10-3115-cv

United States Court of Appeals

for the

Second Circuit

CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,
by Lawrence Francis, Chief, and LLOYD BENEDICT, MIKE MITCHELL,
BRUCE ROUDPOINT, JOE JACOBS, JOHN OAKES,
ANGUS BONAPARTE, JR., DAVID BENEDICT,

Plaintiffs-Counter-Defendants-Appellees,

ST. REGIS MOHAWK TRIBE, by The St. Regis Mohawk Tribal Council,
PEOPLE OF THE LONGHOUSE AT AKWESANE, by the Mohawk Nation
Council of Chiefs,

Plaintiffs-Consolidated-Plaintiffs-Counter-Defendants-Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Plaintiff-Counter-Defendant-Appellee,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-INTERVENOR-DEFENDANTS-COUNTER-CLAIMANTS-APPELLANTS

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JEROME COOK, BASIL COOK, CHERYL ROURKE, PATRICIA PHILLIPS, DEBRA THOMAS, SARAH DAVID, CAROLINE DAY,

Plaintiffs,

– v. –

TOWN OF BOMBAY, NY, COUNTY OF FRANKLIN, NY,

Defendants-Intervenor-Defendants-Counter-Claimants-Appellants,

PAUL PERRYON, HELGA PERRYON, EVA L. KLEINERT, FARMER NATIONAL BANK, NATIONWIDE MUTUAL INSURANCE COMPANY, MARINE MIDLAND PROPERTIES CORPORATION, WALSH REALTY CORPORATION, MARIO CUOMO, as Governor of the State of New York,

Defendants-Intervenor-Defendants,

STATE OF NEW YORK, CANADIAN NATIONAL RAILWAYS, NIAGARA MOHAWK POWER CORPORATION, TOWN OF MASSENA, NY, VILLAGE OF MASSENA, NY, FORT COVINGTON, NEW YORK, TOWN AND VILLAGE, COUNTY OF ST. LAWRENCE, NY,

Defendants-Intervenor-Defendants-Counter-Claimants,

POWER AUTHORITY OF THE STATE OF NEW YORK,

Defendant-Consolidated-Defendant-Counter-Claimant,

KEY BANK OF NORTH NEW YORK, N.A.,

Defendant-Consolidated-Defendant-Intervenor-Defendant,

WILLIAM J. BROCKWAY, LORETTA BROCKWAY, JAMES CHAPMAN, MARY CHAPMAN, ROBERT CHAPMAN, BURTON CHAPMAN, PAUL COMPEAU, CATHERINE COMPEAU, REAL C. COUPAL, THELMA B. COUPAL, HARRY GROW, LAURENT HEBERT, VINCENT JERRY, DANIEL JERRY, ERNEST L. JOCK, CARRIE JOCK, ALPHA LATRAY, DUANE STEWART, KAY STEWART, THOMAS TORREY, ELOISE TORREY,

Consolidated-Defendants-Intervenor-Defendants.

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), the United States District Court has subject matter jurisdiction over this action because the claims are brought under the laws and treaties of the United States.

Pursuant to 28 U.S.C. § 1292(a)(1), the Court of Appeals has jurisdiction because this Appeal is taken from an Interlocutory Order of the Honorable Judge Neal P. McCurn of the District Court of the Northern District of New York (the "District Court") entered on May 13, 2010, adopting the Report-Recommendation of Magistrate Judge George H. Lowe filed on March 4, 2010, and declining a request for an injunction, and an Order of the District Court entered on July 12, 2010, denying reconsideration of the application for an injunction.

On July 27, 2010, Defendants-Appellants filed a Notice of Appeal with the Clerk for the District Court appealing the Orders entered on July 12, 2010, and May 13, 2010. This Brief is filed pursuant to an Order dated September 23, 2011.

ISSUE PRESENTED

> Whether, to prevent the frustration of its jurisdiction over this Indian land claim action, the District Court should have enjoined a non-party Native American group's continued unlawful occupation and development of property that is within the land claim area involved in this case.

ANSWER: Yes. The District Court should have exercised its jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to enjoin the unlawful possession and use of property that is within the land claim area involved in the case.

