional villages, and any other interested lessee.⁸ It is implied that these new leases would include higher rental payments and more favorable terms to the Seneca Nation.⁹ Moreover, all parties would manage this set of transactions without the federal government's input.¹⁰ For the completion of these new leases under better terms, the Seneca Nation would release all prior claims against the United States and the city, congressional villages, and other lessees.¹¹ Finally, to entice the Seneca Nation to enter into new leases and release claims, the United States and New York State would provide settlement funds for the release of land claims.¹²

¶11 The federal share of settlement funds came to \$30,000,000 for the Seneca Nation.¹³ An additional \$5,000,000 would be earmarked for economic and community development in and around the city of Salamanca.¹⁴ Another \$2,000,000 would be placed in an interest-bearing account for the Seneca Nation.¹⁵ The Seneca Nation Council would administer the funds in this account under a Seneca-approved plan for economic development.¹⁶ Income accruing on the account would fund government operations and general welfare programs for the Seneca.¹⁷ Finally, a sum of \$3,000,000 would be placed in an escrow account for the Seneca Nation for up to 10 years.¹⁸

4. *Id.* § 2(a)(2)(E).

5. *Id.*

6. *Id.* § 2(a)(3)-(4).

7. *Id.* § 2(b).

8. *Id.* § 4(a)-(c).

9. *Id.*

10. *Id.* §§ 4(a)-(c), 5.

11. *Id.*

12. *Id.* § 6.

13. *Id.* § 6(b)(1).

14. *Id.* § 6(b)(2)(A).

15. *Id.* § 6(b)(2)(B)(i).

16. *Id.*

17. *Id.*

18. *Id.* § 6(b)(2)(B)(ii).

Additionally, New York State would pay the Seneca Nation \$16,000,000 in cash and \$9,000,000 in additional economic development funds.¹⁹

¶12 None of the money provided, however, could be spent until the Seneca Nation executed new leases.²⁰ Once the Seneca completed new leases and acquired the appropriated funds, they could purchase some of their aboriginal territory back.²¹ In this way, Congress sought to cure the “inequities” of the past by providing settlement funds that the Seneca Nation could use to repurchase lands that were previously taken through unlawful means. Congress meant for this settlement effort to end all differences and conflicts from the past, but it did not fully understand how those difficulties began.

¶13 The language of the Act highlights that Congress missed or ignored the complete history around the Seneca Nation’s land issues. The Act begins its tale of land claims with the incursion of railroads into Seneca Territory in the 1850s.²² It notes that leases were created with railroad employees and farmers absent federal approval. The leases were not favorable to the Seneca.²³ The leases were declared invalid, but an Act of Congress in 1875 upheld certain leases and permitted leasing to continue.²⁴ An amendment in 1890 permitted these leases to exist for 99 years.²⁵

¶14 The SNSA language suggests that Congress understood that the 1875 Act and its amendment in 1890 should not have occurred. Moreover, Congress agreed that the federal government permitted land speculators to swindle the Seneca Nation out of their homelands. The Indian Claims Commission said as much in its 1977 opinion. Congress appeared ready to address the matter almost 15 years after that judgment. But Congress did not seem deeply interested enough to understand the historical nuances involved. In a September 13, 1990, hearing on the legislation, Representative Campbell had the following exchange with expert witness Laurence Hauptman:

Mr. CAMPBELL. Professor Hauptman?

Mr. HAUPTMAN. Yes.

Mr. CAMPBELL. If I could interject?

Mr. HAUPTMAN. Sure.

Mr. CAMPBELL. I think most of us are really aware of a lot of the injustices that have happened to tribal groups; we hear it pretty regularly here. And certainly we are aware of the injustices that have happened to the Seneca Nation. But, in the interest of time, we would prefer to avoid going through all the background and kind of get on with this bill.

19. *Id.* § 6(c).

20. *Id.* § 7.

21. *Id.* § 8(c).

22. *Id.* § 2(a)(2)(A)–(B).

23. *Id.*

24. *Id.* § 2(a)(2)(C)–(D).

25. *Id.*

Mr. HAUPTMAN. Sure.

Mr. CAMPBELL. So, if you would kind of wind it up, I would appreciate it.²⁶

¶15 But Congress could no longer delay. Congress had to move quickly, most likely because local governments, businesses, and non-Indian homeowners would experience major impacts from the expiration of the 99-year leases.

Public Perspective

¶16 The public's perspective on the historical details of the Seneca Nation land claims appeared even less informed than Congress's. The most detailed account came from the *New York Times*. In her article, Elizabeth Kolbert suggests that the 1890s leases were a revolutionary idea for their day. The original leases appeared illicit, but Congress eventually caved to pressure and approved them. Moreover, the Seneca Nation's decision to raise lease rates was received negatively. Kolbert's article focuses on the difference between the original lease rates and the suggested ones—implying that it is unfair of the Senecas to ask for so much in such a small town. The article mentions racism and long-simmering resentments, but it does not provide much history regarding these topics. It spends more time on Salamanca's economic depression, which locals blame on the Seneca.²⁷

¶17 General press coverage for the SNSA in 1990 focused more on the plight of white homeowners and city council members than the legal rights of the Seneca Nation.²⁸ Much of the history that precipitated the need for the Act was glossed over or obscured. No one dug very far into the history to provide a greater understanding of the situation.

Using Archives to Bridge the Disconnect Between the Act and the Public's Perception

¶18 Eric Ketelaar proposes that archives act as spaces of memory.²⁹ In 2008, he reported on the attempts in Northern Ireland to create a historical government archives and on the questions raised in providing a true accounting of the past.³⁰ Ketelaar

26. *The Seneca Nation Settlement Act of 1990, Hearing on H.R. 5367 before the Committee on Interior and Insular Affairs*, 101st Cong. 33–34 (1990).

27. Elizabeth Kolbert, *Indians Bill New York Town as Its 99-Year Leases Expire*, N.Y. TIMES (June 11, 1990), <https://www.nytimes.com/1990/06/11/nyregion/indians-bill-new-york-town-as-its-99-year-leases-expire.html> [https://perma.cc/P6DK-XT6H].

28. See, e.g., Elizabeth Kolbert, *City on Seneca Indian Reservation Reaches New Lease With Tribe*, N.Y. TIMES (May 22, 1990), <https://www.nytimes.com/1990/05/22/nyregion/city-on-seneca-indian-reservation-reaches-new-lease-with-tribe.html> [https://perma.cc/CFZ3-YTL4]; Rosalind S. Paaswell, Opinion, *Town Built on Indian Land Lost its Chance to Plan Ahead*, N.Y. TIMES (July 4, 1990), <https://www.nytimes.com/1990/07/04/opinion/1-town-built-on-indian-land-lost-its-chance-to-plan-ahead-900590.html> [https://perma.cc/RQ9K-A26G]; Lindsey Gruson, *Town Learns Indians Are Taking Most of It Back*, N.Y. TIMES (Dec. 2, 1991), <https://www.nytimes.com/1991/12/02/nyregion/town-learns-indians-are-taking-most-of-it-back.html> [https://perma.cc/YM4D-F9L4].

29. See Eric Ketelaar, *Archives as Spaces of Memory*, 29 J. SOC'Y ARCHIVISTS 9 (2008).

30. *Id.*

compared judicial truths to a more complete and balanced truth in archival work.³¹ In his efforts, he found that archives are “living records” shaped with each entry and each use.³² Because archives can serve as a “living record” in a way that judicial proceedings cannot, Ketelaar argues, archives can become spaces of more accurate, complete, historical memory.³³ As such, archivists’ work could be seen as “memory practice” that works in the public space to avoid historical revisionism.³⁴

¶19 When we become detached from history, historical revisionism can flourish.³⁵ In those gaps of memory and history, we create a disconnect between our perceptions and the fullest truth of a matter. This disconnect undermines our understanding and appreciation of a situation. In the case of the SNSA, a disconnect appeared between what was implemented and why, and what the public perceived as such. Moreover, a disconnect appeared among what Tribal leaders felt they needed, what the State leaders felt they needed, and what the Federal government actually implemented for the solution.³⁶ In this case, the disconnect appeared to alter the public perception and the public memory of the reasoning and spirit behind the SNSA.³⁷

¶20 Nor has the situation with public memory improved. To obtain a more complete understanding of the Seneca land claims, we need greater historical detail to illuminate deeper truths and refocus the memory. To make this happen, an archival dig is needed to clarify the situation.

Digging Through the Past to Answer Present Questions: One Archival Space of Memory

¶21 The archives at the Charles B. Sears Law Library have curated two large collections: the Haas Collection and the Berman Collection. In addition to these collections, the archives contain the legal filings from a number of Seneca land claims from the 1970s and 1980s. Books, journals, periodicals, government documents, legal treatises, and photos produced by Seneca members, professors, lawyers, and journalists on both sides of the issues are included in these collections.

¶22 The archival materials provide significant documentation of Seneca land claims from the late 18th century to the passage of the SNSA. As such, the collections produce a more complete historical record of Seneca land issues in context with contemporaneous politics, time, and legal examinations. The review gives a more detailed understanding of why the SNSA came to pass and why it was perceived as necessary.

31. *Id.* at 9–12.

32. *Id.* at 12.

33. *Id.*

34. *Id.* at 13.

