UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,	:	
Plaintiff	:	Civil Action Nos. 82-CV-783 82-CV-1114 (NPM)
UNITED STATES OF AMERICA,	:	
Plaintiff-Intervenor,	:	
v.	:	
STATE OF NEW YORK, et al.,	:	
Defendants.	:	
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,	:	Civil Action No. 89-CV-829 (NPM)
UNITED STATES OF AMERICA,	:	
Plaintiff-Intervenor,	:	
v.	:	
STATE OF NEW YORK, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NEW YORK POWER AUTHORITY'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Defendant New York Power Authority (the "NYPA") submits this memorandum and the accompanying affidavit of O. Peter Sherwood in support of its motion, pursuant to Fed. R. Civ. P. 12(c), to dismiss this action on the ground that it is barred by the equitable doctrines of laches, acquiescence and impossibility.

PRELIMINARY STATEMENT

As this Court well knows, this is an action by three Indian tribes seeking to seize title and possession of approximately 15,000 acres of land, islands and rivers in northern New York State and to eject defendants from the property. The United States intervened as a plaintiff years after the case was commenced, also asserting that the tribes were entitled to such drastic relief.

The NYPA operates a hydro-electric power facility on the islands at issue. It makes this motion for judgment on the pleadings, dismissing the claims to the islands on the ground that they are barred by equitable doctrines of laches, acquiescence and impossibility. In 2005, the United States Supreme Court issued the landmark decision, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005), in which it held that these equitable defenses required the dismissal of an action in which an Indian tribe asserted sovereignty over land it had vacated hundreds of years earlier. Thereafter, Sherrill was applied by the Second Circuit to dismiss an Indian land claim seeking the identical remedies of possession and ejectment sought by plaintiffs in the case at bar. See Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, __ U.S. __, 126 S. Ct. 2022 (2006).

This case is indistinguishable from Sherrill and Cayuga on the issues of laches, acquiescence and impossibility. Plaintiffs have sat on any rights they may have had with respect to the islands for approximately 150 years. They have never, at any time prior to this action, sought equitable relief with respect to the islands. To the contrary, the tribes accepted

compensation from the State of New York in 1856, thereby acquiescing in their dispossession from the islands. It would be inequitable under these circumstances to permit plaintiffs to proceed with an action that seeks to undo transactions they have accepted for so long without protest -- particularly in light of the fact that the islands have been developed by the NYPA and house a power facility that is an economical source of electricity, a substantial portion of which is sold to local industries employing thousands of workers.

Accordingly, this motion should be granted and this Court should enter judgment in favor of the NYPA, dismissing all claims against it with prejudice.

STATEMENT OF THE CASE

The procedural history relevant to the NYPA's motion for judgment on the pleadings is set forth below.[1]

A. The Tribal Plaintiffs' Complaints.

This action was commenced with the filing of a complaint in 1982 by the Canadian St. Regis Band of Mohawk Indians, now known as the Mohawks of Akwesasne, (the "Canadian Band") against the State, various counties, villages, towns and other parties, laying claim to approximately 15,000 acres of land in northern New York (the "Land") (Ex. 1). A few months later, the Canadian Band filed a complaint against the State, the Niagara Power Corporation and the NYPA, also laying claim to islands in the St. Lawrence River, which are or were known as Barnhart Island, Baxter's Island, the Croil Islands or the Long Sault Islands (the "Islands") (Ex. 2). In June 1989, the St. Regis Mohawk Tribe by the St. Regis Mohawk Council (the "American Band") and the People of the Longhouse at Akwesasne by the Mohawk Council of

[1] "Ex." refers to the exhibits annexed to the accompanying affidavit of O. Peter Sherwood.

Chiefs (the "Longhouse") filed a complaint (i) against the State and other parties claiming ownership and possession of the Land, and (ii) against the State, the NYPA and other parties claiming ownership and possession of the Islands (Ex. 3). The Canadian Band, the American Band and the Longhouse (collectively, the "Tribal plaintiffs") purport to be successors-in-interest to the "Indians of the Village of St. Regis" (the "St. Regis Tribe"), "one people, with one common heritage and having linguistic, social, religious, legal and other community ties binding them together" and who "assert a single and undivided interest in the lands at issue" (Ex. 3**,** ¶ 8).

