UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND
OF MOHAWK INDIANS,

Plaintiff,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,

Defendants.

Civil Action Nos.
82-CV-783
82-CV-1114
89-CV-829 (NPM)

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

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK, *et al.*,

Defendants.

OBJECTIONS OF THE MOHAWK COUNCIL OF AKWESASNE TO THE REPORT AND RECOMMENDATIONS ISSUED BY MAGISTRATE JUDGE DANCKS ON SEPTEMBER 28, 2012

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Constitutional Provisions

Federal Statutes and Treaties

Federal Legislative Materials

Administrative Cases and Materials

State Statutes and Legislative Materials

Books and Publications

I. INTRODUCTION & SUMMARY.

Judge Dancks in her Report and Recommendations of September 28, 2012 correctly distinguishes the Hogansburg Triangle claim in this case from the *Cayuga* and *Oneida* decisions of the Second Circuit,[1] recognizing that those decisions were based on very different facts from the Mohawk claim. In *Cayuga* and *Oneida*, nearly all of the tribal members left the State long ago; nearly all of the tribal lands were sold, leaving the tribes with little or no actual land base in New York; and the tribes claimed enormous areas populated heavily by non-Indian residents.[2]

In stark contrast, the Mohawks never left their home region of Akwesasne, and the Mohawk population at Akwesasne has steadily grown, now numbering over twenty thousand. The Mohawks still retain the majority of the lands of their reservation in New York, as well as additional reservation lands in adjacent Canada. The claims areas in this case total only about 10,000 acres of Mainland claims, plus 3 islands, and the area remains Mohawk country in a way that was simply not so in *Oneida* or *Cayuga*, or now *Onondaga*. Because of these factual differences, the Mohawk claims are not subject to dismissal based on the Second Circuit's version of "laches."[3]

The Mohawk Island claims are even further removed from the factual and legal situation in the three Second Circuit decisions. Indeed, there was no claim even remotely like the Island

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[1] *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010).

[2] The same is true in the *Onondaga* claims case, decided by the Second Circuit on October 19, 2012, after Judge Dancks issued her Report and Recommendations in this case. *Onondaga Nation v. State of N.Y.*, No. 5:05-cv-0314, 2012 WL 5075534 (2d Cir. Oct. 19, 2012); *see also Onondaga Nation v. State of N.Y.*, No. 10-4273-cv, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2011).

[3] The Second Circuit in *Oneida* acknowledged that the Circuit was not applying "a traditional laches defense so much as an equitable defense that drew upon laches and other equitable doctrines." *Oneida*, 617 F.3d at 128.

claims in any of those cases. The three claimed Islands[4] are directly adjacent to islands that are still home to extensive Mohawk population, and there are Mohawk-owned and Mohawk-occupied islands both to the east and to the west of the claimed Islands, up and down the St. Lawrence River. One of the claimed Islands is, and always has been, entirely uninhabited. The other two claimed Islands are occupied only by the State of New York (the original wrongdoer in this case) and the New York Power Authority ("NYPA") – not multitudes of innocent landholders. Moreover, there is already a carefully crafted federal remedial scheme in place – through the Federal Power Act and the existing federal power license for the Robert Moses Dam – that prevents any disruption to power generation or related land use with respect to the Islands occupied by New York and NYPA. In addition, in claiming ownership of these Islands, New York violated two international treaties between the United States and Great Britain, and under the Constitution, treaties are the "supreme law of the land" and must be followed by the courts.[5] No such treaties were involved in the other cases. Simply put, legally and factually, the Island claims are not subject to equitable dismissal under *Cayuga*, *Oneida*, and *Onondaga*.

Moreover, given the express acts of Congress preserving these land claims, and the Supreme Court's rulings affirming that the federal courts are available to hear these land claims, if the Second Circuit's conclusions can be justified at all, it is because of the extreme facts of the *Cayuga*, *Oneida*, and *Onondaga* claims. This Court should not extend the rulings in those cases to the radically different facts in Mohawk.

The Mohawk Council of Akwesasne ("MCA") therefore objects to Judge Dancks' recommended dismissal of the Island claims. We also object to Judge Dancks' recommended dismissal of the other Mainland claims besides the Hogansburg Triangle. With respect to the

[4] One of the claimed Islands (Long Sault Island) is really a small chain of islands.