35. *Id.*

36. See Kolbert, *supra* note 27.

37. *Id.*

Beginning the Archival Journey into the SNSA's Passage: The 1700s, Great Britain, New York State, and the Non-Intercourse Act

¶23 The earliest recitation of Seneca land issues begins after the Revolutionary War of 1776 and the defeat of Great Britain.³⁸ The United States and Great Britain settled their land issues at the Treaty of Paris but did not include the Seneca Nation or any other Indian tribe.³⁹ This is notable because the Indian Nations were indispensable parties to any settlement of land issues. The United States attempted to resolve outstanding issues with the Seneca at the Treaty of Fort Stanwix in 1784.⁴⁰ In that treaty, the Seneca ceded the Ohio River Valley and the Niagara River Strip to the United States.⁴¹

¶24 But the United States also had to contend with land issues between the states based on charters previously received from the British crown.⁴² The New York Constitution of 1777, for instance, stated, "No purchase of . . . contracts for the sale of lands . . . made with or of said Indians within the limits of this State shall be binding . . . or deemed valid unless made under the authority and with the consent of the Legislature of this State."⁴³

¶25 This document signaled New York's intention to cancel any land claims of Loyalists after the end of the war.⁴⁴ But it also asserted an authority over Indian lands in New York that did not sit well with the federal government. Under the Articles of Confederation of 1781, the federal government made clear in Article 9 that only Congress has "sole and exclusive power of . . . regulating the trade and managing all affairs with the Indians not members of any States."⁴⁵

¶26 Despite this, in 1786 New York and Massachusetts attempted to settle land issues that arose due to competing charters from the British crown. The interstate agreement, despite its failure to join the Seneca as an indispensable party, granted New York jurisdiction over its borders; Massachusetts retained a right of preemption over the Indian lands within New York's borders. Thus, Massachusetts believed that it had the first right to purchase any Indian lands in New York, if ever the tribal nations on them wanted to sell and leave. The state then sold the right of preemption to Nathaniel Gorham and Oliver Phelps.⁴⁶

¶27 Before Gorham and Phelps could act, however, land speculators known as the Genesee Land Company attempted to occupy and sublease all New York Indian lands in 1787 for a lease of 999 years.⁴⁷ Alarmed, New York invalidated the lease due to its

38. See Howard Berman Draft Manuscript, n.d., Box 19, Law Spec. Coll. 06, Howard Berman Papers 1835-1977, Charles B. Sears Law Library, State University of New York at Buffalo.

39. See *id.* at 6.

40. *Id.*

41. *Id.*

42. *Id.*

43. Laurence M. Hauptman, Report to Arlinda Locklear on Seneca Land Claims, Feb. 28, 1997, at 8.

44. *Id.*

45. *Id.* at 10.

46. Berman Draft Manuscript, *supra* note 38, at 6, 7.

47. Esther V. Hill, *The Iroquois Indians and Their Land Since 1783*, 11 Q.J. N.Y. ST. HIST. ASS'N 335,

length and perhaps because the offending company hailed from Canada.⁴⁸ With the Genesee Land Company out of the way, Gorham and Phelps immediately attempted to purchase Seneca lands in 1790 and to force the Nation to move out of New York.⁴⁹ Unsurprisingly, this did not appeal to the Senecas, and they complained to President George Washington about the propriety of these attempts.⁵⁰

¶28 In fact, the federal government remained concerned about some of this state activity. It needed to make clear that what it promised in treaties with other sovereigns would be upheld, and that it was the supreme authority on Indian matters. The federal government could not afford to lose this authority so quickly to any state or state actors. Thus, the federal government passed the Non-Intercourse Act of 1790 to ensure that Indian land sales did not occur without federal approval and oversight.⁵¹

¶29 In furtherance of this work, Washington dispatched General Timothy Pickering to visit the Seneca at Tioga Point to explain the Non-Intercourse Act and what it meant for them.⁵² He brought them the message from George Washington:

Here, then is the security for the remainder of your lands. No State, nor person can purchase your lands unless at some public treaty, held under the authority of the United States. The general government will never consent to your being defrauded, but it will protect you in your rights.⁵³

¶30 In short, Washington and Pickering meant to convey that the Treaty at Fort Stanwix would come before any deal with Gorham and Phelps, and the Seneca would not be forced out of New York.⁵⁴ With the failure of their attempt to secure Seneca lands, Gorham and Phelps sold their right of preemption to the Holland Land Company and Robert Morris.⁵⁵

¶31 Around that time, in 1793, Pennsylvania attempted to seize Presqu' Isle, claiming that the Seneca Nation had given up the land.⁵⁶ Specifically, Pennsylvania had convinced Seneca Chief Cornplanter to cede the area for money and managed to obtain a

345–46 (1930).

48. *Id.*

49. Berman Draft Manuscript, *supra* note 38, at 7.

50. *Id.*

51. *Id.*

52. Note that scholars in New York in the 1930s tried to characterize the Pickering exchanges as Washington's attempts to pacify the Indians until they were ready to sell their land. Hill, *supra* note 47, at 337–38. Moreover, they insisted that tribes in New York had only possessory rights to their lands based on the fact that the United States had received its authority over Indian lands from Great Britain's doctrine of discovery and conquest under international law. *Id.* Further, they argued that the right of preemption to Indian lands in New York vested first with the states (thus New York) before the United States was recognized on its own after the Revolutionary War. *Id.* Thus, the Iroquois were a conquered people that were now wards of a new sovereign in New York. *Id.* at 339. But this line of reasoning was debunked decades before in the Everett Report and again in the 1970s. See HELEN M. UPTON, *THE EVERETT REPORT IN HISTORICAL PERSPECTIVE* 80–99 (1980); see also Introduction, Berman Draft Manuscript, *supra* note 38.

53. Berman Draft Manuscript, *supra* note 38, at 7.

54. *Id.*

55. *Id.* at 9.

56. *Id.* at 8.

congressional resolution of the exchange.⁵⁷ Pennsylvania began building up and militarizing the area, but the remainder of the Seneca Nation and its chiefs had not approved the sale, and it could not be held valid.⁵⁸ The federal government knew that a treaty would be needed to avoid war and ensure federal oversight of Indian land sales.⁵⁹

¶32 Again, Washington sent Pickering to deal with this situation, instructing him to obtain title to Presqu' Isle in exchange for sufficient land to avoid war.⁶⁰ The result of his exchanges became the Treaty of Canandaigua in 1794.⁶¹ In that treaty, the Seneca received back most of the Niagara River Strip⁶² and the Allegany and Cattaraugus Territories ceded at Fort Stanwix.⁶³ In exchange, they ceded title to Presqu' Isle.⁶⁴ In addition, the Treaty of Canandaigua reiterated that the United States would protect the Seneca Nation's interests in its lands and would not permit sales and removal.⁶⁵

¶33 Regardless, nonfederal actors continued trying to move the Seneca off their land absent federal approval. The federal government amended the Non-Intercourse Act in 1793, 1796, 1799, and 1802, trying to tighten restrictions on Indian land sales. In fact, New York continued entering into treaties with the Seneca for land exchanges by insisting that the Non-Intercourse Act did not apply or that New York possessed concurrent jurisdiction over Indians in their state.⁶⁶

¶34 Even more strange than New York's argument, in 1797 Robert Morris and the Holland Land Company purchased Seneca Nation lands that included parts of the Niagara River Strip.⁶⁷ Gorham and Phelps had sold their preemption interest to Holland Land Company and Robert Morris after they were unable to move the Seneca.⁶⁸ Later, the Holland Land Company sold its share of the interest to the Ogden Land Company.⁶⁹ The preemption right was never legally determined to be invalid at the time so, absent a legal challenge, it remained an issue outstanding on title.⁷⁰

¶35 In 1797, with the Treaty of Big Tree, Morris and Ogden convinced Seneca leaders to cede large tracts of land.⁷¹ Morris and Ogden managed this by presenting the women's council with presents and convincing the women to use their influence with

57. *Id.* at 3–5.

58. *Id.*

59. *Id.*

60. *Id.* at 8.

61. *Id.*

62. Some of this area was referred to as the Buffalo Creek Reservation. See Hill, *supra* note 47, at 341–42. The Niagara River Strip's southern portion was returned to the Seneca, but they would permit an easement for a federal road to run through it. Berman Draft Manuscript, *supra* note 38, at 13–16.

63. Berman Draft Manuscript, *supra* note 38, at 8.

64. *Id.*

65. *Id.* at 10–12; see Hauptman, *supra* note 43, at 18–19.

