UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ST. REGIS MOHAWK TRIBE

Plaintiff, 09-CV-0896 (NPM/GHL)

-against-

GOVERNOR DAVID A. PATERSON

and

FRANKLIN COUNTY, NEW YORK

Defendants

JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Defendant David A. Paterson
The Capitol
Albany, New York 12224

Robert A. Siegfried
David B. Roberts
Assistant Attorneys General
of Counsel

HISCOCK & BARCLAY LLP
Attorney for Defendant County of Franklin
One Park Place
300 South State Street
Syracuse, New York 13202

Judith M. Sayles, Esq.
Jon P. Devendorf, Esq.
of Counsel

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STATEMENT OF THE CASE

The plaintiff is an Indian tribe which is already a party to the long-pending St. Regis Land Claim, which arises from the common nucleus of facts that give rise to this litigation, and seeks declaratory relief that is necessarily subsumed in the St. Regis land claim litigation. (Hereinafter "Land Claim"). The plaintiff's effort to pursue this parallel litigation against the same real parties in interest, based upon the same operative facts at issue in the Land Claim, runs afoul of the prior action pending doctrine and the prohibition against claim-splitting, and is calculated to circumvent the existing stay in that pending proceeding. Moreover, the plaintiff's current effort to assert tribal jurisdiction over the Hogansburg Triangle is barred under the same equitable principles that barred the Oneida Indian Nation from asserting sovereignty over the lands at issue in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) ("Sherrill"), and barred the Cayuga Indian Nation from asserting a possessory claim over the lands at issue in Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d. Cir. 2005), cert. denied, 547 U.S. 1128 (2006) ("Cayuga"). Finally, unlike the Land Claim, the United States has not joined as a co-plaintiff in this litigation; therefore this Court lacks jurisdiction to grant the relief requested by the plaintiff as against Governor Paterson and the State of New York by virtue of the Eleventh Amendment.

A. The Instant Complaint

The complaint in this action was filed on August 5, 2009 on behalf of the St. Regis Mohawk Tribe, an American Indian tribe recognized by the Government of the United States. (Hereinafter "Complaint"; a copy is submitted as Exhibit A to the Affirmation of David B.

Roberts dated October 30, 2009). The plaintiff Tribe seeks a judicial declaration that the boundaries of the St. Regis Indian Reservation, as identified in the 1796 Treaty with the Seven Nations of Canada, "are currently in place and encompass an area known as the Hogansburg Triangle." Complaint, ¶ 1. Plaintiff seeks a declaration that the reservation's original boundaries have never been diminished by any act of Congress, and therefore jurisdiction within the Hogansburg Triangle "is governed by federal law, including 25 U.S.C. § 233, as applied to Indian reservations." Id., Prayer for Relief.

The Tribe alleges that § 233 confers State civil jurisdiction over certain Indian cases, but in part provides that this act was not to be construed "as subjecting the lands within any Indian reservation in the State of New York to taxation for state or local purposes, nor as subjecting any lands . . . to execution of any judgment rendered in State courts [and] nothing herein shall be construed as authorizing the alienation from any Indian nation . . . any lands within any Indian reservation in the State of New York." Id., ¶2. It is claimed that the State and the County of Franklin "have long considered the Hogansburg Triangle to be outside of the 1796 Reservation and therefore not within the purview of § 233." Id., ¶3. "In order to clarify the application of 233 to its lands, the Tribe seeks a declaration that the 1796 reservation has never been diminished by an Act of Congress and that the land within the Hogansburg Triangle is located within an 'Indian reservation in New York' as referenced in 25 U.S.C. § 233." Id.[1]

[1]The Tribe does not directly request declaratory relief granting it jurisdiction over approximately 10,000 additional acres that lie within the bounds set forth in the 1796 Treaty, but outside the bounds of the current Akwesasne Reservation and the Hogansburg Triangle, presumably because such lands today are distinctly non-Indian in character. See note 5 and accompanying text, infra. Although the requested declaratory relief is characterized in the Complaint as necessary "to clarify the application of §233 to [the Tribe's] lands" (Id., ¶ 3), the grant of such relief respecting only the Hogansburg Triangle would have the practical effect of creating confusion and doubt relating to governmental authority and jurisdiction on all such additional lands within the bounds of the 1796 Treaty.

Plaintiff alleges that "the State and the County have wrongfully treated parts of this reservation as removed from its exterior boundaries and within their full jurisdictional authority, specifically, an area known as the the Hogansburg Triangle, even though there has been no act of Congress to permit this treatment." Id., ¶ 9. Specifically, it is alleged that over the years, "the State has actively attempted to impose licensing laws on businesses in the Triangle"; Franklin County has "claimed the authority to impose real property taxes on all land owned by the Tribe or tribal members within the Triangle"; and "local governments [not parties herein] have attempted to apply their local building codes on Mohawk construction within the Triangle." Id., ¶ 13.

In this action, the plaintiff Tribe seeks the following relief:

(a) A declaratory judgment that the boundaries of the St. Regis Mohawk Reservation surrounding the Hogansburg Triangle, as set forth in the 1796 Treaty, have never been diminished by Congress, and therefore, remain today as they were upon the signing of the Treaty;

(b) A declaration that the Hogansburg Triangle continues to be part of the 1796 reservation; [and]

(c) A declaration that the jurisdiction of the Tribe, the State, and the local governments within the Hogansburg Triangle is governed by federal law, including 25 U.S.C. § 233, as applied to federal Indian reservations[.]

Id., Prayer for Relief.

B. The Complaints in the St. Regis Land Claim Litigation

The St. Regis Land Claim is actually three consolidated civil actions, instituted by three tribal entities, including the plaintiff herein, in which it is claimed that the defendants wrongfully obtained title to and/or possess lands within a claim area of approximately 15,000 acres,

including the area of the so-called Hogansburg Triangle at issue herein.[2] The tribes include: the Canadian St. Regis Band of Mohawk Indians, plaintiff in Civ. Act. Nos. 82-C-783 ("Cplt. I") and 82-CV-1114 ("Cplt. II"); St. Regis Mohawk Tribe, the plaintiff in this action and in Civ. Act. No. 89-CV-829 ("Cplt. III"); and the People of the Longhouse at Akwesasne, co-plaintiff in Cplt. III. The United States intervened as co-plaintiff in all three actions in 1998. ("U.S. Amd. Cplt-in-Intvt.").[3] The tribal plaintiffs allege that they are the successors in interest to the historic "Indians of the Village of St. Regis," Cplt. I at ¶ 24; Cplt. II at ¶ 4; Cplt. III. at ¶ 8, and that a 1796 Treaty between New York State and the Seven Nations of Canada, 7 Stat. 55, reserved the land at issue in these lawsuits to the historic tribe. Cplt. I at ¶ 24; Cplt. II at ¶ 4; Cplt. III. at ¶ 8.

The New York State defendants are the State itself and the Governor. Cplt. I at ¶¶ 13-15; Cplt. II at ¶¶ 7-14; Cplt. III at ¶ 9. Other defendants include the New York State Power Authority, St. Lawrence and Franklin Counties, various towns and villages, Niagara Mohawk Power Corporation, and a defendant class comprised of land owners and other entities who possess lands within the claim area. Cplt. I at ¶¶ 13-23; Cplt. II at ¶¶ 7-14; Cplt. III at ¶¶ 9-13.

