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 STATE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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STATEMENT OF THE CASE

A. The Complaints

The three civil actions before this Court were instituted by three tribal entities that allege that the defendants wrongfully obtained title to and/or possess lands within a claim area of approximately 12,000 acres adjacent to the St. Lawrence River and three islands on the River. The tribes include: the Canadian St. Regis Band of Mohawk Indians, plaintiff in Civ. Act. Nos. 82-C-783 ("Cplt. I") and 82-CV-1114 ("Cplt. II") (hereinafter "Canadian Band"); the St. Regis Mohawk Tribe, plaintiff in Civ. Act. No. 89-CV-829 ("Cplt. III") (hereinafter "American Band"); and the People of the Longhouse at Akwesasne, co-plaintiff in Cplt. III (hereinafter "Longhouse"). The United States intervened as co-plaintiff in all three actions in 1998. ("U.S. Amd. Cplt-in-Intvt.").[1] All three tribal entities will be collectively referred to as the plaintiffs. The plaintiffs allege that they are the successors in interest to the historic "Indians of the Village of St. Regis" (hereinafter "the historic tribe"), Cplt. I at ¶ 24; Cplt. II at ¶ 4; Cplt. III. at ¶ 8, and that a 1796 Treaty between New York State and the Seven Nations of Canada, 7 Stat. 55, reserved the land at issue in these lawsuits to the historic tribe. Cplt. I at ¶ 24; Cplt. II at ¶ 4; Cplt. III. at ¶ 8.

The New York State defendants are the State itself and the Governor. Cplt. I at ¶¶ 13-15; Cplt. II at ¶¶ 7-14; Cplt. III at ¶ 9. Other defendants include the New York State Power

[1]For the Court's convenience, copies of the following pleadings are submitted as exhibits to the affirmation of Assistant Attorney General David B. Roberts in support of this motion: Exhibit A - Cplt. I (Amended Complaint on behalf of Canadian St. Regis Band of Mohawk Indians, et al, 82-CV-783 [docket no. 13]); Exhibit B - Cplt. II (Amended Complaint on behalf of Canadian St. Regis Band of Mohawk Indians, et al, 82-CV-1114 [docket no. 5]); Exhibit C - Cplt. III (Complaint on behalf of the St. Regis Mohawk Tribe, by the St. Regis Mohawk Tribal Council and the People of the Longhouse at Akwesasne, by the Mohawk Council of Chiefs, 89-CV-829 [docket no. 1]); and Exhibit D - U.S. Amd. Cplt-in-Intvt. (Amended Complaint in Intervention on behalf of the United States, 89-CV-829, 82-CV-114, 82-CV-783 [not listed in electronic docket]).

Authority (hereinafter "NYPA"), St. Lawrence and Franklin Counties, various towns and villages, Niagara Mohawk Power Corporation, and a defendant class comprised of land owners and other entities who possess lands within the claim area. Cplt. I at ¶¶ 13-23; Cplt. II at ¶¶ 7-14; Cplt. III at ¶¶ 9-13.[2]

Plaintiffs allege that New York State, in a series of seven transactions between 1816 and 1845, purchased approximately 12,000 acres of land located in Franklin and St. Lawrence Counties reserved to the historic tribe. Cplt. I at ¶ 49; Cplt. III at ¶ 21. Plaintiffs further allege that New York State wrongfully possesses three islands in the St. Lawrence River (Barnhart, Baxter and Long Sault Islands) that have belonged to the historic tribe since time immemorial. Cplt. II at ¶¶ 18-34; Cplt. III at ¶¶ 38-46. Plaintiffs claim that these transactions violated the so-called Indian Nonintercourse Act, 25 U.S.C. § 177 (hereinafter "NIA"), and that for over 150 years, the defendants have been in wrongful possession of the land. Cplt. I at ¶ 49; Cplt. II at ¶ 1; Cplt. III at ¶ 1; U.S. Amd. Cplt-in-Intvt. at ¶¶ 21, 22. In addition to a claim arising under the NIA, plaintiffs allege that the land transfers deprived them of rights, privileges and immunities secured by the Constitution and the laws of the United States, in violation of 42 U.S.C. § 1983. Cplt. I at ¶ 61; Cplt. II at ¶ 36; Cplt. III at ¶ 48.

The plaintiffs seek declaratory relief establishing that they have an absolute right to possession, an order of immediate possession, and the ejectment of the defendants from the subject land. Cplt. I, Prayer for Relief at ¶¶ 3-4; Cplt. II, Prayer for Relief at ¶¶ 2-3; Cplt. III,

[2]The defendant class, certified in 1983, was identified as all persons and entities claiming title to lands within the mainland claim area, excluding individual Indian residents, and non-Indian residents occupying residential parcels up to 2 acres in size. Canadian St. Regis Band v. State of New York, et al, 97 F.R.D. 453 (N.D.N.Y. 1983).

Prayer for Relief at ¶ 4; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at ¶¶ 1, 2.[3] Plaintiffs also seek damages for the fair rental value of the land, calculated from the date of acquisition of the parcels, and for the value of minerals and other resources removed from the land after those purchases, plus interest. Cplt. I, Prayer for Relief at ¶¶ 5-6; Cplt. II, Prayer for Relief at ¶¶ 4-6; Cplt. III, Prayer for Relief at ¶ 5; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at ¶¶ 3-4.