STATEMENT OF THE CASE

In the subject action, Plaintiffs-Appellees have asserted an Indian land claim over, among other things, certain parcels of land located in the Town of Bombay which are owned by or in which Defendants-Appellants (the "Property Owners") have a lawful title and possessory interest. During the pendency of this land claim action, a non-party Native American group, known as Kanienkehaka Kanonhsesne and the Men's Council of the Great Law Longhouse in Akwesasne (the "Occupying Group"), forcibly and unlawfully took possession of a 230-acre parcel that is located within the land claim area and that is owned by Horst Wuersching ("Wuersching"), one of the Property Owners. Wuersching is a private individual, and is not a member of any Indian tribe. As a part of its unlawful occupation and

possession of Wuersching's private property, the Occupying Group altered the premises by clearing portions of the land, posting signs declaring that the land is Indian land, constructing roadways, and erecting permanent building structures. In addition, guards patrolled the property and prevented Wuersching, among others, from entering the property. Plaintiffs-Appellees have represented that they have no affiliation with or control over the non-party Occupying Group. In order to preserve land that is the subject of the underlying land claim action and restrain the unilateral occupation by a non-party of property within the jurisdiction of the District Court, the Property Owners sought, pursuant to the All Writs Act, relief by way of an Order to Show Cause and a Temporary Restraining Order against the Occupying Group.

Adopting the Report-Recommendation of Magistrate Judge George H. Lowe, District Court Judge Neal P. McCurn declined to sign the Order to Show Cause and Temporary Restraining Order. A subsequent Motion to Reconsider based upon new information regarding the continued occupation and development of Wuersching's Property was similarly denied by District Court Judge McCurn. The instant appeal seeks to overturn the determinations made by the District Court.

STATEMENT OF FACTS

Since December 1981, Wuersching has owned and held an approximately 230-acre parcel of land that is located adjacent to New York State Routes 37 and

37C in the Town of Bombay and which is referred to on Town of Bombay Tax Map as Parcel No. 18.-2-12 (the "Property"). [A. 72-75, 79-87.] The Property is located outside of the St. Regis Mohawk Tribe's Reservation, but within the land claim area that is the subject of this case. [A. 76-78.]

Between late December 2008 and early January 2009, a "For Sale By Owner" sign was posted on behalf of Wuersching at the Property. [A. 106.] In response, on or about January 21, 2009, the Occupying Group entered the Property without permission and posted tribal flags and a sign stating that the Property was now an "Akwesasne reclamation site." [A. 88-89.] The occupation and "reclamation" of the Property were confirmed in a statement released by the Occupying Group that same day. [A. 90.] The seizure of the Property by the Occupying Group was further addressed in an article entitled "Disputed Land Site of Controversy" which was published on February 12, 2009, in the Indian Times, a Native American news publication which, among other things, indicated that the occupation was in response to the "For Sale By Owner" sign posted on the Property. [A. 95-97.]

Heavy equipment was brought onto the Property by the Occupying Group, who also proceeded to cut trees, strip topsoil, and install a roadway for other development activities. [A. 69, 98-100.] Additional signs concerning the occupation were posted on the Property, and a "statement" fire was set and

maintained by the Occupying Group. [A. 101-104.] After entering and taking control of the Property, the Occupying Group excluded and blocked Wuersching from the Property in all respects. [A. 94, 98-100.]

On February 13, 2009, and February 19, 2009, contacts were made by the Property Owner's counsel with the attorneys for Plaintiffs-Appellees in this action regarding the wrongful occupation of the Property. [A. 69.] Those contacts indicated that the Occupying Group is not affiliated with the Tribal Plaintiffs and not acting under their authority or control. [A. 69.] In a subsequent meeting, Wuersching's personal counsel, Brian S. Stewart, was advised that the Occupying Group is not part of any of the three Tribal Plaintiffs in this case, that the Occupying Group maintains a "personal" claim to all of the land in Northern New York unrelated to any Treaty, and that the Occupying Group intends to develop Wuersching's Property into residential lots to be provided to the Occupying Group and other Mohawks. [A. 118.]