In the Land Claim litigation, the plaintiffs allege that New York State, in a series of seven

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[2]This court "may judicially notice prior pleadings, orders, judgment, and other items appearing in the court records of prior litigation that are related to the case before" it. See Patrowicz v. Transamerica Homefirst, Inc., 359 F.Supp.2d 140, 144 (D.Conn. 2005) (citing, inter alia, Ambase Corporation v. City Investing Company Liquidating Trust, 326 F.3d 63, 72-73 (2d Cir. 2003)).

[3]The Land Claim was referenced by the plaintiff as a "related case" on the Civil Case Docket Sheet when it filed this latest litigation. For the Court's convenience, copies of the following pleadings are submitted as exhibits to the affirmation of Assistant Attorney General David B. Roberts in support of this motion: Exhibit B - Cplt. I (Amended Complaint on behalf of Canadian St. Regis Band of Mohawk Indians, et al, 82-CV-783); Exhibit C - Cplt. II (Amended Complaint on behalf of Canadian St. Regis Band of Mohawk Indians, et al, 82-CV-1114); Exhibit D - Cplt. III (Complaint on behalf of the St. Regis Mohawk Tribe, by the St. Regis Mohawk Tribal Council and the People of the Longhouse at Akwesasne, by the Mohawk Council of Chiefs, 89-CV-829); and Exhibit E - U.S. Amd. Cplt-in-Intvt. (Amended Complaint in Intervention on behalf of the United States, 89-CV-829, 82-CV-114, 82-CV-783). Cplt. III is the action that was brought on behalf of the plaintiff herein; none of the other plaintiffs in the Land Claim, including the United States, have joined in the filing of the Complaint in this action.

transactions between 1816 and 1845, purchased approximately 12,000 acres of land located in Franklin and St. Lawrence Counties reserved to the historic tribe. Cplt. I at ¶ 49; Cplt. III at ¶ 21. Plaintiffs further allege that New York State wrongfully possesses three islands in the St. Lawrence River (Barnhart, Baxter and Long Sault Islands) that have belonged to the historic tribe since time immemorial. Cplt. II at ¶¶ 18-34; Cplt. III at ¶¶ 38-46. Plaintiffs claim that these transactions were never approved by Congress and therefore violated the so-called Indian Nonintercourse Act, 25 U.S.C. § 177 (hereinafter "NIA"), and that for over 150 years, the defendants have been in wrongful possession of the land. Cplt. I at ¶ 49; Cplt. II at ¶ 1; Cplt. III at ¶ 1; U.S. Amd. Cplt-in-Intvt. at ¶¶ 21, 22. In addition to a claim arising under the NIA, plaintiffs allege that the land transfers deprived them of rights, privileges and immunities secured by the Constitution and the laws of the United States, in violation of 42 U.S.C. § 1983. Cplt. I at ¶ 61; Cplt. II at ¶ 36; Cplt. III at ¶ 48.

The Land Claim plaintiffs seek declaratory relief establishing that they have an absolute right to possession, an order of immediate possession, and the ejectment of the defendants from the subject land. Cplt. I, Prayer for Relief at ¶¶ 3-4; Cplt. II, Prayer for Relief at ¶¶ 2-3; Cplt. III, Prayer for Relief at ¶ 4; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at ¶¶ 1, 2.[4] The Land Claim plaintiffs also seek damages for the fair rental value of the land, calculated from the date of acquisition of the parcels, and for the value of minerals and other resources removed from the land after those purchases, plus interest. Cplt. I, Prayer for Relief at ¶¶ 5-6; Cplt. II, Prayer for Relief at ¶¶ 4-6; Cplt. III, Prayer for Relief at ¶ 5; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at

[4]In 2001 the United States amended its complaint to drop all claims and requests for relief against the municipal defendants and defendant class, but retained a claim for a declaratory judgment, ejectment, and monetary damages against the State and NYPA.

¶¶ 3-4.

In the Land Claim litigation, the plaintiff Tribe requests a declaratory judgment granting the following relief:

> A. Declaring that the conveyances of the subject land [including the three conveyances that relate to the Hogansburg Triangle, described in Cplt. III ¶¶ 21(D), 21(E), and 21(F) (Exhibit D)] are null and void;
>
> B. Declaring that the defendants' interests and the interests of all members of the defendant class in the subject lands are null and void;
>
> C. Declaring that the subject land remains treaty-guaranteed Indian land.

Cplt. III, Prayer for Relief, ¶ 1.

C. The Hogansburg Triangle

A map that includes the Hogansburg Triangle is appended to the Tribe's complaint in the Land Claim. Cplt. III, Attachment A (Roberts Aff. Ex. D). In the Land Claim litigation, the record makes clear that the Hogansburg Triangle is an approximately 2000-acre tract that was the subject of three treaties, dated June 12, 1824, December 14, 1824 and September 23, 1825, through which the State of New York purported to purchase lands that had been reserved to the St. Regis in the Treaty of 1796.[5] These three transactions, and others that took place between 1816 and 1845, allegedly resulted in the dispossession of approximately 12,000 acres of land that had been reserved to the historic tribe in the Treaty of 1796. Cplt. III at ¶ 21. In the Land

[5] The defendants moved for judgment on the pleadings on November 6, 2006 (Roberts Aff. Ex. F, G); the Tribe opposed the motion, requested that the Court convert the motion into a motion for summary judgment, and submitted a comprehensive factual record relating to the claim area, and in particular the Hogansburg Triangle. (Roberts Aff. Ex. H, I, J). The Tribe set forth a detailed description of the Hogansburg Triangle at pp. 32-41 of its Memorandum of Law in Opposition to the Rule 12(c) motion (Roberts Aff. Ex. I), characterizing it as a 2000-acre triangle carved out of the southern part of the Akwesasne Reservation (id. at 33) that was "the subject of the illegal state treaties of June 12, 1824, December 14, 1824, and September 23, 1825." Id. at 32, n. 17. See also Tribe's Statement of disputed material facts pursuant to NDNY Local Rule 7.1(a)(3) (Roberts Aff. Ex. J), ¶¶ 1-3, 5. Pertinent to the point made in footnote 1, supra, the Tribe "concede[d] that some of the land claim areas will not fit within the analysis applied to the Hogansburg Triangle and the Ft. Covington claim areas here." Ex. I at 32, n. 18.

Claim, Plaintiff alleges that the lack of Congressional approval of the State's purchases renders them void under the terms of the Nonintercourse Act. In the instant action, the Plaintiff seeks a declaration that the reservation boundaries set forth in the 1796 treaty have never been diminished, for lack of Congressional action approving such diminishment.