66. Berman Draft Manuscript, *supra* note 38, at 9.

67. *Id.*

68. Hill, *supra* note 47, at 349–52.

69. *Id.*

70. *Id.*

71. *Id.*

the men so they would sign the treaty.⁷² The U.S. Senate approved the sale, and the President proclaimed it in accordance with the Non-Intercourse Act.⁷³

¶36 Deciding to press its luck after this turn of events, New York attempted to enter into a treaty with the Seneca Nation for the southern portion of the Niagara River Strip in 1802. New York immediately began to sell parts of this land to speculators and develop the area around it. That said, the Treaty of 1802 was never ratified by the Senate or proclaimed by the President. New York leased and developed this land without federal approval.⁷⁴

Seneca Nation in the 1800s: The Ogden Years

¶37 The resistance of the federal government to these tactics did not discourage the Ogden agents or New York State. New York continued its attempts to shift jurisdiction over Indians to the state. In parallel, the state continued to argue for concurrent jurisdiction over the Seneca.⁷⁵

¶38 The Holland Land Company, claiming the right of first refusal on New York Seneca lands to be sold, sold this interest to the Ogden Land Company in 1810.⁷⁶ Around this time, the railroads began to obtain leases for their use and for their employees' use across New York Indian lands.⁷⁷ Ogden's agents interfered with Seneca politics to get favorable conditions and to further Seneca removal.⁷⁸ Frank Lankes describes the right of first refusal this way:

This right has been termed a pre-emptive title although there wasn't a shred of title initially. It was a right to purchase Indian land in New York when and if they decided to sell, nothing more than that. However, it was implemented to force them into selling, and in the possession of Ogden and Company, it became a bludgeon that was applied without mercy.⁷⁹

Ogden and his agents used whiskey, bribery, force, and fraud to achieve their ends.⁸⁰

¶39 In response, the Seneca Nation passed its Act of 1821 and removed white non-leaseholders from their territory. Seneca Chiefs Cornplanter and Red Jacket traveled to meet with John Calhoun in the U.S. Department of War to complain about Ogden's attempts to steal tribal land. Calhoun suggested relocation to Wisconsin, but he also insisted that the decision remained with the tribe and they could not be forcibly removed.⁸¹

72. *Id.*

73. Berman Draft Manuscript, *supra* note 38, at 9.

74. *Id.*

75. Laurence Hauptman, *The Historical Background to the Present-Day Seneca Nation—Salamanca Lease Controversy: The First 100 Years, 1851–1951*, ROCKEFELLER INST. OF GOV'T WORKING PAPERS, No. 20, Fall 1985, at 1–6.

76. *Id.*

77. *Id.*

78. *Id.*

79. FRANK LANKES, *THE SENECAS ON BUFFALO CREEK RESERVATION* 29–30 (1964).

80. *Id.* at 16, 29–30.

81. *Id.* at 17–20.

¶40 Despite Calhoun's assurances, in 1826, Oliver Forward came to the Seneca and claimed that he was a U.S. commissioner sent to negotiate purchase of all New York Seneca lands for Ogden. Forward brought the local Indian agent and made his pitch to Red Jacket. Red Jacket consulted the other leaders. He came back to Forward indicating that the Seneca refused to sell. Forward threatened Red Jacket and told him that all U.S. aid and money to the Seneca would be shut off if they did not comply. The local Indian agent agreed and supported the threat.⁸²

¶41 Some chiefs signed the 1826 treaty document that gave almost all Seneca lands to Ogden; some signed thinking they had no other choice, and others were bribed to do so. But these decisions needed to be ratified by a vote of the Seneca people, and only 7 percent approved. Still, the document made its way to Congress for approval. But a letter to John Quincy Adams, dated May 19, 1827, detailed the above deficiencies and asked that the federal government not approve the treaty document. The Senate and the President did not approve it.⁸³

¶42 Ogden's next attempt involved relocating the Menominee through the Treaty of 1832 and taking that land to offer the Seneca a new place to live. Ogden thought he could relocate the Seneca to Wisconsin and get the federal government and the Indian tribes to pay for it through a series of tribal land exchanges. Then, Ogden could purchase the New York land and develop it without tribal influence. The Seneca were not interested in moving to Wisconsin, and so the deal expired.⁸⁴

¶43 Three years later, Ogden tried again. This time, Ogden tried to force a relocation to Kansas. He attempted to bribe certain chiefs to visit Kansas and convince their neighbors to agree to removal. Again, this was a decision that required council approval, but Ogden tried to convince the chiefs to go without alerting others. Liquor and bribes flowed freely. Ogden's agents spent two years trying to obtain signatures on a treaty document that also attached a deed conveying all Seneca and Tuscarora land to the Ogden Land Company. Only 16 chiefs signed the document to remove to Kansas. Further, the treaty and attached deeds were drawn up by, formally executed by, and witnessed by the same people: Commissioner Ransom Gillet and the superintendent of Massachusetts.⁸⁵

¶44 Gillet tried to convince the Senate to ratify the treaty, but the Senate refused on the grounds that Gillet had gone beyond his scope of authority and engaged in double dealing.⁸⁶ The Senate struck the requirement for removal and would not ratify the treaty document until the commissioner went back and explained the provisions to the tribe.⁸⁷ Gillet also had to obtain a sufficient number of signatures to indicate a majority

82. *Id.* at 21–22.

83. *Id.*

84. *Id.* at 30–31.

85. *Id.* at 30–35.

86. *Id.* at 36.

87. N.Y. ST. ASSEMB., SPEC. COMM., REPORT OF SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK 24–29, 51 (1889) (hereinafter WHIPPLE REPORT).

approval of leaders.⁸⁸ Gillet returned to the Seneca and continued his tactics of threats and bribes through Ogden.⁸⁹ The meetings dragged on for months because Gillet would not stop until the Seneca agreed.⁹⁰ Despite his efforts, he obtained only 31 questionable signatures during the council meetings.⁹¹ Gillet remained, and using questionable means outside of the council meetings, he finally reached the 41 signatures necessary for majority approval.⁹² This was done on December 26, 1838.⁹³

¶45 After an investigation by the War Department and the Bureau of Indian Affairs, both the secretary and the commissioner recommended rejecting the treaty.⁹⁴ Despite these two officials' documented concerns, the Senate approved the Treaty of 1838, and the President proclaimed it.⁹⁵ The outcome was devastating to the Seneca, and sympathetic Quakers began to assemble a book of documentary evidence establishing the rampant fraud, forgeries, bribes, and harassment that had produced this deal.⁹⁶ The book circulated and caused a great stir in Washington because it clearly indicated that the federal government had made a mistake in approving the treaty.⁹⁷ To fix the error, the federal government brought the Seneca and Ogden together again for the Compromise Treaty of 1842.⁹⁸ In it, the Seneca lost the Buffalo Creek Reservation but regained the Allegany and Cattaraugus Territories.⁹⁹ Despite the compromise, many Seneca lost their land to Ogden.¹⁰⁰

Seneca Nation in the 1800s and Early 1900s: The Vreeland Years

¶46 Not to be deterred by clouded title issues with Ogden, New York continued its pursuit for Seneca land and jurisdiction.¹⁰¹ New York commissioners, on behalf of the state, traveled to each reservation to observe, meet, and report back on "the Indian problem."¹⁰² The commissioners' report detailed how New York distributed annuities, collected rent on leases, worked with relief programs, and managed healthcare and

88. LANKES, *supra* note 79, at 36.

89. *Id.* at 38–41.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 41. It is also interesting to note here that New York's secretary of state accepted and recorded the treaty and deeds on September 11, 1838, months before its final approval in the U.S. Senate. WHIPPLE REPORT, *supra* note 87, at 29.

94. LANKES, *supra* note 79, at 44.

95. *Id.* at 44–45. This treaty is also known as the Treaty of Buffalo Creek of 1838.

96. *Id.* at 45.

97. *Id.*

98. *Id.*

99. *Id.*

100. Frank J. Lankes, *Bennett's Settlement*, 4 NIAGARA FRONTIER 116–18 (1958) (Henry Two Guns loses his property to Ogden in 1843. The writer pinpoints the location to be Blossom, N.Y., now occupied by a town.)

101. WHIPPLE REPORT, *supra* note 87, at 63–75.

102. *Id.* at 4.

scholarships for New York Indians.¹⁰³ But the real reason for this litany of achievements was to assert that New York State had, or should have, de facto concurrent jurisdiction over New York Indians.¹⁰⁴ They argued that New York State, in its list of activities with the Indians, could eventually persuade the federal government to cede jurisdiction to the state in some areas.¹⁰⁵ In their report to the state, the commissioners observed “one additional step would place these Indians under the protection of all of the laws of the State.”¹⁰⁶ The commissioners suggested that the state work toward “exterminat[ing] the tribe and preserve the individual; make citizens of them and divide their lands in severalty.”¹⁰⁷ In short, the commissioners urged allotment and assimilation, akin to the Dawes Act of 1887.

¶47 The commissioners’ ideas about de facto concurrent jurisdiction could not be constitutionally sustained. In fact, a delegate of the Seneca Nation, Andrew John, pointed out this argument and its fallacy to the federal government in a petition to Congress related to Seneca lease payments in 1898.¹⁰⁸ In his petition, he stated:

That Congress has at all times exercised supervision over the Indian tribes and nations is a matter of common knowledge and needs no citation here The Supreme Court of New York and the Supreme Court of the United States have decided that the legislature of New York has no jurisdiction over the subject, can give no force or validity to any leases of land within said reservation, nor give any authority to such in any way.¹⁰⁹

As such, New York’s attempts to reframe the issues and characterize their work in a manner that led to greater jurisdiction was flawed. The flaw in the reasoning, however, did not stop admirers from continuing similar work to produce the desired result of total state jurisdiction or full Indian removal.

¶48 Edward Vreeland, a New York representative in the 56th Congress, made no secret of his intent to move the Seneca off their land. He served in Congress from 1899 to 1913 and never stopped introducing legislation to remove the Seneca and clear title issues with the Ogden Land Company. Vreeland, a resident of Salamanca and very well connected, wanted the city to flourish without Seneca influence.¹¹⁰

¶49 Vreeland’s determination came after the Congress of 1875 approved leases on Seneca land that began with the railroads and railroad employees.¹¹¹ The leases began around 1810, and none of them were completed with any federal guidelines or oversight.¹¹² This lack of federal oversight and prior approval appeared in contravention of the Treaty at Canandaigua in 1794 and the U.S. Constitution’s grant of sole authority

103. *Id.* at 6.

