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.	:	

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

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Defendant New York Power Authority submits this reply memorandum and the accompanying reply affidavit of O. Peter Sherwood ("Sherwood Reply Aff.") in further support of its motion, pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings, and in response to plaintiffs' papers.[1]

PRELIMINARY STATEMENT

This action, in which the Tribal plaintiffs have asserted ownership and possessory rights over the Islands and the hydroelectric power facility located thereon, is barred by the equitable doctrines of laches, acquiescence and impossibility. The United States Supreme Court in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) and the Second Circuit in Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, __ U.S. __, 126 S. Ct. 2022 (2006), held that such disruptive Indian land claims cannot be maintained. Since the filing of the NYPA's motion, this Court and another Court have applied Sherrill and Cayuga to dismiss similar disruptive Indian land claims on laches grounds. See Oneida Indian Nation of New York v. State of New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007); State of New York v. Shinnecock Indian Nation, Nos. 03-CV-3243, 03-CV-3466, 2007 WL 3307089 (E.D.N.Y. Oct. 30, 2007).

Plaintiffs do not -- because they cannot -- dispute that taking possession of the Islands and ejecting the NYPA from the power facility would be disruptive, and that this is precisely the type of case required to be dismissed under controlling law. Instead, they respond with a stunning concession. After nearly 25 years of litigation in which plaintiffs vociferously insisted that they had the right to possess the Islands and eject the NYPA, and after asserting this same

[1] The abbreviations in the NYPA's moving memorandum ("NYPA Mem.") are also used herein. Plaintiffs' papers consist of voluminous materials, which go well beyond the pleadings and address matters not raised on this motion. As set forth below, these documents should not be considered. See Point I, infra. The NYPA has properly confined its response to plaintiffs' positions with respect to the equitable defenses of laches, acquiescence and impossibility contained in the memoranda of the St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs ("SRMT Mem."), the Mohawk Council of Akwesasne ("MCA Mem."), and the United States ("U.S. Mem.").

position in submissions to the Federal Energy Commission ("FERC"), plaintiffs declare that they want no such thing, and that the remedies they have pursued these many years are actually barred by the Federal Power Act ("FPA"). They now argue that they are entitled to "annual charges", as provided under Section 10(e) of the FPA, where "tribal lands embraced within Indian reservations" are used for power production. 16 U.S.C. § 803(e)(1).[2]

Plaintiffs' about-face, dramatic though it is, is unavailing and does not save their case from dismissal. Plaintiffs do not seek FPA charges in any of their complaints or amended complaints. Moreover, plaintiffs do not have, and have never had, a reservation on the Islands. Any right to "annual charges" would have to be predicated upon the establishment of a "reservation" within the meaning of the FPA -- a process that necessarily implicates a possessory interest in the Islands also subject to equitable defenses, and one that must proceed through federal regulatory agencies, not the courts. The equitable considerations in Sherrill and Cayuga continue to apply, and operate to bar plaintiffs' claims.

Accordingly, this motion should be granted. Judgment should be entered in favor of the NYPA, and all claims against it should be dismissed with prejudice.

ARGUMENT

I.

CONVERSION TO A SUMMARY JUDGMENT MOTION IS UNWARRANTED BECAUSE LACHES IS A COMPLETE DEFENSE ON THE ISLAND CLAIM

In its moving memorandum (NYPA Mem. 10-11, 14), the NYPA showed that its equitable defenses are straightforward, and established by the dispositive facts set forth in the pleadings and in documents subject to judicial notice. Plaintiffs constructed a voluminous

[2] Even now, remnants of the claim for possession remain, despite plaintiffs' new assertion that they do not contend that ejectment will be forthcoming. See discussion, pp. 14-15, infra.

response over the course of approximately eight months, and have submitted thousands of pages of materials that address matters outside the scope of this motion, including so-called expert declarations. As set forth below, the Court should exclude the evidentiary submissions, and plaintiffs' effort to convert this motion to one for summary judgment should be rejected.