The Plaintiff assiduously avoids making specific allegations in the Complaint that reference the NIA or the specific treaties of June 12, 1824, December 14, 1824 and September 23, 1825 which relate to the tract today known as the Hogansburg Triangle, instead making only a perfunctory allegation that "the State and the County have wrongfully treated parts of this reservation as removed from its exterior boundaries and within their full jurisdictional authority." Complaint, ¶ 9. Nonetheless, it is readily apparent that this most recent litigation arises out of the same operative facts that give rise to its already-pending Land Claim, challenging the validity of these same three ancient treaties.[6]

D. Procedural Status of the St. Regis Land Claim

The Land Claim litigation has been pending since the Canadian Band of the St. Regis Mohawks filed its two actions in 1982. Cplt I; Cplt. II. On June 30, 1989, the Plaintiff herein joined another tribal entity known as the People of the Longhouse at Akwesasne, to file Cplt. III against the State, municipal defendants, the NYPA, and a class made up of individual property owners in the claim area. Cplt. III challenged the validity of the seven land transfers and

[6]In the same vein, the Complaint sets forth allegations that a majority of the landowners in the Hogansburg Triangle are Indian, Id. ¶ 10, and the Tribe provides certain municipal services to the Hogansburg Triangle. Id., ¶ 11. In the Land Claim, in response to that aspect of the Rule 12(c) motion that pertains to the Sherrill analysis that examines whether the land subject to the possessory claim has a "distinctly non-Indian character," the Tribe has marshaled a detailed factual record that expands upon the conclusory factual allegations set forth in paragraphs 10 and 11 of the Complaint. See Tribe's Statement of disputed material facts pursuant to NDNY Local Rule 7.1(a)(3) (Roberts Aff. Ex. J), ¶¶ 1-3, 5.

NYPA's ownership of Islands, claiming, inter alia, that they were void for lack of federal approval, in violation of the NIA and the Treaty of Ghent. Cplt. III at ¶¶ 23-56. Cplt. III sought a declaration that the conveyances were null and void, a declaration that any interest the defendant class may have in the subject land to be null and void, ejectment of the defendants and the defendant class, and damages calculated by the fair rental value of the land from the dates of acquisition. Cplt. III, Prayer for Relief at ¶¶ 2-5.

On August 5, 1998, the United States moved to intervene in the Land Claim litigation pursuant to FED. R. CIV. P. 24. That motion was granted on October 27, 1998. On December 22, 1998, the United States filed its Complaint-in-Intervention on behalf of the plaintiffs and subsequently filed an Amended-Complaint-in-Intervention on August 3, 2001. The United States' amended pleading dropped all claims against the non-State defendants, retaining claims only against the State of New York and NYPA. See Canadian St. Regis Band of Mohawk Indians v. State of New York, 205 F.R.D. 88 (N.D.N.Y. 2002).

In July 1989, the Canadian Band, pursuant to FED. R. CIV. P. 42(a), moved to consolidate the three complaints. That motion was granted in August 1991. Following consolidation, the court granted a series of stays in an attempt to facilitate settlement negotiations. Because settlement could not be achieved, the motions to dismiss were ultimately briefed and argued in 1999 after the United States had intervened. The Court issued a comprehensive decision granting in part and denying in part the defendants' renoticed motions to dismiss which included the rejection of the defense of laches based upon this Court's interpretation of then existing Second Circuit case law and its prior decision rejecting laches as a defense to liability in Cayuga. See Canadian St. Regis Band of Mohawk Indians v. State of New York, 146 F. Supp. 2d 170,

186-87 (N.D.N.Y. 2001).

Pertinent to the instant action respecting the Hogansburg Triangle, the Court held that the Plaintiff's NIA action was barred under the doctrine of *res judicata* insofar as it challenged the validity of the transfer of 144 acres of that tract via the conveyance treaty of December 24, 1824. Canadian St. Regis Band, 146 F. Supp. 2d at 187-92. This tract had been the subject of an earlier action brought on behalf of the Tribe by the United States, United States v. Franklin County, 50 F. Supp. 152 (N.D.N.Y. 1943) in which it had been urged that the 1824 transaction was void for failure to comply with the NIA, and that the County therefore lacked authority to assess, levy and collect taxes on 10 parcels of land allegedly located within the St. Regis Reservation that were owned by the Tribe or its members. The Court in U.S. v. Franklin County dismissed the action on the merits; the judgment was never appealed; and this Court held that, notwithstanding an intervening change in the law respecting the interpretation of the NIA, *res judicata* barred the Tribe from relitigating the validity of the 1824 transfer of this 144-acre segment of the Hogansburg Triangle in the pending St. Regis Land Claim litigation.

Answers were subsequently filed on behalf of all defendants. The plaintiffs then moved to strike certain of the defendants' defenses, including, inter alia, the defense of laches. This Court granted that motion, insofar as laches had been asserted as a defense to the cause of action under the NIA, but denied it insofar as the defense was relevant to remedies. Canadian St. Regis Band of Mohawk Indians v. State of New York, 278 F.Supp. 2d 313, 334 (N.D.N.Y. 2003).

Subsequently the parties engaged in renewed, but ultimately unsuccessful, settlement discussions. Concurrently, new developments that changed the legal landscape pertaining to the defense of laches were taking place in two other New York Indian land claims, City of Sherrill v.

Oneida Indian Nation, 544 U.S. 197 (2005) ("Sherrill") and Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d. Cir. 2005), cert. denied, 547 U.S. 1128 (2006) ("Cayuga"). This Court entered a stay, in light of the settlement discussions and the prospect that appellate proceedings in the Sherrill and Cayuga cases would provide greater guidance respecting the issue of laches in the St. Regis Land Claim. The final decision in Cayuga came on May 15, 2006, with the Supreme Court's denial of certiorari. In the wake of that development, the stay in the Land Claim again was lifted.

The defendants in the Land Claim thereafter filed a motion for judgment on the pleadings pursuant to FED. R. CIV. P. Rule12(c) seeking dismissal based on Sherrill and Cayuga, which was fully briefed and ultimately submitted to this Court on January 11, 2008. (Roberts Aff. Ex. F, G, H, I, J, K, L). At the time that the Rule 12(c) motion was being briefed, Judge Kahn issued a decision in Oneida Indian Nation of New York v. State of New York, 500 F.Supp.2d 128 (N.D.N.Y. 2007), which applied Sherrill and Cayuga to dismiss possessory land claims asserted on behalf of the plaintiffs in that case. At the same time, he permitted the plaintiffs to proceed against the State with a contract reformation claim based on allegations that the State had paid unconscionable consideration for the lands it had purchased from the Oneidas in the treaties at issue in that land claim. Judge Kahn and the Second Circuit granted both sides leave to pursue interlocutory appeals from this decision, and it was fully briefed and argued before the Second Circuit on June 3, 2008. The Oneida cross-appeals await a decision at this time.

In anticipation that the pending appeals in the Oneida land claim will likely provide guidance to this Court in addressing the issues that form the basis of the pending motions pursuant to Rule 12(c) in the St. Regis Land Claim, this Court issued a stay of the Land Claim on

May 16, 2008, until such time as a ruling is rendered in Oneida by the Second Circuit Court of Appeals. (Roberts Aff. Ex. M.) This stay remains in force today.

E. All Writs Act Injunction Motions in the Pending Land Claim

There have been two applications in the St. Regis Land Claim for injunctive relief pursuant to the All Writs Act, 28 U.S.C. § 1651, both of which raise issues related to the jurisdictional claims under 25 U.S.C. § 233 that are asserted in the instant Complaint. These motions demonstrate that the jurisdictional issues raised by Plaintiff in the instant claim are factually and legally intertwined with the title issues presented in the pending Land Claim.