104. *Id.*

105. *Id.*

106. *Id.* at 64.

107. *Id.* at 68–69.

108. S. Doc. No. 55-190 (1898).

109. *Id.* at 6–7.

110. Hauptman, *supra* note 75, at 1–5.

111. *Id.* at 1; S. Doc. No. 55-190, at 8–10 (1898).

112. S. Doc. No. 55-190, at 8–10.

over Indian affairs to the federal government.¹¹³ Yet supportive statements from the commissioner of Indian affairs, which seemed questionable and lacked sound evidentiary reasoning, gave rise to approval of these leases.¹¹⁴ The railroads, their employees, and other white individuals subleased the lands further for profits that never went to the Seneca.¹¹⁵ All told, 420 leases made \$1.36 million in profit in 1875 for the white settlers that subleased the lands.¹¹⁶ The Seneca received almost none of it.¹¹⁷ What little monies were collected by the Tribal Council often did not make it to the rest of the Nation's membership.¹¹⁸ Salamanca became completely encompassed by the Seneca Territories, and white locals outnumbered the Seneca five to one.¹¹⁹ Vreeland wanted to end the matter with his own idea of victory.¹²⁰

¶50 Vreeland and others wanted to apply the ideas of allotments and assimilation to the Seneca.¹²¹ He knew the application of allotments would enable Salamanca and white landowners to purchase the city and other tracts of land. To make it work, however, he needed to pass legislation that extinguished competing claims on Seneca land and clear the clouded title.¹²²

¶51 Inspired by the Dawes Act and the Whipple Report, Vreeland introduced H.R. 12270 and H.R. 7262 in an effort to clear title and allot the land. These bills offered almost \$2 million to the Seneca for Kansas land claims, but the money would be used to pay off the Ogdens for their interests in the New York land. With title cleared, the Seneca New York lands could be allotted. Vreeland almost succeeded, but the bills died in the Senate.¹²³

¶52 In 1915, another attempt was made in Congress in the form of H.R. 18735. This bill sought to create an allotment of Seneca lands by first seeking to extinguish any cloud of title from the Ogden claim. Under section 1 of the bill, the attorney general would challenge the Ogden claim in court and hopefully defeat it. Sections 3 and 4 of the bill would create a commission that could undertake the process of allotment and protect the land from sale for 25 years. These sections also assumed that New York State would have a representative on the commission. Section 7 stated that if the Ogden claim was not extinguished, then the Indians could sell to them immediately. Section 8 indicated that all New York Indians would become U.S. citizens and citizens of New York State.¹²⁴

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 5–6.

119. Hauptman, *supra* note 75, at 1.

120. *Id.*

121. S. Doc. No. 55-190, at 8–10.

122. Hauptman, *supra* note 75, at 3.

123. *Id.* at 4.

124. H.R. REP. NO. 63-1590, at 2–10 (1915).

¶53 The Department of Justice (DOJ) responded to this bill with a list of objections.¹²⁵ First, DOJ noted that a commission could not act on allotments before the issue of clouded title was settled in court.¹²⁶ Second, an allotment could not be held in restricted fee for a temporary period of time.¹²⁷ This “restricted fee” status of land, making it inalienable absent federal approval, could not simply change with an expiration date. The status could not just “terminate” automatically at a given time.¹²⁸ Third, it was not legally permissible to declare the Indians to be citizens by virtue of this act.¹²⁹ Moreover, DOJ questioned what appeared to be a reach of authority on behalf of New York State and warned that federal authority over Indian affairs must remain intact in any approved legislation.¹³⁰

¶54 The secretary of the interior (SOI) went even further, with a list of objections that questioned the validity of any nonfederal claim to the land except for that of the Seneca Nation. In listing the history of transactions between the Seneca Nation and other entities, the SOI noted Ogden’s claim to the land appeared possibly invalid and definitely problematic.¹³¹ In considering the history of land exchanges and leases, he stated:

Persons whose opinions are not without weight have even suggested that the Company has no valid claim against these lands, basing their opinions on the grounds that New York had no power to sell to Massachusetts, nor Massachusetts to convey to its assignees. Be that as it may, we find that the claim has stood and been repeatedly recognized by the courts.¹³²

¶55 As such, the SOI felt the Ogden claim needed to be settled before any “allotments” under the bill could occur. Moreover, New York Indians appeared to be managing their own land and creating their own sort of allotment system without the federal government’s interference. The SOI questioned the wisdom of breaking up their system to replace it with a new one suggested by outsiders. Moreover, he noted that the bill appeared to be another attempt by New York to exert control over the Indians, and the Treaty of 1794 made clear that New York lacked authority to force the issue.¹³³

¶56 With objections from DOJ and the SOI, neither New York State nor the federal government tried to allot the lands again.

125. *Id.*

126. *Id.* at 4–5.

127. Restricted fee status means an Indian or tribe cannot encumber or alienate land without federal approval. This status cannot be changed without congressional approval. Thus, an automatic expiration or alteration of status cannot take place via a time limit or sunset provision. New action by Congress would be needed to change the land status.

128. H.R. REP. NO. 63-1590, at 4–5.

129. *Id.*

130. *Id.*

131. *Id.* at 7–10.

132. *Id.* at 8.

133. *Id.* at 9.

Everett Commission: 1919–1922

¶57 New York State's next move came in 1919, when it created the Everett Commission to revisit the Indian reservations and report back on the issues involving them. Chairman Everett ordered his fellow commissioners to learn about each tribe's issues from a legal perspective and submit their own briefing for his final review. He did so because New York had tried to find a way to implement the Dawes Act with the New York Indians and failed. Legislation had failed in 1888, 1902, and again in 1914. Further, the Dawes Act's implementation across the country appeared to be failing, and New York realized that it needed to find another way to address its land issues with the tribes.¹³⁴

¶58 Everett went to each New York tribal territory to visit with and hear from each council about their viewpoints on the land issues.¹³⁵ Only 6 of the 12 commissioners (including Everett) went to all of the meetings.¹³⁶ The tone of the meetings differed from those that had come before because they started off with a premise of fairness and a support for the right of self-governance.¹³⁷ Everett showed his support when he stated:

I believe you are a people and a nation and entitled to be credited and considered as a people and a nation and the occupants of a territory known as a country, now the United States of America. My attitude is that if you did own this country when it was discovered by the white man and it was taken from you without proper and legal and just compensation, it should be returned to you.¹³⁸

¶59 Council members and Everett discussed the meaning of court cases, holdings, and whether the courts upheld any fraudulent land transaction against the Seneca.¹³⁹ Everett noted that New York often refused to provide tribes with copies of their treaties, leases, and land deals. Moreover, tribes noted that when they did receive copies, the wording of the terms differed from their notes and memories of the oral conversations.¹⁴⁰ Everett agreed that the state had lost some original copies and that new versions of some documents contained different boundary lines and created problems.¹⁴¹

¶60 This refusal of information, and sometimes outright revision of written deals and terms, troubled Everett and appeared to be a sign of fraud.¹⁴² He heard in great detail about how the tribes negotiated with President Washington and General Pickering, and how these interactions differed from later negotiations with others.¹⁴³ He became further distressed to hear about how the Treaties of 1838 and 1842 created the

134. UPTON, *supra* note 52, at 79, 80.

135. *Id.* at 82.

136. *Id.* at 84.

137. *Id.*

138. *Id.*

139. *Id.* at 85.

140. *Id.* at 86.

141. *Id.* at 90.

142. *Id.*

143. *Id.* at 96.

current situation of lost lands and compromises.¹⁴⁴ After hearing in detail how New York treated the Indians in negotiations, Everett made the initial determination that the Indians owned the land before the arrival of the white man.¹⁴⁵

¶61 Yet New York State also needed to determine jurisdiction. Everett understood that the state's position of concurrent jurisdiction appeared weak. John Snyder, a member of the Seneca Nation, convinced Everett that jurisdiction remained with the federal government and not New York. Snyder stated the Treaty of 1789 and the Treaty of 1794 spelled out jurisdiction and settled the matter. He implored Everett to review article one of each treaty, and article seven of the Treaty of 1794, to see how the language indicated that the federal government possessed sole jurisdiction. He also cited the Indian Commerce Clause of the U.S. Constitution and noted that New York could not wield this authority absent a constitutional amendment. He noted that the infamous "Ogden claim" was invalid because the deal struck between Massachusetts and New York was also invalid. Because the states made a land deal that failed to join an indispensable party, the Seneca, they could not swap interests in land they did not own. Nor could they do so without the consent of the tribe. As such, the only owners of Seneca land could be the Seneca.¹⁴⁶

¶62 Snyder impressed Everett with his presentations and documents. He determined at the end of his review that the federal government continued to possess sole jurisdiction over the New York Indians and had assumed all treaty responsibilities from before the U.S. Constitution's ratification in 1789.¹⁴⁷ In addition, he determined that fraud occurred against the Seneca, and the land remained their land—not New York State's land.¹⁴⁸

¶63 In his final findings, Everett noted that international law recognized two ways to dispossess people of land: conquest or purchase. Everett believed that England had not accomplished either of these goals, and so it did not have the power to grant treaty power to New York or to Massachusetts in its charter. Moreover, Massachusetts could not receive any title or interest to land in New York by virtue of a piece of paper. As such, Everett concluded that the Ogden claim appeared invalid.¹⁴⁹ But of course, this revelation came too late.

