UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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, and THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. THE STATE OF NEW YORK, et al., Defendants	Civil Action No. 82-CV-783 **LEAD CASE** (Judge McCurn)
THE MOHAWKS OF AKWESASNE, by THE MOHAWK COUNCIL OF AKWESASNE, Plaintiffs, THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. THE STATE OF NEW YORK, et al., Defendants	Consolidated with: Civil Action Nos. 82-CV-1114 and 89- CV-829 (Judge McCurn)

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UNITED STATES' SUPPLEMENTAL BRIEF

Pursuant to Magistrate Judge Lowe's Order dated February 1, 2011, the United States submits the following supplemental brief addressing the extent to which the Second Circuit Court of Appeal's decision in *Oneida Indian Nation of New York, et al. v. County of Oneida, et al*, 617 F.3d 114 (2d Cir. 2010) ("*Oneida*") affects the pending Motions for Judgment on the Pleadings filed by the State of New York (Dkt. 446) and the New York Power Authority ("NYPA") (Dkt. 449) ("Defendants' Motions").

In its Memorandum of Law Opposing Defendants' Motions, the United States asserted that dismissal would be inappropriate because certain facts need to be developed during discovery. United States' Memorandum in Opposition to Judgment on the Pleadings (Dkt. 484) at 20. The United States believes that this is still true. Contrary to what the State of New York or NYPA may contend, the Second Circuit's decision in *Oneida* does not sound the death knell of all Indian land claims in the State of New York, regardless of the facts of each particular case. For the reasons set forth below, the United States believes that discovery is supported here, with regard to both the possessory and nonpossessory claims, notwithstanding the Second Circuit's dismissal of the claims at issue in *Oneida.*

A. *Oneida* Decision

In *Oneida*, the Second Circuit ruled that "all claims raised by plaintiffs in this action, whether possessory or purportedly nonpossessory, are subject to and barred by the equitable defense recognized" in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) and *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert denied*, 547 U.S. 1128 (2006). The Second Circuit in *Oneida* held that the possessory land claims asserted by plaintiffs,

even if the relief were limited to money damages, were "premised on the assertion of a current continuing right to possession" and were, therefore, "by their nature disruptive" and thus subject to the equitable defense recognized in *Sherrill*. *Oneida*, 617 F.3d at 125. Citing to *Cayuga*, the Second Circuit held that claims seeking money damages for trespass were predicated on the right to possession because "there can be no trespass unless the [plaintiffs] possessed the land in question." In other words, a claim for trespass damages was "based on a violation of their constructive possession." *Oneida*, 617 F.3d at 126 (citing to and quoting *Cayuga*, 413 F.3d at 278).

The *Oneida* court recognized that concluding that a particular defense *can* bar a claim (i.e., that it is available) does not mean that the defense *must* bar the claim. Whether a defense actually bars relief requires an additional, fact-specific inquiry. *See Oneida*, 617 F.3d at 126 ("this matter is indistinguishable from *Cayuga* in terms of the underlying factual circumstances that led the *Cayuga* court to conclude not only that the laches defenses were available, but also that laches actually barred the claims at issue in that case"). In analyzing the facts to determine if the possessory claims should be barred, the Second Circuit held that the equitable defense espoused in *Sherrill* and *Cayuga* was not predicated on the traditional elements of laches - - which would have required consideration, among other factors, whether the plaintiffs' delay in bringing suit was reasonable - - but instead was focused "more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." *Oneida*, 617 F.3d at 127 (emphasis added).

The Second Circuit did not hold that length of time alone is dispositive. Likewise, the court did not state that all possessory land claims, regardless of the particular facts of the case, must be dismissed pursuant to *Sherrill* and *Cayuga*. Instead, when analyzing the equitable defense adopted in those decisions, the court repeatedly stated that the essence of the defense was that the claims at issue interfered with the justified expectations of the defendants. The court's consistent use of the qualifier "justified" when referring to defendants' expectations must be presumed to have been intentional, given how often the phrase is used.[1/]

The court's conclusion that the possessory claims in *Oneida* must be dismissed was grounded on an extensive evidentiary record,[2/] and its conclusion that, based on its review of those facts, that the defendants had "justified expectations" sufficient to apply the equitable defense to bar the claim. The court found significant the following facts:

> 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 bought and sold the lands, and also developed them to an enormous extent. These developments have given rise to justified societal expectations (expectations held and acted upon not only by the Counties and the State of New York, but also by private landowners and a plethora of associated parties) under a scheme of "settled land ownership" that would be disrupted by an award pursuant to the Oneida's possessory claims. *See Cayuga*, 413 F.3d at 275.

[1/]Almost every time the court referred to the expectations of defendants, the court used the term "justified expectations." *See* 617 F.3d at 123, 127, 128, 130, 135, 136, 137, and 138.