Wuersching approached law enforcement agencies for assistance in removing the trespassers to no avail. Wuersching obtained a Warrant of Eviction from the Bombay Town Court; yet, due to a long-standing policy of the Sheriff's Department not to enforce civil matters in the land claim area and the fact that the Property appeared as though the Occupying Group was no longer present, the Warrant was not executed. [A. 172-173.]

The Property Owners sought to have the District Court issue an Order directing the Occupying Group to show cause why they should not be enjoined and restrained from their unlawful entry onto the Property and from further clearing and developing it. [A. 67.] On March 4, 2010, Magistrate Judge Lowe issued a Report-Recommendation denying the Property Owners' application. [A. 175.] Magistrate Judge Lowe found, among other things, that the intrusion of the Occupying Group was "*de minimus*", that the damage caused by the Occupying Group was "limited", and that the premises may have been vacated by the Occupying Group. [A. 179-180.] In addition, Magistrate Judge Lowe found that assuming the All Writs Act applied, an alternative avenue for relief existed in State Court, which would prohibit the District Court from exercising any power it had under the Act. On May 13, 2010, the District Court issued an Order adopting the Report-Recommendation in whole. [A. 183-184.] Subsequently on July 12, 2010, the District Court issued an Order stating that "the newly discovered evidence [of further development and construction on the Property] . . . is ineffective to change the result of the former ruling" because the former ruling was "based on grounds independent of . . . the intrusion of the occupying group [being] *de minimus*." [A. 192.]

The non-party Occupying Group remains in possession of and continues to lay claim to the Property.

SUMMARY OF ARGUMENT

Relief is necessary in order to restrain an unlawful occupation of real property which is within the Indian land claim area that is the subject of this case. The unlawful occupation usurps the jurisdiction of this Court, deprives Defendants-Appellants of their rights and remedies in this action and threatens to render moot any remedy ultimately determined by the Court. The All Writs Act authorizes and empowers federal courts to fashion appropriate remedies to ensure the ends of justice when, as presented in this case, the facts warrant such extraordinary relief. Without the federal court's intervention through an order pursuant to its powers under the All Writs Act, the unlawful occupation of private land will continue indefinitely, interfering with the fair administration of justice and potentially jeopardizing the subject of the land claim. For these reasons and the reasons stated below, Defendants-Appellants are entitled to relief and the District Court's Order should be reversed.

STANDARD OF REVIEW

As a general matter, the circuit court affords deference to the district court and reviews the denial of a preliminary injunction for abuse of discretion. *Thornburgh v. American College*, 476 U.S. 747, 755 (1986), *rev'd on other grounds*, *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992). However, when the denial of a preliminary injunction "effectively award[s] victory in the

litigation," the district court's decision must undergo "greater scrutiny." *Romer v. Green Point Savings Bank*, 27 F.3d 12, 16 (2d Cir. 1994). Thus, "[w]hen a district court's order, albeit in the form of a TRO or preliminary injunction, will finally dispose of the matter in dispute, . . . the district court's decision must be correct (insofar as possible on what may be an incomplete record), and appellate review should be plenary." *Id.*

Furthermore, where the district court ruling rests solely on a premise as to the applicable rule of law, and the facts established are of no controlling relevance, the ruling may be considered under plenary review despite the appeal being from the entry of the denial of a preliminary injunction. *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 852 (2d Cir. 1996). In *Hsu*, this Court undertook a plenary review of a preliminary injunction order because the ruling resembled a grant of summary judgment where the facts were established and where the district court's consideration was not abbreviated due to any perceived time constraint. *Id.* at 852-853.