B. Summary of the Present Litigation

Plaintiff Canadian Band filed the original complaint, Cplt. I, on July 27, 1982. An amended complaint was filed on September 3, 1982. Cplt. I challenged the seven alleged transactions referred to above between New York State and representatives of the historic tribe from 1816 to 1845, through which title to approximately 12,000 acres purportedly passed from the historic tribe to the State, and subsequently to the municipalities and private individuals. As noted above, Cplt. I sought a declaration that the plaintiffs hold title to and have the absolute right of possession of the subject lands, an order restoring plaintiffs to immediate possession of the lands, and damages based upon the fair rental value of the land calculated from the time of the acquisition. Cplt. I, Prayer for Relief at ¶¶ 3-6.

Plaintiff Canadian Band filed Cplt. II on October 5, 1982, and amended the complaint on December 17, 1982. As amended, Cplt. II challenged the alleged wrongful acquisition of Barnhart, Long Sault, and Croil (or Baxter) Islands[4] by New York State and the alleged

[3]As discussed below, in 2001 the United States amended its complaint to drop all claims and requests for relief against the municipal defendants and defendant class, but retained a claim for a declaratory judgment, ejectment, and monetary damages against the State and NYPA.

[4] The area now known as the Croil Islands were formerly part of Croil or Baxter's Island but has been divided into several smaller islands by the construction of the St. Lawrence Seaway Project. See Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170, 175 n.7 (2001).

wrongful possession of the Islands by the NYPA, Niagara Mohawk Power Corporation, and others. Cplt II. at ¶¶ 17-19. The Canadian Band asserted that the State's acquisition of the Islands was in violation of the NIA and the Treaty of Ghent (8 Stat. 218), Cplt. II at ¶¶ 39-50, constituted an illegal deprivation of rights under the United States Constitution, Cplt. II at ¶ 52, and was a Fifth Amendment taking without just compensation. Cplt. II at ¶ 57. The Canadian Band sought a declaration that it owns and is entitled to possess the Islands as well as compensation for those lands, formerly part of Croil Island, that were submerged by the construction of the St. Lawrence Seaway Project. Cplt II. at ¶ 24.

On June 30, 1989, Plaintiffs American Band and Longhouse filed Cplt. III against the State, municipal defendants, the NYPA, and various other individuals. Cplt. III challenged the same alleged conduct with respect to the seven land transfers and the Islands, claiming, inter alia, that such conduct was in violation of the NIA and the Treaty of Ghent. Cplt. III at ¶¶ 23-56. Cplt. III also sought a declaration that the conveyances were null and void, a declaration that any interest the defendant class may have in the subject land to be null and void, ejectment of the defendants and the defendant class, and damages calculated by the fair rental value of the land from the dates of acquisition. Cplt. III, Prayer for Relief at ¶¶ 2-5.

On August 5, 1998, the United States moved to intervene pursuant to FED. R. CIV. P. 24. That motion was granted on October 27, 1998. On December 22, 1998, the United States filed its Complaint-in-Intervention on behalf of the plaintiffs and subsequently filed an Amended-Complaint-in-Intervention on August 3, 2001. The United States' amended pleading dropped all claims against the defendant class and local governments, retaining claims only against the State of New York and NYPA. Notably, the United States' effort to drop its claims

for ejectment against the defendant class was opposed by the tribal plaintiffs. See Canadian St. Regis Band of Mohawk Indians v. State of New York, 205 F.R.D. 88 (N.D.N.Y. 2002).

In July 1989, the Canadian Band, pursuant to FED. R. CIV. P. 42(a), moved to consolidate the three complaints. That motion was granted in August 1991. Following consolidation, the court granted a series of stays attempting to facilitate settlement negotiation. Because settlement could not be achieved, the motions to dismiss were ultimately briefed and argued in 1999 after the United States had intervened. The Court issued a comprehensive decision granting in part and denying in part the defendants' renoticed motions to dismiss which included the rejection of the defense of laches based upon this Court's interpretation of then existing Second Circuit case law and its prior decision rejecting laches as a defense to liability in Cayuga. See Canadian St. Regis Band of Mohawk Indians v. State of New York, 146 F. Supp. 2d 170, 186-87 (N.D.N.Y. 2001) (citations omitted).

Answers were subsequently filed on behalf of all defendants. The plaintiffs then moved to strike certain of the defendants' defenses, including, inter alia, the defense of laches. This Court granted that motion, insofar as laches had been asserted as a defense to the cause of action under the NIA, but denied it insofar as the defense was relevant to remedies. Canadian St. Regis Band of Mohawk Indians v. State of New York, 278 F.Supp. 2d 313, 334 (N.D.N.Y. 2003).