¶64 Further still, Everett noted in his final findings that (1) fee title in New York lands began with the Indians, (2) Washington recognized this, and (3) he acknowledged their status as a separate nation in the Treaty at Fort Stanwix.¹⁵⁰ Moreover, because this status had not changed, the lands of New York appeared to be stolen from the Indians by fraud.¹⁵¹ More specifically, he insisted that six million acres appeared to

144. *Id.* at 88.

145. *Id.* at 86.

146. *Id.* at 90–92.

147. *Id.* at 96.

148. *Id.*

149. *Id.* at 99.

150. *Id.*

151. *Id.*

have been stolen from the Iroquois people of New York.¹⁵² Given this result, Everett insisted that New York would have to come up with a solution to repay the tribes and repair the damage.¹⁵³ Everett, however, did not suggest a solution.¹⁵⁴

¶65 Everett's findings were deeply unpopular. Despite this, he managed to achieve a unanimous vote of approval on his findings and conclusions. He needed this approval to finalize the report and have it filed for formal recording. When he attempted on May 17, 1922, to present the final report for filing in the New York Legislature, however, the agents for legislative filing refused it.¹⁵⁵

¶66 Because the legislature failed to file the report, copies are hard to find. Hence, an original does not appear here. It would not be the last time that the state of New York would clash with others on controversial arguments surrounding Seneca land and jurisdiction.

United States v. Forness and the Spite Bills: 1940s–1950s

¶67 The fight over jurisdiction continued into the 1940s, and the Seneca became frustrated with leaseholders not paying their rents and challenging Seneca land ownership.¹⁵⁶ As of 1939, 25 percent of the leaseholders on Seneca land defaulted on payments, and more than 200 leases had maintained a default status for longer than seven years.¹⁵⁷ Meanwhile, the state continued to argue its case before the federal government, outlining the work it completed on behalf of New York tribes, in an effort to establish concurrent de facto jurisdiction.¹⁵⁸

¶68 An attorney for the federal government suggested that the Seneca cancel the 99-year leases and create some test cases that might allow for renegotiating the leases with more favorable terms.¹⁵⁹ The Seneca attempted to do just that on March 4, 1939. They canceled 800 leases, one of which belonged to the Forness family running a garage in downtown Salamanca. The Forness family had been operating a very profitable business while paying only \$4 per year for rent. They had not paid their rent in 11 years. The Seneca asked to increase the rent to \$230 per year, and the Fornesses refused. They insisted that the Seneca would lose and legislation would eventually erode Seneca land ownership so that no one had to pay the tribe anything.¹⁶⁰ The Seneca eventually won a favorable ruling in the Second Circuit in 1942.¹⁶¹ This led to an eviction process that

152. Hauptman, *supra* note 75, at 8.

153. *Id.*

154. UPTON, *supra* note 52, at 99.

155. *Id.* at 100–03.

156. Hauptman, *supra* note 75, at 9.

157. *Id.* at 5–6.

158. *Id.* at 6.

159. *Id.* at 9.

160. *Id.*

161. *United States v. Forness*, 125 F.2d 928, 931–40 (2d Cir. 1942).

the city of Salamanca tried to stop—it failed.¹⁶² By 1944, most lessees accepted new leases on new terms, but the timeframe for expiration did not change.¹⁶³

¶69 Around this time, the Department of the Interior began to agree with some of the jurisdictional arguments coming out of New York. Acting Secretary of the Interior Abe Fortas seemed to support letting New York have some areas of jurisdiction provided the Indians consented to it. Felix Cohen became part of the discussion and insisted on consent as a requirement. New York could not gain the consent of the New York Indian tribes but asked that two specific bills pass Congress regardless of the lack of consent.¹⁶⁴

¶70 These bills permitted New York to exercise criminal jurisdiction over New York tribes and take up or avail itself of civil matters that occurred in New York Indian territory.¹⁶⁵ The Department of the Interior and the Bureau of Indian Affairs objected, but two bills on jurisdiction made it to Congress for consideration in 1948.¹⁶⁶ The bills, colorfully referred to as the “spite bills,” passed on July 2, 1948, and September 13, 1950.¹⁶⁷ These pieces of legislation represented a huge turn of events for tribes in New York.¹⁶⁸ These laws are considered the political backlash and response to the *Forness* case.¹⁶⁹

¶71 Around this time, in 1954, the city of Salamanca closed Seneca schools. The city required Seneca children to attend the white schools for their education.¹⁷⁰

¶72 But the real heartache came in 1957, when the federal government condemned part of the Allegany Reservation in an eminent domain action to build the Kinzua Dam. The Seneca tried to stop the effort in court, but the U.S. District Court for the Western District of New York permitted the action. In April 1959, the Seneca tried to get an injunction but failed. The Supreme Court denied their request for a hearing in June of that same year. The tribe tried to get relief in the Indian Claims Commission, but the damage was done. More than 500 families had to be resettled as their homes flooded. The dam was completed in 1965. The Indian Claims Commission eventually

162. Hauptman, *supra* note 75, at 12–13.

163. *Id.*

164. UPTON, *supra* note 52, at 145–46.

165. *Id.* It should be noted, however, that the civil jurisdiction statute, 25 U.S.C. § 233, stood for the ability of tribal members to avail themselves of civil court proceedings in the state and not for the state to take over all civil matters in the territories.

166. UPTON, *supra* note 52, at 146–48.

167. 62 Stat. 1224 (1948) (codified as 25 U.S.C. § 232); 64 Stat. 845 (1950) (codified as 25 U.S.C. § 233).

168. UPTON, *supra* note 52, at 154. It was not long after this that Kansas and Iowa managed to get similar bills passed through Congress and Public Law 280 came about. *Id.* at 154–55. The federal government was looking for ways to get out of its trust responsibilities built up in the treaties, and these acts were a way to unload duties and responsibilities unto the states. *Id.* at 154–56. Assimilation was a preferred method by some to deal with Indians. *Id.* This is the same era when the federal government began a large-scale process of termination against federally recognized tribes. *Id.* at 155–56.

169. Hauptman, *supra* note 75, at 14, 18.

170. GEORGE ABRAMS, *THE SENECA PEOPLE* 95 (1976).

awarded the tribe \$5 million, but this could not bring back the lost homes and the lost land.¹⁷¹

¶73 Meanwhile, the Ogden Company and its corresponding trust continued to harass the Seneca. In the 1950s, however, Ogden Company sold interests to South Buffalo, West Seneca, Lackawanna, and the Ebenezer Community around Blossom, New York. By the 1950s, Ogden still wanted to take full control of Seneca lands, but the company could not meet the goal because its interests fractionated to a point where they were largely worthless.¹⁷²

Indian Claims Commission: 1960s–1970s

¶74 By 1965, the flooding at the Kinzua Dam had displaced families, homes, and graves.¹⁷³ The Seneca started litigation before the Indian Claims Commission, but the process was slow.

¶75 The United States created the Indian Claims Commission in 1946 to deal with land and treaty violations.¹⁷⁴ Claimants had a five-year window in which to bring claims, and the commission could award monetary damages only as a method of redress.¹⁷⁵

¶76 The Seneca case began in 1951, but the court did not issue its decision until 1977. The Seneca case, however, focused not on the Kinzua Dam but on the United States' failure to adhere to treaty promises and protect the Seneca in all their land sales and leases. The initial filing dealt with the attempts by Gorham and Phelps, the Holland Land Company, the Ogden Land Company, and every ratified deal and treaty therein.¹⁷⁶

¶77 In a separate filing, the Indian Claims Commission asserted that the United States could not be held liable to the Seneca for these deals, but the tribe appealed to the Court of Claims.¹⁷⁷ The Court of Claims agreed with the Indian Claims Commission regarding the Gorham Phelps purchase, but reversed on all others.¹⁷⁸

¶78 The Court of Claims found that the passage of the Non-Intercourse Act of 1790 indicated the United States' willingness to accept a fiduciary responsibility regarding Indian land sales.¹⁷⁹ The Court of Claims used this same reasoning in other cases for

171. *Id.* at 96–100.

172. Gilbert Pedersen, *Early Title to Indian Reservations in Western New York*, 3 NIAGARA FRONTIER 5, 9, 10–12 (1956–1957).

173. ABRAMS, *supra* note 170, at 100.

174. Act of Aug. 13, 1946, Ch. 959, 60 Stat. 1049 (1946). Note that the Indian Claims Commission was succeeded by the United States Claims Court in 1982 and the Court of Federal Claims in 1992.

175. *Id.* at 1052, § 12.

176. *Seneca Nation of Indians v. United States*, 39 Indian Cl. Comm'n 355 (1977).

177. *Seneca Nation of Indians v. United States*, 12 Indian Cl. Comm'n 780 (1963).

178. *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965).

179. *Id.* at 922–25.

