UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,
Plaintiff,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,
Defendants.

Civil Action Nos.
82-CV-783
82-CV-1114
(NPM)

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

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK, *et al.*,
Defendants.

MEMORANDUM OF MOHAWK COUNCIL OF AKWESASNE IN OPPOSITION TO ALL DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

Respectfully submitted,

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I. INTRODUCTION

A. The Two Claims, Island and Mainland

Three Mohawk entities[1] filed suits during the 1980's against the State of New York, several of its local governments (hereafter referred to as "Municipalities"), the New York

[1] For ease of reference, the Mohawk plaintiffs will be referred to as follows: The Mohawk Council of Akwesasne, which was titled the Canadian St. Regis Band of Mohawks at the time the complaint was filed, will be referred to as "MCA" or "the Canadian Tribe."

Power Authority ("NYPA") and various private defendants. There are two Mohawk claims, brought in separate suits joined for trial as follows:

(1) The Island claim, 82-CV-1114, 89-CV-829; 89-CV-829. This claim is based on New York's illegal patenting of three Mohawk Islands in the St. Lawrence River, after these Islands were determined to be in the United States by an international commission established by the Treaty of Ghent, 8 Stat. 218, 222 (Dec. 24, 1814), to set the precise boundary between British North America and the United States.

(2) The mainland claim, 82-CV-783, 89-CV-829; 89-CV-829. This claim is based on the illegal purchase by the State of New York of certain areas of the reservation established for the Indians of the Village of St. Regis in the Treaty of May 31, 1796 between the United States and the Seven Nations of Canada, 7 Stat. 55. The Treaty provided the Mohawks with a reservation of some 24,900 acres. The greater part of the reservation, some 14,500 acres, unquestionably remains in Mohawk ownership. The Mohawks claim that in a series of transactions between 1816 and 1845, the State of New York unlawfully took approximately 10,400 acres of lands recognized as owned by the Mohawks under the Treaty of May 31, 1796.

The Mohawks claim that the transactions by which the State took both the Islands and mainland lands violate the Indian Non-Intercourse Act, 25 U.S.C. § 177, which provides in pertinent part that "no purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.* (emphasis

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The St. Regis Mohawk Tribe will be referred to as "the Tribe." The People of the Longhouse, who are now called the Mohawk Nation Council of Chiefs, will be referred to as "the Nation." The entire group will be referred to as "the Mohawks."

supplied). The complaints all allege these transactions violate the Indian Non-Intercourse Act because they were not approved under federal law by the United States, an allegation defendants do not seriously dispute. Later, the United States filed two similar complaints raising separately these two claims as trustee for the Mohawks.

B. Defendants' Motions

The State, Municipalities, and NYPA (collectively referred to as "defendants") have now each filed motions for judgment on the pleadings on both Mohawk claims. These defendants argue that, because the complaints filed two decades ago included requests for a declaration that the Mohawks own and are entitled to possess lands taken from them in violation of the Indian Non-Intercourse Act and sought a restoration of these lands – at a time when such relief seemed permitted as to all the claims by existing case law[2] – the Mohawks are now entitled to no relief of any kind whatever and their underlying claims must be dismissed in their entirety. State Memo at 6, 15; NYPA Memo at 11-12, 14 & n.4; Municipalities Memo at 5-6.

The defendants rely chiefly on the Second Circuit's decision in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), and the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005), as barring any remedy in the Mohawk claim – or, in fact, any land claim by any tribe under the Indian Non-Intercourse Act[3] – because some of the relief originally pleaded in the Complaints, *i.e.*, restoration of possession and

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[2] As the Second Circuit stated in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 267-68 (2d Cir. 2005), the "legal backdrop . . . has evolved" as this case has proceeded over 25 years. *See infra* Part VI.

[3] *E.g.*, State Memo at 12 ("The laches doctrine embraced by the Second Circuit in *Cayuga* defeats all such possessory claims.").

declaration of ownership of the lands, in their view has now been barred by the Second Circuit in *Cayuga*. Defendants' argument, simply put, is that any Indian land claim based on illegal transactions that occurred many decades ago is automatically barred by laches, irrespective of the facts – such as the history concerning the lands claimed and present circumstances concerning them. This is certainly not the law, nor is it the holding of either *Cayuga* or *Sherrill*, as we explain next below.

C. *City of Sherrill*

In *City of Sherrill,* the Oneida Nation sought a single, specific remedy – to bar state and local property taxation on parcels of land which the Nation had repurchased in 1997 and 1998 within the Nation's original 300,000 acre reservation, 190 years after the State of New York had acquired virtually the entire reservation from the Nation.[4] 544 U.S. at 202-03. The *Sherrill* Court noted that since the mid-19th century virtually all Oneidas had resided elsewhere, *id.* at 202, and that at federal urging, almost all the Oneidas had left the State of New York, removing to either Wisconsin or Canada. *Id.* at 206-07, 214-15. *See also* the Appendix to this Memorandum, Declaration of Peter Michael Whiteley, Ph.D. (hereafter "Whiteley") at 29, response to Question 30. In a prior case, the Oneida Nation had successfully claimed the transaction by which New York acquired the lands in the early 19th century was void under the Indian Non-Intercourse Act. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II).* In *Sherrill*, the Court repeatedly stated expressly that it was not disturbing its holding in *Oneida II*, 544 U.S. at 202-03, 209, 213-14, 221. However, observing that "[f]or two centuries, governance of the area in which the properties

[4] The Court in *Sherrill* found that by 1920, the Oneidas retained only 32 acres of land in New York. 544 U.S. at 210 n.3.

are located has been provided by the State of New York and its county and municipal units," *id.* at 202, the Court in *Sherrill* rejected the Oneidas' claim for several reasons: first, because generations have passed during which non-Indians had owned and developed the entire 300,000 acre area except for 32 acres, and at least since the middle years of the 19th century most Oneidas had resided elsewhere, *id.* at 202;[5] second, because of the dramatic changes in the property and the "longstanding, distinctly non-Indian character of the area and its inhabitants," *id.* at 202, 216-17; third, because of the regulatory authority constantly exercised by New York State and its counties and towns over the lands, *id.* at 202, 216; fourth, because of the Oneidas' long delay in seeking judicial relief. *Id.* at 202, 216-17.

The Court in *Sherrill* concluded that "the appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory," 544 U.S. at 214 (emphasis supplied), and relied on 2000 census data showing that "over 99% of the population in the area is non-Indian," and that non-Indians own 98.5% of the land in the area. *Id.* at 211; *see also id.* at 219 (area "today overwhelmingly populated by non-Indians"). The *Sherrill* Court stated that "in the different, but related, context of the diminishment of an Indian reservation . . .'[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use' may create 'justifiable expectations'" that tribal authority has been displaced by state jurisdiction and cannot be revived. *Id.* at 215 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977) & citing *Hagen v. Utah*, 510 U.S. 399, 421 (1994)). The Court in *Sherrill* then observed that, as in the cases involving diminishment of a reservation, "[s]imilar justifiable

[5] By contrast, the *Sherrill* Court cited *United States v. Boylan*, 265 F. 165 (2d Cir. 1920) with approval, 544 U.S. at 210 n.3, as a case involving a tribal claim to lands it had never left and had "occupied the land continuously for over a century." *Id.*

expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction . . . merit heavy weight here," 544 U.S. at 215-16, and barred the Oneidas' claim to displace state with tribal governance in the area. *Id.* at 217-18.