The complaints, which have been amended in various respects during the course of this litigation, all assert claims under treaties, and federal law, including the United States Constitution, the Indian Non-Intercourse Act of 1793, 25 U.S.C. § 177 *et seq*. and 42 U.S.C. § 1983 (Ex. 1**,** ¶ 2; Ex. 2, ¶ 2 ; Ex. 3, ¶ 3). The gravamen of the claims is that the Land and Islands "have been Indian property from time immemorial to the present" (Ex. 3, ¶ 14); that defendants "have no legal or valid interest in the lands" (id. at ¶ 30); and that "the claims, titles and interests of the NYPA [in the Islands] are also void, illegal and without force or effect" (id. at ¶ 44). Specifically, the Tribal plaintiffs seek to eject the NYPA from the St. Lawrence Islands (id. at p. 22). In addition, the Tribal plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring, inter alia, that "the conveyances of the subject land … are null and void"; that "defendants' interests in the subject lands are null and void"; and that "the subject land remains treaty-guaranteed Indian land" (id. at pp. 21-22).

While the complaints catalog the various "purchases," "transactions," and "conveyances" whereby defendants acquired the subject lands and the Islands, there is no allegation that the Tribal plaintiffs took any prior legal action to challenge them.

B. The Consolidation Of The Actions.

In August 1991, this Court consolidated the three actions. The Canadian St. Regis Band of Mohawk Indians v. The State of New York, 146 F. Supp. 2d 170, 176 (N.D.N.Y. 2001) ("St. Regis I").

C. The Intervention By The United States.

In August 1998, the United States moved, pursuant to Fed. R. Civ. P. 24, to intervene as a plaintiff. The United States' motion was granted, and it filed its complaint in intervention in December 1998. It subsequently filed an amended complaint, dropping all claims against defendants other than the State and the NYPA. (Ex. 4); St. Regis I, 146 F. Supp. 2d at 176; The Canadian St. Regis Band of Mohawk Indians v. The State of New York, 205 F.R.D. 88 (N.D.N.Y. 2002) ("St. Regis II")).

The allegations in the United States' complaint mirror those of the Tribal plaintiffs. Thus, the United States alleges that that the Land and Islands were acquired in violation of treaties and federal law, including Indian Non-Intercourse Act of 1793, and that "defendants . . . have been in possession of the subject land, without lawful authority, variously from 1816 to 1845 until the present" (Ex. 4, ¶¶ 2, 25). The United States seeks to eject the NYPA from the Islands (id. at p. 14). In addition, it seeks a declaration that the Tribal plaintiffs have ownership and possessory rights in the Land and the Islands (id.). This complaint is also bereft of any allegation that the Tribal plaintiffs or the United States challenged the conveyances of which they complain since the Tribal plaintiffs' dispossession from the Land and Islands in the 19th century.

D. Prior Motion Practice Regarding The Laches Defense.

In July 1999, the defendants moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(1) and (6) on numerous grounds, including that the action was barred by the equitable

doctrine of laches.[2] The Court denied the motion with respect to laches, holding, among other things, that "laches is not available as a defense to defendants." St. Regis I, 146 F. Supp. 2d at 187.

The NYPA and other defendants answered the complaints, denying all liability and damages. They continued to press laches as an equitable affirmative defense. See, e.g., Ex. 5, ¶ 24.

Plaintiffs moved to strike certain of the defenses, including laches. This Court granted the motion in part, holding that laches was not a defense to liability. However, it denied the motion to strike the laches defense as it pertains to remedies. The Canadian St. Regis Band of Mohawk Indians v. The State of New York, 278 F. Supp. 2d 313 (N.D.N.Y. 2003) ("St. Regis III").

E. This Court Recognizes The "Dramatically Altered Legal Landscape" With Respect To Equitable Defenses To Possessory Land Claims.

Thereafter, the United States Supreme Court handed down a decision in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) in which it held that the equitable defenses of laches, acquiescence and impossibility barred the Oneida Indian Nation from asserting sovereign dominion over land in New York and avoiding the payment of property taxes. This Court recognized the import of Sherrill and its impact on the claims in this case by staying further proceedings pending a decision by the Second Circuit on the application of equitable defenses to similar claims asserted by the Cayuga Indian Nation.