As plaintiffs acknowledge and this Court has recognized, "laches may be raised by a motion limited to a review of the pleadings." (SRMT Mem. 9 quoting Canadian St. Regis Band of Mohawk Indians v. State of New York, 278 F. Supp. 2d 313, 333 (N.D.N.Y. 2003)). The factual material that the NYPA submitted on this motion was the Order of the FERC issuing the new license for the St. Lawrence Project on October 23, 2003 (Sherwood Aff. Ex. 8) and excerpts from the NYPA's website with information concerning the facility (Sherwood Aff. Ex. 9). There is no question that the information contained in these documents is subject to judicial notice. See NYPA Mem. 11 (citing authorities which hold that judicial notice may be taken of information contained in accurate sources, including, inter alia, government records and a party's website).[3] Plaintiffs do not seriously argue otherwise.

By contrast, plaintiffs have offered extensive evidentiary submissions, and have presented "matters outside the pleadings", which should be "excluded" under Rule 12(c), Fed. R. Civ. P. Plaintiffs contend that their submissions are made "in response to facts alleged in the

[3] On reply, the NYPA offers submissions made by the Tribal plaintiffs to the FERC in connection with its application for re-licensing of the St. Lawrence Project. See Sherwood Reply Aff. Exs. 11, 12. On a motion for judgment on the pleadings, a court may take judicial notice of public records without converting the motion to one for summary judgment. See Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006). Public records include documents that are part of an administrative proceeding. See Palmer v. New York State Office of Court Admin., No. 5:00-CV-00110, 2007 WL 2362360, at *5 (N.D.N.Y. Aug. 13, 2007). See also Dollinger v. State Ins. Fund, 44 F. Supp. 2d 467, 472 (N.D.N.Y. 1999) (noting that "administrative complaints and findings are matters of public record" and that judicial notice was properly taken on motion to dismiss). Moreover, the court may appropriately take judicial notice of the FERC filings because the NYPA does not offer them for the truth of their contents, but rather to demonstrate the inconsistent position that plaintiffs have taken with respect to this dispute. See Global Network Commc'ns, Inc., 458 F.3d at 157.

Defendants' motions" (SRMT Mem. 6).[4] However, plaintiffs do not identify any meaningful factual dispute raised by the NYPA's motion. For example, the Tribal plaintiffs take issue with the NYPA's statement that they "vacated" the Islands. See SRMT Mem. 8 ("NYPA claims that the Mohawks 'vacated' the islands, with no evidentiary support whatsoever in either the complaint or in other evidence."). There is no issue here. The Tribal plaintiffs left the Islands, and do not inhabit them. The Islands are the site of a hydroelectric power facility, state park, and undeveloped and uninhabited regions. Plaintiffs admit as much. See, e.g., SRMT Mem. 25; MCA Mem. 10; U.S. Mem. 4-5. The bottom line is that plaintiffs have had actual notice of the facts upon which the NYPA relies, which are self-evident, uncontroversial, and the subject of the FERC licensing proceeding in which plaintiffs participated. Where a plaintiff has "actual notice . . . of all the information in the movant's papers, . . . the necessity to convert . . . is dissipated." DeJesus v. Tierney, No. 9:04-CV-298, 2006 WL 839541, at *2 (N.D.N.Y Mar. 28, 2006).

Plaintiffs purport to rely on Cayuga and Oneida for the proposition that fact-finding is necessary where the defense of laches is raised (SRMT Mem. 8-9). However, these authorities actually assist the NYPA and the other defendants. In Cayuga, 413 F.3d at 277-78, the Second Circuit noted the propriety of dismissing cases such as this "ab initio" and stated that, "[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." In Oneida, 500 F. Supp. 2d at 137, n.2, this Court rejected the need for specific fact-finding on a laches defense. It stated, "It is also important to note that the facts that would be considered as part of a laches inquiry, especially with regard to the potential prejudice that would result to

[4] The bulk of plaintiffs' materials have nothing to do with the Islands, and concern their mainland claims. For the reasons set forth in the other defendants' reply papers, it is not necessary to develop a factual record in order to dismiss the mainland claims either.

Defendants, are generally self-evident and further discovery regarding these matters would, in any event, be counterproductive." The Court took "special notice of Judge McCurn's wise reasoning, born of long experience with various Indian land claim litigations that led him to conclude [that] . . . the court gained little if any insight -- either factually or legally -- from that [evidentiary] hearing; it only needlessly prolonged the Cayuga litigation." Id.