[2/] Although there had been no discovery specifically on the elements of laches, there had been extensive discovery on the issue of liability, and the Second Circuit had the benefit of that record in addressing the issue before it.

Oneida, 617 F.3d at 126-27. The court found that the facts indicated that the defendants had developed justified expectations regarding land ownership and that, therefore, the claims should be barred.

When analyzing the facts, the court did not hold that the long lapse of time between the "predicate events" (i.e. initial acquisition of lands by the State) and the filing of the land claims was, in itself, dispositive on the "justified expectations" issue. Instead, it concluded that application of the equitable defense derived from *Sherrill* required consideration of "the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." *Id.* (emphasis added). If the court meant to hold that the only fact that matters is the length of time between the initial land acquisitions by the State and the filing of the land claims at issue, it would have said as much.[3/] Whether an "expectation" exists and whether it is "justified" is, at least in part, a factual inquiry.

[3/]Similarly, in *Onondaga Nation v. State of New York*, No. 5:05-cv-0314 (LEK/RFT), 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010), although Judge Kahn stated that the Onondaga Nation's claims were barred "on their face,"the court's holding that the claims were barred was predicated on an analysis of the facts of the case. Judge Kahn, citing to and quoting *Oneida*, explained that the equitable bar focused on the lapse of time between the land transactions at issue and the filing of the land claims and on "the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury. These considerations are manifestly present here." *Id.* at * 8 (quoting *Oneida*, 617 F.3d at 127). In concluding that the claims interfered with the justified expectations of the defendants in that case, the court took judicial notice that "the contested land has been extensively populated by non-Indians" and other similar facts. *Id.* As explained below, in the case at bar, the facts are more complicated, thus necessitating discovery.

B. United States' Possessory Claims

1. Mainland Claims

In this case, unlike *Oneida*, discovery has only begun. Discovery is appropriate in this case to determine the facts regarding whether Defendants have developed justified expectations regarding land ownership. The facts currently known illustrate that this case arguably is different from *Oneida* and suggest the appropriateness of discovery to produce a complete evidentiary record. Unlike the situation in *Oneida*, many Mohawks stayed in the area and additional lands have been acquired by the Tribe and individual Mohawks over the course of time. See The St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs Memorandum in Opposition to the Defendants' Motion for Judgment on the Pleadings ("St. Regis and MNCC Opp. Br.") (Dkt. 471) at 36-37. See also Declaration of Donald Fisher (Ex. 1 of Tribal Plaintiffs' Opp. Br.) (Dkt. 474-1) and Declaration of Patricia Thomas (Ex. 6 of Tribal Plaintiffs' Opp. Br.) (Dkt. 474-24). Further, evidence exists that indicates that Mohawk representatives have taken various actions over the years which put the State of New York and others on notice that the Mohawks contended that the land transactions at issue in this case were unlawful and thus void. *See*, e.g., Decl. of Peter Whitely (Dkt. 475) at 65, attached as an Appendix to Memorandum of Mohawk Council of Akwesasne in Opposition to all Defendants' Motions for Judgment on the Pleadings ("MCA Opp. Br.") (Dkt. 473) (in 1922, before a state legislative committee known as the Everett Commission, Mohawk representatives strongly protested New York State's long conduct of illegality with regard to lands protected by the 1796 Treaty). *See also Deere v. New York*, 22 F.2d 851 (N.D.N.Y. 1927), aff'd, *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929) (ejectment action against New York filed by member of the St. Regis Mohawk Tribe alleging that

State's acquisition of land pursuant a March 16, 1824 treaty was unlawful and void).

To determine the extent to which Defendants, in fact, have developed longstanding "justifiable expectations" regarding land ownership, it is necessary to determine when tracts of lands were purportedly acquired by non-Indians and by the Mohawk Tribes and/or individual Tribal members, as well as what actions were taken by the Mohawk Tribes, and when they took place, to put Defendants on notice, either actual or constructive, that there were issues regarding ownership of the lands at issue. These facts would go directly to the pivotal question whether the Defendants' expectations as to land ownership were justified.