In Cayuga Indian Nation v. Pataki, 413 F.3d 266, 277 (2d Cir. 2005), cert. denied, __ U.S. __, 126 S. Ct. 2022 (2006), the Second Circuit held "the import of Sherrill is that

[2] From time to time during the course of this action, the parties entered into settlement negotiations. A series of stays were granted to facilitate their attempts to settle. Defendants had moved to dismiss the action as early as 1989, but the motion was not adjudicated in light of the settlement discussions and attendant stays. See St. Regis I, 146 F. Supp. 2d at 176.

'disruptive' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses including laches." Indeed, the teaching of Cayuga is that Sherrill "dramatically altered the legal landscape" such that it requires the dismissal of ancient possessory land claims. Id. at 273.

F. This Motion.

On May 15, 2006, the Supreme Court denied the petitions for a writ of certiorari filed by the plaintiffs in the Cayuga action. In light of Sherrill and Cayuga, Magistrate Judge Lowe set a briefing schedule for this motion, limited to the issue of whether equitable defenses mandate the dismissal of the action -- which they do. (Ex. 6).

FACTUAL BACKGROUND

The facts supporting the NYPA's motion are set forth below, and in the other defendants' motion papers, which are hereby incorporated by reference. These facts, which pertain to plaintiffs' claim to the Islands, are taken from the complaints or are matters of which the Court may take judicial notice. See p. 11, infra.

A. The History Of The Islands And Their Purchase By The State.

Prior to 1783, the Islands belonged to the St. Regis Tribe.[3] As a consequence of certain treaties, the Islands thereafter came into possession of the State, and were declared part of it. The State disposed of the Islands throughout the early 19th century by issuing patents, conveying title to property on the Islands to various third parties. As a consequence, the Islands fell into the hands of numerous private owners, and members of the St. Regis Tribe moved elsewhere (Ex. 2, ¶¶ 34, 43; Ex. 3 ¶¶ 14, 40-43).

[3] The allegations in the pleadings are accepted for purposes of this motion only. In fact, the Tribal plaintiffs did not hold aboriginal title to the Islands as they claim, and the NYPA has meritorious defenses to the case on its merits. In any event, this matter is not relevant to adjudication of the instant motion. See pp.18-19, infra.

The St. Regis Tribe was compensated for the Islands. On April 30, 1856, a payment of $5,960 was remitted from the State to the St. Regis Tribe for the purchase of the Islands. (Ex. 2, ¶ 48; St. Regis Tribe of Mohawk Indians v. The State of New York, 5 N.Y.2d 24, 25, 177 N.Y.S.2d 289, 297 (1958)).

B. The State And NYPA Acquire The Islands From Private Owners For Construction Of The St. Lawrence Project.

A century later, 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 (the "St. Lawrence Project"). As early as 1909, the United States and Canada created by treaty the International Joint Commission ("IJC") and gave that Commission the authority to approve or prohibit and regulate certain international waters, including the international rapids section of the St. Lawrence River. (Ex. 7: Ketchum v. The United States of America, Civ-87-0105T, slip op. at 5, 38 n.1 (W.D.N.Y. Mar. 16, 1988)). Thereafter, the United States and Canada submitted a joint application to the IJC for the construction of dams to provide hydro-electric power. (id. at 5). In 1952, the IJC approved that construction, designating the Hydro-Electric Commission of Ontario as the Canadian entity and as yet unidentified United States entity to be named later by the United States Government. (id. at 6). In November 1953, President Eisenhower in Executive Order No. 10500 officially designated the NYPA as the United States entity referred to in the IJC's approval order. (id. at 10). The NYPA's operation of its St. Lawrence Project is therefore dependent on its ability to conform with both federal and international mandates and directives.

In contemplation of the facility's construction, the State and the NYPA purchased or appropriated parcels of the Islands from private owners -- as the Islands had been privately owned for more than 100 years. (Ex. 2, ¶¶ 54-55, 58).