Subsequently the parties engaged in renewed, but ultimately unsuccessful, settlement discussions. Concurrently, new developments that changed the legal landscape pertaining to the defense of laches were taking place in two other New York Indian land claims, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 125 S. Ct. 1478 (2005) ("Sherrill") and Cayuga

Indian Nation of New York v. Pataki, 413 F.3d 266 (2d. Cir. 2005), cert. denied, 126 S.Ct. 2021, 2022 (2006) ("Cayuga"). This Court entered a stay in this proceeding, in light of the settlement discussions and the prospect that appellate proceedings in the Sherrill and Cayuga cases would provide greater guidance respecting the issue of laches in this case. The final decision in Cayuga came on May 15, 2006, with the Supreme Court's denial of certiorari. In the wake of that development, the stay in this case again was lifted. The State now moves for an order dismissing the complaints pursuant to Rule 12(c), on the basis of the defenses of laches, acquiescence and impossibility.[5]

ARGUMENT

I. THE PLAINTIFFS' LAND CLAIMS ARE BARRED BY THE DECISIONS IN SHERRILL AND CAYUGA UNDER THE EQUITABLE DOCTRINES OF LACHES, ACQUIESCENCE AND IMPOSSIBILITY

The Supreme Court's Sherrill decision, 544 U.S. 197, and the Second Circuit's Cayuga decision, 413 F.3d 266, compel the dismissal of the plaintiffs' claims in their entirety, pursuant to Rule 12(c).[6]

In Sherrill, the Supreme Court ruled that the Oneida Indian Nation of New York ("OIN") could not reestablish sovereignty over land recently purchased on the open market so

[5]With respect to its prior ruling striking the defense of laches as to liability, this Court has inherent power to reconsider earlier rulings in an ongoing case. See United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982) ("A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment."); see also Parmar v. Jeetish Imports, Inc., 180 F.3d 401, 402 (2d Cir. 1999) (quoting LoRusso); United States v. Uccio, 940 F.2d 753, 758 (2d Cir. 1991) (same). A change in controlling law certainly warrants such reconsideration. Doe v. New York City Dep't. of Soc. Serv., 709 F.2d 782, 789 (2d Cir. 1983). In light of Sherrill and Cayuga, State Defendants do not believe that a formal motion for reconsideration is required but are, of course, prepared to file such a motion should the Court deem it necessary.

[6]"In deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party." Barbette v. Carters, 192 F.3d 52, 56 (2d Cir. 1999); see also King v. Am. Airlines, Inc., 284 F.3d 352, 356 (2d Cir. 2002).

as to avoid the payment of property taxes on that land. 544 U.S. at 221. The Court, basing its decision on "standards of federal Indian law and federal equity practice[,]" id. at 214, ruled that the equitable doctrines of laches, acquiescence and impossibility barred the claim. Id. at 217-19. In so holding, the Court iterated several important factors leading to its conclusion.

The Court emphasized the long passage of time from the alleged wrongs and the OIN's delay in bringing suit. As the Court explained, "[g]enerations have passed during which non-Indians have owned and developed the area that once composed the [OIN's] historic reservation." Id. at 202. Moreover, the OIN "did not seek to regain possession of their aboriginal lands by court decree until the 1970's." Id. at 216 (noting that over this long lapse of time, the OIN "did not seek to revive their sovereign control through equitable relief in court").

Similarly, the Court also focused on the long history of state and local governance over the area. Id. ("The relief OIN seeks . . . is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender"); id. at 202 (explaining that "[f]or two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units"); see also id. at 214 (stating that "[t]he appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory").

Based on this history of governance, the Court recognized that OIN's attempt to reassert sovereignty would impose major disruptive impacts on state and local governance as well as the settled expectations of the current individual land-owners. Id. at 206 (declining "to

project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns"); id. at 197 (noting the adverse affects on current landowners); id. at 218 (noting that "longstanding observances and settled expectations are prime considerations"). These disruptions, the Court explained, were the practical effect of the tribe's reasserting sovereignty over lands within the bounds of its historic reservation: "The unilateral reestablishment of present and future Indian sovereign control . . . would have disruptive practical consequences . . . . [Indeed] a checkerboard of state and tribal jurisdiction--created unilaterally at OIN's behest–would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." Id. (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994) (emphasis added)).

Lastly, the Court also placed great emphasis on the "dramatic changes in the character of the properties," noting that the properties here involved have greatly increased in value since the Oneidas sold them 200 years ago." Id. at 215 ("Notably, it was not until lately that the [OIN] sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill").

Following close on Sherrill's heels, the Second Circuit's Cayuga decision noted that Sherrill "dramatically altered the legal landscape against which we consider [the Cayugas'] claims," Cayuga, 413 F.3d at 273, and held that the same equitable principles relied on in Sherrill applied to the Cayugas' possessory land claim. Id. at 268. There, the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma ("Cayugas"), together with the United States (as an intervenor), sought a declaration that the State's purchases of the land in question were void as in violation of the NIA and the Treaty of Canandaigua, 7 Stat. 44, and

that the tribal plaintiffs were "the owners of and have the legal and equitable title and the right of possession to all of the land in the Original Reservation and that the Court [should] restore plaintiffs to immediate possession of all portions of the subject land . . . and eject any defendant claiming their chain of title [from time of the allegedly illegal purchases]." Id. at 269.[7] Additionally, the Cayugas sought trespass damages, in the form of fair rental value for the period when the Cayugas were out of possession, stemming from the alleged unlawful conduct of the State, and the continuing presence of the State, the municipalities and individual defendants currently residing on the subject land. Id.

The Cayuga Court determined that these claims were barred for the very same reasons that barred the Oneida assertion of sovereignty in Sherrill, despite differences in the context in which the Sherrill litigation arose. As the Second Circuit indicated, "the broadness of the Supreme Court's statements indicates to us that Sherrill's holding is not narrowly limited to claims identical to that brought by the Oneidas, . . . but rather, . . . apply to 'disruptive' Indian land claims more generally." 413 F.3d at 274. Moreover, opined the Court, "[w]hile the equitable remedy sought in Sherrill – a reinstatement of Tribal sovereignty – is not at issue here, this case involves comparably disruptive claims," which the Court reasoned should be treated "like the tribal sovereignty claims in Sherrill." Id. at 274-75.