The same is true here. All the information necessary for adjudication of this motion is before the Court. The motion should not be converted to summary judgment.[5]

II.

THE ISLAND CLAIM MUST BE DISMISSED BECAUSE, EVEN AS RESTATED, IT REMAINS A POSSESSORY LAND CLAIM AND THE NEW MONETARY REMEDY SOUGHT UNDER THE FEDERAL POWER ACT IS UNAVAILABLE IN THIS ACTION

In their moving memorandum (NYPA Mem. 10-19), the NYPA demonstrated that this action cannot be maintained under Sherrill and Cayuga. In response, and with the hope of salvaging their case from dismissal, the Tribal plaintiffs have abandoned any claim to possession of the Islands and ejectment of the NYPA. As set forth below, this tactic does not rescue their case. Equitable defenses still apply and operate to bar the claims.

A. Equitable Defenses Continue To Apply Despite Plaintiffs' Change In Position.

First, it bears emphasis that the Tribal plaintiffs have consistently sought the remedies of possession of the Islands and ejectment of the NYPA. These remedies are expressly prayed for in their complaints. See, e.g., Sherwood Aff. Ex. 3 at 22 ¶ 4 (demanding "a permanent injunction ejecting the defendants and members of defendant class from the subject lands"). The United States has also taken the position that the Tribal plaintiffs are entitled to possess and

[5] However, if the motion is so-converted, the NYPA should "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(c). See Sears Petroleum & Transp. Corp. v. Ice Ban Am., Inc., 217 F.R.D. 305 (N.D.N.Y. 2003) (permitting party adequate opportunity to present materials before deciding summary judgment motion).

occupy the Islands and the Land. See, e.g., Sherwood Aff Ex. 4 at 14 ¶ 1 (demanding "a declaratory judgment pursuant to 28 U.S.C. § 2201 that the Indians of the Village of St. Regis have the right to occupy the lands described in this complaint that are currently occupied by the State of New York and/or NYPA").

Plaintiffs have consistently pressed this position in the course of the litigation. For example, in 2001, the United States disavowed any relief that would dispossess private landowners, but specifically reaffirmed its intention to seek "full relief" on behalf of the Tribal plaintiffs -- including possession and ejectment -- from the State and the NYPA. See Sherwood Reply Aff. Ex. 10 at 2 ("Due to the unique history of Barnhart, Baxter and Long Sault Islands, we reserve the right to pursue appropriate remedies against the New York Power Authority, and perhaps other entities claiming an interest in these islands."). The Court has understood that this action is grounded in plaintiffs' alleged possessory interests, and that all claims flow therefrom. See Canadian St. Regis Band of Mohawk Indians v. State of New York, 146 F. Supp. 2d 170, 173-74 (N.D.N.Y. 2001) ("In this protracted land claim litigation, plaintiff tribes, as self-described descendants of the Village of St. Regis, seek a declaration of ownership and the right to possess approximately 12,000 acres of land in northern New York, plus damages for almost 200 years of dispossession.") (emphasis added).

Furthermore, the Tribal plaintiffs have represented to the FERC that, if successful in this action, they would be entitled to take over the Islands, evict the NYPA, and cause the "total removal" of the St. Lawrence Project. For example, in the course of the re-licensing proceeding in 2001, the St. Regis Mohawk Tribe (referred to here as the Kanienkeh aka) asserted, among other things, that:

> One of the reasonable alternatives that the applicant [i.e., the NYPA] failed to consider is the repatriation to the Tribe of the very lands upon which the Project is constructed. The significance of

> this contingency cannot be understated as a favorable court ruling in the Kanienkeh aka Land Claims litigation would result not only in a need to re-open the license to calculate retrospective (for the past 50 years) and prospective 10(e) charges, but also in a requirement to re-open the licensing process to determine whether the "license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" and to impose such conditions as are "necessary for the adequate protection and utilization of such reservation." See 16 U.S.C. § 797(e). Assuming that FERC could establish the "consistency" element (a doubtful proposition), an example of such a "condition" that might be "necessary" to protect Kanienkeh aka interests is the total removal of the Project from the St. Lawrence River landscape. The dramatic consequences of this eminently reasonable proposition have been all but ignored by the applicant, although a favorable Land Claims ruling may lead to the applicant's eviction from the Project lands.