C. The St. Regis Tribe's Unsuccessful Action To Challenge The State's Acquisition Of The Islands.

Only after the State and the NYPA took steps to acquire the Islands for development of the power facility did any representative of the St. Regis Tribe assert a claim to them. The St. Regis Tribe filed a complaint in New York State Court, for the first time asserting what it characterized as "immemorial rights arising prior to white occupation." St. Regis Tribe of Mohawk Indians, 5 N.Y.2d at 28; 177 N.Y.S.2d at 291. Nevertheless, the St. Regis Tribe did not seek equitable relief, but instead "filed a claim for damages for $33,800,000 in the Court of Claims." St. Regis Tribe of Mohawk Indians v. The State of New York, 5 A.D.2d 117, 123, 168 N.Y.S.2d 894, 896 (3d Dept. 1957), aff'd, 5 N.Y.2d 24, 177 N.Y.S.2d 289 (1958). The State moved to dismiss the complaint on a number of grounds, including that the Tribe had released its claim to the Islands by virtue of accepting payment for them in 1856. In a unanimous decision, the Court of Appeals Court rejected the St. Regis Tribe's claim as having been settled through a legislative grant of compensation. 5. N.Y.2d at 40; 177 N.Y.S.2d at 301. Accordingly, the complaint was dismissed with prejudice.

D. The Construction And Operation Of The Hydro-Electric Power Facility.

The St. Lawrence Project was then constructed. The entire facility stretches over the St. Lawrence River Valley for 37 miles. It includes the Long Sault Dam and the Robert Moses Power Dam, which has 32 turbine-generators. The facility's generating units have the capability of producing in excess of 900,000 kilowatts of electricity, which is more than enough to light a city with a population the size of Washington D.C. (Ex. 2, ¶¶ 54-55; Ex. 8: FERC Order, 105 FERC P. 61102, pp. 2-5 (Oct. 23, 2003); Ex. 9).

The St. Lawrence Project has been operating continuously since 1958, and is part of a larger international power project, which spans the international portion of the St. Lawrence

River with companion facilities in Ontario, Canada. It is an economical source of hydro-electrical power for millions of citizens of the State. The NYPA is charged, by legal mandate:

> [t]o develop, maintain, manage and operate those parts of the Niagara and Saint Lawrence hydro-electric projects owned or controlled by it in such a manner as to give effect to the policy hereby declared . . . that in the development of hydro-electric power therefrom such projects shall be considered primarily for the benefit of the people of the state as a whole and particularly the domestic and rural consumers to whom the power can economically be made available.

N.Y. Pub. Auth. L. § 1005(5) (McKinney's 2005). The NYPA is also licensed by the Federal Energy Regulatory Commission to operate the St. Lawrence Project pursuant to The Federal Power Act (the "FPA"), 16 U.S.C. § 792 *et seq*. See Ex. 8, p. 2 ("We therefore find that the St. Lawrence Project . . . will serve the public interest because it is best adapted to the comprehensive development of the St. Lawrence River basin for all beneficial public purposes, in accordance with the requirements of the FPA."). (Ex. 9).

The NYPA employs hundreds of workers at the St. Lawrence Project. The inexpensive power it generates supports area industries, which themselves are major employers. In 1997, the NYPA undertook to modernize and renovate the St. Lawrence Project. The modernization is scheduled to be completed in 2013 at a cost of $281 million. (Ex. 9).

E. Plaintiffs' Inaction.

Plaintiffs do not allege and cannot prove that they took any timely action to seek return of, or assert equitable claims to, the Islands. There is no question that they acquiesced in the transfer of the Islands by accepting compensation for them in 1856. Indeed, the Tribal plaintiffs did not assert legal action of any kind from the time of their dispossession from the Islands in the early 19th century until the State and NYPA acquired them for the development of the St. Lawrence Project in the 1950's. See St. Regis Tribe of Mohawk Indians v. The State of New York, 5 N.Y.2d 24, 35, 177 N.Y.S.2d 289, 297 (1958) ("The ledger of the Comptroller indicates

that on April 30, 1856, $5,690 was paid out to 'St. Regis Indians, in full of their claim for the sale by the State of two Islands in the River St. Lawrence, known as Barnhart's & Baxter's Islands' . . . The situation remained thus, with the Indians asserting no claim to title to the island until after the State appropriated it for the development of a power project"). And then, they alleged only that they were entitled to a second monetary payment -- not equitable relief. See St. Regis Tribe of Mohawk Indians v. State of New York, 5 A.D.2d 117, 122, 168 N.Y.S.2d 894, 899 (3d Dept. 1957) (noting that the plaintiffs argued that they had interests in the Islands "for which the State must pay to extinguish"), aff'd, 5 N.Y.2d 24, 177 N.Y.S.2d 289 (1958).