[5] *See* discussion *infra* at 17-19.

Mainland claims, we defer to the joint brief of the other Mohawk plaintiffs – the St. Regis Mohawk Tribe ("SRMT") and the Mohawk Nation Council of Chiefs ("MNCC" or "Longhouse").

II. THE FACTS IN THE MOHAWK CLAIMS ARE RADICALLY DIFFERENT FROM THE FACTS IN *CAYUGA*, *ONEIDA*, AND *ONONDAGA* – AND STRIKINGLY SO IN THE ISLAND CLAIMS.

A. The facts in *Cayuga*.

The *Cayuga* fact situation was extreme in that long ago nearly all the Cayugas' land was sold, nearly all the Cayugas left the state, and the Cayugas claimed a vast area of land. The Second Circuit noted that in 1795 the Cayuga ceded all of their land in New York except for three square miles (1,920 acres) and that in 1807 New York purchased that remaining tract, leaving the Cayuga with no reservation land at all and only a small population in New York. 413 F.3d at 269. With almost 200 years since the Cayugas occupied a reservation in New York and very little Cayuga population in the State,[6] the Cayugas claimed over 64,000 acres. 413 F.3d at 268. The Second Circuit in *Cayuga* noted that "[g]enerations had passed during which non-Indians had owned and developed the area that once composed the Tribe's historic reservation, . . . a large swath of central New York State," and "at least since the middle years of the 19th century, most [tribal members] had resided elsewhere." *Id*. at 277 (quoting *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202 (2005)). Based on these extreme facts, the Second Circuit, in a divided opinion, held that "[b]ased on *Sherrill*, we conclude that the

[6] A 2005 report from the Bureau of Indian Affairs lists a total New York Cayuga membership of 275 individuals. Office of Indian Servs., Bureau of Indian Affairs, American Indian Population and Labor Force Report (2005), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf (last visited Nov. 5, 2012). *See also* Bureau of Data Management & Analysis, NY State Dep't of Soc. Servs., *American Indians in New York State* (1978) (showing enrolled membership of 377 Cayugas in New York State as of March 1978).

possessory land claim alleged here is the type of claim to which a laches defense can be applied." *Id.* at 268.

B. The facts in *Oneida.*

The Oneida fact situation tracks the situation in *Cayuga.* The Supreme Court noted in *Sherrill* that the Oneidas after the Revolutionary War had a reservation of 300,000 acres. 544 U.S. at 202. But in 1838, the Oneidas and the United States entered into the Treaty of Buffalo Creek, Jan. 15, 1838, 7 Stat. 561, which provided the Oneidas with land in the West. 544 U.S. at 206. Indeed, the Treaty of Buffalo Creek "envisioned the removal of all remaining" Oneidas to Kansas. *Oneida*, 617 F.3d at 119 n.3. As a result, nearly all the Oneida land was sold, and nearly all the Oneidas left New York:

> The Oneidas who stayed on in New York after the proclamation of the Buffalo Creek Treaty continued to diminish in number and in the 1840s sold most of their remaining lands to the State . . . By the mid-1840s, only about 200 Oneidas remained in New York State . . . By 1920 only 32 acres continued to be held by the Oneidas [in New York State].

Sherrill, 544 U.S. at 207 (citations omitted). By 1838, six hundred Oneida members had moved to Wisconsin, and the 600 Oneidas who stayed in New York "continued to diminish in number and, during the 1840s, sold most of their remaining lands to the State." *Oneida,* 617 F.3d at 119 (citations omitted). The Oneida land claim came to encompass over 250,000 acres of aboriginal territory. *Id.* at 120. The Second Circuit found that these subject lands had "passed into the hands of a multitude of entities and individuals, most of whom have no connection to the historical injustice" asserted by Oneida, that the lands had been "bought and sold" and "developed to an enormous extent." *Id.* at 127 (emphasis added).

The Second Circuit, again in a divided opinion, found these Oneida facts "indistinguishable from *Cayuga* in terms of the underlying factual circumstances that led the *Cayuga* court to conclude not only that the laches defense and other equitable defenses were

available, but also that laches actually barred the claims at issue in the case." *Oneida*, 617 F.3d at 126 (emphasis added).