Indian Country.¹⁸⁰ Finally, on remand, the Indian Claims Commission awarded the Seneca \$5.6 million.¹⁸¹

Environmental Challenges and Land Claims: 1970s–1990s

¶79 The Seneca Nation and New York State continued to interact through the 1970s on legislation and environmental issues. The Nation learned about toxic chemical dumping sites near their reservation.¹⁸² Investigations revealed that numerous corporations used the areas of Niagara River Strip, Hyde Park, and Love Canal in Niagara Falls to dispose of toxic chemicals for more than 50 years.¹⁸³

¶80 The Seneca learned about the extent of the dumping and its hazardous effects on the health of surrounding populations, including tribal members. The three Niagara Falls sites appeared so badly contaminated that the situation was termed an “ecological catastrophe” by government officials, who conceded to only partial knowledge of the extent of the contamination in the Erie and Niagara regions.¹⁸⁴

¶81 The corporations dumped chemicals into the surrounding water, buried toxic chemicals in barrels under clay caps, buried them at landfills, or encased them in steel drums. None of these efforts were sufficient to keep the toxic chemicals from leaching into the soil and water, thus harming the surrounding community. Some of the toxic chemicals were known carcinogens and mutagens, like Agent Orange and other poisons.¹⁸⁵

¶82 New York State permitted corporate use of the Niagara River Strip for decades under the belief that the state owned the land.¹⁸⁶ New York State acquired the land in an 1802 treaty and had been using and leasing the land for corporate purposes ever since.¹⁸⁷ Corporations wanted the land for their use due to the proximity to Niagara Falls and its ability to create industry on the river.¹⁸⁸

¶83 The news about the dumping alarmed the Seneca, particularly in reference to the Niagara River Strip, because they felt strongly that the Niagara River Strip still belonged to the tribe.¹⁸⁹ The Seneca insisted that conveyances under the Treaty of 1802 remained invalid because the treaty violated the Non-Intercourse Act.¹⁹⁰ The Non-Intercourse Act was passed in 1790 and amended in 1793, 1799, and 1802.¹⁹¹ As such, to be valid a treaty needed to be ratified by the Senate and proclaimed by the President

180. *United States v. Oneida Nation of N.Y.*, 201 Ct. Cl. 546, 548 (1973).

181. ABRAMS, *supra* note 170, at 100–01.

182. See Berman Draft Manuscript, *supra* note 38.

183. *Id.* at 1.

184. *Id.* at 2.

185. *Id.* at 2–3.

186. *Id.*

187. *Id.* at 1.

188. *Id.* at 2.

189. See Berman Draft Manuscript, *supra* note 38.

190. *Id.* at 1.

191. *Id.* at 9.

before it could take effect.¹⁹² The Treaty of 1802 did not comply with these requirements.¹⁹³

¶84 While this fight over land and stewardship raged on, the Seneca received a boon when the Supreme Court ruled in *California v. Cabazon Band of Mission Indians*, asserting that Tribes retained sovereignty over certain matters of civil jurisdiction.¹⁹⁴ In *Cabazon*, the Court stated:

In *Barona*, applying what it thought to be the civil/criminal dichotomy drawn in *Bryan v. Itasca County*, the Court of Appeals drew a distinction between state “criminal/prohibitory” laws and state “civil/regulatory” laws: if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State’s public policy.¹⁹⁵

Specifically, the case held that regardless of state regulatory rules, tribes could regulate gambling on their territories.¹⁹⁶

¶85 This case paved the way for the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., and the creation of the National Indian Gaming Commission in October 1988. With aid from this commission, and its federal oversight of Indian gaming activities, tribes could seize an economic opportunity on a larger scale without as much concern over state involvement.¹⁹⁷ With the prospect of a larger economic opportunity, tribes could consider the prospect of regaining lost lands using some new reserves of capital.

¶86 By this time, however, the 99-year leases were set to expire with no solution in sight. No one could wait for gaming dollars to help resolve the land issue. Members of Congress from New York began crafting a solution that eventually became the SNSA.¹⁹⁸

¶87 After the SNSA passed, the Seneca Nation continued to challenge New York State’s title claims to other land. After years of litigation and extensive briefing and argument, the U.S. Second Circuit Court of Appeals found for the state in 2004.¹⁹⁹ The court focused on the presumption that when a state acquires land, it cannot be divested of that land through a generous treaty interpretation.²⁰⁰ The treaty would have to show “beyond reasonable question” that the land at issue was meant for the tribe and not the state.²⁰¹

192. *Id.* at 5.

193. *Id.* at 9.

194. 480 U.S. 202 (1987).

195. *Id.* at 209–10.

196. *Id.*

197. 25 U.S.C. § 2701 et seq.

198. See note 1, *supra*, and accompanying text.

199. *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004).

200. *Id.* at 259.

201. *Id.* (quoting *United States v. Minnesota*, 270 U.S. 181, 209 (1926)).

¶88 While the decision felt like a setback, not all was lost. In fact, the Seneca used the money from the SNSA to open a casino in Niagara Falls and operate Class III gaming through a Tribal-State Compact with New York.²⁰²

¶89 Not everyone appeared happy for the Senecas' success. In news stories published shortly after the SNSA passed, few people seemed deeply aware of the Seneca land issues in detail.²⁰³ Many people seemed to understand that the Seneca owned the land *once upon a time*, but believed these past events had little or no impact on the present day.²⁰⁴ Moreover, even after the Act passed, residents resisted handing over lease payments and continued to refuse to pay what was owed.²⁰⁵

Rehabilitating and Restoring the Public Memory by Promoting Archival Spaces

¶90 Residents like those described above are not uncommon. Their gaps in understanding the Senecas' history reflect a larger tendency: public consciousness often lacks clear detail of the historical path.²⁰⁶ In part, this is explained by our not wanting to remember what is uncomfortable or inconvenient.²⁰⁷ Even attempts to inform ourselves of current events can fall short. Residents, politicians, and even journalists present small anecdotes or sound bites of information that encapsulate such moments.²⁰⁸ But even the most skilled expressions in law or journalism reveal only pieces of truth rather than the whole picture. Few of these moments capture the collective history that frames an entire issue or conflict. Our memories are flawed things, and we cannot always rely on them to provide the fullest historical truth or understanding.²⁰⁹

¶91 Archives help provide a bigger picture and enable greater understanding of the law. A prime example comes from the archival recordings of the women's liberation movement in Great Britain and its impact on legislative change in that country.²¹⁰ The movement for equality provided archivists with recordings of women's education, family, work, and day-to-day experiences.²¹¹ The women's liberation movement, and these archives, focused on equal pay for women, equal access to jobs, sexual health, and

202. See *Niagara Falls Seneca Niagara Casino*, NIAGARA FALLS LIVE, http://www.niagarafallslive.com/niagara_falls_seneca_niagara_casino_in_niagara_falls.htm [<https://perma.cc/K2MB-NA4R>].

203. Colum Lynch, *Bitter Residents Charge Indians Want Their Homes*, CHI. TRIB. (Jan. 30, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-01-30-9201090577-story.html> [<https://perma.cc/78TB-36FE>].

204. *Id.*

205. Donna Snyder, *Salamanca Urged to Make Lease Payment Seneca Nation President Appeals to City, Says Issue Not Negotiable*, BUFF. NE S (May 22, 1992), <https://buffalonews.com/1992/05/22/salamanca-urged-to-make-lease-payment-seneca-nation-president-appeals-to-city-says-issue-not-negotiable/> [<https://perma.cc/PH9K-KSGG>].

206. See Ketelaar, *supra* note 29, at 9–11.

207. *Id.*

208. See Kolbert, *supra* note 27.

209. Ketelaar, *supra* note 29, at 12.

210. Polly Russell, *An Archive of the Women's Liberation Movement: A Document of Social and Legislative Change*, 15 LEGAL INFO. MGMT. 1, 31 (2015).

211. *Id.* at 32.

sexuality issues.²¹² The recordings give researchers a clear view into the discrimination faced by women as they navigated the legal space for jobs, decent pay, and dignity.²¹³ But, the recordings also indicate how changes under the laws affected these women's lives.²¹⁴ The law before the movement gave women few choices, rendering them second-class citizens.²¹⁵ After the movement, some laws gave women more choices, and the recordings reflect the change while noting areas of continued conflict on the civil rights front.²¹⁶

¶92 Examples of archival work intersecting with the law are also found in the international arena, such as where tribunals review war crimes and determine how the public should remember atrocities and guard against a recurrence.²¹⁷ One example comes from the 1984 Paris Tribunal regarding the Armenian Genocide. The tribunal became one of several examples where international law intersected with what became known as "official history."²¹⁸ In these tribunals, archives played a key role in determining the scope of official history and where and how it impacts international law.²¹⁹ Moreover, the tribunals produce a counterhistory to the official history, written from the victor's perspective.²²⁰

¶93 In the 1984 Paris Tribunal, evidence indicated that not all official documents made it into the official history recorded at the Turkish government archives.²²¹ Particularly damning pieces of evidence were either destroyed or "lost," only to be found and produced by witnesses who had preserved the documents against official orders.²²² These documents filled in gaps in the history and reasoning, making the archives more accurate and complete.²²³

¶94 The Paris Tribunal impacted international law with its counterhistory archive. Moreover, the tribunal impacted how war crimes are prosecuted under international law. Prosecuting state violations and insisting on the state governmental body making all required reparations became part of the international process for tribunals.²²⁴

¶95 The Paris Tribunal also discussed how archives can serve the people and how they prevent political bodies from engaging in revisionist practices. Archives can provide evidence for later legal proceedings that arise over time. They also serve as a

212. *Id.*

213. *Id.*

214. *Id.* at 33.

215. *Id.*

216. *Id.*

217. See, e.g., Gabrielle Simm, *The Paris Peoples' Tribunal and the Istanbul Trials: Archives of the Armenian Genocide*, 29 LEIDEN J. INT'L L. 245 (2016).

218. *Id.* at 246.

219. *Id.*

220. *Id.* at 249.

221. *Id.* at 253.

222. *Id.*

223. *Id.* at 253–54.