The United States and its authorized representatives also knew about the transactions at issue in this action, but did nothing to challenge them. To the contrary, the United States acquiesced in the transactions as well. The United States was "fully aware of New York's negotiations with the New York Indians at all times," and "had no desire to take any action to prevent New York from doing what would otherwise have been the Government's job, i.e., buying lands from the New York Indians in order to persuade them to move west." Oneida Nation of New York v. U.S., 43 Ind. Cl. Comm. 373, 405 (1978).

ARGUMENT

THIS ACTION IS BARRED ON EQUITABLE GROUNDS AND SHOULD BE DISMISSED

Pursuant to Fed. R. Civ. P. 12(c), a party may move for judgment "after the pleadings are closed." The Second Circuit has held that the court may dismiss an action on a Rule 12(c) motion where the court is convinced that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Bloor v. Carro, Spanbock, Londin, Rodman & Fass 754 F.2d 57, 61 (2d Cir. 1985). "Although a moving party, for purposes of the Fed. R. Civ. P. 12(c) motion, concedes the accuracy of the factual allegations in its adversary's pleading, it does

not admit other assertions in the opposing party's pleading that constitute conclusions of law, legally impossible facts, or matters that would not be admissible in evidence at trial." Wright & Miller, 5C Federal Practice & Procedure: Civil 3d § 1368 (2006). Hence, a court will examine the facts as alleged in the complaint, and will enter judgment for a defendant where no cognizable claim can be stated.

A court will also consider any judicially noticeable facts that bear on the motion. Judicial notice will be taken of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice has been taken of information contained in accurate sources such as census data, judicial opinions and records, government records and reports, maps, newspapers, standard reference works, treatises and other scholarly works. See Wright & Graham, 21B Federal Practice and Procedure: Evidence 2d § 5106.2 (2005). In addition, "a court may take judicial notice of information publicly announced on a party's website." Doron Precision Sys., Inc. v. FAAC, Inc., 423 F. Supp. 2d 173, 179 n.8 (S.D.N.Y. 2006). "Judicial notice may be taken at any stage of the proceeding" (Fed. R. Evid. 201(f)), including on a motion for judgment on the pleadings. See Wright & Graham, § 5110, at 522 ("[C]ourts have always taken judicial notice of facts in ruling on demurrers and motions to dismiss").[4]

As demonstrated below, plaintiffs here cannot state a claim for the reasons set forth by the Supreme Court in Sherrill, 544 U.S. 197, and applied by the Second Circuit in Cayuga, 413 F.3d 266. The equitable doctrines of laches, acquiescence and impossibility are a complete

[4] The United States Supreme Court took judicial notice of treatises and census data in dismissing the Oneida's sovereignty claims. See Sherrill, 544 U.S. at 204-05, 211. Likewise, the New York Court of Appeals took judicial notice of treatises, statutes, and "official documents" in dismissing of the St. Regis Tribe's claim to the Islands in 1958. See St. Regis Tribe of Mohawk Indians, 5 N.Y.2d at 37; 177 N.Y.S.2d at 298.

defense to, and require dismissal of, this ancient possessory land claim.

A. *Sherrill* And *Cayuga* Make Clear That Equitable Defenses Are Available To Dismiss Possessory Land Claims.

The Supreme Court and the Second Circuit have made it abundantly clear that possessory land claims having a disruptive effect on long-settled expectations of the citizenry are subject to dismissal on equitable grounds. These are precisely the claims asserted by the plaintiffs in this case.