The Court in *Sherrill* recognized, as it had in *Hagen*, 510 U.S. at 410-11, that other Supreme Court decisions have determined that tribal rights to a reservation have not been diminished where an area retains a sizeable Indian population and has not lost its Indian character. *Sherrill*, 544 U.S. at 219-20. In *Solem v. Bartlett*, 465 U.S. 463 (1984), for example, the Court held a reservation had not been diminished and tribal rights had not been lost where "roughly two-thirds of the Tribe's enrolled members live" in the area, its seat of tribal government is located there, important tribal activities take place in the area and the entire population of the area is "now evenly divided between Indian and non-Indian residents." *Id.* at 471-72 & n.12, 480. *See also Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962). In its most recent decision considering whether a tribe's rights on an Indian reservation had been diminished by acquisition of lands by and the presence of a majority non-Indian population, the Supreme Court narrowly limited its holding of diminished tribal rights to particular areas with predominantly non-Indian populations, in contrast to lands on which Indians still lived, remarking that the Court had similarly limited its holding in *Hagen* as well. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-58 (1998).

In finding laches a bar to the relief sought in *Sherrill*, the Supreme Court also specifically relied on *Felix v. Patrick*, 145 U.S. 317 (1892), in which the Court held that the heirs of an Indian could not establish "a constructive trust over land their Indian ancestor had conveyed in violation of a statutory restriction" three decades previously, during which time

the lands had greatly changed in value, and a large portion of the tract had been platted as an addition to the City of Omaha. 544 U.S. at 217-18. Similarly, the *Sherrill* Court relied upon *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926), to support its conclusion that it was impracticable to return Indian control to land that generations ago had passed into the possession of innumerable non-Indian purchasers. 544 U.S. at 219. While the Court in both *Felix* and *Yankton* found that it was impracticable to restore title to the Indian plaintiffs, in both cases the plaintiffs were awarded money damages. *Yankton*, 272 U.S. at 356-59; *Felix,* 145 U.S. at 333-34. [6] The *Sherrill* Court also relied extensively on this Court's decision in *Oneida Indian Nation v. N.Y. County of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000), denying the Nation an ejectment remedy. *Sherrill*, 544 U.S. at 209-11, 213, 219.[7]

Both the facts here, and the remedies sought, differ markedly from *Sherrill*. In *Sherrill* the only relief sought concerned governmental authority over scattered tracts of land in a largely non-Indian area. Here damages are a portion of the remedy. The Supreme Court in *Sherrill* was clear that it was not reversing its decision in *Oneida II*, which upheld a tribe's right to damages for violation of the Non-Intercourse Act. The Court in *Sherrill* concluded:

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[6] In *United States v. Imperial Irrigation Dist.*, 799 F. Supp. 1052 (S.D. Cal. 1992), relied on by Municipalities Memo at 8-9, the court similarly denied ejectment but granted a monetary damage remedy for a longstanding flooding of Indian lands.

[7] Finally, the Court in *Sherrill* considered the doctrine of long acquiescence between two states in exercise of dominion and sovereignty over territory, as applied in the Court's "original jurisdiction state-sovereignty cases" as providing a "helpful point of reference." 544 U.S. at 218-19. *See also New Jersey v. New York*, 523 U.S. 767, 786-87 (1998). Acquiescence is not a doctrine that can be applied against the United States. *United States v. California*, 332 U.S. 19, 40 (1947). In addition, where a government has not acquiesced in a boundary change – as is true with the Mohawks here as we show in Part III.C, *infra* – the Supreme Court has held that laches cannot be applied to bar that government's claim. *Rhode Island v. Massachusetts*, 40 U.S. 233, 272-74 (1841).

> In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*.

544 U.S. at 221.

Nor did the Court in *Sherrill* consider a situation even remotely like the Island claim here or the Hogansburg Triangle, which we discuss within.

D. *Cayuga*

The Second Circuit's holding in *Cayuga* was expressly based both on the Supreme Court's ruling in *Sherrill* and the findings of this Court in the remedy stages of that case, holding that ejectment was barred by laches. 413 F.3d at 268, 277. Relying on this Court's findings "after serious consideration of this exact question," the Second Circuit held that laches bars "the possessory land claim presented by the Cayugas here." *Id.* at 277.

In *Cayuga*, the Second Circuit noted that in 1795 the Cayuga ceded all of their land in New York except for three square miles (1,920 acres) and that in 1807 New York purchased that remaining tract, leaving the Cayuga with no reservation land at all and only a small population in New York.[8] *Id.* at 268. Under those extreme facts, with almost 200 years since the Cayuga occupied a reservation and very little Cayuga population in the State, the Second Circuit, in a divided opinion, held that "[b]ased on *Sherrill*, we conclude that the possessory land claim alleged here is the type of claim to which a laches defense can be applied." *Id.* at 268. The court then went through a laches analysis that it applied to the claim, rather than to

[8] This Court in *Cayuga Indian Nation v. Cuomo*, Nos. 80-CIV-930, 80-CIV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999) (*Cayuga X*) likewise determined that the 64,000-acre tract involved in *Cayuga* "today bears almost no resemblance to the undeveloped state of that property in the 1790s" and that this "complete transformation is directly attributable to these defendants and their forbears." *Id.* at *26.

This Court also determined that today there are 464 Cayugas, about two-thirds of whom live in New York, but virtually none on the 64,000-acre tract claimed. *Id.* at *23. Other Cayugas removed to Oklahoma.

the remedy, and found on the facts before it that Cayuga's claim was barred. There was a strong dissent, and a strong argument can be made that *Cayuga* did not follow the holding of *Sherrill*, which focused on what remedies were appropriate, nor the holdings of *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) and *Oneida II, infra* Part VI, and that *Cayuga* does not follow other decisions of the Second Circuit aside from those cases. *See infra* Part IV. But what is most important for present purposes is that the facts of the Mohawk claims do not fit at all within the standard of *Cayuga* for dismissal.