Here, discovery is in its infancy - - there have been minimal document exchanges and no depositions have been taken. Litigation of this action has been dominated by briefing on various motions to dismiss on various procedural and legal issues (i.e whether tribal plaintiffs had standing, whether certain claims should be dismissed pursuant to 12(b)(6), whether certain defenses or counterclaims should be dismissed as a matter of law, whether claims were barred by sovereign immunity). Because the focus of the litigation has been on briefing these myriad legal issues, there has been very little discovery. Another reason discovery has not developed is that the parties have devoted considerable effort to resolving this action through settlement. This Court, on several occasions, has stayed litigation in order to foster settlement discussions. It was not until 2004 that discovery began in earnest. Even then, only limited discovery has occurred. On June 23, 2004, Magistrate Judge Lowe directed the parties to prepare a joint discovery plan. Dkt. 297. Pursuant to a schedule imposed by the Magistrate Judge, *see* Dkt. 309, the parties exchanged disclosure documents pursuant to Rule 26(a)(1), as well as a first set of interrogatories and requests for production in October 2004. No responses to the interrogatories or requests for

production have been exchanged, however, as Magistrate Judge Lowe subsequently ordered a stay to allow the parties to focus on settlement efforts. Dkt. 367. The stay was extended by Judge Lowe several times and remained in place until after the Second Circuit's decision in *Cayuga*. On September 5, 2006, Magistrate Judge Lowe lifted the stay to allow Defendants to file motions to dismiss or motions for summary judgment on or before November 6, 2006. Dkt. 445. Defendants filed their Motions for Judgment on the Pleadings on that date. Because very little discovery has taken place in this case, this Court should not dismiss the United States' claims but instead allow the parties to engage in discovery, to develop a record so that this Court can determine the extent to which Defendants have developed justified expectations regarding land ownership.[4/]

[4/]The State and Municipal Defendants argued in their Reply Brief in support of its Motion for Judgment on the Pleadings that discovery in this action is not necessary because the facts that would be considered in a laches inquiry are "generally self-evident." Joint Reply Memorandum of Law in Support of State and Municipal Defendants' Motions for Judgment on the Pleadings (Dkt. 498), at 27. The United States disagrees. To the contrary, whether Defendants' expectations regarding land ownership were justified requires consideration of many factors, including not only specific details regarding when lands were purportedly acquired over time and by whom, but also what representatives of the Defendants knew about potential title issues, when such facts were disclosed or otherwise ascertainable to Defendants, and similar issues. These facts are not "self-evident." To support their contention that discovery is not needed here, Defendants cite to this Court's decision in *Oneida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000). In that case, the factual issues this Court examined related to the "pros and cons of ejectment" as a remedy. *Id.* This Court did not hold that laches could be addressed in the absence of discovery and an evidentiary hearing. The facts focused on potential displacement of landowners, economic disruption if persons were evicted, and similar matters. This Court held that much of the evidence submitted "fell into the category of commonsense observations." *Id*. The case at bar is different. Here, the facts pertaining to whether Defendants developed justified expectations regarding land ownership is complicated, as many factors are involved, as they cannot be resolved merely on the basis of commonsense observations.

2. Islands Claims

Additional discovery is needed with regard to the Islands claims to determine whether the expectations of the State and NYPA regarding land ownership were affected by the Tribes' actions to recover the Islands. Further, there is a factual issue regarding whether the United States owns underlying title to the Islands. Moreover, based on provisions of the Federal Power Act, it is not clear that a declaration by this Court that NYPA does not own the Islands will result in disruption to NYPA.

When the United States filed its Amended Complaint, it was not important to address the issue as to what sovereign owned underlying fee to the Islands. Under the claim asserted in this action, Defendants' violation of the Non-Intercourse Act, 25 U.S.C. § 177 ("NIA"), all that is required under the NIA is that an Indian tribe retains a possessory interest (which includes a right of occupancy) in the land. This Court recognized in its 2001 Memorandum Decision that:

> In order to establish a *prima facie* case based on a violation of the Act, a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned.

Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170, 182 (N.D.N.Y. 2001). Thus, the United States in its Amended Complaint[5/] properly did not focus on whether it

[5/] The allegations in the United States' Amended Complaint are not inconsistent with the proposition that the United States hold underlying title to the Islands. As discussed below, under the discovery doctrine, underlying title belongs to the sovereign and Indian tribes retain an aboriginal title, which is a right of occupancy. Thus, the fact that Indians hold aboriginal title does not mean that they hold underlying fee title. The United States' allegations that the Islands were the "property of the Indians of St. Regis," United States' Amended Complaint ¶ ¶ 29-30 are, therefore, consistent with long established law that underlying title belongs to the sovereign and the right of occupancy (Indian or aboriginal title) belongs to the tribes.

owns underlying title to the Islands, as that was not a pertinent inquiry. The Second Circuit's analysis in *Cayuga* and *Oneida* regarding when it is appropriate to apply laches against the United States, however, makes the ownership status of the Islands relevant, for the reasons discussed below.

The claim to the Islands in this case arguably differs from the lands at issue in *Oneida* and *Cayuga*: the facts of this case suggest that the United States may have acquired the underlying title to the St. Lawrence Islands of Barnhart, Baxter, and Long Sault from Britain and that neither the State of New York nor NYPA lawfully acquired that title. In *Oneida* and *Cayuga*, in contrast**,** the United States did not hold the underlying title to the lands at issue.