In Sherrill, the Supreme Court ruled that the Oneida Indian Nation of New York could not avoid paying property taxes on land purchased in the open market that was once part of its historic reservation. The Oneidas claimed that the purchased land became "Indian country" because there was a reunification of fee titles with aboriginal title, such that it became sovereign Indian land once again. 544 U.S. at 212. The Supreme Court rejected the claim as barred by the equitable principles of laches, acquiescence and impossibility. It announced, "[w]e now . . . hold that the 'standards of federal Indian law and federal equity practice' preclude the tribe from rekindling embers of sovereignty that long ago grew cold." Id. at 214 (citations omitted).

In so holding, the Court recognized that the character of the land had substantially changed and had been developed in the centuries that had passed since the plaintiffs departed from it; that there was a lengthy delay in the plaintiffs' assertion of their rights which gave rise to "longstanding observances and settled expectations" by the citizenry of the State; that reestablishment of Indian control would have "disruptive practical consequences"; that the plaintiffs had, over a long period of time, acquiesced in the state and local governments' exercise of jurisdiction and occupation of the land by non-Indians. Id. at 215-19.

In Cayuga, 413 F.3d 266, the Second Circuit applied Sherrill to dismiss a possessory land claim indistinguishable from the case at bar. As in this case, the plaintiffs in Cayuga claimed

that they had possessory rights to former aboriginal land that was part of their historic reservation and was conveyed in contravention of treaties and federal law, including the Non-Intercourse Act of 1793. And, as in this case, the United States belatedly intervened on behalf of the Indians.

The Second Circuit made clear that, "Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that the equitable defenses that formed the basis of the decision, i.e., laches, acquiescence and impossibility, apply to 'disruptive' Indian land claims more generally." Cayuga, 413 F.3d at 274. It concluded that, "the same considerations that doomed the Oneidas' claim in Sherrill apply with equal force here." Id. at 277. It dismissed the action in its entirety -- even after a lengthy jury trial and the rendering of a $248 million judgment for plaintiffs. It concluded, "the import of Sherrill is that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses including laches." Id. The Court found the Cayuga claim disruptive even though the trial court had long before eliminated ejectment as an available remedy.

It is plain that this action is an even more "disruptive" possessory land claim subject to the equitable defenses of laches, acquiescence and impossibility since both the Tribal plaintiffs and the United States seek to eject the NYPA from the Islands. Indeed, the 1989 complaint begins, "This is a defendant class action to declare Indian ownership of and right to possess certain lands and rivers . . . " (Ex. 3, ¶ 1; emphasis added), and ends with a request, inter alia, for a declaratory judgment "that the subject land remains treaty-guaranteed Indian land" and for a "permanent injunction ejecting defendants . . . from the subject lands" (Ex. 3, p. 22). The other pleadings make the same assertions and seek the same relief. (See Ex. 1 p. 12; Ex. 2, pp. 9-10; Ex. 4, pp. 14-15). If this relief is granted, the NYPA's ownership and possession of the Islands,

and operation of the St. Lawrence Project, would be disrupted. See Seneca Nation of Indians v. New York, 382 F.3d 245 (2d Cir. 2004), cert. denied, ___ U.S. __, 126 S. Ct. 2351 (2006) (noting that "as long as an Indian tribe retains aboriginal title, ownership of the fee title . . . brings with it no present right of possession for current owners.").[5]

Therefore, the legal landscape has been "dramatically altered." Cayuga, 413 F.3d at 273. It is now a matter of settled law that equitable defenses apply to all the claims in this action, however denominated. These are the same equitable defenses that defendants have pressed from the inception of this action.[6]

B. Application Of The Factors Articulated In *Sherrill* And *Cayuga* Requires Dismissal Of The Claims To The Islands.

Each of the considerations that "doomed" the claims in Sherrill and Cayuga apply with equal force and compel the dismissal of the claims here as well. There is no need for any fact-finding or development of a record for the Court to reach this conclusion. The Second Circuit has recognized that equitable defenses may be established by reference to the pleadings and the judicially noticeable facts on a motion to dismiss. See Cayuga, 413 F.3d at 277-78 ("[I]f the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under Sherrill and could dismiss on that basis.") (emphasis added). Here, it is clear that plaintiffs have inexcusably delayed in asserting their claims and that the equities are unquestionably in the NYPA's favor. It would serve no purpose,

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[5] The Tribal plaintiffs also seek a money judgment "in an amount equal to the fair rental value of the subject lands, with interest, for the entire period of plaintiffs' dispossession from the subject lands" (Ex. 3, p. 22). As the Second Circuit has held, such claims for monetary damages are also barred since they are "predicated entirely upon plaintiffs' possessory land claim." Cayuga, 413 F.3d at 278.