Sherwood Reply Aff. Ex. 11 at 27 (emphasis added). The Mohawk Council of Akwesasne made similar representations. See Sherwood Reply Aff. Ex. 12 at 2 (representing to the FERC that it was "seeking a declaration that it owns and is entitled to possession of lands and certain islands in the St. Lawrence River").

Given their own representations, plaintiffs' accusation that the NYPA is "imagining 'a parade of horribles'" is odd. (MCA Mem. 27). The disruptive consequences of this action are not the product of the NYPA's imagination but reflect the expressed intentions of plaintiffs. There can be no doubt that widespread disruption would have ensued if the Tribal plaintiffs had their way. See NYPA Mem. 17-18 (setting forth authorities which hold that Indian land claims are dismissed where they would cause upheaval in essential services or require removal of existing infrastructure such as power plants).

Plaintiffs tacitly admit the disruptive nature of their claim for possession of the Islands and ejectment of the NYPA. Thus, on this motion, plaintiffs retreat from their own pleadings -- wherein they seek the remedies of dispossession or ejectment -- and the positions they have espoused for almost 25 years to this Court and to a federal agency. They now argue at length

why they are not entitled to the remedies they have sought for many years. See, e.g., MCA Mem. 12 ("[F]ederal 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."); SRMT Mem. 28 ("[E]ven if the Mohawks establish they have never lost title to the islands, it does not follow that the NYPA power project will be 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.").

The reason for plaintiffs' dramatic shift in position is obvious: their case cannot be maintained in light of Sherrill and Cayuga. As plaintiffs acknowledge, the reason that the claims were dismissed in Sherrill is because "[T]he Oneidas' chosen remedy, reasserting sovereign authority over land it had purchased in fee, was barred." (SRMT Mem. 15; emphasis added). As plaintiffs further acknowledge, the claims in Cayuga were dismissed because "tribes [were] seeking the return of large swaths of land of largely non-Indian character." (SRMT Mem. 16). This is a precise description of the case at bar.

Plaintiffs' sleight of hand and dropping of remedies do not change the essential nature of this case, or dispose of the NYPA's meritorious defenses.[6] It is not clear what plaintiffs are presently looking for in this action because, in derogation of Rule 15, Fed. R. Civ. P., they have not filed a proposed amended complaint. Rather, they ask the Court to "fashion an appropriate

[6] Courts do not condone parties making drastic changes in the theory of their case for strategic reasons, and to avoid dispositive motions. See Fox v. Amtrak, No. 04-CV-1144, 2006 WL 395269, at *2 n.2 (N.D.N.Y. Feb. 16, 2006) ("To the extent Plaintiff attempts to raise, for the first time in his Memorandum of Law in Opposition to Summary Judgment, an independent hostile work environment claim separate from his claim of retaliation . . . , that claim is not considered in this action."), aff'd, 2007 WL 2719062 (2d Cir. Sept. 19, 2007); Bracci v. N.Y.S. Dep't of Correctional Servs., No. 3:01 CV 01300, 2005 WL 2437029, at *5 (N.D.N.Y. Sept. 30, 2005) (same); Davis v. City of New York, No. 06 CV 3323, 2007 WL 2973695, at *3 (E.D.N.Y. Sept. 28, 2007) (disallowing a new claim and legal theory raised in plaintiff's opposition to 12(c) motion for judgment on the pleadings). Here, the Tribal plaintiffs' concessions that they are not seeking possession or ejectment -- which are binding upon them -- will not avoid dismissal in any event.

remedy" (MCA Mem. 27) -- "regardless of the pleading" (id. at 29). With respect the Islands, the remedy mentioned by the plaintiffs is "annual payment for use of the Island for the production of electricity under section 10(e) of the FPA" (MCA Mem. 12). However, "annual payments" are not available as a remedy to plaintiffs in this action.

