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.	:	

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

MANATT PHELPS & PHILLIPS, LLP
7 Times Square
New York, New York 10036
(212) 790-4500

Attorneys for Defendant
New York Power Authority

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Defendant New York Power Authority ("NYPA"), in further support of its motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), submits this Opening Supplemental Memorandum in light of the Second Circuit decision in *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) ("*Oneida*") and this Court's decision in *Onondaga Nation v. State of New York*, No. 05-cv-0314 (LEK), 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010) ("*Onondaga*"). NYPA also joins in the separately filed Joint Supplemental Memorandum of Law in Support of the State and Municipal Defendants' Motions for Judgment on the Pleadings.

PRELIMINARY STATEMENT

The Second Circuit's recent decision in *Oneida* makes clear that the plaintiffs' ancient land claims against NYPA are precluded. The plaintiffs here seek to resurrect a grievance challenging a more-than century long chain of title in certain islands that, today, host an international hydro-electric facility supplying power to thousands. Plaintiffs' claims threaten extreme disruption to well-settled societal expectations of land ownership. Based on equitable principles set forth in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), and as reaffirmed by the Second Circuit and this Court in *Oneida* and *Onondaga*, plaintiffs' claims must be dismissed.

Plaintiffs' arguments in opposition to NYPA's original motion have been directly refuted by *Oneida* and *Onondaga*. Principally, Plaintiffs disclaimed their prayers for ejectment remedies to distance this case from the so-called "possessory" claims in *Cayuga*. As *Oneida* and *Onondaga* clearly state, however, equitable principles of laches apply to Indian land claims that seek to undermine ancient conveyances of title in land, regardless if the legal theories or the particular remedies sought are "possessory." Plaintiffs' claims are necessarily disruptive as a matter of law, and laches is therefore an available defense.

Moreover, all the relevant factors demonstrate that the claims here, as in *Oneida* and *Onondaga*, should be dismissed. The claims to the islands were more than 150 years old before this action was commenced. The islands bare little if any indicia of former tribal ownership, and for more than 50 years, have hosted a massive hydroelectric facility constructed and operated under International and federal law. NYPA is an innocent landowner wholly unconnected to the plaintiffs' 150-year-old grievances. Equity compels that the ancient claims to the Islands be dismissed. Accordingly, the NYPA's motion for judgment on the pleadings should be granted.

BACKGROUND AND PROCEDURAL HISTORY

The procedural history relevant to NYPA's motion for judgment on the pleadings is set forth more fully in NYPA's November 6, 2006 Memorandum of Law ("NYPA Mem.") (Dkt. No. 449).[1] To summarize, this action consists of complaints filed by three Indian tribes (collectively, the "Tribal Plaintiffs" or the "St. Regis Tribe"), who seek title and possession to various lands, including certain islands currently owned by NYPA (the "Islands"). The allegations of the plaintiff United States, as intervenor, mirror those of the Tribal Plaintiffs.

Regarding NYPA, the gist of the complaints is that the Islands are the Tribal Plaintiffs' property, wrongfully occupied by private parties and then NYPA, and that NYPA's titles and interests in the Islands are null and void (the "Island Claims"). *See* Ex. 2, Am. Cplt., CA No. 82-cv-1114, at ¶¶ 1, 43-45; Ex. 3, Cplt., CA No. 89-cv-829, at ¶¶ 42, 44; Ex. 4, United States Am. Cplt. at ¶¶ 1-3, 33-35. The complaints allege that New York State wrongfully issued patents for the Islands to private individuals in or around 1822 in violation of federal law, including the

[1] "NYPA Reply" refers to NYPA's December 5, 2007 Reply Memorandum of Law in support of this motion. (Dkt. No. 499) "Ex." refers to the exhibits annexed to the November 6, 2006 Affidavit of O. Peter Sherwood accompanying NYPA's Memorandum of Law (Dkt. No. 449) and the consecutively numbered exhibits annexed to the December 5, 2007 Reply Affidavit of O. Peter Sherwood (Dkt. No. 499).

Indian Non-Intercourse Act of 1793 (the "Non-Intercourse Act"). *See* Ex. 2 at ¶¶ 2, 42-45; Ex. 3 at ¶¶ 39-45; Ex. 4 at ¶¶ 30-36. The Tribal Plaintiffs seek declarations of title and ejectment of NYPA from the Islands. *See* Ex. 2 at pp.9-10; Ex. 3 at pp.21-22; Ex. 4 at p.14.