[6] In light of Sherrill and Cayuga, this Court should revisit its prior ruling on the NYPA's laches defense. "A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment." United States v. Lo Russo, 695 F.2d 45, 53 (2d Cir. 1982). A change in controlling law -- particularly where, as here, the law has been "dramatically altered" by the United States Supreme Court (Cayuga, 413 F.3d at 273) -- warrants such reconsideration. See Doe v. New York City Dep't of Soc. Serv., 709 F.2d 782, 789 (2d Cir. 1983).

and be a waste of the resources of this Court and of the parties, for this action to proceed any further.

First, the Supreme Court and the Second Circuit took note of the fact that "generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation." Cayuga, 413 F.3d at 277, citing Sherrill, 544 U.S. at 202. As admitted in the complaints, the Islands passed into the hands of numerous private owners throughout the 1800's, were acquired by the State and NYPA in the 1950's and have been home to a major hydro-electric power facility for fifty years. The Tribal plaintiffs have not owned or developed the Islands for "generations."

Second, the Courts recognized that, "at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere." Cayuga, 413 F.3d at 277, citing Sherrill, 544 U.S. at 202. Here, the Tribal plaintiffs do not allege that they have resided on the Islands at any time in recent history. Indeed, they have not.

Third, the Courts considered the "longstanding, distinctly non-Indian character of the area and its inhabitants." Cayuga, 413 F.3d at 277, citing Sherrill, 544 U.S. at 202. The Islands likewise have a "distinctly non-Indian character." Their "character" is in that of a fully operational international power plant, which serves the citizenry of the State and employs its residents. As such, the Islands have long since been "converted from wilderness," and they "have greatly increased in value" since the St. Regis Tribe vacated them and sold them to the State in the 19th century. Sherrill, 544 U.S. at 215.

Fourth, "the distance from 1805 to the present day" was also consideration in dismissing the claims. Cayuga, 413 F.3d at 277, citing Sherrill, 544 U.S. at 221. There has been a similar time lapse in the present case as demonstrated by the Tribal plaintiffs' allegations that "the State

of New York disposed of said Islands by issuing patents granting them to various other parties" after they were declared part of the State in 1822 (Ex. 2, ¶ 43).

Fifth, "the Tribe's long delay in seeking equitable relief against New York or its local units" was a significant factor requiring dismissal of the claims in Cayuga and Sherrill. Cayuga, 413 F.3d at 277, citing Sherrill, 544 U.S. at 221. The Tribal plaintiffs have certainly delayed in this case. They stood idly by for approximately 150 years, without seeking equitable relief as to any of the conveyances or transactions with respect to the Islands. Even worse, they affirmatively accepted payment as compensation for the Islands. Indeed, all they ever sought prior to this action was "monetary recompense," which is the same remedy sought by the Oneida tribes prior to commencing suit in Sherrill, and which the Supreme Court rejected as insufficient to withstand a laches defense. Sherrill, 544 U.S. at 207. There is no reason or excuse for plaintiffs' "long delay," and it would be inequitable to permit claims that could have been asserted centuries ago to proceed now. Equity aids the vigilant. See New York State Teamsters Conference Pension and Retirement Fund v. Hoh, 554 F.Supp. 519, 526 n. 13 (N.D.N.Y. 1982) ("The defense of laches is bottomed on the principle that equity aids the vigilant, not those [who] sleep on their rights"). Simply put, plaintiffs have not been vigilant in this case, and do not even allege that they have.