More particularly, the Second Circuit in *Cayuga* applied the *Sherrill* decision to the land claim in *Cayuga*, and concluded that laches barred that land claim because, as in *Sherrill*: (1) "[g]enerations had passed during which non-Indians had owned and developed the area that once composed the Tribe's historic reservation," 413 F.3d at 277, consisting of 64,000 acres, a "large swath of central New York State," where the Tribe sought "the ejectment of tens of thousands of landowners," *id.* at 275; (2) "at least since the middle years of the 19th century, most [tribal members] had resided elsewhere," *id.* at 277; (3) "the longstanding distinctly non-Indian character of the area and its inhabitants," *id.*; (4) "the distance from 1805 to the present day," *id.*; (5) "the Tribe's long delay in seeking equitable relief against New York or its local units," *id.*; and (6) "developments in [the area] spanning several generations." *Id.*

As this Brief will show in detail in Part III, factors (1), (2), (3), (5), and (6) are clearly not applicable to the Mohawk's Island claim, nor are they applicable to the mainland claim, except perhaps factor (3) (non-Indian character of the two one-mile squares, a minor part of the claim). In short, the only common factor this case shares with *Sherrill* and *Cayuga* is the

passage of time, and even that reflects vastly different circumstances, with a large Mohawk population remaining in the area and diligently asserting its rights.

For the Islands claim, as we discuss in detail below, no non-Indians had lived on the Islands for many years before the Mohawks brought their claims. All non-Indians had been entirely removed decades ago by the State of New York, and the only non-Indian entities using any of the Islands are NYPA and State of New York Parks Department. As for NYPA, the Federal Power Act provides for hydroelectric projects to function without disruption whether the lands where they are located are Indian owned, federal lands, or privately owned. Moreover, in its recent license renewal decision, the Federal Energy Regulatory Commission expressly renewed NYPA's license with a provision that if the Mohawks established that they owned the land and that it is part of a federal reservation, there could be no disturbance in NYPA's operation of the project, but annual payments to the Mohawks would be set, as they are for other power projects using Indian lands. *See infra* at 16-17. *See also Mont. Power Co. v. F.P.C.*, 459 F.2d 863 (D.C. Cir. 1972), *cert. denied*, 408 U.S. 930 (1972). The existence of the Federal Power Act and its attendant administrative procedures for compensating tribes and protecting their interests when their lands are used for such a project precludes a finding that the Mohawk claim for the Islands falls within the reasoning of either *Sherrill* or *Cayuga*. *See infra* Part III.A. Nor is there any possible basis for subjecting the Mohawks to laches for failure to assert their rights to the Islands, which they have raised over and over through the years. *See infra* Part III.C.

As for the mainland claim, as shown in detail in the Opposition of the Tribe and Nation and the declarations filed with it, the demography and land ownership patterns are completely distinct from those at issue in *Sherrill* or *Cayuga*. And, unlike the tribes in

Sherrill and *Cayuga*, the Mohawks never moved out of their contiguous reservations in New York and Canada, have a current population of approximately 24,000 people, still possess most of their reservation lands, and are a thriving and important part of the surrounding community. *See infra* Part III.B. Neither the facts on which *Sherrill* and *Cayuga* are based, nor their legal reasoning, support dismissal of either of the Mohawk claims.

II. THE STANDARD OF REVIEW

As demonstrated in the Tribe and Nation's Opposition, to succeed in their motions, Defendants must show that the Mohawks can prove no set of facts that would entitle them to relief. That is not the case here.

III. THE FACTUAL CIRCUMSTANCES OF THE MOHAWK CLAIMS DIFFER MARKEDLY FROM THOSE IN *SHERRILL* OR *CAYUGA*.

A. The Mohawk claim to the Islands is in no way governed by *Cayuga*.

The factual and legal circumstances in *Sherrill* or *Cayuga* are not even remotely like the Mohawk Island claim.[9] While resolution of those cases turned solely on judicial interpretation of the Indian Non-Intercourse Act, this claim implicates an additional Act of Congress – the Federal Power Act – a statute that includes detailed and specific provisions to assure continual operation of power projects, whether the land on which they are located is Indian-owned or not. Further, no non-Indian person or entity other than NYPA and the State of New York have possessed any part of the Islands or asserted any ownership over them for over fifty years. Nor will sustaining the Mohawks' claim to ownership of the Islands in any way disrupt NYPA's use of the Islands, because that issue has already been addressed by Congress in the Federal Power Act and by the Federal Energy Regulatory Commission in the

[9] MCA endorses the Statement of Facts in the Tribe and Nation's Opposition and in the Tribe and Nation's separate "Response to Defendants' Statements of Material Facts."

renewal of NYPA's license in 2003. If this Court were to find that the Mohawks hold underlying title to the Islands, as it should, federal law precludes restoring the Mohawks to actual possession of lands forming part of the project or in any way interfering with the operation of the project. The remedy provided is an annual payment for the use of the Island for the production of electricity under section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e). Neither *Sherrill* nor *Cayuga* considered a situation where an act of Congress so wholly controls the impact of tribal ownership of land.

1. The Islands have long been out of private ownership.

The facts, as shown in the complaints, are that the Mohawk claim encompasses three Islands (one of them a set of small islands): Barnhart Island, Baxter Island (also known as Croil Island) and the Long Sault Islands. The Mohawks had undisturbed possession of and exercised ownership over these Islands from the time of first European settlement until after the War of 1812, when the Islands were first determined to be part of the United States. Whiteley at 8-9, responses to Questions 19, 20. These were three of the many islands that formed a part of the Mohawk territory north and south of the Saint Lawrence River in this area. The Mohawks used the Long Sault Islands for hunting and fishing, and archaeological evidence indicates aboriginal importance. Whiteley at 30-31, response to Question 31. Portions of Barnhart and Baxter Islands were leased by the Mohawks to non-Indians in the late 18th and early 19th centuries, and after the War of 1812 the State of New York illegally patented them to others. Whiteley at 11-13, 15, responses to Questions 21, 22, 24.

Thirty years later, in 1853, Barnhart complained to the State of New York that he had a valid lease to the Island from the St. Regis Indians, protected by the Treaty of Ghent. Barnhart argued that New York's transfer of the land to Ogden violated his leasehold rights.

The State Assembly agreed, and paid Barnhart for his leasehold interest. Later the Mohawks complained that if the tenant should be paid, so should the owner. The Assembly report recognized the St. Regis ownership as uncontested, and the Assembly passed legislation in 1856 to pay the St. Regis Indian back rent (at $20 per year) for certain years, and $1,000 as additional compensation. There are issues over whether the money was ever paid, and whether it was for back rent or title, but the Mohawks were satisfied that they had established their ownership of the Islands. The State on the other hand, took the position that it acquired title by this payment, although there was no agreement signed by the Mohawks, much less one approved by the United States. *See* Whiteley at 15-17, response to Question 25.