In both *Oneida* and *Cayuga*, the Indian lands at issue were unquestionably located in the State of New York and, prior to the United States Constitution, the State of New York held the right of preemption with regard to Indian lands within the State. *Seneca Nation of Indian v. New York*, 382 F.3d 245, 265 (2d Cir. 2004). Beginning with the European discovery of North America, the tribes were understood to be "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but . . . their power to dispose of the soil at their own will, to whomsoever they pleased, was denied." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). A tribe's interest pursuant to the discovery doctrine is variously termed the "right of occupancy," "right of possession," or "aboriginal" title.

The discovering nations, in contrast, possessed the underlying fee – termed the "right of preemption" – which constituted the right to purchase land from tribes. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Oneida Indian Nation of New York v. State of New York*,

860 F.2d 1145, 1150 (2d Cir. 1988). The underlying fee in the sovereign provided evidence of dominion and "was designed to regulate the competing claims of European nations to . . . purchase Indian land." *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1075 (2d Cir. 1982). The discovering nation, as the sovereign, initially also possessed the exclusive right to authorize extinguishment of the aboriginal title, termed the right of "extinguishment."

Prior to adoption of the United States Constitution, the right of preemption in the original thirteen states was thought to lie with the states. *Oneida*, 860 F.2d at 1159. The right of extinguishment, in contrast, was exercised by both states and the Confederal government prior to the adoption of the Constitution.[6] However, "[o]nce the United States was organized, and the Constitution adopted, [the] tribal rights to Indian lands became the exclusive province of federal law." *Oneida Indian Nation of New York State v. Oneida County, New York*, 414 U.S. 661, 667 (1974). Although "fee title to Indian lands [was] in [the original 13] States," federal law protected Indian occupancy and "its termination was exclusively the province of federal law." *Id*. at 670.

Whereas in *Oneida* and *Cayuga* the United States did not own the underlying title to the lands at issue (because the State of New York held the right of preemption), in this case the facts indicate that the United States may own title to the Islands. In 1763, Great Britain exercised control over the Islands, and it recognized the aboriginal rights of the Indians of the village of St. Regis, through the British Royal Proclamation of 1763. Royal Proclamation of Oct. 7, 1763,

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[6] The scope of national and state authority over Indian affairs during the Confederal period, as defined in Article IX of the Articles of Confederation, was ambiguous, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558 (1832), with both the United States and states claiming the exclusive right of extinguishment.

reprinted in Colonies to Nation 1763-1789: A Documentary History of the American Revolution 16, 18 (Jack P. Greene ed.1975). In 1783, the United States and Great Britain concluded the Treaty of Paris, which established a boundary between the United States and British North America. The boundary ran, in relevant part, "along the middle of the [St. Lawrence] River." Treaty of Paris, 8 Stat. 80, Art. II (1783). It was generally acknowledged at that time that the Islands fell within the territory of, and were governed by, Great Britain. *See St. Regis Tribe of Mohawk Indians v. State of New York*, 5 N.Y.2d 24, 28 (Ct. App. 1958). Britain and the United States subsequently concluded the War of 1812 and executed the 1814 Treaty of Ghent, 8 Stat. 218. Pursuant to that Treaty, a Boundary Commission was charged with determining whether certain Islands, including the Islands at issue in this case, were within the boundaries of the United States or British North America. *Id*, art. VI. The Treaty provided that property rights would not be disturbed in the event islands formerly in possession of one sovereign were transferred to the other. *Id*., art. VIII. The Boundary Commission determined in 1822 that the Islands at issue were within the territory of the United States. 8 Stat. 274.

Some evidence suggests that the finding of the Boundary Commission were due to compromises between the United States and Great Britain, and that, although the Islands were within British territory, the Islands were in effect exchanged with other lands, and the Islands, as a result of such compromise, then became for the first time within United States territory. *St. Regis Tribe*, 5 N.Y.2d at 30 (citing to a report written by the New York State Assembly in 1856 which stated that "the commissioners, in retracing the boundary line between the United States and the British Provinces, under the Treaty of Ghent, in 1822, exchanged these two islands [Baxter and Barnhart] for others in the St. Lawrence river, and they were thereby declared to be

within the jurisdiction of the United States"). Because the determination that the Islands were within United States territory was made after enactment of the United States Constitution, underlying title may have passed to the United States, not the State of New York.

The United States recognizes that Defendants are likely to dispute the United States' contention that it holds underlying title to the Islands. It may, consequently, be necessary for the parties to engage in discovery on this issue, to gather documents relating to, among other things, the negotiations leading up to the Treaty of Ghent, the findings and deliberations of the Boundary Commission, and similar issues.