1. November 1, 2004 Injunction Motion

The Tribe filed a motion on November 1, 2004, for an injunction pursuant to the All Writs Act, seeking to enjoin the Franklin County defendants from foreclosing against eleven parcels owned by Indians in the Hogansburg Triangle who had failed to pay real estate taxes levied against such properties. Notice of Motion and Memorandum of Law in Support of Motion Pursuant to All-Writs Act (Roberts Aff. Ex. N). This Court referred the matter for a report-recommendation before Magistrate Lowe, and ultimately denied the Tribe's application, based on the County's express assurance that it would not, until complete resolution of the Land Claim, transfer title to any foreclosed-upon parcels to third parties. Report-Recommendation, December 6, 2004, 6-7. (Roberts Aff. Ex. O); Order Adopting Report-Recommendation, January 12, 2005 (Id., Ex. Q).

Annexed to the Report-Recommendation as Exhibit A is a Notice Of Appearance and Answer to Tax Enforcement Notification dated November 18, 2004, which was filed by the Tribe in one of the eleven Franklin County foreclosure proceedings, of which Magistrate Lowe

took judicial notice in his Report-Recommendation. (Roberts Aff. Ex P). In that document, the Tribe's duly authorized representatives asserted its legal interest in the properties within the St. Regis Land Claim area, and asserted that the County Court lacked jurisdiction over the foreclosure proceeding because of the pendency of the Land Claim in federal court. The Tribe averred: "In the land claim, the Tribe disputes the County's right to underlying title and further the Tribe's claim necessarily includes the assertion that these lands continue to be part of the Tribe's reservation." Id., Ex. P ¶1 (emphasis added). The Tribe also averred:

> The issues presented by the state foreclosure action and the federal land claim are clearly related. The County is foreclosing on disputed land, which is part of the [Land Claim] litigation. Within the land claim area, the Tribe disputes not only its loss of title, but the right of the County to exercise civil jurisdiction over Native-owned property. Whether or not the land is subject to the county's taxing authority is a question that will be answered by the resolution of the land claim.

Id., Ex, P ¶ 7 (emphasis added). It is therefore clear that in November 2004, the Tribe regarded the legal claims set forth in the instant Complaint to be part and parcel of the claims that had been raised in the context of the long-pending Land Claim litigation.

2. March 9, 2009 Injunction Motion

A second application for injunctive relief pursuant to the All-Writs Act was brought on behalf of the municipal defendants and the defendant class of landowners in the Land Claim on March 9, 2009. This application was brought after Horst Wuersching, a non-Indian owner of more than 230 acres of property in the Hogansburg Triangle, attempted to place his property on the real estate market. Certain Mohawks, upon seeing a "for sale by owner" sign on the property, took it upon themselves to simply seize and occupy it starting in January, 2009. Since then, these individuals have excluded Mr. Wuersching from his land; they have been camping on the property, cutting trees on the property, using a bulldozer and other heavy equipment to clear

a road, and they have erected signs proclaiming that Mr. Wuersching's property was now an "Ahkwesahsne reclamation site." Roberts Aff. Ex. R. As of August, 2009, this occupation continued unabated; among other things, lumber and other construction materials had been delivered to the property by the proponents of the "reclamation" project. Id., Ex. T.

The Tribe and the other plaintiffs in the Land Claim have all disavowed any affiliation with the individuals who have carried out the occupation of Mr. Wuersching's land. Id., Ex. S. In opposition to the motion for injunctive relief pursuant to the All Writs Act – which is awaiting action at this time – the Tribe characterized the underlying dispute over Mr. Wuersching's property as a private dispute that did not implicate this Court's jurisdiction to adjudicate the Land Claim. In opposition to this application, the Tribe and the other Land Claim plaintiffs urged, among other things, that "recourse is properly sought through local law enforcement and the state court system" and that "a private remedy in state court is the most appropriate action for this private land owner to pursue." Id., Ex. S, 5-6. The Tribe's position in this regard appears to conflict with the instant Complaint's allegation that the State and County of Franklin must be enjoined from "impos[ing] state and local laws over the Tribe and tribal members on lands within the boundaries of the original reservation," including the Hogansburg Triangle. Complaint, ¶¶ 17, 18.

ARGUMENT

POINT I

THIS ACTION MUST BE DISMISSED INASMUCH AS IT SEEKS RELIEF THAT IS SUBSUMED IN THE PENDING ST. REGIS LAND CLAIM.

A. The Action Is Barred Under the "Prior Action Pending" Doctrine.

The declaratory relief that is sought by the Tribe, seeking to establish its governmental jurisdiction over the Hogansburg Triangle, is part and parcel of the possessory claims that are already before the court in the long-pending Land Claim. The complaint the Tribe filed in the Land Claim in 1989 in part seeks a judicial "[d]eclar[ation] that the subject land [including all land within the original bounds of the 1796 Treaty] remains treaty-guaranteed Indian land." Cplt. III, Prayer for Relief, ¶ 1 (C) (Roberts Aff. Ex. D). The Land Claim seeks declaratory relief that, in the Tribe's words, "necessarily includes the assertion that these lands continue to be part of the Tribe's reservation." Roberts Aff. Ex. P ¶ 1. By the Tribe's admission, the Land Claim is not just a claim for title to the lands within the bounds of the 1796 Treaty, but also it challenges "the right of the County [and the State] to exercise civil jurisdiction over Native-owned property." Id. Ex. P at ¶ 7. By the Tribe's admission, one of the legal issues pending before this Court in the Land Claim is "[t]he Tribe['s] claim that the lands at issue have never been removed from the reservation by sale or otherwise and as such, they are 'Indian lands' as defined by federal law." Id. Ex. P at ¶13.

The instant litigation is duplicative because it seeks relief that necessarily is part of the claims that are already before the court in the Land Claim. The defendants' fully-briefed motion

for judgment on the pleadings in that matter has been stayed for more than a year. The Tribe should not be permitted to avoid that stay by filing a second, redundant litigation for declaratory relief arising from the same nexus of operative facts.

In Curtis v. Citibank, N.A., 226 F.3d 133, 138-39 (2d Cir. 2000) the Court held that a district court may dismiss a suit that is duplicative of another federal court suit "[a]s part of its general power to administer its docket." (citing and quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) ("As between federal district courts, . . . though no precise rule has evolved, the general principle is to avoid duplicative litigation.")). The Second Circuit noted that "the rule against duplicative litigation is distinct from but related to the doctrine of claim preclusion or *res judicata*. . . . The two doctrines serve some of the same policies. The power to dismiss a duplicative lawsuit is meant to foster judicial economy and the 'comprehensive disposition of litigation.' The doctrine is also meant to protect parties from 'the vexation of concurrent litigation over the same subject matter.'" Curtis, 226 F.3d at 138 (citations omitted). "[A] court faced with a duplicative suit will commonly stay the second suit, dismiss it without prejudice, enjoin the parties from proceeding with it, or consolidate the two actions. Of course, simple dismissal of the second suit is another common disposition because plaintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time." Curtis, 226 F.3d at 138-39 (emphasis added; citations omitted). Dismissal of this action is the appropriate remedy – as opposed to a stay or consolidation – because the jurisdictional issues that the Tribe seeks to litigate separately in this proceeding are already among those posed in the Land Claim.

B. The Action Should Be Dismissed Because It Violates the Prohibition Against "Claim Splitting."

The fact that the Tribe may characterize the instant claims as "jurisdictional" as opposed to ones of "title" does not enable it to avoid the prohibition against claim splitting. Even if there were a valid distinction to be drawn between the relief requested by the Tribe in the Land Claim and in this litigation, it is indisputable that both claims for relief, as well as the equitable defenses asserted by the defendants related to both claims, arise out of a common nucleus of operative facts. See, e.g., Waldman v. Village of Kiryas Joel, 207 F.3d 105, 108 (2d Cir. N.Y. 2000) ("To ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations . . . .'") (quoting Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 90 (2d Cir. 1997)).