The FPA establishes a comprehensive and complex regulatory scheme, pursuant to which the FERC is given broad powers and exclusive licensing authority over the development and operation of non-federal hydro-electric projects on navigable waters.[7] Section 10(e) of the FPA authorizes the FERC -- not federal district courts -- to establish certain charges "when licenses are issued involving the use of . . . tribal lands embraced within Indian reservations". 16 U.S.C. § 803(e)(1); see also 16 U.S.C. §§ 796(2), 797(e). The Supreme Court has held that, in enacting the FPA, Congress "intended to and did confine 'reservations,' including 'tribal lands embraced within Indian reservations' . . . to those located on lands 'owned by the United States' . . . or in which it owns a proprietary interest." FPC v. Tuscarora Indian Nation, 362 U.S. 99, 114 (1960) (rejecting Indian tribe's claim under the FPA where there was no reservation).[8] Therefore, an entitlement to payments under the FPA only arises if the Islands belong to the Tribal plaintiffs such that a federal Indian "reservation" is established within the meaning of the statute. As plaintiffs acknowledge (SRMT Mem. 28), the FERC's order issuing the 2003 license for the St. Lawrence Project does not provide for payments to the Tribal plaintiffs, and expressly notes that any right to payments is contingent upon "resolution of the Mohawk land claim litigation . . . in

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[7] The Tribal plaintiffs cannot obtain payments under the FPA from a District Court. Issues concerning payments under the FPA are within the exclusive jurisdiction of the FERC. See City of Tacoma v. FERC, 331 F.3d 106, 115 (D.C. Cir. 2003) (holding that "the authority to assess charges under Section 10(e)(1) of the FPA is FERC's exclusive responsibility"); E. Columbia Basin Irrigation Dist. v. FERC, 946 F.2d 1550, 1557 (D.C. Cir. 1991) (holding that the FERC "alone had authority over the annual charges mandated by Section 10(e)").

[8] The United States has not laid claim to the Islands on its own behalf. Its complaint in intervention is based on the Tribal plaintiffs' asserted ownership rights.

such manner sufficient as to cause the lands and waters subject to the referenced claims to become Federal reservations for the purposes of the Federal Power Act" (Sherwood Aff. Ex. 8 at 97). See also Id. at 58-60. There is no question that the Tribal plaintiffs do not have a reservation on the Islands, and are not entitled to payments for this reason alone.

Furthermore, to the extent that plaintiffs seek a declaration of title in an effort to establish a reservation and collect such payments (SRMT Mem. 28), such relief is also subject to the equitable defenses of laches, acquiescence and impossibility. This, by its very nature, is a possessory remedy.

Cayuga is directly on point and controlling.[9] The Second Circuit in Cayuga dismissed the action even though the trial court had long before eliminated ejectment as an available remedy. The District Court in Cayuga awarded only money damages for trespass, but the Second Circuit nonetheless concluded that entire case was subject to dismissal on laches grounds. The Second Circuit reasoned that trespass damages in the amount of the fair rental value of the land were "predicated entirely upon plaintiffs' possessory land claim, for the simple reason that there can be no trespass unless the Cayugas possessed the land in question." Cayuga, 413 F.3d at 278. Likewise, a declaration of title for the purpose of obtaining payments under the FPA implicates rights of ownership and possession. Plaintiffs try to distinguish Cayuga but cannot. They argue that 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." (MCA Mem. 31). However, this is not a distinction but rather an apt description of the

[9] Plaintiffs assert that Cayuga was wrongly decided. See U.S. Mem. 14-17; SRMT Mem. 70. Cayuga accords with the Supreme Court's decision in Sherrill, which it repeatedly cites and applies. Plaintiffs have identified no error of law in Cayuga, and their critiques of the Second Circuit opinion ring hollow. Plaintiffs are simply dissatisfied with Cayuga because it requires dismissal of this action.

Tribal plaintiffs' situation with respect to the Islands, i.e., in 1856, they settled any lingering claim to the Islands and accepted payment for them. See St. Regis Tribe of Mohawk Indians v. State of New York, 5 N.Y.2d 24, 40 (1958). No members of the tribe remain there.