224. *Id.* at 257–58.

memory space for the oppressed, providing a collection of heritage and a way to share it with a larger community.²²⁵

¶96 In his discussion on archives and international law, Abdulqawi Ahmed Yusuf notes that academic use of archives informs the international community, informs international legal theory, and informs the practice of law.²²⁶ He notes that the decentralized nature of international law produces a greater role for academic study and legal theory.²²⁷ Practitioners often review the archival evidence of customary practices and general principles to inform international law and theory.²²⁸

¶97 Archives play a vital role in this work as the archives grow with updates that inform and change customary practices for state actors. Academic study of these changes enables a practitioner to evolve legal theories and the overall practice of law.²²⁹

¶98 Yusuf insists that law evolves to address changes in societies, and archival work aids in that overall evolution. Thus, archival work helps extend the reach of existing law and create new law to meet the needs of the people. Yusuf insists that the law must serve the people, a process made possible only when laws evolve. Thus, legal theorists must “identify, propose, and effect changes” in legal theory and practice to ensure the growth and evolution of law that serves the people. Without archives, we cannot achieve these steps.²³⁰

¶99 Legal archives, or those memory spaces by which we record laws and their changes, aid researchers in understanding the legal landscape across time and how it impacts the community. Creating a legal archive and formatting that archive can shape the memory of the law and how it evolves over time. In short, the archive as a memory space helps crystalize what we know about the law and how we understand it.²³¹

¶100 An archive contains traces of legal memory, like legal writing and draft legislation, but it also impacts future interpretations and how researchers will note any process of legal evolution.²³² That is because archives show us the relationship between memory and justice.²³³ Justice requires that we do not forget what has come before.²³⁴ To successfully find justice, we must strive for it and seek it out.²³⁵ To that end, we must remember the law and its impacts on communities who lack a voice in the main

225. *Id.* at 250–51.

226. Abdulqawi Ahmed Yusuf, *The Role of International Lawyers Between Theory and Practice*, 15 J. INT'L CRIM. JUST. 601 (2017).

227. *Id.* at 604.

228. *Id.* at 604–05.

229. *Id.* at 605.

230. *Id.* at 612.

231. Kirsten Campbell, *The Laws of Memory: The ICTY, the Archive, and Transitional Justice*, 22 SOC. & LEGAL STUD. 247, 252, 253 (2013); see also Pierre Nora, *Between Memory and History*, 26 REPRESENTATIONS 1, 7–25 (1989).

232. Campbell, *supra* note 231, at 253.

233. *Id.* at 260.

234. *Id.*

235. *Id.*

political arena.²³⁶ Law attempts to represent justice, but it cannot do so with inadequate memory.²³⁷ We need archives to aid our memory and instantiate justice.²³⁸

¶101 To better represent justice, writes Campbell, our laws must bear witness to the losses and injuries of the disenfranchised, the oppressed, and the voiceless. Laws must evolve as our notion of justice evolves. Archives enable us to bear witness in this way and make it possible to legislate and litigate accordingly.²³⁹

¶102 Recall Ketelaar's point that archives represent living records that inform our flawed memories. Archival spaces try to collect everything they can on an issue, event, or person. Archives try to avoid curating *only the good stuff* and work to provide the fullest history without a veneer. Each item curated, and each use of the item, becomes part of the record. As the record evolves, its strength of memory increases. The archive serves as a communal memory, a place where our collective memory can be renewed and restored. In some ways, with guidance, archives can help us avoid the revisionism of our history that allows us to forget inconvenient truths.²⁴⁰

¶103 Moreover, archives possess "instrumental, institutional, and intrinsic value."²⁴¹ According to Ian Richards, archives are instrumental based on their impact on the culture of our society. They are committed to the public they serve. Further, archives possess intrinsic value in the nature of their work and how it evolves as our history evolves.²⁴²

¶104 Although archives serve the community, this service is not defined simply by geographic borders.²⁴³ According to Richards, communities are defined by common elements of social groups with boundaries discerned by perceptions and activities. This creates a space where archives serve a larger, more amorphous community that evolves as the archives evolve. With increased technology and globalization, archives can serve a broader community on a larger scale.²⁴⁴

¶105 But, this change of perception does not alter the mission to create a memory space that informs our collective consciousness. In fact, this perception of a global community makes the mission of a memory space more precious than before. Notably, Ketelaar sees this tension when comparing legal proceedings to archival reviews.²⁴⁵ The questions arise, what is truth, and when do we find it? Ketelaar insists that the search for truth does not stop at the end of a proceeding; truth, as a living concept, continually engages archivists and whole communities. Ketelaar also understands that such an

236. *Id.*

237. *Id.* at 261.

238. *Id.*

239. *Id.*

240. Ketelaar, *supra* note 29, at 12, 13.

241. Ian Richards, Archives as Cornerstone of Community Growth: Developing Community Archives in Brandon, Manitoba 1–2 (Feb. 2010) (M.A. thesis, Brandon University), <https://mspace.lib.umanitoba.ca/handle/1993/3833?show=full> [<https://perma.cc/GR7R-RW9P>].

242. *Id.* at 17–18.

243. *Id.* at 21.

244. *Id.* at 21–22.

245. Ketelaar, *supra* note 29, at 11.

understanding of truth can create tension between who will establish a “whole” picture and who will keep the information and protect it. But Ketelaar insists that archives are both open spaces and spaces of memory. They are never “closed” or finished and, as such, they act as keepers of living information that serve as a collective memory space for community.²⁴⁶

¶106 Additionally, this *concept of a living truth* raises tensions around the manipulation of information and whether archives can operate as memory spaces in the face of such potential issues, including whether any memory can be complete or whether any archive can be “finished,” “complete,” or “whole” in any way to achieve that fullest truth. When do we stop collecting? Whose truth is the most accurate and how do we collect it and protect it? When does the collection and protection begin to look like a manipulation of the history and truth that people knew before? When and how do you engage the community to make a fuller and more accurate accounting of memory and truth? Ketelaar insists that archivists play a great role in the face of this pressure not to be perceived as manipulators by acting as liberators of records and information to an extent that they cannot be destroyed and minority voices become silenced as part of history.²⁴⁷ Richards agrees with this principle and notes that specific archives can provide a space to preserve information from manipulation or destruction when archivists act as gatekeepers to what exists in the archives and how access is managed. That said, Richards also notes that archivists must invite further community engagement to create broader community spaces and continue their efforts to remain a cornerstone of community in a larger sense.²⁴⁸

¶107 Ketelaar, Richards, and others conclude that the goals of expanding our global community, and serving that community with access and collaboration, are worth fighting for despite these issues.²⁴⁹ Maintaining this mission and the communities served by archives becomes more complex as our society evolves.²⁵⁰

¶108 Richards notes that archives must be seen as a cornerstone of the community to successfully maintain them and serve the community. Restated, it becomes necessary to engage the community and reeducate individuals on the archives and their uses. Establishing that constant contact and continued communication can improve understanding of the archives’ holdings and uses.²⁵¹

¶109 Ketelaar suggests that archives can achieve these objectives by engaging online with the community to create online records, digital storytelling, and greater access. Creating or developing an archival space that is geared toward an online, interactive community can yield tremendous rewards. But it also presents challenges with

246. *Id.* at 11–13.

247. *Id.* at 14–17.

248. Richards, *supra* note 241, at 74–76, 80–82.

249. Ketelaar, *supra* note 29, at 20–21; Richards, *supra* note 241, at 80–82.

250. Richards, *supra* note 241, at 22–23, 74–75.

251. *Id.* at 36.

provenance and requires new policy drafting that addresses the unique challenges created from using new technology.²⁵²

¶110 Richards makes additional suggestions for archives becoming a cornerstone of a community. He suggests engaging with historians and researchers to participate in specific ways that lobby for education about an archives' uses and its mission. Formal letters of support, social media, and participation in events can provide archives with an additional platform for reeducation. Further, creating dialogue around difficult topics and historical events can provide archives and parts of the community with a space to develop greater understanding of each other, the archives' subjects, and themselves.²⁵³

¶111 Creating this dialogue or developing digital histories adds to the archives and creates "living documents" as described by Ketelaar. In addition, reaching out to parts of the community to develop this dialogue solidifies the archives as a cornerstone of the community as suggested by Richards. These discussions create and develop awareness, and that awareness becomes part of the community identity.²⁵⁴

¶112 Archival spaces can contribute to the community by means of engagement, collection and development of community history, personal stories, and reestablished connections to places and groups.²⁵⁵ Archives as a memory space and a cornerstone of the community can be a place where histories intersect and overlap.²⁵⁶ Archives balance histories and provide us with fuller knowledge of those histories.²⁵⁷ These services are key to education and government policy development.²⁵⁸ They fill in the gaps of our knowledge, they inform us, they engage with us, they spur greater understanding, and they evolve as we do. They rescue pieces of our memory that we have lost.²⁵⁹ Without them, we are left with only our own fallible memories, and much of what is important becomes lost to time.

¶113 To preserve, protect, and support our archival spaces, we need to make a compelling case for doing so. Doing this successfully could require getting professionals across disciplines to liaise on collections and concur on preservation and access issues.²⁶⁰ It could also require communicating across disciplines on the meaning of an artifact and how best to balance competing preservation versus conservation issues for the use and development of the community.²⁶¹

252. Ketelaar, *supra* note 29, at 14–17.

253. Richards, *supra* note 241, at 40, 42.

254. *Id.* at 42–43.

255. *Id.* at 44.

256. *Id.* at 46.

257. *Id.*

258. *Id.* at 58–60.