In 2006, this Court permitted the defendants to file the instant motions based on the laches principles set forth in *Sherrill* and *Cayuga*. NYPA argued that the Island Claims were unequivocally precluded under *Sherrill* and *Cayuga*, particularly in light of the federally licensed hydroelectric plant operating on the Islands today.

The plaintiffs opposed NYPA's motion on various grounds. They contended that the application of the Federal Power Act distinguishes this case from *Sherrill* and *Cayuga*. Specifically, they contended the Federal Power Act would preserve NYPA's possession and operation of the power plant, while allowing the St. Regis tribe to receive annual payments for NYPA's use of the land. *See* St. Regis Mohawk Tribe & Mohawk Nation Council Opp. Mem. ("St. Regis Mem.") at 26-29 (Dkt. No. 471); Mohawk Council of Akwesasne Opp. Mem. ("Akwesasne Mem.") at 14-17 (Dkt. No. 473). The Tribal Plaintiffs also argued their claims were preserved because their predecessors had timely and diligently asserted their grievances to state and federal officials throughout the years. *See* St. Regis Mem. at 23-25, 29-30.

The United States opposed the defendants' motions on additional grounds. The United States principally argued that the equitable doctrines set forth in *Sherrill* and *Cayuga* should not apply to a "non-possessory" land claim. *See* United States Opp. Mem. at 21-31 (Dkt. No. 484). In that vein, the United States articulated a reformation-of-contract theory of liability based on Judge Kahn's 2007 decision in *Oneida Indian Nation of New York v. State of New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007). In that case, Judge Kahn held that the Oneida Indian Nation could pursue Non-Intercourse Act claims for equitable reformation to adjust the original purchase price of the contested lands.

After briefs were submitted, the Court, per Magistrate Judge Lowe, stayed this action until the Second Circuit decided the appeals in *Oneida*. (Dkt. No. 504) The Second Circuit decided *Oneida* on August 9, 2010. It affirmed dismissal of the so-called possessory claims but reversed in part, finding that the non-possessory claims should have been dismissed as well. The Second Circuit explained that "[t]he equitable defense recognized in *Sherrill* and *Cayuga* is not limited to 'possessory' claims – to claims premised on the assertion of a current possessory right to tribal lands . . . ." 617 F.3d at 135. Rather, it applied to "inherently disruptive claims," including the Oneida's Non-Intercourse Act claim because it was "premised on the invalidity of the initial transfer of the subject lands" over a hundred years before the suit was filed. *Id.* at 136.

Soon after, in September 2010, the Northern District applied *Oneida*, dismissing with prejudice all claims in *Onondaga Nation v. State of New York*, No. 05-cv-0314 LEK, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010). In that suit, the Onondaga Nation asserted that various lands in central New York were unlawfully acquired in a series of transactions from 1788 to 1822. The plaintiffs there alleged that the original land conveyances were never approved by the Onondaga Nation and, in any event, were void under federal law, including the Non-Intercourse Act. The court, per Judge Kahn, concluded that "*Sherrill*, *Cayuga* and *Oneida* foreclose any possibility that the Onondaga Nation's action may prevail." 2010 WL 3806492 at *7. In light of the express purpose of the claims – to upset the validity of land conveyances dating back to 1822 – the court found that the Onondaga claims "are equitably barred on their face." *Id.* at *8.

Thereafter, this Court lifted the stay on the instant action and ordered supplemental briefing on the *Oneida* and *Onondaga* decisions.

ARGUMENT

Sherrill, *Cayuga*, *Oneida* and *Onondaga* plainly bar the Tribal Plaintiffs from pursuing the Island Claims. NYPA acquired the Islands decades ago, following the state's conveyances

dating back as far as 1822 and untold numbers of subsequent private transactions. NYPA had no role in the alleged wrongdoing. The Islands are not alleged to host any Indian population or presence. A hydroelectric power facility in operation there for the past fifty years starkly demonstrates the Islands' non-Indian character, the enormous development of the area, and the massive disruption that this action poses to settled expectations of land ownership. The recent decisions in *Oneida* and *Onondaga* make clear that the strong equitable interests in well-settled expectations of land ownership preclude the plaintiffs' Island Claims, and NYPA's motion should be granted.

I. Laches Is Available Under *Oneida*, Regardless of the Remedy Sought, Because the Island Claims Are Inherently Disruptive

Oneida holds that ancient land claims premised on current right of ownership and possession are *inherently* disruptive of well settled societal expectations and subject to equitable defenses. The *Oneida* court found this conclusion inescapable:

> This much is clear from even the most cursory reading of *Cayuga*. *Cayuga* expressly concluded that "possessory land claims"—any claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title—are by their nature disruptive and that, accordingly, the equitable defenses recognized in *Sherrill* apply to such claims.