Applying Cayuga, this Court recently confirmed that monetary payments arising even "remotely" out of possessory interests are barred by laches. See Oneida, 500 F. Supp. 2d at 144 n.8 ("The Circuit's reasoning [in Cayuga] suggests that any award of damages that is predicated on possession of the land in question, however remotely, is too disruptive and must be barred by laches. Plaintiffs' and the United States' reliance on the Court's equitable powers to compensate them for the loss of land necessarily implicates the Oneida's historical claim to the land in question."). The only claim that survived in Oneida was for fair compensation, a contract-based claim for money damages. The Tribal plaintiffs do not assert such a non-possessory claim, nor do they want contract damages. See MCA Mem. 28, n.13 (asserting that the remedy that remained in Oneida "is not a suitable remedy here"); see also Sherwood Reply Aff. Ex. 13 at 2 ("The Mohawks do not assert the 'fair compensation' claim at issue in the Oneida land claim").[10]

It is also significant that in Sherrill, the equitably barred claims had a similar declaratory and monetary remedial aspect since the Oneidas sought a declaration that they had no obligation to pay property taxes. In other words, the Oneidas sought a declaration of sovereign immunity with respect to the land such that they would receive an economic benefit in the form of tax relief. Here, the Tribal plaintiffs seek a declaration of title to the Islands such that they may take steps to obtain an economic benefit in the form of "annual charges" under the FPA. Laches applies in both cases because the monetary interest is derived from a claim that the Indian tribe

[10] The United States takes a different position from the Tribal plaintiffs and espouses a so-called "fair compensation claim" for them. See U. S. Brief 22-23. For the reasons set forth in the joint reply memorandum of the State and Municipal Defendants, the United States' position is unavailing.

had been wrongfully dispossessed of property belonging to them. See Sherrill, 544 U.S. at 213-14. See also Oneida, 500 F. Supp. 2d at 137 (holding that laches bars "damages related to Defendants' unjust possession of the land").

Accordingly, the equitable defenses recognized by the Supreme Court in Sherrill and applied by the Second Circuit in Cayuga remain controlling despite plaintiffs' new-fashioned abandonment of the remedies of possession and ejectment.

B. The Equities Require Dismissal Of This Action.

Application of the equitable considerations set forth in Sherrill and Cayuga requires dismissal of this action and entry of judgment for the NYPA. See NYPA Mem. 15-19. Plaintiffs' arguments to the contrary are simply incorrect.

The Courts in both Sherrill and Cayuga considered the present non-Indian character of the land at issue, noting that "generations have passed during which non-Indians have owned and developed the area" and "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. Plaintiffs seek to turn this consideration on its head by arguing that "no non-Indians have lived on the Islands" (MCA Mem. 10). However, the pertinent inquiry is whether there is "a longstanding distinctly non-Indian character of the area and its inhabitants." Cayuga, 413 F.3d at 277, citing Sherrill, 544 U.S. at 202. This is obviously the case with the Islands, which were in non-Indian hands since at least 1822 and now house a power plant, a state park and wilderness areas. Furthermore, the NYPA (not the Tribal plaintiffs) has developed the Islands, and expended hundreds of millions of dollars in constructing, maintaining and improving the St. Lawrence Project.

The Sherrill and Cayuga Courts also noted "the [Tribe's] long delay in seeking equitable relief." Cayuga , 413 F.3d at 277, citing Sherrill, 544 U.S. at 202. The same is true here. As in

Sherrill and Cayuga, "[t]he wrongs of which [the Tribal plaintiffs] complain [] in this action occurred during the early years of the Republic." Sherrill, 544 U.S. at 216. See, e.g., Sherwood Aff. Ex. 1 ¶¶ 35-46 (complaining of acts, treaties and events concerning the Islands in the late 1700's and early 1800's). Plaintiffs try to explain away the delay by arguing that "between 1856 and the 1950's, the Mohawks repeatedly complained to the federal government and the state that they had not lost title to the islands . . . [and] objected in 1954 at the onset of the project" (SRMT Mem. 30).[11] Plaintiffs omit to mention that they did not seek any equitable relief, which is the relevant consideration. During this time period, and according to their own pleading, the Tribal plaintiffs acquiesced in their dispossession from the Islands by accepting a payment from the State of New York "as compensation" (Sherwood Ex. 2 ¶ 48).[12]