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[7] After rejecting ejectment as a remedy, the District Court subsequently "effectively 'monetized' the ejectment remedy" concluding that monetary damages would produce satisfactory results to the Cayugas. 413 F.3d at 275. The Second Circuit, however, explained that: "Despite the eventual award by the District Court of monetary damages, we emphasize that plaintiffs' claim is and has always been one sounding in ejectment; plaintiffs have asserted a continuing right to immediate possession as the basis of all of their claims, and have always sought ejectment of the current landowners as their preferred form of relief. . . . [Moreover,] in their complaint in this case the Cayugas seek 'immediate possession' of the land in question and ejectment of the current residents." Id. at 274; see also id. at 275 (explaining that "[t]he nature of the claim as a possessory claim . . . underscores our decision to treat this claim like the tribal sovereignty claims in Sherrill."). Likewise, in the instant case, the plaintiffs' complaints and amended complaints assert a claim for ejectment and Cayuga makes clear that such possessory claims cannot be salvaged by reformulation of the requested relief in terms of monetary damages.

The Second Circuit then determined that the "present case must be dismissed because the same considerations that doomed the Oneidas' claim in Sherrill apply with equal force here." Id. at 277. The Court stated that:

> "[G]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation," Sherrill, 125 S. Ct. at 1483; "at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere," id.; "the longstanding, distinctly non-Indian character of the area and its inhabitants," id.; "the distance from 1805 to the present day," id. at 1494; "the [Tribe's] long delay in seeking equitable relief against New York or its local units," id.; and "developments in [the area] spanning several generations." Id.; see also id. at 1492-93 ("[This Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands.") (citing Yankton Sioux Tribe v. United States, 272 U.S. 351, 357, 71 L. Ed. 294, 47 S. Ct. 142, 63 Ct. Cl. 671 (1926) ("It is impossible . . . to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . .")). We thus hold that the doctrine of laches bars the possessory land claim presented by the Cayugas here.

Id. at 277. Not surprisingly, these very same considerations require the dismissal of the plaintiffs' disruptive possessory land claims in the instant case.

1. The Plaintiffs' Claims Are Disruptive Indian Land Claims.

As the Cayuga Court aptly noted, what the Supreme Court was concerned with "was the disruptive nature of the claim itself." Id. at 274. The Court explained that possessory land claims such as the one at issue therein, i.e. those "seeking possession of a large swath of . . . New York State and the ejectment of tens of thousands of landowners[,]" are "indisputably disruptive." Id. at 275. The obvious thrust of the plaintiffs' claims in the instant case is also for possession. Cplt I., Prayer for Relief at ¶ 4 (seeking a declaration of a "right of

repossession"); Cplt. II, Prayer for Relief at ¶ 3 (seeking restoration of "immediate possession of all of the subject land claimed by defendant"); Cplt. III, Prayer for Relief at ¶ 4 (seeking the ejectment of the defendants). Indeed, as will be shown below, the plaintiffs' claims closely mirror those stated by the Cayugas, are patently just as disruptive, and should similarly be dismissed.

Here, as in Cayuga, the plaintiffs seek a declaration that the ancient conveyances resulting in the defendants' current possession were null and void as in violation of the NIA (Cplt. I at ¶ 49; Cplt. II at ¶ 1; Cplt. III at ¶ 1; U.S. Amd. Cplt-in-Intvt. at ¶¶ 18, 21, 30), and various treaties. (Cplt II. at ¶ 45; U.S. Amd. Cplt-in-Intvt. at ¶¶ 25-29 [the 1814 Treaty of Ghent, 8 Stat. 218]; Cplt. III at ¶¶ 48, 52, 56 [the 1784 Treaty of Fort Stanwix, 7 Stat. 15, the 1794 Treaty of Canandaigua, 7 Stat. 44, and the 1796 Treaty between the Seven Nations of Canada and New York State, 7 Stat. 55]; compare Cayuga, 413 F.3d at 269 [NIA and the Treaty of Canandaigua]). Just as in Cayuga, plaintiffs have asserted that the ancient conveyances violated rights secured to plaintiffs under the United States Constitution and 42 U.S.C. § 1983. (Cplt. I at ¶¶ 60-62; Cplt. II at ¶¶ 52, 57-58; Cplt. III at ¶¶ 3, 48 [privileges and immunities clause, Fifth and Fourteenth Amendments, and § 1983]; compare Cayuga, 565 F. Supp. 1297, 1305-06 (N.D.N.Y. 1983) [commerce clause, Fifth and Fourteenth Amendments, and § 1983]). Just as in Cayuga, plaintiffs seek a declaration that they hold title to and have the right to possession of all of the subject land. Cplt. I, Prayer for Relief at ¶ 3; Cplt. II, Prayer for Relief at ¶ 2; Cplt. III at 21-22; compare Cayuga, 413 F.3d at 269. Just as in Cayuga, plaintiffs seek actual possession of all of the claimed land. Cplt. I, Prayer for Relief at ¶ 4; Cplt. II, Prayer for Relief at ¶ 3; Cplt. III, Prayer for Relief at ¶ 4; U.S. Amd. Cplt-in-

Intvt., Prayer for Relief at ¶ 2**;** compare Cayuga, 413 F.3d at 269. Just as in Cayuga, each complaint also seeks the "fair rental value" of the lands in question for the period the plaintiffs were out of possession, plus interest. Cplt. I, Prayer for Relief at ¶¶ 5-6; Cplt. II, Prayer for Relief at ¶¶ 4-6; Cplt. III at 22-23; U.S. Amd. Cplt-in-Intvt., Prayer for Relief at ¶ 3; compare Cayuga, 413 F.3d at 269.