The Tribe no doubt will contend that the jurisdictional issues it seeks to raise in this latest litigation pursuant to § 233 are legally distinct from the title issues that are before the Court in the Land Claim pursuant to the NIA. This Court has previously recognized the legal distinction to be drawn between such claims, Thompson v. Franklin County, 987 F. Supp. 111, 123 & n. 43 (N.D.N.Y. 1997); however, it is evident that analysis of the jurisdictional issue (i.e., diminishment of the 1796 reservation) remains factually and legally intertwined with the issue of title that is asserted in the Land Claim litigation.

In Thompson v. Franklin County, 127 F. Supp. 2d 145 (N.D.N.Y. 2000), this Court entered judgment in favor of Franklin County, in an action brought by Dana Leigh Thompson, a member of the Tribe who owned land in the Hogansburg Triangle, who claimed such property

was within "Indian country" and exempt from real estate taxes. The District Court's entry of summary judgment in favor of the County was thereafter affirmed by the Second Circuit in a split decision. Thompson v. Franklin County, 314 F.3d 79 (2d Cir. 2002). In the opinion rendered by Senior Circuit Judge Van Graafeiland, the merits of the plaintiff's claim that her property was entitled to tax-exempt status were found to be entirely intertwined with her concession (for purposes of that litigation) that the State's 1824 and 1825 purchases in the Hogansburg Triangle were not void under the NIA; having made that concession, Thompson's property of necessity was not within "Indian country." Thompson, 314 F.3d at 82-83 ("[L]and made alienable by a conveyance governed by and in compliance with the [NIA] is land made alienable by Congress, and hence taxable."). Judge Winter concurred in the result in the Thompson appeal on different grounds, but observed in his opinion that "there is a complete factual and legal overlap of the individual title, tribal jurisdiction, and taxability issues" posed by that challenge to Franklin County's taxing authority on a parcel within the Hogansburg Triangle. Thompson, 314 F.3d at 86.

The "complete factual and legal overlap" of the jurisdictional claims asserted in this litigation and the title claims asserted in the St. Regis Land Claim is further demonstrated by an action that was bought by the Cayuga Indian Nation against the Village of Union Springs, a municipality within the bounds of the 64,000 acre claim area which had been the subject of the Cayuga land claim. See Cayuga Indian Nation of New York v. Pataki, 165 F. Supp. 2d 266 (N.D.N.Y. 2001). After the Cayuga Nation obtained a favorable judgment in the District Court, holding its transfers of reservation lands to New York in 1795 and 1807 were void for failure to comply with the NIA, it purchased land in the Village of Union Springs and commenced

construction of a gaming facility, without obtaining any building permits or abiding by local zoning ordinances and State environmental protection laws. When the municipality issued stop-work orders against such construction, the Cayuga Nation bought an action similar to the instant one, seeking declaratory and injunctive relief preventing the municipality from enforcing its land-use laws and regulations on Nation-owned land within the bounds of its original reservation. In an opinion rendered before Sherrill was rendered by the Supreme Court and before the Cayuga appeal was decided by the Second Circuit, Judge Hurd initially granted the requested injunction. Cayuga Indian Nation v. Vill. of Union Springs, 317 F. Supp. 2d 128 (N.D.N.Y. 2004). After the Sherrill and Cayuga decisions were issued in 2005, an appeal from the 2004 Union Springs decision was remanded back to the District Court for reconsideration in light of those developments. The District Court issued a decision vacating the injunction and granting summary judgment in favor of the defendants. Cayuga Indian Nation v. Vill. of Union Springs, 390 F. Supp. 2d 203 (N.D.N.Y. 2005). The same equitable considerations that had been weighed and determined in the Cayuga land claim litigation were also dispositive for purposes of evaluating the viability of the jurisdictional claims that had been asserted by the Cayuga Nation in Union Springs.

Accordingly, even if the Tribe were to contend that the declaratory relief requested in this action were distinct from the claims that the Tribe has brought in the Land Claim, it would still run afoul of the prohibition against "claim splitting." See generally Waldman, 207 F.3d at 108-14; Coleman v. B.G. Sulzle, Inc., 402 F. Supp. 2d 403, 417-21 (N.D.N.Y. 2005); Ambase Corp. v. City Investing Co. Liquidating Trust, 326 F.3d 63, 71-74 (2d Cir. 2003). That rule

> prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action. There is a close

> relationship between claim splitting and *res judicata* (also known as claim preclusion). Under the former doctrine, a party cannot avoid the effects of *res judicata* by splitting [its] cause of action into separate grounds of recovery and then raising the separate grounds in successive lawsuits. Rather, a party must bring in one action all legal theories arising out of the same transaction or series of transactions. Thus, *res judicata* bars claims in a subsequent action where, among other things, the claims asserted in that subsequent action were, or could have been raised in the prior action.

Coleman, 402 F.Supp.2d at 419 (internal quotation marks and citations omitted).

The putative claim for declaratory relief pursuant to 25 U.S.C. § 233, seeking to establish that the 1796 reservation boundaries are intact today for lack of Congressional action approving their diminishment, cannot be split and litigated separately from the Tribe's long-pending (and currently stayed) claim that the treaties by which State purchased lands within the bounds of the 1796 reservation were void under the NIA for lack of Congressional approval.

POINT II

PLAINTIFF'S CLAIMS ARE BARRED BY THE DECISIONS IN SHERRILL AND CAYUGA UNDER THE EQUITABLE DOCTRINES OF LACHES, ACQUIESCENCE AND IMPOSSIBILITY

The Supreme Court's Sherrill decision, 544 U.S. 197, and the Second Circuit's Cayuga decision, 413 F.3d 266, compel the dismissal of the plaintiff's claims in their entirety, pursuant to Rule 12(b)(6). The Memoranda of Law that were submitted by the State and the County of Franklin in support of their motions pursuant to Rule 12(c) in the Land Claim are annexed to the Affirmation of David Roberts and marked as Exhibits F, G and K. They are incorporated herein by reference.

In Sherrill, the Oneida Nation had purchased lands within the bounds of its historic reservation, which (like the lands within the St. Regis Land Claim) the tribe had sold to the State

of New York in a series of ancient "treaties" that allegedly were void for failure to comply with the NIA. The Oneida Nation sued the City of Sherrill, claiming that, upon the Nation's purchase of lands within the bounds of the original Oneida reservation, such parcels automatically were entitled to treatment as "Indian county" – outside the taxing and regulatory authority of the State, the Counties, and the local municipalities. "OIN resists the payment of property taxes to Sherrill on the ground that OIN's acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel. Consequently, the Tribe maintains, regulatory authority over OIN's newly purchased properties no longer resides in Sherrill." 544 U.S. at 202; see also id. at 213. In the instant case, the St. Regis Tribe goes further, asserting that the Tribe is entitled to assert sovereignty over any lands within the Hogansburg Triangle (and indeed, the entire claim area in the Land Claim litigation) which are owned in fee by individual members of the Tribe, and non-members as well. This assertion of tribal sovereignty necessarily excludes the State and local governments from the exercise of full governmental authority over the subject lands, and is palpably disruptive. See Coeur D'Alene, 521 U.S. at 282. ("The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory.").