At the time these complaints were filed in the 1980s, the three Islands had long been totally out of private "ownership." Long Sault Island remains entirely uninhabited. In 1953, at the time of the license to NYPA under the Federal Power Act, Barnhart and Baxter Islands had a small number of non-Indian private residents. The State of New York through purchase or eminent domain ejected them all and, according to its view of the law, transferred ownership of those two Islands to NYPA. *See* Whiteley at 73, response to question 38. The Saint Lawrence Hydro-electric Project uses Barnhart Island and part of Baxter Island as anchors for the Robert Moses Dam and for various NYPA installations. A small State Park, aptly named the Robert Moses State Park, is located on Barnhart Island within the boundaries of the power project. These two Islands are otherwise uninhabited.[10]

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[10] It is interesting to note that Canada also had to deal with islands owned by the Mohawks that had been leased with unfavorable terms and, unlike the United States so far, protected the Mohawk interest. In *R. v. McMaster*, [1926] Ex. C.R. 68, the Exchequer Court of Canada considered such a situation. The Court stated the facts as follows:

> The property in question . . . Thompson's Island, was in Indian occupation from the date of the proclamation of 1763, and doubtless prior to that date,

2. Restoration of Mohawk title would not disrupt NYPA's operations.

NYPA argues in its motion to dismiss, relying on *Cayuga*, that recognition of Mohawk title to the Islands would interfere with operation of NYPA's hydroelectric project, thus causing a major disruption to the people of the New York area who rely on electricity from the project. NYPA Memo at 13-14. This is plainly not so.

As NYPA agrees, "in 1953, the NYPA was granted a license from the Federal Power Commission for the construction and operation of a hydro-electric power facility, which came to be known as the St. Lawrence Project." NYPA Memo at 7. The Federal Power Act, under which NYPA is licensed, establishes the law and Federal policy on use of Indian lands for federally-licensed power projects. Section 4(e) of the Federal Power Act permits use of Indian lands for federally licensed hydroelectric projects if the Federal Energy Regulatory Commission (FERC) finds that it is not inconsistent with the purpose of the Indian reservation involved. The Act also sets a fair policy of compensation to the Indians for the use of their land, and authorizes the Secretary of the Interior to seek provisions for their protection. Section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e), provides in pertinent part:

> All licenses issued under this Part shall be on the following conditions:
>
> > (e)(1) . . . . That when licenses are issued involving the use of . . . tribal lands embraced within Indian reservations the Commission shall, . . . in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in

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> until 1817, when the same was leased in writing, to one David Thompson by certain chiefs of the Indian tribe then in occupancy of the same, and which constituted a part of what was known as the St. Regis Indian Reserve. The lease was for a period of 99 years and contained a covenant for renewal . . . for a term of 999 years.

The Court held that the lease was invalid under the 1763 Act and that the land belonged to the Crown for the benefit of the Indians. *Id.*

> [25 U.S.C. § 476], fix a reasonable annual charge for the use thereof . . . .

The Commission has construed the tribal approval language as not providing tribes with a right of veto over the Commission's determination of an annual charge, but rather providing tribes, as well as licensees, a right to judicial review if the annual payment set by the Commission is unreasonable. According to FERC, "the purpose of section 10(e) both of the Federal Water Power Act and the Federal Power Act was to provide that the Indian proprietors of the land would be compensated for use of their lands by reasonable rentals thereon." *Re: Mont. Power Co.*, 38 F.P.C. 766 (Oct. 4, 1967), *aff'd sub nom. Mont. Power Co. v. F.P.C.*, 459 F.2d 863 (D.C. Cir. 1972). Thus, while the Federal Power Act provides reasonable compensation to tribes for use of tribal land, it does not permit tribes to interfere with the production of electricity from federally licensed projects unless the Commission finds that the use is inconsistent with the purposes of the reservation. That is not an issue here because the Commission has already renewed the license and provided for annual payments to the Mohawks only if their claim of title and reservation status is upheld.

More specifically, NYPA has long been aware of the Mohawks' claim to the islands, the Tribe having filed suit once in the 1950's[11] and all of the Mohawks again filing these land

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[11] *St. Regis Mohawk Tribe v. New York*, 5 N.Y.2d 24 (1958). In that suit, the Tribe claimed that the State had illegally appropriated land for the proposed power project, land to which the Mohawks continued to hold title. The Tribe argued that it has not lost title to the Islands on the ground that the lands were protected by the Indian Non-Intercourse Act and any prior payment made by the State to the Tribe for the lands did not meet the terms of that Act. *Id.* Therefore, the Tribe argued that the State's claim to title was void. The state court rejected these contentions, citing to both *Seneca Nation of Indians v. Christy*, 126 N.Y. 122 (1891) and *United States v. Franklin County*, 50 F. Supp. 152 (N.D.N.Y. 1943), for the proposition that the Non-intercourse Act did not apply to the State of New York, 5 N.Y. 2d at 40, a proposition now overruled by the Supreme Court in *Oneida I, supra and Oneida II, supra.* Neither MCA nor the Nation participated in that litigation.

claims in 1982 and 1989. The Mohawks had asserted other claims to the Islands as well. *See infra* Part III.C. During the recent relicensing proceeding for the power project, the issue of potential Mohawk ownership of the Islands was expressly addressed throughout the proceedings by MCA, the Tribe, the Nation, NYPA, and the Department of the Interior and was considered in the decision by FERC granting the new license. NYPA vigorously argued to the Commission that the Mohawks had no interest in the land that would be recognized by a court, or for that matter, under the Federal Power Act. Yet FERC in re-licensing recognized the Mohawks' interest in the area:

> As previously noted, three entities from the Mohawk Community have intervened in this proceeding [Lists the Mohawk plaintiffs in this case]. The Mohawks have a particular interest in this proceeding because the Project is located in and near historical Mohawk territory, the SRMT reservation boundary is close to the Project boundary, and the Project's location on the St. Lawrence River bisects the Mohawk communities on either side of the international border.

FERC Order Issuing New License, Project No. 2000-036, October 23, 2003, at 49.

FERC granted the new license and, at Interior's request, environmental protections for the Mohawks were required. FERC also specifically reserved its "authority to establish reasonable annual charges for the use of subject lands should they be determined to be reservation lands during the term of the new license." *Id.* at 60. To reflect this authority FERC inserted Article 418 into the NYPA license, which provides:

> Authority is reserved to the Commission to require the Licensee to implement such conditions for the protection and utilization of the St. Regis Mohawk Tribe Reservation as may be provided by the Secretary of the Interior pursuant to Section 4(e) of the Federal Power Act. Authority is also reserved to establish a reasonable charge for the use of federal reservation lands pursuant to Section 10(e) of the Federal Power Act. Exercise of these authorities is contingent on resolution of the Mohawk land claim litigation pending the issuance date of this license in the United States District Court for the Northern District of New York, Civil Action

> Nos. 82-cv-829, 82-cv-1114, 89-cv-783, in such a manner sufficient as to cause the land and waters subject to the referenced land claims to become Federal Reservations for purposes of the Federal Power Act.

Id. at 97.