In short, plaintiffs seek to "call into question[,]" 413 F.3d at 275, title to thousands of acres of land that have long been owned by non-Indians. Cplt. I at ¶ 59 (urging that "the defendants and members of the defendant class have claimed title to land that is not theirs"); Cplt. II at ¶ 50 (same); Cplt. III at ¶ 26 (contending that "[a]s the purported transactions with the State of New York are void . . . the claims, interests and possession of the defendants . . . are also void, illegal and without force or effect."); id. at ¶ 44 (positing that "the claims, titles, and interest of the [NYPA] are also void, illegal and without force or effect."). Such claims, under Sherrill and Cayuga, are inherently disruptive. Cayuga, 413 F.3d at 275 (stating that "this disruptiveness is inherent in the claim itself – which asks this Court to overturn years of settled land ownership. . . ."). Cayuga therefore makes clear that laches bars the underlying possessory claim (and not just the potential remedies that might flow from such a claim). The laches doctrine embraced by the Second Circuit in Cayuga defeats all such possessory claims, regardless of the particular legal theories on which they are premised.

Furthermore, ejectment of current non-Indian private and governmental occupants of the claim area was flatly ruled out by the district court in Cayuga as a remedy that would spawn "unthinkable consequences." See Cayuga Indian Nation of New York v. Cuomo, Nos. 80-930 & 80-960, 1999 U.S. Dist. 10579, at *98 (N.D.N.Y. July 1, 1999) ("Cayuga X")

(Roberts aff., Ex. E). The Second Circuit subsequently confirmed that such coercive relief is both inherently and indisputably disruptive. See Cayuga, 413 F.3d at 275. In the same vein, in Oneida, the district court denied a motion by the OIN and the United States for leave to file amended complaints so as to seek ejectment, declaratory relief and damages against a proposed defendant class of all current non-Indian landowners in the claim area. Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000). In denying leave to amend, this Court concluded that the OIN had brought the motion in a "bad faith" effort to coerce a settlement from the State, 199 F.R.D. at 80-87, and that it would be "futile" to allow amendment to assert claims against the proposed defendant class. Id. at 88-95. The Court wrote: "[T]here are absolutely no circumstances under which ejectment of the private landowners will be a viable remedy in this case. Likewise, for the reasons set forth herein, monetary damages also will not be recoverable against those landowners; nor will the court grant declaratory relief against them." Id. at 94.

After a span of more than 150 years, a declaration that aboriginal or Indian title to the contested lands belongs to the plaintiffs, would also be inherently disruptive. Indian title recognizes "the Indians as 'the rightful occupants of the soil" with a legal as well as just claim to retain possession." Oneida Indian Nation of New York v. New York, 691 F.2d 1070, 1075 (2d Cir. 1982). Because the purpose of a declaratory judgment is to have government officials take steps to comply with the court's decree, declaring that title to the contested lands belongs to the plaintiffs is therefore as disruptive to the present day landowners, and the State and municipal governmental entities that assert jurisdiction and sovereignty over the area, as a direct claim for possession. Oneida, 199 F.R.D. at 82 ("[P]ractically speaking, the effect of a

declaration that the Oneidas have the right to possess the subject land, is that they would have the concomitant right to, or at a minimum, the prerogative to, evict current landowners. Thus, if the court allows the Oneidas to amend their complaint to assert such possessory claims, whether they would actually choose to exercise the option to evict, the fact remains that eviction would be an option available to the Oneidas. Consequently, despite the Oneidas' repeated public assurances that they will not evict any current landowner, in considering these motions to amend the court cannot ignore the harsh reality of the possessory nature of the claims which they are seeking to add to their complaint, especially as manifested in their requests for declaratory relief.").

An examination of the factors relied upon by Sherrill and Cayuga unequivocally demonstrates that, after a delay of more than 150 years, and because the instant claims are inherently and indisputably disruptive in nature, they are clearly subject to the same considerations, and consequently, the same equitable bars to relief, as those in Sherrill and Cayuga.

2. More Than 150 Years Have Passed Since The Plaintiffs Last Possessed The Land And The Plaintiffs Did Not Attempt To Assert Sovereignty Over The Land At Any Time During That Period.