The fact that there is an issue as to whether the United States owns underlying title of the Islands makes this case very different from *Cayuga* and *Oneida*. The Second Circuit's holding in *Cayuga* that laches could apply against the United States was predicated on the courts' view that the United States' claims did not "involve the enforcement of a public right or the protection of a public interest." 413 F.3d at 279 n.8. The court's analysis appears to rest on the fact that the United States' intervention in the case was solely as trustee to protect the tribes' rights. The court held that such action was not taken to enforce a "public right." In the case at bar, the facts arguably are different. The United States' claims to protect the Mohawks may be based in part on its underlying title to the Islands and thus the equities and justified expectations of Defendants are different.

The Supreme Court has never held that laches or a similar equitable argument barred the United States from seeking a remedy for the unlawful loss of federal title. *See United States v. California*, 332 U.S. 19, 40 (1947) (in case where United States asserted title and paramount rights over a three mile belt of land, court held that the government "is not to be deprived of those

interests by ordinary court rules designed particularly for private disputes" and the actions of federal officials cannot "cause the government to lose its valuable rights by their acquiescence, laches, or failure to act"); *Utah Power and Light v. United States,* 243 U.S. 389, 409 (1917) (where the United States sued to enjoin the continued occupancy and use of lands the federal government owned, laches did not bar the United States' claim because the United States' suit to protect its property rights "stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it").

In *Cayuga,* the Second Circuit recognized this body of caselaw, holding that its ruling applying laches against the United States "does not disturb our statement in *United States v. Angell*, 292 F.3d 333, 338 (2d Cir.2002) that 'laches is not available against the federal government when it undertakes to enforce a public right or protect the public interest'." 413 F.3d at 279 n.8. Because the United States' Islands claim seeks to protect title to the land, which is owned by the United States for the benefit of the Mohawks, its claim is predicated on enforcing a public right or interest.[7/]

Discovery is also appropriate because a specific federal statute, the Federal Power Act, 16 U.S.C. § 803(e) ("FPA") addresses the legal implications to NYPA and the Mohawks and therefore casts doubt on whether there can be disruption. Because the FPA provides a precise

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[7/]It is notable that in *Oneida* the Second Circuit's citation to *Angell* directly follows the court of appeal's analysis of the three recognized exceptions to the general rule that laches cannot be applied against the United States. By discussing *Angell* after it analyzed the three exceptions to the general rule, and noting that its decision applying laches against the United States was consistent with *Angell*, the court appeared to recognize that, notwithstanding its view that the facts in *Cayuga* fell within all three exceptions, its decision might be different if, like the facts in *Angell*, the federal government's action was undertaken to enforce a public right or to protect the public interest.

mechanism to address these matters, the Islands claim is distinct from the land claims addressed by the Second Circuit in *Oneida* and *Cayuga*. In *Oneida* and *Cayuga*, the Second Circuit focused on the fact that awarding title to the tribes would result in disruption to the State and other defendants. The Second Circuit determined in those cases that disruption to the defendants was clear because granting title to the tribes would directly interfere with defendants' rights. In this case, by contrast, NYPA's right to use the Islands derives from a federal statutory licensing scheme established under the FPA, and that licensing scheme provides a mechanism for addressing projects on tribal lands. The FPA provides that when licenses for federal power projects are issued involving the use of "tribal lands embraced within Indian reservations," the licensee can operate its facility on the tribal lands, but that the Federal Energy Regulatory Commission ("FERC") shall "fix reasonable annual charges for the use thereof." 16 U.S.C. § 803(e). NYPA's ability to use the Islands to operate its facilities is not threatened. NYPA, as a licensee, may continue to operate a power project free from disruption or interference, even if NYPA is deemed not to hold title.

In NYPA's 2003 license renewal process, FERC was made aware by the Mohawks and the United States that there were pending Indian land claims in this Court relating to the Islands. The United States explained in a letter to FERC that it was the position of the United States that the Island lands are Indian Reservation Lands and that Sections 4(e) and 10(e) of the Federal Power Act apply to them:

> Most importantly, because the disputed land transactions were not ratified by an act of Congress, it is the position of the United States that the lands in question have been and remain *Mohawk reservation lands.* If the Mohawk land claim is resolved in accordance with the United States' position, Barnhart, Croil and

> Long Sault Islands would likely qualify as reservations for purposes of sections 4(e) and 10(e) of the FPA. The Supreme Court of the United States has determined that the term "reservations," as defined in FPA section 3(2), is restricted to lands "'owned by the United States' . . . or in which it owns a proprietary interest" and does not apply to lands owned in fee simple by Indian tribes. Under the United States' asserted position in the Mohawk land claim, the disputed islands meet the FPA definition of "reservation." As a result of certain boundary determinations in the 1783 Treaty of Paris and the 1812 Treaty of Ghent, it is the United States' position that title to Barnhart, Baxter and Long Sault Islands passed directly from the British Crown to the United States in 1822, subject to the use and occupancy of the Indians of the Village of St. Regis.