This condition makes clear that, should the Mohawks succeed in their claim, even as to their title to the Islands, NYPA will not lose its license to provide power to the State of New York and that its interest in the project will be protected through the Federal Power Act and FERC's exercise of jurisdiction. NYPA accepted the renewed license with these terms and operates under these conditions. Thus, if the Mohawks establish they have never lost title to the Islands, it does not follow that the NYPA power project will be disturbed or disrupted. While the Federal Power Act provides reasonable compensation to tribes, it does not permit tribes to interfere with the production of electricity from federally licensed projects.

Consequently, whether the *Cayuga* court was right or wrong under the circumstances of the history of the Cayuga Tribe and its claim concerning the lands involved in that case, the Mohawks' Island claim is in no way precluded by *Cayuga,* both because of the demographic history of the Islands and because of the Federal Power Act's provisions that protect NYPA's possession and operations. Thus, this claim should not be subject to any of the equitable considerations that might have barred the claims in *Cayuga*. Congress itself has decided that paying tribes for use of tribal lands for hydro-electric projects based on their contribution to the production of electricity is a proper recompense for the use of the land.

B. The Mohawk mainland claim is also not subject to dismissal.

1. The Mohawks have not removed from the claim area, but instead have continuously been in possession of substantial portions of it.

The defendants are simply mistaken when they state that, with respect to the mainland claim, it has been more than 150 years since plaintiffs last possessed the lands (*e.g.*, State Memo at 14-15; NYPA Memo at 15) and that virtually all tribal members have resided elsewhere since the mid-19th century. Municipalities Memo at 12. Unlike the Indians in *Sherrill* and *Cayuga*, the Mohawks did not remove from their reservation or from the State of New York. The majority of tribal members still reside on the Mohawks' existing reservations adjacent to the mainland areas subject to the claim, and on the claim area itself.[12]

The Mohawk population in the area has always been substantial. At the time the St. Regis Mohawk Reservation was established, the total St. Regis Mohawk population was reported as approximately 800. This was a sizable population for that time:

- 1852: 1,120 St. Regis Mohawks, 632 on the British side and 488 on the American Side;
- 1885: 1,870 Indians attended the St. Regis Catholic Church; and
- 1885: population on both sides of the reservation numbered over 2,000.

Both the New York St. Regis Annuity Rolls and the Bureau of Indian Affairs report a continually rising Mohawk population both on the Reservation and in the surrounding area. Whiteley at 24-30, response to Question 29.

In 1948, the Bureau of Indian Affairs reported to Congress that 1,865 St. Regis Mohawks lived on the New York Reservation. H. Rep. No. 2355 (1948), *as reprinted in*

[12] See the more complete description of land ownership and demographics in the Tribe and Nation's Opposition and attached declarations.

U.S.C.C.A.N. 2286-87. The Tribe and Nation in their Opposition list the current enrollment of the Tribe as 12,100. The Mohawk Council of Akwesasne estimates its current enrollment at 12,000. The last official count made by Indian and Northern Affairs Canada – Canada's equivalent of the BIA – is a total population of 10,430, with 8,421 living on the Reserve and 2,009 off the Reserve. So, on and near the two reserves the total Mohawk population is about 24,000 people – an entirely different situation from that of Cayuga or Oneida.

In the Hogansburg Triangle portion of the land claim, a 2,000 acre triangular shaped tract that is surrounded on two sides by the Reservation, the population is overwhelmingly Mohawk. Even the Municipal defendants' own census data shows an increasing Native presence in the two Counties. Municipalities Memo at 16.

Thus, unlike *Sherrill* and *Cayuga*, the Mohawks are a large population, never re-located, still own most of the lands on their historic reservation, have a growing community, and many Mohawks reside in the claim area. This is not a distinctly non-Indian area.

The New York Mohawk Reservation, defined in the 1796 Treaty, is some 24,900 acres consisting of a rectangular tract of land equivalent to a six-mile square (36 sections), two one-mile squares, and pasturage along the Grasse river, all adjacent to or in the vicinity of the Mohawk Village of St. Regis, which now lies in Canada. The greater part of the reservation, some 14,500 acres in the United States, remains intact today and is the home and center of government of the Tribe.

A portion of the reservation created by the 1796 Treaty, including the Village of St. Regis, is now in Canada. The village of St. Regis is the headquarters of MCA. The Canadian Reservation includes not only the Village of Saint Regis (south of the St. Lawrence and adjacent to the United States reservation), but Cornwall Island, a large island in St.

Lawrence River, entirely Mohawk owned and populated, and Chenail, a mainland area south of the Saint Lawrence. The Canadian Tribe also owns, in addition to Cornwall Island, 16 other islands in the St. Lawrence near the two Reservations, ranging from 175 acres to one acre each, and individual Mohawks own 40 others. The Mohawk presence throughout this area is continuous and obvious.

Sherrill does not compel or even suggest dismissal here, as is also made clear by the *Sherrill* Court's heavy reliance on its reservation diminishment cases. The Court pointed to "jurisdictional history" and "the current population situation" as factors it had used to demonstrate diminishment: "in the different, but related, context of the diminishment of an Indian reservation . . . 'the longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and land use' may create justifiable expectations'" that tribal authority has been displaced by state jurisdiction and cannot be revived. 544 U.S. at 215 (quoting *Rosebud Sioux Tribe*, 430 U.S. at 604-05 & citing *Hagen*, 510 U.S. 399). *See also supra* at 5-6. But in the Island claim, and in major portions of the mainland claim, there is no such 90% - nor even a majority - non-Indian occupation.

2. Much of the claimed area has not dramatically changed since the illegal transactions.

Another factor cited in both *Sherrill* and *Cayuga* were the "dramatic changes in the character of the properties." 544 U.S. at 216-17; 413 F.3d at 274. While the defendants claim that is also so with respect to the Mohawk mainland claim, *see* State Memo at 17-19, NYPA Memo at 15-17, the facts are otherwise. As shown in the Tribe and Nation's brief, the reservation population has spread off the reservation and into the land claim areas, particularly in the Town of Bombay, otherwise known as the Hogansburg Triangle.

C. The Mohawks have repeatedly asserted their ownership of both the Islands and mainland areas.

The Mohawks protested encroachment on their lands in the Hogansburg area as early as 1826, and in 1858 they asked the State's newly appointed Commissioner for the St. Regis Tribe to undertake a survey of the St. Regis Reservation. Whiteley at 50-51, response to Question 32. In 1908, the Mohawks filed another petition with the State of New York, asserting ownership of these lands and seeking a survey. *Id.*, response to Question 38.