Plaintiffs argue that "[t]he lapse of time from the rejection of the Tribe's claim in 1958 to the filing of this claim in 1983 [i.e, 25 years] is not great" (SRMT Mem. 30). Merely to state this argument is to reveal its weakness. Plaintiffs further contend that the Supreme Court's decision in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) should have put defendants on notice of their potential claims (SRMT Mem. 30). However, plaintiffs offer no reason for their failure to institute action at that time and for sitting on their rights during this 9-year period. Courts have dismissed claims on laches grounds where considerably shorter time frames have

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[11] The Mohawk Council of Akwesasne cannot rely upon the New York State court action because it was not party thereto and have previously insisted that the 1958 New York Court of Appeals decision is not binding on it (MCA Mem. 22). See Memorandum Of Law Of The Mohawks Of Akwesasne In Opposition To The Motion To Dismiss dated July 30, 1999, p. 31 ("[T]he Canadian St. Regis and the Longhouse did not participate in and were not in privity with the party-plaintiff in St. Regis Tribe v. State of New York. Neither of these plaintiffs played any role or gave any authorization in that case. Their non-participation prevents the application of res judicata as to their island claims.").

[12] In contradiction of their allegations, the Tribal plaintiffs now state that "[t]here are issues over whether the money was ever paid, and whether it was for back rent or title." (MAC Mem. 13). This is not an issue required to be resolved on this motion. The undisputed material point, which mandates dismissal of this case on laches grounds, is that the Tribal plaintiffs never asserted any equitable claim to the Islands until the commencement of this action -- more than 150 years after the alleged wrongs.

elapsed. See, e.g., Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 192 (2d Cir. 1996) (five year delay gives rise to laches); Kessler v. Gen. Servs. Admin., 341 F.2d 275, 276 (2d Cir. 1964) (four year delay gives rise to laches); Oroz v. Am. President Lines, Ltd., 259 F.2d 636, 637 (2d Cir. 1958) (five year delay gives rise to laches).

Furthermore, and while there is ample basis to find that plaintiffs inexcusably delayed in asserting their claims to the Islands, this Court has explained that such delay is not a necessary prerequisite to a finding of laches. See Oneida, 500 F. Supp. 2d at 137 ("Under the factors to be considered in a laches analysis, as set forth in Cayuga, it is not necessary to determine whether Plaintiffs unreasonably delayed in pursuing their claims."). The Court focused on practical considerations, and recognized the disruptive consequences that would follow if the Oneida's claims were permitted to proceed. As the Court put it, "[p]ast injustices suffered by the Oneidas cannot be remedied by creating present and future injustices." Id.

Here, the disruptive consequences to the St. Lawrence Project and the Islands, and the prejudice to the NYPA, are not eliminated by plaintiffs' abandonment of possession and ejectment as remedies. Even though the Tribal plaintiffs now represent that they will not interfere with the production of electrical power, they cannot avoid the fact that the NYPA will suffer an enormous financial burden by annual FPA payments. Plaintiffs admit the economic disruption but try to downplay it by erroneously characterizing the prejudice as "minimal." (SRMT Mem. 5; see also id. at 29, n.15). Plainly, it is significant.

Plaintiffs also want title to Robert Moses State Park located on Barnhart Island and uninhabited parts of the Islands, as well as "use of these lands." (SRMT Mem. 31). There is no Indian character to these parts of the Islands either, and permitting the Tribal plaintiffs to take title and use them would be disruptive. Robert Moses State Park is a recreational area open to all New York residents and others. The disruption to the users of a park by a takeover of public

space is self-evident.

Nor are the Tribal plaintiffs entitled to the undeveloped areas of the Islands. Plaintiffs argue that Long Sault Islands and Croil Island "would have little if any impact on the production of power and would not threaten the displacement or settled expectations of anyone." (SRMT 31). What plaintiffs fail to appreciate is that the FPA requires the FERC, when licensing a hydroelectric facility, to ensure that the facility "is best adapted to a comprehensive plan for improving or developing waterway" by including within the project lands, facilities, and operating conditions that promote interstate or foreign commerce, power development, recreation, flood control, fish and wildlife protection and mitigation, and other public interests. See 16 U.S.C. §§ 797(e), 803(a)(1). As such, all lands that are necessary or appropriate for these multiple public uses are considered part of the licensed project. See 16 U.S.C. § 796(11). Here, the undeveloped areas of the Islands are embraced within the FERC-established project boundary precisely because they are critical parts of the St. Lawrence Project, and are needed to satisfy the recreational and preservational components of the FPA's comprehensive development standard. These lands fall within the plenary jurisdiction of the FERC. Thus, plaintiffs continue to press for disruption of the NYPA's license and the operation of the St. Lawrence Project by threatening to interfere with areas within the project.