Just as in Sherrill and Cayuga, generations have passed since the plaintiffs have been in possession of the subject land. Cplt. I at ¶¶ 50-59; Cplt. II at ¶¶ 43-50; Cplt. III at ¶ 27 (alleging non-Indians have possessed the land for as many as 190 years). And, just as in Sherrill and Cayuga, there was here a general failure of the plaintiffs to assert sovereignty over the land in dispute through litigation. See Sherrill, 544 U.S. at 216 & n.10 (having last occupied the property in 1805, it was not until the 1970's that the OIN sought to regain

possession by court decree); Cayuga, 413 F.3d at 269 (original purchases in 1795 and 1807 with the action not commenced until 1980). Indeed, it was not until 1982 that the plaintiffs brought the first of these consolidated actions, despite the fact that almost a third of the land had been purchased by the State on March 15, 1816, and that similar purchases openly continued for decades.[8] See, e.g., Cplt. I at ¶ 50 (stating that, on March 15, 1816, the State "purport[ed] to purchase the one mile square tract on the Salmon River, and 5,000 acres on the eastern side of the subject lands"); Cplt. II at ¶ 43 (stating, without giving an exact date, but after 1822, that New York "disposed of [Barnhart and the Croil Islands] by issuing patents granting them to various other parties"); Cplt. III at ¶ 21 (complaining of New York State's purchases that ended in 1845); U.S. Amd. Cplt-in-Intvt. at ¶ 22 (noting that defendants "have been in possession of the subject land . . . variously from 1816 to 1845 until the present."). This delay, like that in Sherrill and Cayuga, weighs heavily against the plaintiffs' possessory claims.[9]

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[8] Any attempt by the plaintiffs to reach back to earlier lawsuits relating to the claim area by or on behalf of the St. Regis, so as to claim that the current action is timely and thereby circumvents the laches defense, must fail. The Franklin County action was brought almost 130 years after the initial transaction, and almost 100 years after the final transaction that is the subject of the complaint. United States v. Franklin County, 50 F. Supp. 152 (N.D.N.Y. 1943); Cplt. I at ¶ 50 (explaining that the first complained of transaction took place in 1816); Cplt. III at ¶ 21 (complaining of New York State's purchases that ended in 1845). The St. Regis action was not brought until some 14 years after Franklin County, and did not involve a claim for possession . St. Regis Tribe v. State of New York, 5 N.Y.2d 24, reh'g denied, 5 N.Y.2d 793 (1958), aff'g, 5 A.D.2d 117 (3d Dep't 1957). Moreover, whether or not the fault for this delay rests on the plaintiffs is of no consequence. In Cayuga, the Second Circuit explained that "[t]he Cayugas and the United States highlight the District Court's findings . . . that the Cayugas were not responsible for any delay in bringing this action and that the delay was not unreasonable, insofar as the actions of the Cayuga are concerned. We acknowledge these findings, but do not believe they are dispositive for our consideration of the laches question." Cayuga, 413 F.3d at 280 (quotation marks and citations omitted). The Court focused on this Court's finding at the ejectment hearing that given the length of delay and the disruptiveness of the possessory land claim, plaintiffs were guilty of laches. Id. at 277-78.

[9] It is of little consequence that some of the plaintiffs' tribal members continue to reside on a reservation located in Franklin County, Cplt. III at ¶ 5, since that fact does not provide a reasonable excuse for the delay, nor does it mitigate the disruptive consequences to the defendants that would result from plaintiffs' claimed remedies.

3. The Remedies Sought Would Disrupt Over 150 Years Of State And Local Governance Of the Area.

Not only have the plaintiffs not possessed the land in question for over 150 years, but that land has been under the jurisdiction of state and local authorities that entire time. Such sovereign control is of the utmost importance in evaluating the plaintiffs' claims. Sherrill, 544 U.S. at 214 (explaining that "[t]he appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory"); id. at 216 (noting that the justifiable expectations resulting from the state's "long-standing assumption of jurisdiction over an area . . . grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight here.") (internal quotation marks and citations omitted).[10] The "disruptive practical consequences[,]" id. at 219, of the plaintiffs' possessory claims here are obvious given that the remedies of dispossession or ejectment, would: 1) remove this land from the local tax rolls; 2) potentially require the relocation of miles of state highway, power lines, and other infrastructure; 3) require the uprooting of hundreds, perhaps thousands, of New Yorkers from their current homes and places of business; and 4) effect the potential closure of a major state-based power plant. Likewise, a declaration of the plaintiffs' possessory right and concurrent right of title would undermine hundreds of years of ownership, imposing clouds on the titles of the current landowners, thereby disrupting the settled expectations of those landowners.

[10] Conversely, it is of little consequence that some members of the plaintiff Tribes have resided on reservation land geographically located near the subject land. See, e.g., Cplt. III at ¶ 17 (alleging that members of the American Band and the Longhouse currently reside on a reservation near the subject land). What is at issue here is the long passage of time from which the plaintiffs, and their predecessors in interest, did not possess the subject land, as well as the multiple governmental authorities' exercise of jurisdiction over that land. In other words, it is the possessory history of the subject land that is at issue, not that of other land occupied by the plaintiffs.

That such remedies would "seriously burden the state and local governments" and adversely impact the people and businesses on the subject lands, is obvious. Sherrill, 544 U.S. at 220.[11]

4. The Subject Land Has Undergone Dramatic Developmental Changes Since The Time Of Plaintiffs' Possession.

Lastly, just as in Sherrill and Cayuga, the subject land here has undergone dramatic changes since the plaintiffs last possessed or occupied the land. Sherrill, 544 U.S. at 215 (noting that "the properties . . . have greatly increased in value since the Oneidas sold them 200

[11] Moreover, the fact that plaintiffs assert that they no longer claim "those parcels occupied by the owner exclusively as a principal place of residence to the extent of up to two acres surrounding such residence[,]" Cplt. I at ¶ 24; Cplt. II at ¶ 22, does little, if anything, to mitigate the negative effects this would have on the administration of government over these areas and on the "longstanding observances and settled expectations" (Sherrill, 544 U.S. at 218) of New York State citizens. Three points are relevant here.