Oneida, 617 F.3d at 125. As the Second Circuit explained, these claims are inherently disruptive because of their impact, not on land *owners*, but on land *ownership*. *See Oneida*, 617 F.3d at 126 ("this type of claim is inherently disruptive because it seeks to overturn years of settled land ownership . . . .") (internal quotation marks omitted); *see also id.* at 124 (noting that *Cayuga* concluded that possessory claims "'were by their nature disruptive in that they called into question settled land titles . . . .'") (quoting *Cayuga*, 413 F.3d at 275).

Moreover, *Oneida* holds that laches defenses are available against *any* claims that challenge the validity of an ancient transfer of Indian lands, because such claims are inherently

disruptive. Thus, *Oneida* found that laches was a viable defense to the plaintiffs' "non-possessory" claims under the Non-Intercourse Act for reformation of contract:

> Despite the contentions of the plaintiffs, this claim is, at base, ***premised on the invalidity of the initial transfer of the subject lands***. . . . Such a claim, which necessarily calls into question the validity of the original transfer of the subject lands and at least potentially, by extension, subsequent ownership of those lands by non-Indian parties, effectively "asks this Court to overturn years of settled land ownership." *Cayuga*, 413 F.3d at 275. ***Claims having this characteristic, as Cayuga recognized, necessarily threaten to undermine broadly held and justified expectations as to the ownership of a vast swath of lands*** – expectations that have arisen not only through the passage of time but also the attendant development of the properties. Accordingly, such claims are subject to the defense recognized in *Sherrill* and *Cayuga*.

Oneida, 617 F.3d at 136-37 (emphases added).

Thus, *Oneida* teaches that such claims are subject to laches regardless of the particular remedy or legal theory advanced. Indeed, both *Cayuga* and *Oneida* barred claims for purely monetary relief – namely, the fair market value of land and back rent. *See Oneida*, 617 F.3d at 126; *Cayuga*, 413 F.3d at 276, 278. *Onondaga* recognized that actions challenging ancient claims of title are "at the center of the range of claims barred under *Cayuga*" even where the plaintiffs seek only a declaratory judgment. *See Onondaga*, 2010 WL 3806492 at *7. Thus, claims subject to the laches defense sustained in *Cayuga*, *Oneida* and *Onondaga* cannot be saved by careful selection of remedies.

The Tribal Plaintiffs' claims against NYPA pose precisely the inherent disruption described in *Oneida* and *Onondaga*. The Island Claims clearly challenge the Islands' initial transfer of ownership, dating back as far as 1822. It makes no difference that the Tribal Plaintiffs now disclaim possession as an available remedy. It makes no difference that ejectment may be foreclosed by the Federal Power Act or that the Tribal Plaintiffs' ultimate objective is an

annual payment set by the Federal Energy Regulatory Commission ("FERC").[2] The Tribal Plaintiffs' claims are possessory in nature or, at the very least, they indisputably challenge the ancient termination of their alleged title in the Islands. Either way, the claims are inherently disruptive, as recognized in *Cayuga*, *Oneida* and *Onondaga*, and subject to laches.

II. Laches Bars the Island Claims and Requires Dismissal, As Confirmed by *Oneida* and *Onondaga*

The recent decisions in *Oneida* and *Onondaga* confirm not only that the *Cayuga* laches defense is available, but also that the defense actually bars the Island Claims. The Island Claims are for all purposes indistinguishable from the claims in *Oneida* and *Onondaga*. Moreover, *Oneida* makes clear that the claims are barred regardless of the Tribal Plaintiffs' contention that they "repeatedly asserted" their rights to the Islands throughout the period of delay.

A. The Island Claims Have All the Same Essential Qualities as the Claims in *Oneida* and *Onondaga*

The claims against NYPA present each of the factors that required dismissal in *Cayuga*, *Oneida* and *Onondaga*. After concluding that the *Cayuga* laches defense was available, the *Oneida* Court summarized the relevant factors in words that easily could have been written about the Island Claims here:

> This matter is indistinguishable from *Cayuga* in terms of the underlying factual circumstances that led the *Cayuga* court to conclude . . . that laches actually barred the claims at issue in that case. Here, as in *Cayuga*, a ***tremendous expanse of time*** separates the events forming the predicate of the ejectment and trespass-based claims and their eventual assertion. In that time, ***most of the Oneidas have moved elsewhere***, the subject lands have ***passed into the hands of a multitude of entities and individuals, most of whom have no connection to the historical injustice*** the Oneidas assert, and these parties have themselves both bought and sold the lands,

[2] The annual charges referenced by the Tribal Plaintiffs relate to power facilities on Indian *reservations*. This Court cannot establish an Indian reservation or set annual rate charges in the first instance. *See* NYPA Reply at 9, n.7. Thus, the only relevant relief the Tribal Plaintiffs can seek from this Court is a declaration of title, which was the sole remedy sought in *Onondaga*.