In addition, there are obvious homeland security concerns in transferring ownership of areas adjacent to the United States' border and a major power facility into the hands of private parties.

Accordingly, given all of these practical concerns, and the equities which favor the NYPA, this Court should rule that plaintiffs' claims against the NYPA are barred by equitable defenses of laches, acquiescence and impossibility.

III.

THIS CASE SHOULD BE STAYED PENDING THE APPEAL IN ONEIDA BECAUSE THAT RULING MAY HAVE A DIRECT BEARING ON THE ISSUES IN THIS MOTION

This Court's decision in Oneida is now under appellate review. The NYPA and the other defendants have applied for a stay pending the outcome of the appellate proceedings. See Sherwood Reply Aff. Ex. 14. The United States took no position on defendants' application, but the Tribal plaintiffs opposed it. As set forth below, a stay is appropriate and necessary to avoid the inefficiencies that will result if the instant motion is decided in a manner inconsistent with the Second Circuit's decision in Oneida.

It is well-settled that, "[a] district court has discretion to stay a case pursuant to the 'power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.'" Statewide Aquastore, Inc. v. Pelseal Techs., LLC, No. 5:06-CV-0093, 2007 WL 1825204, at *1 (N.D.N.Y. June 21, 2007) (citation omitted). In determining whether to grant a stay, "district courts consider several factors, including (but not limited to) whether the movant would be prejudiced if the stay were not granted, whether the non-movant would be prejudiced if the stay were granted, whether the stay is expected to be of a reasonable duration, and whether the movant has taken, or will take, any steps to hamper the progress of the action." Id. These factors militate in favor of a granting a brief stay in this action.

First, the NYPA will be prejudiced if the Court does not grant a stay. The District Court's decision in Oneida is cited by plaintiffs and defendants alike on this motion. The Second Circuit's decision on laches will have direct relevance to the issues before this Court. If this Court renders a decision without guidance by the Second Circuit, there is the distinct possibility that the parties will be put to further litigation expense. This is reason to grant a stay. See

WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 76 (2d Cir. 1997) (granting stay where there would be "substantial prejudice" to the defendant in the "significant expense and inconvenience" of litigating the case). It bears mention that an earlier stay has been issued in this action for this precise reason -- to await a decision in a precedential case under appellate review. See St. Regis Band of Mohawk Indians, 146 F. Supp. 2d at 176 (noting that "the court stayed the litigation pending the Supreme Court's decision in Coeur d'Alene Tribe of Idaho v. State of Idaho, 42 F.3d 1244 (9th Cir. 1994), cert. granted, 517 U.S. 1132 (1996)").

Second, plaintiffs will not be prejudiced by a stay. This case was filed 25 years ago and the parties have sought, and obtained, several stays. Plaintiffs "have shown little apparent inclination to seek an early and comprehensive resolution of the issues underlying the case at bar." Kappel v. Comfort, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996). They have obtained adjournments on this motion, and took eight months to respond to defendants' moving papers. Plaintiffs will not be prejudiced by a brief stay pending the outcome of the appeal in Oneida. This is particularly so with respect to the Islands since the members of the Tribal plaintiffs do not reside there, and plaintiffs have identified no hardship if a stay were granted to the NYPA.

Third, the proposed stay would be of reasonable duration. The Oneida appeal will be fully briefed on March 10, 2008. Even if the Oneida decision is not rendered until sometime in 2009, a stay of a year would be a reasonable in light of the circumstances of this case.

Finally, defendants have not attempted to halt the progress of this action. Defendants seek a prompt disposition of this action consistent with the law.

Accordingly, this case should be stayed until the appeal in Oneida is decided.

CONCLUSION

For the foregoing reasons, and those set forth in the accompanying affidavit, the NYPA's moving papers and the defendants' submissions, this motion should be granted, and judgment should be entered in favor of the NYPA.

Respectfully submitted,

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