In 1888, the St. Regis Mohawks testified before the State's Whipple Committee that they owned the entire six-mile square reserved to them in the 1796 Treaty, and that none of the State treaties had accomplished a legal sale of any lands. Whiteley at 50-53, response to Question 32. In the early 1920's the State legislature established a State Indian Commission to investigate the Status of the American Indian residing in New York State, chaired by Edward Everett, a State Assemblyman. *Id.*, response to Question 34. Four Akwesasne/St. Regis delegates presented testimony to this Commission that the Mohawks still owned the six-mile square reservation and that all transactions in which New York attempted to take their title were invalid. *Id.*, response to Question 38. The Chairman of the Commission, Assemblyman Everett, agreed in his final report, which was not published by the State for more than 50 years thereafter. *Id.*, response to Questions 34, 38. Assemblyman Everett encouraged the St. Regis Mohawks to assert their land claims and actually represented the Mohawks as one of the attorneys in the *Deere* case, in which they asserted the claims. *Id.*, response to Question 38. In *Deere v. New York*, 22 F.2d 851 (N.D.N.Y. 1927), a St. Regis tribal member brought suit against the State of New York and the St. Lawrence River Power Company alleging that certain lands reserved pursuant to the Treaty of May 31, 1796 remained in the Tribe's reservation and had been transferred in violation of the Indian Non-

Intercourse Act. The Court dismissed this claim for want of federal question jurisdiction, an outcome overturned in *Oneida I.*

After the failure of the *Deere* case, a resolution by the Six Nations' chiefs petitioned Congress to redress the claimed illegal transfer of Six Nations lands, reserved by the treaty and Barnhart Island. Whiteley at 68-69, response to Question 38. In 1935, a St. Regis leader filed a similar petition with the State government in Albany, and in 1947, the St. Regis Council again petitioned Congress asserting their land claims, with three Akwesasne/St. Regis chiefs attending congressional hearings in Washington, D.C. to testify on bills before Congress conferring jurisdiction on New York over Indian reservations in the State. *Id.*, response to Question 38. In 1954, the St. Regis Tribe brought another unsuccessful lawsuit against the State and St. Lawrence Seaway, asserting their Island claim. Whiteley at 73, response to Question 38; *St. Regis Mohawk Tribe v. New York*, 5 N.Y.2d 24 (1958). *See supra*. n.11.

In 1948 and 1949, Congress held hearings on the legislation that became 25 U.S.C. §§ 232 & 233, providing the extent to which New York law could be applied within Indian reservations in the state. A number of Indian witnesses and their representatives expressed concern that granting jurisdiction to the State over civil actions could extinguish tribal land claims under the Non-Intercourse Act. *See, e.g.*, Hearings Before a Subcommittee of the Comm. on Interior and Insular Affairs, 80th Cong. 86-90 (1948) (Testimony of Augustus Merrill, an attorney from Utica, New York speaking on behalf of the Tonawanda Indians stating that if the civil jurisdiction bill passed, it would apply the State's statute of limitations to Indian claims to land); *id.* at 154, 159 (Testimony of Robert R. Sollenberger that Iroquois have "possible federal claims cases" including suits with "the object of reestablishing Indian

ownership of land alienated without formal permission of the United States since the adoption of the present Federal Constitution""); *id.* at 155 ("[A]ll bills . . . which give the State added jurisdiction on the reservations, have been opposed by the Indians."); *id.* at 157 (expressing concern that the Indians "would have to go to the courts . . . of the very county where the property owners naturally have a great deal more political influence than the Indians . . . (and) where the judges and the juries . . . would be the very people that they would be likely to sue"); *id.* at 170 (Testimony of Ernest Benedict of the St. Regis Mohawk Tribe expressing the concern that if "[s]tate laws can apply to the reservations . . . the Indians would be hampered . . . in presenting their cases").

The Senate passed the bill conferring civil jurisdiction on the State on June 16, 1950, 96 Cong. Rec. 8738 (1950). Senator Ives (of New York) inserted into the Congressional Record a report by the Joint Legislative Committee on Indian Affairs to the State Legislature, which stated that if the bill passed:

> the United States would retain authority to prosecute in Federal courts claims of Indian tribes against the State (*United States v. Minnesota*, 270 U.S. 181 [1952] . . .). This case also determines that State statutes of limitations "neither bind nor have any application to the United States when suing to enforce a public right to or to protect interests of its Indian wards."

Id. at 8739.

On the House floor Representative Morris, Chairman of the House Committee on Indian Affairs, offered an amendment expressly prohibiting state court jurisdiction or application of state law to Indian land claims. This amendment, as included in the final statute, read:

> [p]rovided, further, [t]hat nothing herein contained shall be construed as conferring jurisdiction of 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 [September 13, 1952].

96 Cong. Rec. 11,239 (1950).

Representative Morris explained that "[t]hese amendments . . . will preserve their right to go into the United States courts in regard to claims that they might have growing out of any transactions in regard to land dealings . . . with the State of New York." *Id.* Representative Morris stated "that the particular amendment . . . is word for word the amendment offered by the Indians themselves through their counsel before our committee." *Id.* at 11240.

When the House considered and passed the bill, Representative Morris stated that this amendment "just assures the Indians of an absolutely fair and impartial determination of any claims they might have growing out of any relationship . . . with the great State of New York in regard to their lands." *Id.* at 12,460. He stated that since the Indians "are wards of the Government . . . therefore, the statute of limitations does not run against them . . . concerning those claims that might have arisen before the passage of this act." *Id.* Representative Morris continued that "of course, they may go into the Federal Courts and adjudicate any differences they had between themselves and the great State of New York relative to their lands." *Id.* He stated that the Indians who appeared before the Committee had "very much opposed the bill as it was" and "that is why we offered the amendments." *Id.*

In *Oneida II*, the Supreme Court specifically relied on this amendment as ensuring "that the New York statute of limitations would not apply to pre-1952 land claims." 470 U.S. at 241 & n.14. There, the Court relied upon Representative Morris' statement quoted in part above:

> Representative Morris, the sponsor of the proviso, stated:

> As it is now, the Indians, as we know, are wards of the Government and, therefore, the statute of limitations does not run against them as it does in the ordinary case. This [proviso] will preserve their rights so that the statute will not be running against them concerning those claims that might have arisen before the passage of this act. 96 Cong. Rec. 12460 (1950).

470 U.S. at 241 n.14.

In *Oneida I*, 414 U.S. at 680-82, the Court similarly relied on the legislative history of Section 233 as follows:

> The Senate report on the bill disclaimed any intention of "impairing any of their property or rights under existing treaties with the United States." S. Rep. No. 1836, 81st Cong., 2d Sess., 2 (1950) . . . Moreover, the final proviso of the statute negativing the application of state law with respect to transactions prior to the adoption of the Act was added by amendment on the floor of the Senate [sic], and its purpose was explained by the gentleman who offered it to be as follows:
>
> * * *
>
> Mr. Chairman, I do not think there will be any objection from any source with regard to this particular amendment. This just assures the Indians of an absolutely fair and impartial determination of any claims they might have had growing out of any relationship they have had with the great State of New York in regard to their lands. I think there will be no objection to that; they certainly ought to have a right to have those claims properly adjudicated . . . . . 96 Cong. Rec. 12460 (1950) (remarks of Congressman Morris).