> and also ***developed them to an enormous extent***. These developments have given rise to justified societal expectations . . . under a scheme of "settled land ownership" that would be disrupted by an award pursuant to the Oneidas' possessory claims.

Oneida, 617 F.3d at 126-27 (emphases added).

In *Onondaga*, this Court likewise found that dismissal was required, noting that case presented the same "essential qualities" as *Cayuga* and *Oneida*. *See Onondaga*, 2010 WL 3806492 at *8. *Onondaga*'s discussion of the relevant factors also aptly describes the Island Claims – that is, the last challenged land conveyance "was effected in 1822"; therefore "a tremendous expanse of time separates" the events underlying the claims and the plaintiffs' lawsuit; "generations have passed during which non-Indians have owned and developed the area"; and "the land is predominantly non-Indian today, and has experienced significant material development by private persons and enterprises as well as by public entities." *Onondaga*, 2010 WL 3806492 at *8 (internal quotation marks omitted).

Here, the Island Claims bear all the same "essential qualities" that required dismissal in *Oneida* and *Onondaga*. The Islands' contested conveyances occurred in or around 1822 when the State issued patents to private parties, or no later than 1856, when the state compensated the tribes for the Islands – either way, a "tremendous expanse of time" before this action was filed. *Oneida*, 617 F.3d at 126; *Onondaga*, 2010 WL 3806492 at *8. Generations later, despite the plaintiffs' contention that some portions of the Islands are uninhabited, there is no dispute that the Islands are "predominantly non-Indian today." *Onondaga*, 2010 WL 3806492 at *8. Indeed, there is no alleged Indian character or presence to the Islands at all. "[T]he subject lands have passed into the hands of a multitude of entities and individuals, most of whom have no connection to the historical injustice the [tribes] assert." *Oneida*, 617 F.3d at 127. Among the

innocent landowners are NYPA itself, which did not even exist when the challenged transactions occurred. It would be grossly inequitable to revive the Island Claims today.

Most importantly, the Islands have undergone enormous development, creating broad societal expectations in their current ownership. The Islands host a modern marvel of engineering, international endeavor and capital investment. The hydro-electric complex has operated on the Islands since 1958, pursuant to an international treaty and under federal license. The State and NYPA had to purchase or appropriate parcels of the Islands in advance of the massive construction – as title had rested with private landowners for over a century. Today, the Islands are made up of the plant's main generating unit; the United States-side of a power damn that stretches three thousand feet across the St. Lawrence River to Ontario, Canada; and a state park and uninhabited areas that satisfy the recreation and preservation aspects of the FERC licensing requirements. The project employs hundreds of workers, provides power for thousands more, and has received hundreds of millions of dollars in capital improvements. It is difficult to fathom a stronger equitable case against the revival of ancient ownership claims.

Under these circumstances, the considerations set forth in *Sherrill*, *Cayuga*, *Oneida*, and *Onondaga* permit only one result. NYPA's motion should be granted and the claims against it should be dismissed.

B. Under *Oneida*, the Tribal Plaintiffs' Alleged Previous Attempts to Assert Their Claims Are Not Relevant

The Tribal Plaintiffs' arguments about their past attempts to seek relief are also foreclosed by *Oneida*. The Tribal Plaintiffs contend that they petitioned state and federal officials several times in the past – specifically, in the years 1856, 1930 and 1935 – and by filing a state court suit (which they lost) in 1954. *See* St. Regis Mem. at 23-25, 29-30. Based on this, the Tribal Plaintiffs argue that they did not "unreasonably delay" filing this suit and that, under

Cayuga, there were no "settled expectations" in the Islands' title. Under *Oneida*, however, these arguments by the Tribal Plaintiffs fail as a matter of law.

The Plaintiffs' pre-complaint objections are certainly not relevant as a matter of laches doctrine. *Oneida* holds that the term "laches," although a "convenient shorthand," is only an imprecise label for the equitable principles developed in *Sherrill* and *Cayuga*. *See Oneida*, 617 F.3d at 127-28. The law is now clear that, to invoke the *Cauyga* laches defense, the defendants are ***not*** required to establish either prejudice to themselves or that the plaintiffs "unreasonably delayed the initiation of this action." *Id.* at 127 (emphasis added); *see also Onondaga*, 2010 WL 3806492 at *8 (relevant issue is purely length of time that has passed, not whether plaintiffs' delay was excusable). The Island Claims were more than 150 years old when this action was filed, and the Tribal Plaintiffs' conduct during that period is irrelevant.