Here, it is submitted that the determinations of the District Court should be reversed under either measure of review. However, the greater scrutiny afforded by plenary review is appropriate where, as here, the District Court's denial of the request for an Order to Show Cause for injunctive relief effectively awards the Property to the Occupying Group based on the District Court's application of the

rule of law under the All Writs Act. In that regard, the District Court's denial of the Property Owners' request for a Temporary Restraining Order effectively awards victory to the Occupying Group and is reliant on the application of the rule of law – namely, that courts cannot exercise powers pursuant to the All Writs Act when there are alternative avenues for relief. Specifically, when asked to reconsider its denial, the District Court expressly stated that the decision to deny the relief sought was "based on grounds independent of [the Magistrate's factual] report that the intrusion of the Occupying Group is *de minimus*". Although the Property Owners certainly dispute this factual conclusion, the District Court's statement confirms that the facts presented by the Property Owners were neither germane nor relevant to the District Court's decision in light of the legal standard under the All Writs Act. As in *Hsu*, the core facts are undisputed – the non-party Occupying Group took possession of Wuersching's Property, built on the Property, and claimed the Property as its own to make use as it will for its Mohawk members in derogation of Wuersching's rights. It is noted that, like in *Hsu*, the District Court's consideration of the application for an Order to Show Cause and Temporary Restraining Order was not abbreviated – the District Court ruling was over a year after the application was filed. Given the nature of the District Court's ruling, plenary review is warranted.

ARGUMENT

POINT I

THE ALL WRITS ACT AUTHORIZES THE COURT TO ENJOIN THE OCCUPYING GROUP

The All Writs Act (the "Act") provides in relevant part that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). It is well settled that the Act authorizes federal courts "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). The Supreme Court further explained that the Act is "a legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Id*. Indeed, "a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

In addition, "[a]n important feature of the Act is its grant of authority to enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction." *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985). To

this end, the power conferred by the All Writs Act extends, in appropriate circumstances, to non-parties to the original action who are in a position to frustrate the implementation of a court order or the proper administration of justice. *New York Telephone Co.*, 434 U.S. at 173-174. In a subsequent decision, this Court further clarified the applicability of the Act to enjoin non-parties, stating that "if jurisdiction over the subject matter of and the parties to litigation is properly acquired, the All Writs Act authorizes a federal court to protect that jurisdiction even though non-parties may be subject to the terms of the injunction." *United States v. Int'l Bros. of Teamsters, Chauffeurs*, 907 F.2d 277, 281 (2d Cir. 1990); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 55-57 (N.D.N.Y. 2003) (in order for injunctive relief ordering New York City to obtain a SPDES permit within a certain period of time to be effective, the district court directed non-party New York State Department of Environmental Conservation ("DEC") to complete the application for the SPDES permit within eighteen months, recognizing that ordering the City to obtain the SPDES permit within a certain period of time would be ineffective if the DEC, which was the only agency with authority to issue such a permit, failed to cooperate), *aff'd in part and remanded in part (for recalculation of a penalty assessed)*, 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252, 127 S. Ct. 1373 (2007).

A. The District Court Has Jurisdiction Over the Land Taken by the Occupying Group

The District Court has jurisdiction over the Property as part of its jurisdiction over the land that is the subject of the underlying land claim action. The same jurisdiction affords the District Court the authority to enjoin the Occupying Group from entering, posting, and occupying the Property. The Property at issue is within the geographical area of the land claim that is before the District Court in the consolidated action, including *The Canadian St. Regis Band of Mohawk Indians v. State of New York, et al.*, Civil Action No. 82-CV-783, and *The St. Regis Tribe by the St. Regis Mohawk Tribal Council and The People of the Longhouse at Akwesasne by the Mohawk Nation Council of Chiefs v. State of New York, et al.*, Civil Action No. 89-CV-829 (collectively, the "St. Regis Mohawk Land Claim"). The consolidated actions were brought on behalf of descendants of the Indians of the Village of St. Regis seeking a declaration of their ownership and right to possess certain land in Franklin and St. Lawrence Counties. The District Court has undisputed, original jurisdiction over the St. Regis Mohawk Land Claim under 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1343, and 28 U.S.C. § 1362. The District Court acquired jurisdiction over the real property for the purpose of resolving the St. Regis Mohawk Land Claim and is, therefore, entitled to exercise that jurisdiction over the real property that is the subject of the dispute between the Property Owners and the Occupying Group. *See The Cayuga*

Indian Nation of New York v. New York, et al., 544 F. Supp. 542, 548, 550 (N.D.N.Y. 1982) (wherein the District Court held that it had first acquired jurisdiction over the real property in Cayuga and Seneca Counties at issue in the Cayuga Indian land claim action at the filing of the Cayuga land claim and acquired that jurisdiction for the purpose of fully resolving the Cayuga land claim and determining all questions relating to the subject matter of the lawsuit).