The Supreme Court rejected the Oneida Nation's claim, concluding that "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through

open-market purchases from current titleholders." Sherrill, 544 U.S. at 203. The Court "reject[ed]" as disruptive the Nation's request for "declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We . . . hold that 'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." Id. at 214. The Court went on to hold that after nearly two centuries, during which the lands had been subject to State and local governance and taxes and, "during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks." Id. at 216. The Court in Sherrill concluded that equitable doctrines of laches, acquiescence and impossibility stood as a bar to the claims for injunctive and declaratory relief that were sought by the OIN. Id. at 217-21.

The doctrines of laches, acquiescence, and impossibility discussed in Sherrill foreclose the St. Regis Tribe from obtaining the disruptive declaratory relief that is requested in the Complaint in this action. In Cayuga Indian Nation v. Vill. of Union Springs, 390 F. Supp. 2d at 207, Judge Hurd held: "If avoidance of taxation [in Sherrill] is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive. . . .The [Cayuga] Nation is seeking relief that is even more disruptive than non-payment of taxes. The Supreme Court's strong language in City of Sherrill regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations."). In a virtually

identical action, Seneca-Cayuga Tribe of Okla. v. Town of Aurelius, 233 F.R.D. 278 (N.D.N.Y. 2006), this Court followed the reasoning of Judge Hurd in Union Springs, and issued an order granting judgment on the pleadings dismissing an action on behalf of an Indian tribe, seeking to enjoin the enforcement of land-use laws against the tribe, on lands it owned in fee within the bounds of its historic reservation. Id. at 282-83. See also Osage Nation v. State ex rel. Okla. Tax Comm'n, 597 F. Supp. 2d 1250, 1265-66 (N.D. Okla. 2009).

This latest Complaint should be dismissed pursuant to Rule 12(b)(6) under the same equitable principles that barred the Oneida Indian Nation from asserting sovereignty and tax-exempt status over the lands at issue in Sherrill, and that barred the Cayuga Indian Indian Nation from asserting a possessory claim over the lands at issue in Cayuga.

POINT III

THE ELEVENTH AMENDMENT BARS THE TRIBE'S ACTION AS AGAINST THE STATE AND THE GOVERNOR.

The Eleventh Amendment was raised as a defense in the St. Regis Land Claim, but was rejected by the Court because the United States had intervened in that action, enabling the tribal plaintiffs to litigate their NIA claims against the State. Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170, 180-81(N.D.N.Y. 2001). The United States has not joined with the Tribe in bringing this action, and the Eleventh Amendment stands as a complete jurisdictional bar to the Tribe's effort to bring this action against Governor Paterson and/or the State of New York.

A. The Eleventh Amendment Bars A Tribe From Seeking Any Relief Against A Nonconsenting State

The Eleventh Amendment bars tribal lawsuits against nonconsenting States in federal court. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any Foreign State.

U.S. Const. Amend. XI.

"For over a century, the Supreme Court has interpreted the Eleventh Amendment . . . as a confirmation of the preexisting principle of sovereign immunity." Dairy Mart Convenience Stores, Inc., v. Nickel, 411 F.3d 367, 371 (2d Cir. 2005), citing Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). The Eleventh Amendment exists to protect a sovereignty inherent in each state, a sovereignty that was not relinquished with the ratification of the Constitution. In addition, Eleventh Amendment immunity from suit "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" Seminole, 517 U.S. at 58 (citation omitted).

In addition to its explicit restriction of suits by "Citizens of another State," the amendment has been construed to protect a non-consenting state from suit by its own citizens. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Hans v. Louisiana, 134 U.S. 1, 13 (1890). The Amendment bars a suit for any relief against a State in federal court absent its consent or Congressional abrogation. Papasan v. Allian, 478 U.S. 265, 276 (1986); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984); Cory v. White, 457 U.S. 85, 90-91 (1982).

In Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 755 (1991), the

Supreme Court held that state sovereign immunity under the Eleventh Amendment also bars suit in federal court by an Indian tribe against a State. The Blatchford Court stated that "a State will . . . not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention" (citations omitted). Id. at 779. The Court concluded that states had not waived their immunity to suit from Indian tribes in the plan of the convention. Blatchford, at 781-82. Since Blatchford, the Supreme Court has reiterated that the Eleventh Amendment precludes federal court jurisdiction over a tribal suit against a nonconsenting State. See Coeur d'Alene, 521 U.S. 261; Seminole Tribe, 517 U.S. 44.

This immunity from suit is subject to only three narrow exceptions: 1) congressional abrogation, 2) state waiver, and 3) suits against individual state officers for prospective relief to end an ongoing violation of federal law. See Papasan v. Allian, 478 U.S. at 276; Pennhurst, 465 U.S. at 100; Frew v. Hawkins, 540 U.S. 431, 436-37 (2004). The first two exceptions are briefly discussed here; the third exception is discussed in section B below.

1. Congress Has Not Abrogated New York's Eleventh Amendment Immunity From Suit With Respect To The Claims Raised In The Complaint.

The first exception is where Congress validly exercises its authority to abrogate the States' Eleventh Amendment immunity to suit. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Huang v. Johnson, 251 F.3d 65, 70 (2d Cir. 2001); Russell v. Dunston, 896 F.2d 664, 667 (2d Cir. 1990). In analyzing whether Congress has properly abrogated the states' Eleventh Amendment immunity, the court must determine two things: first, did Congress unequivocally express its intent to abrogate immunity? And second, did Congress act pursuant to a valid grant of constitutional authority? Seminole, 517 U.S. at 55, 59.

a. Section 233 contains no language unequivocally abrogating the State's Eleventh Amendment immunity.

In determining the first issue, the Supreme Court has enunciated a strict test, requiring that Congress' intent to abrogate must be obvious from a "clear legislative statement." Dellmuth v. Muth, 491 U.S. 223, 227-228 (1989); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985).

Nothing in the language of § 233 evinces a clear legislative intent to abrogate New York's Eleventh Amendment immunity from suit. This statute, enacted in1950, provides:

§ 233. Jurisdiction of New York State courts in civil actions

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, [1]That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to the effective date of this Act, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, [2]That nothing in this Act shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, [3] That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, [4] That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, [5]That nothing herein contained shall be construed as

> conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to the effective date of this Act.