414 U.S. at 680-82. This Congressional saving of the New York land claims in 1950, cited by the Supreme Court in *Oneida I*, should not be ignored and weighs strongly against the dismissal of the Mohawk claim as barred by laches.

IV. STANDARDS OF LACHES FIRMLY ESTABLISHED IN SECOND CIRCUIT CASE LAW PRECLUDE DISMISSAL OF THE MOHAWK CLAIM.

Reversing a district court's dismissal of a case on the ground of laches "without holding any hearing," *Tamini v. Jewon*, 808 F.2d 978, 980 (2d Cir. 1987), the Second Circuit stated that "[t]his Court has long been committed to the proposition that dismissal of an

action with prejudice is a drastic remedy which should be applied only in extreme circumstances." In *Cayuga Nation*, the Second Circuit determined that a land claim under the Indian Non-Intercourse Act by that tribe should be dismissed, relying on findings by this Court after a three-day hearing, following which this Court determined in that case that laches barred an ejectment remedy. *Cayuga X*, 1999 WL 509442 at *1. The motions for a judgment on the pleadings in this case should be denied because the motions entirely ignore the principle that laches necessarily requires that the resolution be based on the "circumstances peculiar to each case." *E.g., Stone v. Williams*, 873 F.2d 620, 623-24 (2d Cir. 1989), *cert. denied*, 493 U.S. 959 (1989). Similarly, in *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994), *cert. denied*, 513 U.S. 987 (1994), quoting and relying on *Stone*, the Second Circuit held that in considering a claim of laches, "the inquiry is a factual one" and that the Court must consider whether it can conclude with certainty that the claim is barred. As we demonstrated in detail in Part III above, the factual circumstances of the Mohawk claim are very different from those in *Sherrill* and *Cayuga.*

Another reason that the Mohawk claims should not be dismissed is that despite the Court's holding in *Cayuga,* the Second Circuit has held a number of times in recent years that laches is not a bar to a claim brought within the applicable statute of limitations. *E.g.*, *United States v. Milstein*, 401 F.3d 53, 63 (2d Cir. 2005); *Ikelionwu v. United States*, 150 F.3d 233, 238 (2d Cir. 1998) (alternative holding); *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259-60 (2d Cir. 1997). There is no question the Mohawk claims were brought within the statute of limitations established by 28 U.S.C. § 2415. *See Oneida II*, 470 U.S. at 240-44. While the Second Circuit in *Cayuga* rejected this basis for escaping laches on the extreme facts before it in that case, that outcome cannot fairly apply beyond the

circumstances present in that case. Clearly, it would not comport with due process to have one set of principles for applying laches in land claims brought by tribes and another set of principles for applying the doctrine in all other cases.

V. THIS COURT HAS THE AUTHORITY TO FASHION AN APPROPRIATE REMEDY FOR THE MOHAWK CLAIM.

In their motions, Defendants emphasize the remedies sought by the Mohawks, in particular "the remedies of dispossession or ejectment." State Memo at 16; *see also* NYPA Memo at 1 ("[t]his is an action . . . seeking . . . possession . . . and to eject defendants . . . ."); Municipalities Memo at 1 (impracticality of returning to Tribal Plaintiffs lands that passed into public and private hands). Setting forth a long list of implausible horrors tied to the remedy of ejectment, the defendants argue that the Mohawks can receive no relief on their valid legal claim. For example, NYPA complains about the supposed disruption of its power generation, which as we have shown, is entirely fanciful given the Federal Power Act and the legion of federally-licensed power projects which use tribal land under the auspices of that Act. The other parties posit disruption to their long possession, not taking into account either that the Mohawk claims are all in a small area adjacent to the Reservation that the Mohawks have possessed continuously since before the 1796 treaty or that the Mohawks are no longer seeking ejectment of anyone, and that the remaining claims are primarily for money damages as to the mainland and for recognition of title, money damages, and eventually annual payments under the Federal Power Act, but not ejectment, as to the Islands.

This kind of argument – imagining "a parade of horribles" – has been consistently rejected by both the Supreme Court and the Second Circuit. For example, in *Cole v. Richardson,* 405 U.S. 676 (1971), a party argued that a provision in an oath required of state employees would lead to constant litigation. There was, however, no evidence that was

actually true. The court in upholding the oath said "[t]hose who view the Massachusetts oath in terms of an endless 'parade of horribles' would do well to bear in mind that many of the hazards of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes . . . that it would not occur 'while this Court sits.'" *Id.* at 685-86. Thus, with this Court having consistently held that it would not evict anyone over these New York land claims, the dire disruptions predicted by defendants are sheer fantasy.

Similarly, in *In re: Application of Aldunate,* 3 F.3d 54 (2d Cir. 1993), the Chilean guardian of a Chilean man sought discovery pursuant to 28 U.S.C. § 172 in a competency hearing. The appellant paraded all the horrible things that would happen if foreign residents were allowed to use United States discovery rules, that this would be "ignoring principles of comity . . . risking offense to a friendly foreign sovereign . . . opening the federal courts to a deluge of foreign litigants . . . ." 3 F.3d at 61. The Second Circuit rejected this line of argument stating that the parade of horribles predicted by the appellant "is unlikely to occur given that district courts, in exercising their discretion, are not free to ignore the purposes underlying the statute." *Id.* at 62.

Similarly here, the district courts in New York – and the Supreme Court – have been careful to enforce the Indian Non-Intercourse Act, but with remedies that take into account the present situation. The decision in *Cayuga* should be limited to the extreme facts in that case, and should not be used to create a parade of horribles undermining the discretion of the courts to fashion appropriate relief in enforcing an important protective act of Congress – the Indian Non-Intercourse Act. *See also United States v. Alcan Aluminum Corp.,* 990 F.2d 711 (2d Cir. 1993), upholding provisions of CERCLA against an argument of a parade of horribles, but fashioning a remedy that avoided those horribles.

Instead, this Court should reject defendants' fantastic predictions and fashion a remedy perhaps of money damages for some areas and return of ownership or jurisdiction in others to properly redress the Mohawks claim pursuant to Rule 54(c) of the Federal Rules of Civil Procedures, which provides:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.[13]

The Second Circuit and this Court have uniformly applied Rule 54(c) to require a court (in a non-default judgment) to award a plaintiff the relief to which he is entitled, regardless of the pleading. *E.g., United States ex rel. Bergen Point Iron Works v. Md. Casualty Co.*, 384 F.2d 303, 304 (2d Cir. 1967) ("There is of course no requirement that the plaintiff request in his complaint the specific relief which is eventually granted."). *See also Truth Seeker Co. v. Durning*, 147 F.2d 54, 56 (2d Cir. 1945) (Although plaintiff was not entitled to a writ of mandamus to compel the defendant to admit books through customs, plaintiff prayed "for such other and further relief as to the Court may seem just and proper," and his case should not be dismissed.); *Gins v. Mauser Plumbing Supply*, 148 F.2d 974, 976 (2d Cir. 1945) ("[T]heories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not.").