Additionally, federal court is the appropriate court of exclusive jurisdiction to determine this matter involving the Occupying Group's possession of privately owned land within the boundaries of the St. Regis Mohawk Land Claim. Congress has explicitly limited the civil jurisdiction over Indian land-related matters in New York, stating that "nothing herein contained shall be construed as conferring jurisdiction on the courts 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 (September 13, 1952)." *See* 25 U.S.C. § 233. While the Occupying Group has not brought a formal complaint, their encroachment on and occupation of the Property is ostensibly a claim to title of the land relating to the history of land dating back to the 1700's and certainly involves Indian land to the extent the dispute concerns land at issue in the St. Regis Mohawk Land Claim. [*See* R. 115 (Statement of the Occupying Group explaining its claim to the land extends back to 1763).] Further, the adjudication of the Occupying Group's claim

and any possessory interest therein falls under the District Court's jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1362 and 28 U.S.C. § 1367. *See, e.g.*, *Oneida Indian Nation v. Madison County*, 376 F. Supp. 2d 280, 282 (N.D.N.Y. 2005) (issuing a preliminary injunction pursuant to the All Writs Act in order to aid in and preserve the court's jurisdiction over and determination of an Indian land claim action over which it had jurisdiction under Sections 1331, 1362 and 1367). Specifically, Section 1367 expressly authorizes a District Court to exercise "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." This dispute is such an instance of supplemental claims being so intertwined with the case and controversy that jurisdiction properly rests with the District Court.

B. The Occupying Group's Possession of the Property Frustrates the District Court's Jurisdiction

Notwithstanding its conclusion that its jurisdiction was not threatened because the Occupying Group's actions are *de minimus*, it is submitted that the acts by a non-party Native American group to enter, post, occupy, and exclude the titled owner and all others from property that is part of the pending land claim action is indeed disruptive and frustrates the very jurisdiction of the District Court. First, it is in all respects an exercise of self-help by a non-party to acquire a

unilateral remedy over land that is the subject of the pending action and against a member of a named party to the pending action. Second, the remedy unilaterally fashioned by the Occupying Group is one which the Plaintiffs-Appellees themselves would not be entitled to in the action based on current law. *See Cayuga Indian Nation of New York v. Cuomo*, No. 80-CV-930, 1999 U.S. Dist. LEXIS 10579, *96-97 (N.D.N.Y. Jul. 1, 1999) Third, the unilateral occupation is in the context of an Indian land claim action by a Native American group that claims some tribal interest in the Property. Lastly, the Occupying Group has actively and continually developed the Property during the course of the pending action and thereby has and continues to irreparably change the Property while the land claim action that covers the Property is pending.

There is a recognition that adjudicating a claim involving real property necessitates that the same court have control over the property in order ultimately to fashion relief. *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477-478 (1936). The Occupying Group's occupation and development of the Property effectively usurps the District Court's jurisdiction and undermines its ability to adjudicate the competing claims in the land claim action. Allowing the development of property that is the subject of the pending action to continue unabated by a non-party to the action renders illusory Wuersching's ownership interest and any possessory relief later afforded by the District Court. The

requested relief under the All Writs Act would preserve and protect the District Court's jurisdiction and allow the proper adjudication of the claims in the land claim action. Consequently, it is submitted that the District Court has and should have exercised its jurisdiction with respect to the application filed by the Property Owners for injunctive relief against the non-party Occupying Group.