U.S. Dep't of the Interior, Comments, Recommendations, Terms, Conditions and Prescriptions, St. Lawrence-FDR Power Project, Project No. 2000 (Feb. 10, 2003), at 21 (emphasis in original).

FERC did not make any decisions as to whether annual charges were appropriate. Instead, FERC imposed, as a condition of the renewed license, the following:

> Article 418. *Unified Mohawk Land Claim*. Authority is reserved to the Commission to require the Licensee to implement such conditions for the protection and utilization of the St. Regis Mohawk Tribe Reservation as may be provided by the Secretary of the Interior pursuant to Section 4(e) of the Federal Power Act. Authority is also reserved to establish a reasonable annual charge for the use of federal reservation lands pursuant to Section 10(e) of the Federal Power Act. Exercise of these authorities is contingent on resolution of the Mohawk land claim litigation pending on the issuance date of this license in the United States District Court for the Northern District of New York, Civil Action Nos. 82-CV-829, 82-CV-1114, and 82-CV-783, in a such a manner sufficient as to cause the lands and waters subject to the referenced claims to become Federal reservations for purposes of the Federal Power Act.

The unique provisions of the FPA may distinguish the Islands claim in the case at bar from the facts in *Oneida* and *Cayuga*. Accordingly, discovery can assist the Court in

ascertaining whether disruption can occur.

Likewise, even if disruption exists, for the reasons set forth above in connection with the mainland claims, discovery would be needed to flesh out facts related to the Island Claims to determine if Defendants had justified expectations regarding issues of title. As described by the Tribal Plaintiffs in their briefs opposing the Defendants' Motions to Dismiss, various actions have taken place over the course of time which arguably have alerted the State of New York and NYPA to the fact that land title issues regarding the Islands were not settled. See St. Regis and MNCC Opp. Br., at 23-25. For example, in 1856, a payment was made to the Mohawks pursuant to an act of the New York Legislature. There are factual issues regarding the extent to which such payment constituted a recognition by the Mohawks of title held by the State or whether, as asserted by the Mohawks, it constituted recognition of title in the Mohawks through the payment of back rents. There are also issues as to whether monies were ever actually paid to the Mohawks. Whitely Decl., ¶ *32,* p. 53, attached as an Appendix to MCA Opp. Br.; *St. Regis Mohawk Tribe v. New York* , 5 N.Y.2d 24, 39 (N.Y. 1958). In 1930, the Six Nations petitioned Congress for redress regarding what the tribes claimed to be illegally transferred lands, including the Islands. Whitely Decl., ¶ 38, p. 69. Whether the State of New York or NYPA was aware of this Petition is appropriately the subject of discovery. A similar petition was filed with the State of New York in 1935. Id., ¶ 38, p. 70-71. In 1953, soon after NYPA received its federal permit to operate its project on the Islands, the Mohawks raised regarding ownership of the Islands. In fact, the St. Regis Mohawk Tribe filed a lawsuit on the issue in 1954. *St. Regis Mohawk Tribe v.*

New York, 5 N.Y.2d 24 (1958). Discovery would be needed to determine the extent to which NYPA was aware in 1953 that title to the Islands was not settled. If NYPA had an awareness of the existence of a dispute, there is little justification for concluding that it had an "expectation," much less a "justified expectation" at that time.

There may be other documents uncovered during discovery that would demonstrate that representatives of the State and/or NYPA were aware, or reasonably should have been aware, of the fact that issues pertaining to title to the Islands were not settled.[8/] Because no discovery has taken place on these factual issues, it is not possible to know how many such documents exist, nor what probative value they may have. Thus, should this Court should allow the parties to engage in further discovery on these important factual issues. Those issues go directly to what the Second Circuit found important in *Oneida:* whether the Defendants had longstanding, justifiable expectations regarding settled issues of land ownership.

C. United States' Nonpossessory Claim

In *Oneida*, the United States and tribal plaintiffs asserted what they, and the district court, characterized as a nonpossessory claim. *Oneida Indian Nation of New York v. New York*, 500 F. Supp. 2d 128, 138 (N.D.N.Y. 2007). Under this claim, title to the lands was not challenged. Instead, the district court said that the essence of the claim

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[8/]Judicial notice would not be the proper mechanism for the Court to consider the above-referenced documents. Federal Rule of Evidence 201 allows judicial notice of adjudicative facts that are not subject to reasonable dispute. See Fed. R. Evid. 201(a), (b). Here, the documents are "not the type of document[s] about which there can be no reasonable dispute." *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 78 (D.D.C. 2009).

was that the tribes are entitled to money damages because they received unfair compensation from the State when the State acquired the lands at issue. *Id*. The district court held that "this claim is best styled as a contract claim that seeks to reform or revise a contract." *Id*. at 140. The court held that the non-possessory claim survived *Cayuga* because "this type of claim only seeks retrospective relief, in the form of damages, is not based on plaintiffs' continued possessory right to the claimed land, and does not void the agreements." *Id*. at 140. The district court reasoned that a ruling which awards money damages, but "implicitly recognizes and confirms the transfer of property made pursuant to the agreements" would not disrupt the defendants' settled expectations. *Id*.