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[13] In *Oneida Indian Nation, et. al. v. State of New York, et. al.*, No. 5:74-CV-187 (LEK/DRH) (May 21, 2007), Judge Kahn – recognizing plaintiffs' "claims concern 'grave, but ancient wrongs, and the relief available must be commensurate with that historical reality,' *Sherrill*, 544 U.S. at 217 n.11" – fashioned a remedy that may be suitable for the Oneida, who had a very large reservation of 300,000 acres, virtually all of which was sold to the State of New York for an inadequate price. That is not a suitable remedy here, where the Mohawks have kept much of their land, have a growing population, and have been continuously damaged by being deprived of the land illegally taken from them. This is not a question of a fair price for land sold, but of damages or recognition of title where land has been unlawfully taken. However, the question of fashioning an appropriate remedy should wait until after the denial of the motions to dismiss.

A similar issue was addressed by this Court in *Oneida Indian Nation v. County of Oneida,* 434 F. Supp. 527, 547-48 (N.D.N.Y. 1977). The defendants, characterizing the Nation's claim as a "common law action for use and occupancy," "wrongful desseisin," or "trespass for mesne profits," argued that the complaint failed to allege all the elements of these claims. This Court rejected this tactic:

> To start with, the precise form of this action, which would have been so important at common law, is no longer determinative of the action's outcome. Under the Federal Rules of Civil Procedure, the question is not how plaintiffs have characterized the action, but whether plaintiffs are entitled to relief.

Id. at 547. This Court also invoked Rule 54(c)'s requirement that a court grant the proper relief, regardless of what is pled:

> [I]t is of no importance at the present time to consider whether the plaintiff's remedy is by replevin, trover, money had and received, or trespass. The real question is whether, under the facts disclosed in the complaint, the plaintiff is entitled to relief. If he is, the court can apply the proper remedy, [under] Rule 54(c).

Id. (quoting *Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp.*, 28 F. Supp. 586, 588 (W.D. Pa. 1939)). This Court correctly viewed the question of right and remedy as two separate issues: "In this phase of the trial, the only question to be determined is that of liability. The extent of the liability and the manner in which the relief is to be fashioned remain for another day." 434 F. Supp. at 548.

Much has happened since the Complaints were filed in the 1980's. In other cases such as *Cayuga X*, this Court has made it clear that tribes are not entitled to the remedy of restoration of ownership or possession for lands now owned by large populations of individual non-Indians, even if the lands were unlawfully taken in violation of the Non-Intercourse Act. 1999 WL 509442. And in *City of Sherrill*, 544 U.S. 197, the Supreme Court has held that tribes cannot reassert governmental jurisdiction over lands unlawfully

taken in violation of the Act simply by purchasing the land. Defendants claim that, merely because the complaints over twenty years ago sought some remedies that may not now be available, the Mohawks are entitled to no relief at all for violations of the Non-Intercourse Act. This argument necessarily must fail. As set forth in Part III, *supra*, the Mohawk claim is not like the ones presented in *City of Sherrill,* where Oneida sought restoration of tribal sovereignty over repurchased land in a broad swath of New York State. Nor is this like *Cayuga* – in which the drastic remedy of dismissal with prejudice and denial of all relief, if justifiable at all, can only be justified under the extreme facts of that case, where all of Cayuga's land had been ceded by 1807, and where only a remnant of the Tribe remains in the State. Rule 54(c) entitles the Mohawks to relief in the form of money damages and recognition of their title to the Islands, and at the very least relief in the form of money damages for the unlawful use of the rest of their lands, but more properly, in addition, the return of some of these lands to reservation status.

VI. *CAYUGA* MUST BE HARMONIZED WITH *ONEIDA I* AND *ONEIDA II*.

A final reason this Court should not extend *Cayuga* beyond the extreme factual circumstances present in that case is the need to harmonize *Cayuga* with *Oneida I* and *Oneida II*. In *Oneida I*, the Supreme Court unanimously affirmed federal court jurisdiction over the Oneidas' claim, observing that the Oneida asserted a present right based on the "not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands." 414 U.S. at 677. On remand and after further proceedings, the district court entered judgment for the Oneidas and awarded trespass damages.

In *Oneida II*, the Supreme Court expressly held that a tribe may bring suit to recover damages for violation of its possessory rights protected by federal law. 470 U.S. at 236. The Court found that "[f]rom the first Indian claims presented," the "'unquestioned right'" of Indians to their lands "has been reaffirmed consistently," *id.* at 234-35 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)), and that the Court's decisions spanning two centuries had recognized that "Indians have a federal common-law right to sue to enforce their aboriginal land rights." 470 U.S. at 235. Based on these "well-established principles," the Court concluded that "the Oneidas can maintain this action for violation of their possessory rights based on federal common law." *Id.* at 236.

In so holding, the Court expressly acknowledged that it had considered whether the passage of 175 years defeated the Oneidas' right, stating that:

> One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.

Id. at 253. The Court left open the question of "whether equitable considerations should limit the *relief* available to the present day Oneidas." *Id.* at 253 n.27 (emphasis added).

In *Sherrill*, far from narrowing the *Oneida* precedents, the Court specifically reaffirmed that under *Oneida II*, Indian tribes have a substantive right to bring an action "to be compensated 'for violation of their possessory rights based on federal common law,'" 544 U.S. at 209 (quoting *Oneida II*, 470 U.S. at 236). *See also id.* at 221 ("[T]he question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*."). The Court in *Sherrill* then considered the issue

reserved in *Oneida II*, namely "the question of equitable considerations limiting the relief available to [the Oneidas]." *Id.* at 214.

The *Sherrill* Court observed that "[w]hen the Oneidas came before this Court . . . in *Oneida II*, they sought money damages only." *Id.* at 213. The Court distinguished the question reserved in *Oneida II* from the Tribe's substantive right to bring such an action. The Court explained that the "substantive question[ ] whether the plaintiff has any right" is very different "from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." *Id.* (quoting D. Dobbs, *Law of Remedies* § 1.2, at 3 (1973)). Declaring this distinction to be "fundamental," *id.*, the *Sherrill* Court adopted this Court's holding following remand of *Oneida II* that "[t]here is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right . . . ." *Sherrill*, 544 U.S. at 213 (quoting *Oneida Indian Nation*, 199 F.R.D. at 90). The Court expressly made clear that, in contrast to the "piecemeal shift in governance" sought by the Oneidas, *Sherrill*, 544 U.S. at 221, neither of these considerations is relevant to or present in the context of a money damages award: "In sum, the question of [money] damages for the Tribe's ancient dispossession is not at issue in this case, and we do not disturb our holding in *Oneida II*." *Id.*

CONCLUSION

The defendants' motions for judgment on the pleadings should be denied.

Dated this 13th day of July, 2007.

Respectfully submitted,

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