First, exemption of up to two acres of land surrounding a principal place of residence, while dispossessing the landowners of the rest of the surrounding land, would effect exactly the type of inequitable "piecemeal shift in governance" the Supreme Court was concerned with. Sherrill, 544 U.S. at 221; see also id. at 197 (explaining that "a checkerboard of state and tribal jurisdiction . . . would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches") (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994)).

Second, the two-acre exemption says nothing of the many farms and businesses local individuals currently own and operate on land beyond the two acres. The ownership interests in those farms and businesses would be destroyed through ejectment of the owners and assumption of possession by the plaintiffs. A farm house absent the farm is of little value indeed.

Third, even disregarding the issue of uprooting businesses and dispossessing farm owners of their farmland, the plaintiffs, immediately after providing for the two-acre exemption for residences, leave themselves a convenient loophole to reassert their claimed right of ownership over the exempted land. Plaintiffs contend that: "By excluding those parcels occupied as a principal place of residence to the extent of up to two acres surrounding such residence from the present complaint, plaintiffs do not intend to waive or relinquish any rights they may have in such lands or against claimants of such lands." Cplt. I at 6 ¶ 27; Cplt. II at 5 ¶ 23. This provides scant comfort to the individual land owner. Indeed, it greatly disturbs the "longstanding observances and settled expectations" (Sherrill, 544 U.S. at 218) of New York State citizens, and as such, does nothing to limit the extremely disruptive nature of the remedies sought. Accord, Oneida, 199 F.R.D. at 82 (by reserving themselves the right to seek ejectment at some future time "the Oneidas are intent on having the possibility of ejectment hanging over the landowners' heads like the proverbial sword of Damocles"); Cayuga X, 1999 U.S. Dist. 10579, at *57-*60 (Roberts aff., Ex. E) (Cayugas' purported willingness to entertain long-term leases with current occupants of claim area did nothing to mitigate the disruptive nature of plaintiffs' possessory claims).

years ago. Notably, it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill."); Cayuga, 413 F.3d at 277. These developmental changes -- which are properly matters as to which this Court can take judicial notice[12] -- include such public infrastructure as more than 10 miles of State highway, more than a dozen bridges, the St. Lawrence Seaway (operated by the U.S. Department of Transportation), a Department of Transportation facility in Hogansburg, and more than 800 acres on Barnhart Island and the mainland constituting the Robert Moses State Park.[13] Many of these improvements are necessary to the proper functioning of the State as well as the federal government. These functions would be greatly impaired if the plaintiffs were granted the remedy of ejectment. Indeed, as this Court noted in Cayuga, the possibility of ejecting the State from areas containing public infrastructure, such as the New York State Thruway, posed "unthinkable consequences." See Cayuga X, 1999 U.S. Dist. 10579, at *98 (Roberts aff., Ex. E) (stating that "ejectment would mean that transportation systems . . . would have to be rerouted at great expense. Putting aside costs, rerouting the Thruway would have almost unthinkable consequences in terms of intrastate and interstate commerce.").

Perhaps the most telling of the dramatic changes in the claim area is the presence of the St. Lawrence-Franklin D. Roosevelt Power Project ("the Project"). The Project, operating

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[12] See Fed. R. Evid. 201(b) ("A judicially noticed fact must be one 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."). The presence of these roadways, bridges, and public facilities can be accurately and readily determined and cannot be reasonably questioned. See., e.g., Rodriguez v. Schriver, No. 99 Civ. 8660, 2003 U.S. Dist. LEXIS 20285, at *8 n.4 (S.D.N.Y. 2003) (Roberts aff., Ex. F) (taking judicial notice of the location of a building), vacated on other grounds by, 392 F.3d 505, 508 (2d Cir. 2004); Paniaguas v. Aldon Cos., No. 2:04-CV-468, 2006 U.S. Dist. LEXIS 6332, at *49 n.13 (D. Ind. 2006) (Roberts aff., Ex. G) (judicial notice of the presence, direction, and character of a highway).

[13] This does not even speak to the numerous county and town roads, other local municipal improvements, houses, businesses, and farms that lie within the claim area.

since 1958, is located on the claimed Islands, Cplt. II at ¶ 21; Cplt. III at ¶ 44, is operated by the NYPA on lands held in the name of the People of the State of New York (U.S. Am. Cplt-in-Intvt. at ¶¶ 7, 8), is a major source of electrical power in upstate New York, and is vital to the economic life of the entire region. See Public Authorities Law §§ 1005 et seq.; New York Power Authority: St. Lawrence-Franklin D. Roosevelt Power Project website, at http://www.nypa.gov/facilities.stlaw.htm. The plaintiffs concede, as they must, that the NYPA, and/or its predecessors in interest, have been in possession of the Islands since approximately 1822. Cplt. II at ¶ 42; Cplt. III at ¶ 45. Awarding title and/or physical possession of this facility to the plaintiffs would be palpably disruptive to the functioning of the State and its citizens.

Given the disruptive nature of these remedies, it is no wonder that this Court has, in the recent past, concluded that such remedies cannot be awarded in these situations. See Cayuga X, 1999 U.S. Dist. LEXIS 10579, at *98 (denying the Cayugas' claim for ejectment explaining that "ejectment would cause great upheaval in terms of requiring removal of existing power and sewer infrastructures.").