The Second Circuit reversed the district court, holding that (1) New York's sovereign immunity bars the claims and (2) *Cayuga* bars the Oneidas' and United States' claims. On the sovereign immunity issue, the court recognized that when the United States intervenes in a case on behalf of an Indian tribe, the State does not retain sovereign immunity. *Oneida*, 617 F.3d at 131. However, a State may retain sovereign immunity "to the extent that the [plaintiff Indian tribes] raise claims or issues that are not *identical* to those made by the United States." *Id*. at 132 (emphasis supplied by court). The Second Circuit found that it did not have to determine "the precise contours of when a tribe's complaint raises a claim or issue not "identical to" one asserted by the United States because, "even construing the United States' most recent amended complaint liberally, it simply does not contain the contract-based claim that the district court found to be adequately pled by the Oneidas." *Id.*

In this case, this Court does not have to address the sovereign immunity issue.

This is because the nonpossessory NIA enforcement claim seeking restitution is raised by the United States. *Arizona v. California*, 460 U.S. 605, 614 ("nothing in the Eleventh Amendment has ever been seriously supposed to prevent a State from being sued by the United States"). Moreover, there is no need to decide whether claims asserted by the Tribal Plaintiffs are barred by the Eleventh Amendment because the Tribal Plaintiffs did not assert such claims. The Eleventh Amendment is, consequently, inapplicable. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, (8th Cir. 1997) (United States has the right to assert claims against the State of Minnesota and "as an intervenor, it has the right to continue suit even without the presence of the Bands").

The only issues regarding the United States' unfair compensation claim this Court must address in connection with the Defendants' pending Motions for Judgment on the Pleadings are (1) whether the United States' Amended Complaint provides an adequate basis for a restitution remedy for violation of the NIA; and (2) whether such claim must be barred pursuant to *Oneida*.

On the pleadings issue, as the United States explained in its Memorandum in Opposition to Defendants' Motions for Judgment on the Pleadings, at pp.24-30, the United States' nonpossessory claim is one seeking a particular remedy (restitution) from Defendants, on the grounds that they violated the NIA. The NIA strictly prohibits the "purchase, grant, lease, or other conveyance of lands" without federal approval. 25 U.S.C. § 177. However, and as the Supreme Court has noted, the Act does not "speak directly to the question of remedies for unlawful conveyances of Indian land." *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 237 (1985). If equity bars

relief premised on a current right of possession, the logical response is not to ignore the clear statutory violation, but to fashion alternative relief. Such relief for the unlawful transaction might focus on the terms of the illegal transaction itself, instead of on actual recovery of the lost land, so as to require the return of unlawfully obtained profits. Restitution, which is available both at law and in equity, *FTC v. Verity International, Ltd.*, 443 F.3d 48, 66-67 (2d Cir. 2006), has "compelled wrongdoers to'disgorge' – i.e., account for and surrender – their ill-gotten gains for centuries." *SEC. v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006). Such disgorgement would not vindicate any possessory right – indeed, it would be premised on an inability to do so, and would be predicated upon an acquiescence in and acceptance of the transactions as a result. Such a remedy is consistent with the purpose of the Nonintercourse Act, which sought to ensure that a fair price would be paid for tribal lands. *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (NIA was intended not only to enable the Government to vacate unlawful dispositions of Indian lands, but also "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them").

The United States' Amended Complaint-in-Intervention sets forth the bases of a NIA claim (that tribal lands were acquired through various "treaties" and other transactions not approved by the United States) and requests this Court to award "monetary remedies" and "appropriate monetary damages" against Defendants. U.S. Am. Compl.-in-Int., at Wherefore Clause ¶¶ 2 & 4. Further, the United States seeks "such other relief as this Court may deem just and proper." Id. ¶ 6. Fed. R. Civ. P. 54 (c) provides that "every final judgment shall grant the relief to which the party in whose

favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Rule 54 (c) confirms the broad power of the federal courts to provide a plaintiff with whatever relief is appropriate, regardless of whether that relief was sought in the complaint. Thus, omissions in the prayer for relief do not prevent the federal courts from redressing meritorious claims and providing appropriate relief. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978); *Pension Benefit Guar. Corp. v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1126 (6th Cir. 1994), *cert. denied*, 513 U.S. 816 (1994); *Ring v. Spina*, 148 F.2d 647, 653 (2d Cir. 1945). The nonpossessory remedy for lands lost to the Mohawks due to Defendants' violations of the NIA is fairly included in the United States' Amended Complaint.