Additionally, the Tribal Plaintiffs' sporadic objections cannot overcome the societal expectations that firmly settle when a challenged conveyance slips over a century into history. The Tribal Plaintiffs' handful of pre-complaint protests, combined with a state court lawsuit that they ***lost*** over a half-century ago, are simply overwhelmed by the sheer amount of time that has passed, comprising several generations and enormous development of the lands. Tellingly, *Cayuga* and *Oneida* did not require defendants to show that the plaintiffs' delay occurred in silence, only that it occurred. *Oneida* repeatedly states that claims questioning the validity of ancient land transfers are "inherently" disruptive and "***necessarily*** threaten to undermine broadly held and justified expectations." 617 F.3d at 137 (emphasis added); *see also Onondaga,* 2010 WL 3806492 at *8 (discovery and factual development unnecessary in light of "mandatory basis" for dismissal). The Tribal Plaintiffs' pre-complaint protests do not weaken the well-settled expectations that have formed during the tremendous expanse of passing time.

Indeed, in the District Court decision in *Oneida*, Judge Kahn had dismissed certain claims despite finding that the Oneida Nation, through the period of delay, had diligently expressed their objections. *See Oneida*, 500 F. Supp. 2d at 137 ("In fact, ***the Oneidas have diligently pursued their claims in various fora***, and this finding [of laches] does not, in any substantial part, rest on any supposed deficiency in the Oneidas' efforts to vindicate their claims.") (emphasis added). Judge Kahn cited evidence of the Oneida Nation's numerous efforts at various times from 1840 to 1965.[3] However, he found that such efforts were irrelevant under *Cayuga*. *See id.* The Second Circuit did not disturb that aspect of Judge Kahn's ruling or even discuss the Oneida Nation's non-judicial efforts. Such pre-complaint objections are simply not relevant. Thus, the *Cayuga* laches defense unequivocally bars the Island Claims.

III. *Oneida* Forecloses the United States' Non-Possessory Theory of Recovery

Oneida directly forecloses the United States' purported "non-possessory" contract reformation theory. As discussed above, the Second Circuit in *Oneida* made clear that the *Cayuga* laches defense applies beyond mere "possessory" claims, and it specifically rejected the reformation of contract theory advanced by the United States under the Non-Intercourse Act.

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[3] Judge Kahn quoted at length the findings of District Judge Edmund Port in a related case by the Oneidas:

> "Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. These efforts were not documented prior to 1909. However, expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government. Usually, such petitioning was conducted through the Oneidas' Indian agent. . . . All of these efforts were to no avail. Between 1909 and 1965, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances."

Oneida Indian Nation of New York v. New York, 500 F.Supp.2d 128, 137 n.3 (N.D.N.Y. 2007) (quoting *Oneida Indian Nation of New York v. Oneida County*, 434 F. Supp. 527, 536-37 (N.D.N.Y.1977) (per Port, J.)).

See Oneida, 617 F.3d at 136-37. Even if that theory were somehow viable, it could not be asserted against NYPA, which did not engage in any transactions with the St. Regis Tribe. *See Oneida*, 617 F.3d at 125 ("Indeed, the Counties were not parties to the various sale agreements between New York and the Oneidas, and thus the only claims *available to be asserted* against them relate to their alleged unlawful occupation of the subject lands in derogation of the Oneidas' superior possessory interest."). Regardless of what remedy or legal theory the United States may suggest, the claims in this action are "at base, premised on the invalidity of the initial transfer of the subject lands," 617 F.3d at 136, and are therefore subject to the laches defense articulated in *Cayuga*.

CONCLUSION

For the foregoing reasons, the decisions in *Oneida* and *Onondaga* further support NYPA's motion for judgment on the pleadings, and the Island Claims should be dismissed.

New York, New York
February 7, 2011

Respectfully submitted,

MANATT PHELPS & PHILLIPS, LLP

By: */s/ Kimo S. Peluso*
Kimo S. Peluso

7 Times Square
New York, New York 10036
(212) 790-4500 (telephone)
(212) 790-4545 (facsimile)
kpeluso@manatt.com

Arthur T. Cambouris
New York Power Authority
123 Main Street
White Plains, New York 10601
(914) 390-8007 (telephone)
(914) 390-8038 (facsimile)
arthur.cambouris@nypa.gov

Attorneys for Defendant New York Power Authority