Sixth, the Courts took into account the "developments in the area spanning several generations." Cayuga, 413 F.3d at 277, citing Sherrill, 544 U.S. at 199. This consideration applies with tremendous force in the case at bar. The Islands have obviously been developed over the course of the last two centuries. The St. Lawrence Project has been constructed, has been operating for nearly fifty years, and is a significant source of power for the region. It continues to be modernized, improved and renovated, with a major and costly public works project that is presently underway.

Nor did the United States do anything to protest the transactions at issue. Thus, its complaint, which asserts possessory land claims for the Tribal plaintiffs and seeks the same disruptive relief, is subject to dismissal for the reasons set forth above. Laches also applies to lawsuits by the federal government. See Cayuga, 413 F.3d at 278 (concluding that the "United States as plaintiff-intervenor is subject to laches").

Other equitable considerations confirm that the claim to the Islands must be dismissed. The Supreme Court has recognized the "impracticability of returning to Indian control land that generations earlier passed into numerous private hands." Sherrill, 544 U.S. at 219. Here, the impracticality and disruptive consequence of awarding immediate possession of these islands which house a federally licensed, publicly owned hydro-electric project is infinitely more impractical. The NYPA, along with its Canadian counterpart, has been operating the transborder project for half a century, and the NYPA just received a license to do so for another fifty years. Ejecting a federal licensee like the NYPA from these islands, the relief demanded by the Tribal plaintiffs and the federal government, is the very type of relief which prompted the Supreme Court in Sherrill to reaffirm the validity of laches as a defense to century-old land claims.

This Court has already acknowledged the "self-evident" and "widespread disruption" caused when ejectment is ordered as a remedy on land which contains public projects. Specifically, this Court recognized that ejectment can cause widespread disruption because it can displace "those who provide such essential services as electricity and transportation systems." The Cayuga Indian Nation of New York v. Mario M. Cuomo, Nos. 80-CV-930; 80-CV-960, 1999 U.S. Dist. LEXIS 10579 at *91, (N.D.N.Y. July 1, 1999). Moreover, "ejectment would cause great upheaval in terms of requiring removal of existing power and sewer infrastructure." Id. at *98. In Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61, 92 (N.D.N.Y 2000), the Court wrote:

> Many of the reasons which this court gave in Cayuga Indian Nation of New York v. Cuomo . . . for not permitting ejectment, such as the potential for displacement of vast numbers of private landowners; "negative economic impact"; "widespread disruption" to everyone residing in the general vicinity of the claim area due, in part, to interference with the transportation systems which currently transect the claim area, were self-evident.

See also Sherrill, 544 U.S. at 219 (recognizing the "pragmatic concerns about restoring Indian sovereign control over land [is] 'magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries'") (citations omitted); The Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, New York, 233 F.R.D. 278, 282 (N.D.N.Y. 2006) (McCurn, S.J.) (applying Sherrill and dismissing claim by Indian tribe because "the doctrine of impossibility bars the Tribe from asserting immunity from state and local zoning laws and regulations, as well as state and local taxation laws and regulations"); Cayuga Indian Nation of New York v. Village of Union Springs, 390 F. Supp. 2d 203 (N.D.Y. 2005) (same).

Finally, plaintiffs have acquiesced in the property transactions of which they now complain. The Tribal plaintiffs unquestionably knew about the transactions and accepted compensation from the State for the Islands in 1856. There is also no question that the United States knew about the transactions and pursued a policy of non-intervention. Thus, the validity of the original boundaries to the Islands is of no moment in this action. What matters, and what is fatal to plaintiffs' case, is their long-standing acquiescence in their dispossession from the Islands. See Sherrill, 544 U.S. at 218 ("The acquiescence doctrine does not depend on the original validity of a boundary line; rather it attaches legal consequences to acquiescence in the observance of the boundary"); California v. Nevada, 447 U.S. 125, 131 (1980) (holding that there is no "particular relationship between the origins of a boundary and the legal consequences of acquiescence in that boundary").

Accordingly, plaintiffs cannot rekindle claims to the Islands that "long ago grew cold." Sherrill, 544 U.S. at 214. Equity compels dismissal of this action.

CONCLUSION

For the foregoing reasons, and those set forth in the accompanying affidavit and in the other defendants' papers, this motion should be granted, and judgment should be entered in favor of the New York Power Authority.

Respectfully submitted,

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