This Court is not bound by the finding of the district court in *Oneida* that the non-possessory claim advanced in that litigation is contract-based. This Court must, instead, examine the issue independently. The Second Circuit in *Oneida* issued no ruling on the matter. The focus of the court, in the context of deciding the Eleventh Amendment issue, was merely on whether the allegations in the United States' amended complaint pled sufficient facts to support "the contract-based claim that the district court found to be adequately pled by the Oneidas." 617 F.3d at 132. The court of appeals did not opine on whether the district court's holding that the claim was contract-based was correct. The nature of the nonpossessory claim (i.e. whether it is contract based or, as asserted by the United States, an appropriate remedy, in the form of restitution, for violation of the NIA), in this litigation is a disputed issue and must be resolved by this Court.

Moreover, even if this Court were to determine that a nonpossessory claim is, in whole or in part, necessarily contract-based, that would not mandate dismissal of this action. Rather, this Court should grant the United States leave to amend its Complaint to add the requisite allegations to substantiate a contract-based claim. Amendments to pleadings should be freely granted when they cause no prejudice to the parties. *State Teacher's Retirement Board v. Fluor Corp.*, 654 F.2d 843 (2d Cir. 1981). Although the Second Circuit held in *Oneida* that it was not appropriate to allow the United States to amend its complaint, the procedural posture of that case was different than the case at bar. In *Oneida*, the parties had engaged in extensive discovery on the liability issue and had consequently developed a substantial record. Because virtually no discovery has taken place and there has been a minimal development of a factual record, allowing the United States to amend its Complaint at this early stage of the litigation would cause no prejudice to any party.

As to whether the United States' nonpossessory claim is barred by *Oneida*, the Second Circuit applied the same analysis as for possessory claims, emphasizing that equity bars nonpossessory claims only when an award of relief would disrupt "justified societal expectations." 617 F.3d at 136. *See also id*. at 135 (defense bars claims that "are disruptive of significant and justified societal expectations"); 136 (defense is "potentially applicable to all ancient land claims that are disruptive of justified societal interests"). It is premature for this Court to rule on the matter. As in the case of the possessory claims, discovery is also appropriate and necessary on the United States' nonpossessory claim. The United States needs time to conduct discovery and prepare expert testimony and

exhibits which will enable the court to fully and fully assess the claim and fairly address the factual questions raised. Thus, as in the case of the possessory claims, whether the unfair compensation claim is barred by the equitable defense in *Sherrill* and *Cayuga* is contingent on whether, given the facts of the specific case, the claims interfere with defendants' longstanding, justified expectations. As noted above, discovery is required to resolve these issues in this particular case.

CONCLUSION

In its Memorandum of Law Opposing the State's and NYPA's Motion for Judgment on the Pleadings, the United States asserted that it was inappropriate to dismiss this action on the pleadings alone because facts need to be developed during discovery to determine whether the equitable defenses espoused in *Sherrill* and *Cayuga* apply to this case. This remains true. The facts regarding the expectations of the State of New York and NYPA regarding land ownership, both as to the mainland claims and the Islands, are substantially more complicated in this case than in *Sherrill*, *Cayuga*, or *Oneida*. There has been little discovery in this litigation and none of it has concentrated on the issue of whether a land ownership expectation is, under the circumstances, justified. Only a fully-developed evidentiary record can provide this Court sufficient information to determine whether the expectations of Defendants regarding land ownership were justified. Given the lack of an adequate record, this Court should now allow the parties necessary discovery on this critical issue.

Moreover, for the reasons explained above, there are important facts in this case regarding the Islands claims that distinguish such claims from *Cayuga* and *Oneida*.

There are issues regarding whether the United States, as a result of the Treaty of Ghent, acquired underlying title to the Islands. If the United States holds underlying title, the Second Circuit's laches analysis in *Cayuga* may not apply here. Thus, more discovery is needed on the title issue.

Finally, the unique facts relating to provisions in the Federal Power Act may prevent disruption to NPYA even if this Court were to hold that NYPA does not own title the Islands.

Dated: February 7, 2011 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day February, 2011, I filed the foregoing pleading with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to counsel of record.which will send notification of such filing to the following CM/ECF participants: Curtis G. Berkey; Arthur T. Cambouris; Jon P. Devendorf; Jan Farr; Paul J. Giancola; Christopher W. Hall; Arthur Lazarus, Jr.; Marcie Montgomery; Alexandra C. Page; Kimo S. Peluso; Alan R. Peterman; David B. Roberts; Michael L. Roy; Harry R. Sachse; Judith M. Sayles; Marsha K. Schmidt; and Heidi McNeil Staudenmaier.

S/ James B. Cooney