259. Lisa Leff, *Rescue or Theft? Zosa Szajkowski and the Salvaging of Jewish History After World War II*, JEWISH SOC. STUD., Winter 2012, at 1, 32.

260. See, e.g., Elizabeth Yakel, *Choices and Challenges: Cross-Cutting Themes in Archives and Museums*, 21 OCLC SYS. & SERVS. 13 (2005).

261. *Id.* at 15–16. To conserve is typically meant to focus on keeping materials in a way that prevents physical damage. This can sometimes lead to limited access to materials. Preservation, on the other hand, focuses on reducing damage to increase the life expectancy of materials. This focus arguably places

¶114 Moreover, developing our archival spaces as spaces of collective memory requires digitization techniques that advance those goals. Updating the technology used in an archival space, and the means by which we see an archival space, enables us to learn from our past. To increase access and storage, portable hard drives, ultra-dense optical media, holographic storage, and mega-dense tape cartridges can provide storage and access solutions.²⁶²

¶115 Increasing these technological options can lead to creating memory spaces that function with greater access to reach a broader community. These options can enable archivists to meet the needs of their communities with greater flexibility and ensure the archive they protect is better understood.

Conclusion

¶116 In sum, archives serve as cornerstones of community and spaces of collective memory. They serve as a more complete memory of our past and give context to the present, in a way that our fallible memories cannot. A more complete archival memory space impacts its community and history as the community engages with it and refines it. Librarians wishing to improve their relationship with their community should consider creating an archival memory space as a means to further access to information and engage the community in the concept of information completion. Gathering oral histories and memories of an important event in the community can be one of many examples where information professionals begin the work of creating a memory space. Gathering community art, poetry, and recordings on an event or law can be another way to reach out and build the space. Further research is needed to establish the most successful ways to build memory spaces with the right tools. Yet, even now, we can proceed with creating those spaces and engaging with the world around us to preserve and protect community memories. Indeed, it is the work of these memory spaces that enables us as information professionals to better preserve the history and the memory that we protect. As information professionals, we promote access to information, but that access is only as good as what we have on hand to provide to our community. Creating memory spaces enables us to provide access to more information than ever before. It enables us to provide a more complete, more nuanced picture of events than before. It enables us to hone the image of the library as a cornerstone of the community. Memories do not live in brick and mortar buildings. They endure beyond the cement, and stone, and time, provided we preserve them. So, too, our libraries can become memory spaces enduring beyond brick and stone. They can stand the test of time, as long as we think creatively about how they, and we, evolve and maintain their role in the community. The history around the SNSA and what led up to it offers a prime

the values of access and dissemination in a higher priority status when administering an archival system. Both are necessary archival values, but they can lead to competing issues and circumstances that require a balancing of perspectives.

262. See Lowell Rapaport, *Storage for the Long Haul*, IT ARCHITECT, no. 3, 2006, at 27, 27–29.

example of how our history can get distorted or lost without an archival dig for understanding. It appears that few fully understood the history behind the land issues they meant to solve by passing the SNSA. Even after the Act's passage, few seemed willing to remember any of the history that once favored the Seneca in any meaningful way. This is exactly why archives are so important.

¶117 Archives limit our ability to revise history and remove uncomfortable truths. Archives also enable us to create spaces of living memory that grow richer with each use. But, maintaining this role requires understanding, education, and technology. Understanding is needed to ensure that archives continue to maintain their role as a cornerstone in the community. Education is needed to see how archives inform us and protect our history. Technology updates are needed to ensure that these goals are maintained.

Exhibit A

Timeline of Events

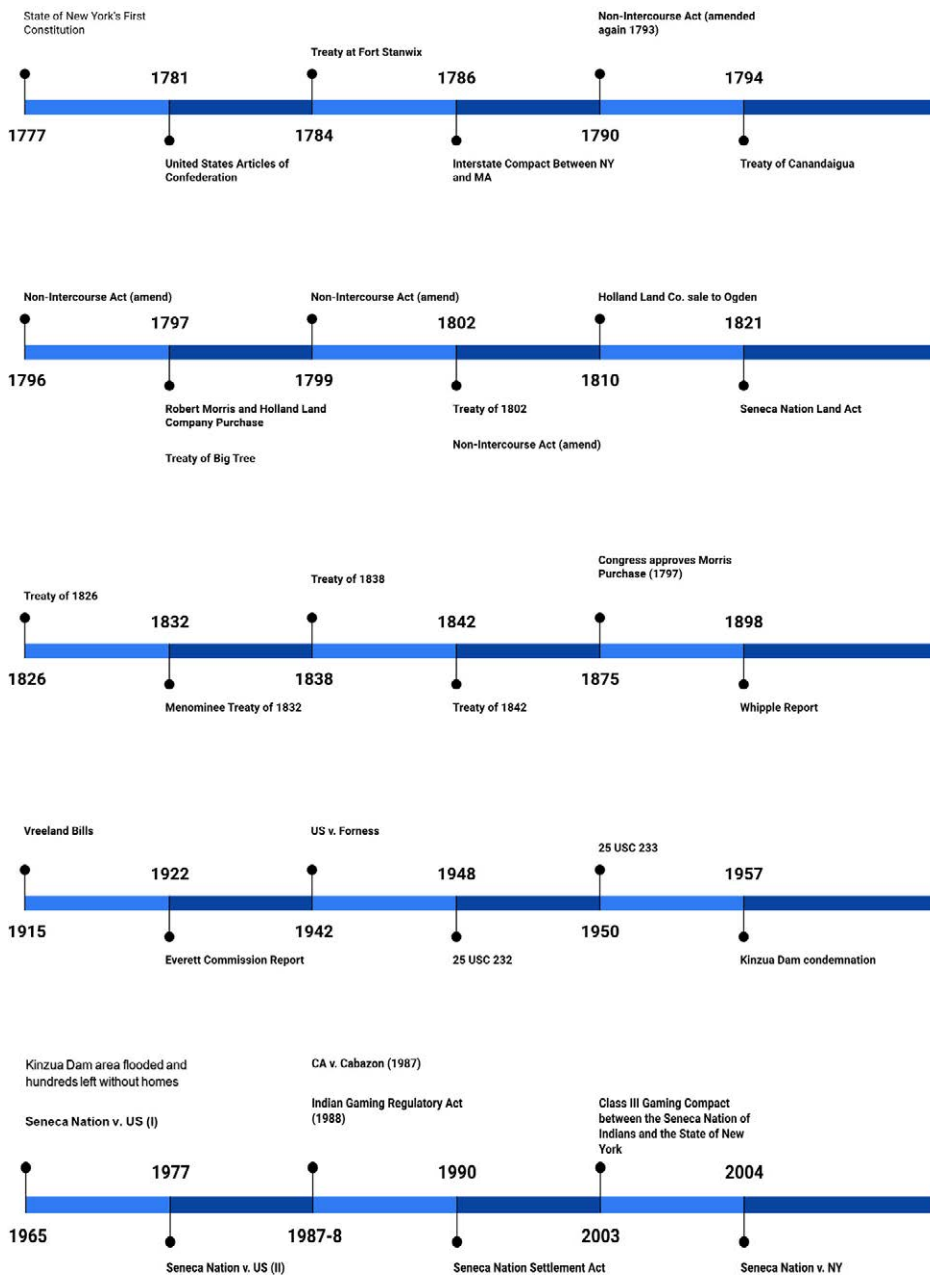
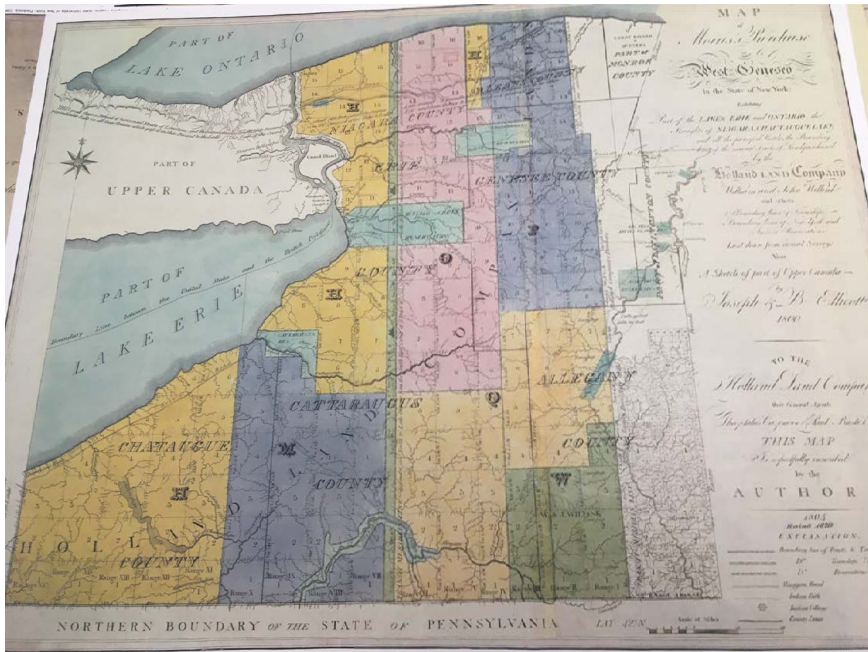


Exhibit B

Maps, 1797–1804



Exhibit B
Maps, 1797–1804



Marilyn Haas. New York Map, 1797, Folder 1, Law Spec. Coll., Marilyn L. Haas Collection, Charles B. Sears Law Library, State University of New York at Buffalo.