25 U.S.C. §233 (emphasis added).

This statute confers on the Courts of State of New York State civil jurisdiction to determine certain cases involving members of Indian tribes, and it sets forth provisos that clearly were intended to assure that this grant of jurisdiction was not intended to affect existing rights possessed by tribes and their members – rights such as tribal self-government, fishing rights, and non-alienation of tribal lands – that arose from already-established sources. See, e.g., Mohegan Tribe v. Connecticut, 528 F. Supp. 1359, 1364-65 (D. Conn. 1982) ("[The fourth] proviso was added to ensure that the courts would not construe 25 U.S.C. § 233 as repealing the Nonintercourse Act in New York."). In Thompson III, 15 F.3d at 250, the Court recognized that an individual member of the St. Regis Tribe had standing to pursue a claim that was premised on an alleged violation of §233; however, the State was not a defendant in that litigation, and the issue of Eleventh Amendment immunity was not before that Court.[7]

Because "Congress may abrogate the States' constitutionally secured immunity from suit

[7] The question of whether a state is subject to a federal statute is not identical to whether Congress intended to abrogate the State's immunity from suit. See, e.g., Vermont Agency of Nat'l Resources v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000) (court decides question of whether states can be sued under federal False Claims Act without deciding separate issue of whether states have Eleventh Amendment immunity from suit by relator). For example, States may be sued by the United States without violating their Eleventh Amendment from suit. See also Ysleta del sur Pueblo v. Raney, 199 F.3d 281, 287 (5th Cir.), cert. denied, 529 U.S. 1131 (2000) ("Even assuming an implied private cause of action [under the NIA], however, the Tribe makes a fatal logical leap by concluding that a congressional intent to abrogate state sovereign immunity flows from the fact that an implied private cause of action exists under a statute applicable to states and private individuals. The leap is especially large considering the historical relationship between the United States and the Indians. The statute could easily be determined to provide tribes an implied private cause of action against any party other than a state while reserving for the United States a cause of action as fiduciary against any party, including a state"). Therefore, even if this Court were to find that § 233 allows a private cause of action for its enforcement of its terms, it must still address the separate question of whether Congress provided, in unmistakably clear terms, an intent to subject the state to suit by Indian tribes.

in federal court only by making its intention unmistakably clear in the language of the statute," Dellmuth, 491 U.S. at 227-28 (emphasis added), it is evident that Congress did not abrogate the states' immunity when it enacted §233. Accord Ysleta del sur Pueblo v. Raney, 199 F.3d 281, 288 (5th Cir.) ("The [NIA], on its face, does not provide an unmistakably clear intent to abrogate state sovereign immunity."), cert. denied, 529 U.S. 1131 (2000).

b. Section 233 was not enacted pursuant to a valid grant of Congressional authority to abrogate the State's immunity.

In determining the second issue, whether Congress acted pursuant to a valid grant of authority, in Fitzpatrick the Supreme Court made clear that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. Id., 427 U.S. at 453 n. 9. Section 233, however, was enacted pursuant to the Indian Commerce Clause contained in Article I of the Constitution. See McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n. 7 (1973); Williams v. Lee, 358 U.S. 217, 219 n. 4 (1959).

In Seminole, the Court ruled that Congress could not subject states to suit in federal court pursuant to the Indian Gaming Regulatory Act ("IGRA"), even though Congress' intent to include states was unmistakably clear, because IGRA was enacted pursuant to the Indian Commerce Clause in Article I of the Constitution. The Court held that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Seminole, 517 U.S. at 73; see also Close v. State of New York, 125 F.3d 31, 37-38 (2d Cir. 1997) (after Seminole, Congress cannot abrogate sovereign immunity under any Article I provision); accord, Burnette v. Carothers, 192 F.3d 52, 59 (2d Cir. 1999).

Likewise, neither the general jurisdictional statute upon which plaintiff sues, 28 U.S.C. §

1331, nor the Declaratory Judgment Act, 28 U.S.C. § 2201, provides a basis to abrogate New York's immunity from suit. Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 714 F.2d 946, 950 (9th Cir.1983) ("Neither 28 U.S.C. § 1331, nor § 1343, nor 42 U.S.C. § 1983 contains an expression of Congressional intent to abrogate [the states'] immunity. Therefore none operates to lift the Eleventh Amendment bar"); Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1137-38 (8th Cir. 1974) ("[W]here properly invoked, the Eleventh Amendment bars the action regardless of the statutory basis of jurisdiction"); Blatchford, 501 U.S. at 781-88 (28 U.S.C. § 1362, which provides the federal district courts with original jurisdiction over suits brought by Indian tribes, did not contain the explicit language necessary for Congress to abrogate the States' Eleventh Amendment immunity).

2. New York Has Not Waived Its Sovereign Immunity From Suit In Federal Court.

The second exception occurs when the states themselves decide to waive their immunity to suit in federal court. See, e.g., Lapides v. Bd. of Regents of the Univ. Sys., 535 U.S. 613, 618 (2002); Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 675 (1999); Clark v. Barnard, 108 U.S. 436, 447 (1883); In re Charter Oak Associates, 361 F.3d 760, 765 (2d Cir. 2004). States cannot "constructively consen[t]" to waiver of their Eleventh Amendment protection from suit. Edelman, 415 U.S. at 673; Santiago v. New York State Dep't of Correction Svcs., 945 F.2d 25, 29-30 (2d Cir. 1991), cert. denied, 502 U.S. 1094 (1992). The Court has stated that "waiver . . . will not be found unless such consent is unequivocally expressed.'" Close v. State of New York, 125 F. 3d at 39, quoting Atascadero State Hospital v. Scanlon, 473 U.S. at 241 and Pennhurst, 465 U.S. at 99. Thus, the waiver must be "stated 'by the most express language or by such overwhelming implications from [a written] text as [will]

leave no room for any other reasonable construction.'" Edelman v. Jordan, 415 U.S. at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)). Here, plaintiff has presented nothing to indicate that the State has waived its Eleventh Amendment immunity.

B. The Eleventh Amendment Bars The Current Action As Against The Governor In His Official And Individual Capacities

1. Plaintiff's Suit Against The Governor In His Official Capacity For Prospective Declaratory And Injunctive Relief Is Barred By The Eleventh Amendment Because It Affects Vital State Interests And Is The Functional Equivalent Of A Suit Against The State

In some circumstances, the Eleventh Amendment does not bar a suit for prospective equitable relief against State officials sued in their official capacity who are alleged, on an ongoing basis, to be violating the U.S. Constitution or federal law. This is because under the landmark decision in Ex parte Young, 209 U.S. 123, 155-56 (1908), such a suit is not considered to lie against the State even if the relief sought would require the expenditure of substantial sums of money prospectively. See Milliken v. Bradley, 433 U.S. 267, 289 (1977); CSX Transp. v. N.Y. State Office of Real Prop. Servs., 306 F.3d 87, 98 (2d Cir. 2002). The theory behind Young is that when an officer attempts to enforce an unconstitutional state law, that officer is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Ex parte Young, 209 U.S. at 160.

However, Ex parte Young does not apply if, although the action is nominally against individual officers, the state is the real, substantial party in interest and the suit in fact is against the state. Pennhurst, 465 U.S. at 101; Dugan v. Rank, 372 U.S. 609, 620 (1963). Furthermore, an action cannot be maintained under Ex parte Young, where "the suit against the state officer

affects a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state." Coeur d'Alene, 521 U.S. 261. The tribal plaintiff in Coeur d'Alene sought the following relief against the State of Idaho, respecting submerged lands over which the State asserted title and jurisdiction:

> a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect in any way the submerged lands. . . . [and] a preliminary and permanent injunction prohibiting defendants from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands . . . .

521 U.S. at 265 (emphasis added). A majority of the Court rejected the applicability of Ex parte Young, holding that the claim Tribe's suit sought "in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State," which declaration would "bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." Id. at 282. So too in this case, the Tribe seeks a declaration that the State (through its Governor) lacks governmental authority over the lands within the claim area, including the Hogansburg Triangle, and directly implicates the State's sovereignty.