POINT II

THE PROPERTY OWNERS HAVE NO ADEQUATE ALTERNATIVE REMEDY

It is submitted that the District Court similarly erred in concluding that Wuersching has an adequate alternative remedy in State Court. Despite having an Order and Warrant of Eviction issued by the State Court, the Franklin County Sheriff (whose responsibility it is to execute such warrants) has a long-standing policy of not enforcing civil matters within the land claim area. [A. 172.] This policy of non-involvement has been addressed by New York State courts. In *St. Regis Dev. Corp. v. Nemier*, 166 A.D.2d 861, 563 N.Y.S.2d 189 (3d Dep't 1990) ("*Nemier*"), the petitioner, a tribal organization, obtained a temporary injunction from the New York State Supreme Court directing that two members of the tribe relinquish control and possession of a bingo hall located on the reservation. The order also included enforcement provisions which authorized and directed any enforcement of competent jurisdiction to assist in its execution. When

the Franklin County Sheriff refused to implement the temporary injunction, the petitioners brought a mandamus proceeding under Article 78 of the New York Civil Practice Law and Rules seeking to compel the Sheriff to remove the two tribal members. The Sheriff resisted the application, arguing that the unrest on the reservation would only be exacerbated by service of the order. The trial court denied the application. *Id*.

On appeal, New York's intermediate appellate court, held that:

> Mandamus is an extraordinary remedy; its issuance is largely guided by principles of equity. If granting the requested relief would cause public disorder, it is sounder exercise of judicial discretion to deny the request. Supreme Court, conscious that bringing its order to bear could exacerbate the turmoil already pervading the Indian Reservation, dismissed the petition. Irrespective of the relief demanded, we are of the view that the Supreme Court's refusal to order respondent to enforce the injunction was a proper exercise of its discretion.

Id. at 862, 563 N.Y.S.2d at 190 (citations omitted); *see also N.Y. Assoc. of Convenience Stores v. Urbach*, 181 Misc. 2d 589, 594, 694 N.Y.S.2d 885, 890 (Sup. Ct. Albany County 1999), *aff'd*, 275 A.D.2d 520, 712 N.Y.S.2d 220 (3d Dep't 2000) (in an action seeking to collect sales tax on cigarettes sold on reservations, the court held that mandamus relief should not be granted if the granting of such relief would cause public disorder).

Contrary to the District Court's determination, the same concern over "civil unrest" that resulted in the court's refusal to issue mandamus in *Nemier* exists and

undermines the use of State Court in the instant case. As expressed in Mr. Stewart's March 3, 2009, letter to Chief Counsel for the New York State Police, when Mr. Stewart asked Roger Jock ("Jock"), the apparent leader of the Occupying Group, whether he [Mr. Stewart] could go onto the Property, Jock told him that if he did "it would start a chain of events that he could not control and that it would be unsafe." [A. 119.] True to Jock's word, when Mr. Stewart went to the Property to meet with the Occupying Group, his tires were slashed. [A. 167.]

It is submitted that there is plain and apparent futility to seek further relief in the form of mandamus or otherwise from the state courts. Although courts should not resort to the All Writs Act when another method of review would suffice, such as when an adequate alternative remedy at law exists, a writ should issue when the equities require an extraordinary form of relief. *See Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). However, unlike in *Clinton*, the only case cited in support of this finding in the Magistrate's Report-Recommendation, in this case, further State Court action offers neither an adequate nor sufficient remedy. In such a case as this where there is no adequate alternative remedy, the District Court should exercise its jurisdiction pursuant to the All Writs Act. *See generally Castle Hills Prop. Co. v. CAPX Realty, LLC*, Case No. 4:10cv6, 2010 U.S. Dist. LEXIS 69315 (E. Dist. Tex. May 12, 2010) (District Court exercising jurisdiction over a state court action for eviction); *see also United States v. Young*, 806 F.2d 805, 807

(8th Cir. 1986) (affirming District Court correctly grant of a writ of assistance to enforce its eviction order because the government was entitled to possession of the property); *United States v. 63-39 Trimble Rd.*, 860 F. Supp. 72, 73 (E.D.N.Y. 1994) (issuing a writ of assistance evicting an occupant pursuant to the All Writs Act); *United States v. Porter*, Case No. 4:CV92-3293, 1993 U.S. Dist. LEXIS 4211, 93-1 U.S. Tax Cas. (CCH) P50, 154 (Dist. Neb. 1993) (issuing a writ of assistance to evict occupants of a property where the owner demonstrated it was entitled to possession under Nebraska state law).