In sum, plaintiffs' possessory land claims, like those in Sherrill and Cayuga, are inherently and indisputably disruptive. After more than 150 years, plaintiffs now ask this Court to disrupt the settled expectations of the current landowners, expectations legitimized by 150 years of New York State and local governance over the area, which has been entirely transformed through generations of public and private development by non-Indians. Because such a claim is clearly disruptive, it is barred by Sherrill and Cayuga.

II. THE CLAIMS OF THE UNITED STATES ARE SIMILARLY BARRED BY LACHES

In Cayuga, as in this case, the United States, in response to the State's Eleventh Amendment defense, moved to intervene "on behalf of itself and on behalf of plaintiffs." See Cayuga, 413 F.3d at 270-71. The Second Circuit in Cayuga specifically addressed the issue of whether laches applied to the United States' claims and ruled that it did. Cayuga, 413 F.3d at 278.

Although noting that the United States "has traditionally not been subject to the defense of laches," the Court adopted the position of the Seventh Circuit that "in appropriate circumstances, laches can apply to suits by the federal government." Cayuga, 413 F.3d at 278. The Court enumerated three circumstances in which laches may be available against the United States: (1) "egregious" instances of laches; (2) suits in which there is no statute of limitations; and (3) suits brought on behalf of private parties that are a matter of private rights. Id. at 279. The Court then concluded:

> We need not decide which of these three possibilities might govern because this case falls within all three. First, given the relative youth of this country, a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined; second, though there is now a statute of limitations, see 28 U.S.C. § 2415(a), there was none until 1966 – i.e., until one hundred and fifty years after the cause of action accrued; and third, the United States intervened in this case to vindicate the interest of the Tribe, with whom it has a trust relationship. Accordingly, we conclude that whatever the precise contours of the exception to the rule against subjecting the United States to a laches defense, this case falls within the heartland of the exception.

Id. (internal citations omitted).

This case also falls within each of the three categories and is within the "heartland" of the exception. There is no substantive difference between the claims that the United State

asserted in Cayuga and the claims asserted here. Accordingly, it is clear that the laches doctrine bars the putative claim of the United States on behalf of the plaintiff tribes.

III. THE COURT CAN AND SHOULD GRANT JUDGMENT ON THE PLEADINGS, DISMISSING THE COMPLAINTS HEREIN WITHOUT FURTHER LITIGATION

There can be no legitimate dispute that Sherrill and Cayuga foreclose the plaintiffs' claims. The plaintiffs' possessory land claims are indistinguishable from those asserted in Cayuga. That decision also makes clear that the claims in this case are ripe for dismissal, and no further proceedings are necessary. Notably, when the Second Circuit in Cayuga reversed this Court's judgment in favor of the Cayugas, it found "no need to remand . . . for a determination of the laches question" and simply entered judgment for defendants. Cayuga, 413 F.3d at 280. Underscoring the point, the Court stated that the claim could properly have been dismissed at the pleading stage under the rule it adopted: "if 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." Id. at 278 (emphasis added).

The appropriateness of dismissing possessory land claims on the basis of laches without an evidentiary hearing was also recognized by this Court in its 2000 decision in Oneida. There, the Court refused to "allow amendment and await further litigation" before deciding that laches and impossibility precluded the claim against non-state defendants. Oneida, 199 F.R.D at 92. Discussing the Court's own experience in Cayuga, this Court noted that the evidentiary hearing it conducted in that case on the availability of ejectment as a remedy had proven to be an "academic exercise." Id. The proof offered was largely

"commonsense observations" and the reasons for not permitting ejectment "were self-evident." Id.

To the limited extent that facts outside the pleadings have been marshaled in support of defendants' motion pursuant to rule 12(c), all such facts are matters that are "commonsense observations" that are properly matters that may be judicially noticed under Fed. R. Evid. 201(b). In an earlier context in this case, this Court stated:

> The court is aware that ordinarily the applicability of laches involves a fact intensive inquiry, thus making it improper to consider on a motion such as this which is confined to a review of the pleadings. See Carell v. Shubert Organization, Inc., 104 F. Supp. 2d 236, 263 (S.D.N.Y.2000) (citing Tri-Star Pictures Inc. v. Leisure Time Prods., B.V., 17 F.3d 38, 44 (2d Cir.1994)). By the same token, laches may be raised by a motion limited to a review of the pleadings when "it is clear on the face" and no set of facts can be proven "to avoid th[at] insuperable bar." Id. (citation omitted)

Canadian St. Regis Band v. State of New York, 278 F. Supp. 2d at 332. Although the Court made the above observation in the context of plaintiffs' motion to strike the defense of laches in this case, in the wake of Sherrill and Cayuga it applies with equal force in the context of this motion pursuant to Rule 12(c).

CONCLUSION

It is clear that the same factors barring the Sherrill and Cayuga claims preclude the plaintiffs' claims here. Asking the Court to uproot thousands of New York citizens, potentially destroying businesses and long settled expectations, prohibiting the State from operating one of its largest and most important energy generation facilities, despite more than a century of non-Indian control and ownership, simply asks too much. The claims are inherently disruptive, and as such, are barred under the equitable doctrines of laches, acquiescence and impossibility as elucidated in Sherrill and Cayuga. The complaints must therefore be dismissed with prejudice.

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Syracuse, New York

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