In Coeur d'Alene, that essential aspect of state sovereignty was the "state's title, control, possession, and ownership of water and land" that the plaintiff tribe claimed. Id. at 287. Despite the alleged ongoing federal violations, the Court declined to permit an action under Ex parte Young for, inter alia, a declaratory judgment and injunctive relief establishing the plaintiff's entitlement to submerged lands and prohibiting state officials from enforcing state laws that purported to regulate the sue of such lands. Id. at 287-88. The Court stated that such relief was the "functional equivalent" of an action to quiet title in that "all benefits of ownership

and control would shift from the State to the [Coeur d'Alene Tribe]." Id. at 282. Because a quiet title action would be barred by the Eleventh Amendment, a substantially similar action would be barred as well. Id. at 281. The Court in Coeur d'Alene pointed to the importance of the State's sovereignty over riparian lands, noting that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," id. at 287, and that "[t]he suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory." Id. at 282.

The Second Circuit applied the reasoning of Coeur d'Alene in a factual setting that parallels the instant case, in Western Mohegan Tribe and Nation v. Orange County, 395 F.3d 18, 19 (2d Cir. 2004), to dismiss an alleged Tribe's claim for "a declaration of [the Tribe's] ownership and right to possess their reservation lands in the State of New York." The Western Mohegans claimed that the Tribe "had been wrongfully dispossessed of its property by the actions of the defendants, who have claimed title to land that is not theirs . . . ." Id. at 20 (internal quotations omitted). The court, after noting that "there apparently has been no treaty between the United States and the [Tribe] extinguishing the Tribe's title to the . . . lands" (id.), declined to grant the declaration because "the Tribe's claim is fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas . . . ." Id. at 23. The court ruled that the "Tribe's action is barred by the Eleventh Amendment" as the relief requested is the "functional equivalent of an action to quiet the Tribe's claim to title . . . ." Id.

The same sovereignty implications that barred the suits in Coeur d'Alene and Western Mohegan Tribe apply here. The attributes of state sovereignty present in those cases, namely,

New York's "title, control, possession, and ownership" of land, are at issue here, where the Tribe seeks a declaration that the State lacks full jurisdiction over all lands within the bounds of the 1796 Treaty, including the Hogansburg Triangle. See Coeur d'Alene, 521 U.S. at 287; Western Mohegan Tribe, 395 F.3d at 23 (noting that the court believed that the case raised "the core issues of land, state regulatory authority, and sovereignty expressly examined" in Coeur d'Alene).

The allegations in the complaint focus on the authority of the State, making clear that the suit is actually against the State, and not the Governor. It is alleged that the Governor "is charged with the duty of implementing the laws of the State of New York" and that "the Governor and the Executive Branch and its agencies have purported to exercise sovereignty and jurisdiction over that part of the Tribe's 1796 reservation known as the Hogansburg Triangle." Complaint, ¶ 6. It is alleged that "the State and County have wrongfully treated parts of this [1796] reservation as removed from its exterior boundaries and within their full jurisdictional authority . . .." Id., ¶ 9 (emphasis added). In the only paragraph that sets forth any specific factual allegations, it is alleged that the "State has actively attempted to impose licensing laws on businesses in the Triangle area." Id., ¶ 13(b) (emphasis added).

The State has a substantial interest in ensuring that the Hogansburg Triangle – and all other land within the Land Claim area – is regulated and maintained to protect public health and welfare. Depriving the State of regulatory authority over the land claimed by the Tribe would have a devastating effect on state sovereignty similar to the situation in Coeur d'Alene. "[T]he Tribe's argument that the State will retain sufficient regulatory control over the Property rings hollow. A judgment for the Tribe will significantly alter the State's regulatory control over the

Property because the Property will be considered part of an Indian reservation under federal control." Ysleta del sur Pueblo 199 F.3d at 290; id. at 289 (noting State's argument that it "has special interests equal to those of Idaho in Coeur d'Alene. The land at issue here is located in a highly developed area, used for highway construction, maintenance and operation, and has many improvement that help facilitate the purposes which it serves. . . .[T]he State will be unable to properly carry out its sovereign responsibilities with regards to state roadways if it loses possession of the property"). As such, the declaratory relief fits squarely within the parameters of both Coeur d'Alene and Western Mohegan Tribe.

2. Plaintiff's Suit Against The Governor In His Individual Capacity Is Barred By The Eleventh Amendment Because It Is The Functional Equivalent Of A Suit Against The State And The Governor Has No Connection With The Alleged Wrongs

"[I]t is clear that a suit against a government official in his or her personal capacity cannot lead to the imposition of . . . liability upon the governmental entity. A victory in a personal capacity action is a victory against the individual defendant, rather than against the entity that employs him." Kentucky v. Graham, 473 U.S. 159, 167-68 (1985). Here, a suit against the Governor in his individual capacity does not lie for two reasons: first, the declaratory relief the Tribe seeks lies only against David Paterson as Governor of the State and, as demonstrated above, is not properly brought against the Governor in his official capacity; and second, there is no basis for seeking damages or any other relief against the Governor in his individual capacity because the Governor has had no personal involvement or other connection with the alleged wrongs that are the basis of the Tribe's Complaint.

In the principal opinion in Coeur d'Alene joined by five Justices, the Court recognized that, even when state officials are sued as individuals, the State itself will have a continuing

interest in the litigation whenever state policies or procedures are at stake. 521 U.S. at 269. The Court observed that to interpret Ex parte Young to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle that Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. The Court stated, "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." 521 U.S. at 270. See also Ysleta del sur Pueblo, 199 F.3d at 290, 286 (holding that State is real party in interest even though "state officials are named in their individual capacities").

It is well-established that to bring suit against a state officer in his individual capacity "the state officer against whom a suit is brought 'must have some connection with the enforcement of the act' that is in continued violation of federal law." Dairy Mart, 411 F.3d at 372-73, citing Ex Parte Young, 209 U.S. 154,157; accord Verizon Md, Inc., v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635, 645 (2002) (applying Ex Parte Young where it was alleged that state officials were currently enforcing state law in "contravention of controlling federal law."). Here, the three treaties pertaining to the Hogansburg Triangle occurred in 1824 and 1825 and Governor Paterson obviously had no hand in the State's purchases. The Governor has no connection with the alleged wrong, other that than that he is currently the executive in charge of the real party in interest, the State.

In light of the above, the Eleventh Amendment clearly provides the State and the Governor with immunity from the present suit in federal court and none of the enumerated exceptions apply. Therefore, the Complaint, as it relates to the State and the Governor, should

be dismissed pursuant to Rule 12(b)(1) for want of subject matter jurisdiction based upon the bar of the Eleventh Amendment.

CONCLUSION

The complaint must be dismissed.

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ANDREW M. CUOMO
Attorney General of the State of New York

By: David Roberts

DAVID B. ROBERTS
Bar Roll No. 102455
David.Roberts@oag.state.ny.us
Assistant Attorney General of Counsel
Attorney for Defendant David A. Paterson
Office and Post Office Address
The Capitol
Albany, New York 12224
Telephone (518) 408-2516
Facsimile (518) 473-1572

ROBERT A. SIEGFRIED
DAVID B. ROBERTS
Assistant Attorneys General
of Counsel

HISCOCK & BARCLAY, LLP

By: Judith M. Sayles

JUDITH M. SAYLES
Bar Roll No. 301647
jsayles@hiscockbarclay.com
Attorneys for Defendant County of Franklin
One Park Place
300 South State Street
Syracuse, New York 13202
Telephone (315) 425-2784
Facsimile (315) 425-8584

JUDITH M. SAYLES, Esq.
JOHN P. DEVENDORF, Esq.
of Counsel