Here, Wuersching's ownership interest and entitlement to possession of the Property is clear. The wrongful occupation and development of the Property by a non-party Native American group is clear. The presence of the Property within the land claim area that is the subject of this case is clear. Yet, absent relief in District Court, there will be no end to the occupation and no remedy for Wuersching as demonstrated by the Record in this matter and by other precedent.

POINT III

FAILING TO ISSUE RELIEF UNDER THE ALL WRITS ACT IS CONTRARY TO PUBLIC POLICY AND RESULTS IN INJUSTICE TO THE LAWFUL PROPERTY OWNER

In *Pennsylvania Bureau of Correction v. United States Marshals Service et al.*, 474 U.S. 34 (1985), the Supreme Court described the All Writs Act as "a

residual source of authority to issue writs that are not otherwise covered by a statute, . . . empowering federal courts to fashion extraordinary remedies when the need arises." *Id.* at 43; *see generally Zucker v. Menifee*, Case No. 03 Civ. 10077, 2004 U.S. Dist. LEXIS 724 (S.D.N.Y. (Jan. 21, 2004) (a district court invoking its power under the All Writs Act where law and justice required).

The Occupying Group's intrusion onto and development of the Property constitutes an extraordinary attack upon the jurisdiction of the District Court under any assessment. The harm already inflicted and being inflicted on Wuersching by the non-party Occupying Group is real and the divestment of his ownership rights is in all respects comprehensive. The fact that the harm involves property which is the very subject of the action pending in District Court manifestly supports the exercise of jurisdiction under the All Writs Act. In the absence of the requested relief, the lawful owner will be divested of his property and property rights by the unilateral actions of a non-party Native American group. As a matter of policy and law, the District Court can and should have prevented this injustice by issuing an appropriate order. Because the facts and circumstances of this case present an extraordinary situation, an extraordinary remedy is needed to ensure justice and a fair adjudication of the pending action.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that this Court reverse and remand the District Court's Orders denying a preliminary injunction.

DATED: October 24, 2011

HISCOCK & BARCLAY, LLP

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,

Plaintiff-Appellee,

ST. REGIS MOHAWK TRIBE, BY THE ST. REGIS MOHAWK TRIBAL COUNCIL, PEOPLE OF THE LONGHOUSE AT AKWESASNE, BY THE MOHAWK NATION COUNCIL OF CHIEFS,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor Plaintiff-Appellee,

v.

THE COUNTY OF FRANKLIN, THE TOWN OF BOMBAY AND DEFENDANT CLASS OF INDIVIDUAL PROPERTY OWNERS,

Defendants-Appellants,

THE STATE OF NEW YORK, HUGH CAREY, as Governor of the State of New York, THE COUNTY OF ST. LAWRENCE, THE VILLAGE OF MASSENA, THE TOWN OF MASSENA, THE TOWN AND VILLAGE OF FORT COVINGTON, FARMERS NATIONAL BANK, n/k/a KEY BANK OF NORTHERN NEW YORK, N.A., NATIONWIDE MUTUAL INSURANCE CO., NIAGARA MOHAWK POWER CO., MARINE MIDLAND PROPERTIES CORP., WALSH REALTY CORP. AND CANADIAN NATIONAL RAILWAYS, ST. LAWRENCE SEAWAY DEVELOPMENT CORP., DAVID W. OBERIN, AND POWER AUTHORITY OF THE STATE OF NEW YORK, THE STATE OF NEW YORK, MARIO M. CUOMO as Governor, et al. individuals,

Consolidated Defendants-Intervenor Defendants.

CERTIFICATE OF COMPLIANCE

Docket No. 10-3115

I, **ANGELA C. WINFIELD**, not a party to the action, hereby certify that the foregoing Brief complies with the type-volume limitation set forth in Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The total number of words in the Brief is 4,816.

DATED: October 24, 2011

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