C. The Facts in *Onondaga*.

The original Onondaga Reservation, established in 1788, was 100 square miles, or 64,000 acres. *Onondaga Nation v. State of N.Y.*, 2010 WL 3806492, at *2. *See also* Harold Blau et. al., *Onondaga, in* 15 *Handbook of North American Indians* 491, 496 (William C. Sturtevant ed., 1978). By treaties signed in 1793 and 1795, the Onondagas disposed of over three fourths of the Reservation, and later much more. *Onondaga*, 2010 WL 3806492, at *3. The Onondagas in New York, like the Cayugas and Oneidas, were small in number.[7] However, the Onondagas did not limit their claim to the 1788 reservation. As their first amended complaint shows, "the land which is the subject of this action is the aboriginal property of the Onondaga Nation," a strip which runs "from the St. Lawrence River along the east side of Lake Ontario and south as far as the Pennsylvania border. The strip varies in width from about 10 miles to more than 40 miles." First Am. Compl. for Declaratory J. at ¶¶ 17-18, *Onondaga Nation v. New York*, No. 05-cv-314, 2005 WL 4136413 (N.D.N.Y. 2010). This area encompasses, among other things, the City of Syracuse, which was named as a defendant. *Onondaga*, 2010 WL 3806492 at *2. In other words, the claim was to aboriginal land that the Onondagas had not occupied since before the United States was created, and was significantly more land than the *Cayuga* and *Oneida* claims combined. This Court took judicial notice that "[n]on-Indians have extensively populated and

[7] Bureau of Indian Affairs data shows a total Onondaga population of 1,596 in 1995, before the Onondaga claims were filed. *See* Doug George-Kanentiio, "*Iroquois Population in 1995*," Akwesasne Notes New Series, Fall 1995, at 61 *available at* http://www.ratical.org/many_worlds/6Nations/population95.html. *See also* Kirk Semple, *Challenging History and Pollution; Onondagas' Suit is the Largest in Indian Claim History.* N.Y. Times, Mar. 31, 2005, at 31 (noting approximately 1,500 Onondaga enrolled members in 2005).

developed the [Onondaga's] aboriginal lands." *Onondaga*, 2010 WL 3806492, at *3 (emphasis added). *See also id.* at *8.

D. The facts in the Mohawk claims.

1. In general.

The facts in this case are dramatically different from the facts in *Cayuga*, *Oneida*, and *Onondaga*. Unlike those three Tribes, who largely abandoned their original homeland, moved elsewhere, and claimed large land areas in New York, *supra*, the Mohawks have remained in place and have steadily grown in number to over 20,000, claiming only 10,000 acres and 3 islands in the St. Lawrence River that were clearly illegally taken from them.

Significantly, in the supplementary addendum to the Treaty of Buffalo Creek, supp. art., Feb. 13, 1838, 7 Stat. 561, only the Mohawks were exempted from the pressure to move out of the State of New York. This special addendum was added to the Treaty and gave the Mohawks the right to remain in New York,[8] which they did. *Id*. *See also* Declaration of Peter Michael Whiteley, Ph.D. at 23-24, 27-28 (Responses to Questions 28-30) (June 14, 2007) (describing how the Mohawks, unlike the Cayugas and Oneidas, remained in New York after the Treaty of Buffalo Creek). [9]

[8] Contrary to the statement of the Supreme Court in *Sherrill*, cited by the Second Circuit in *Oneida*, the Treaty of Buffalo Creek did not "envision[] the removal of all remaining New York Indians . . . to Kansas." *Oneida*, 617 F.3d at 119 n.3 (quoting *Sherrill*, 544 U.S. at 206) (emphasis added). In fact, the treaty very explicitly singled out the "St. Regis Indians" (and no others) and provided them the option to stay where they were. 7 Stat. 561.

[9] The Whiteley Declaration was filed in this Court on June 14, 2007. Relevant excerpts are enclosed here as Exhibit 4. Dr. Whiteley is an expert witness for the Mohawk plaintiffs. As Judge Dancks correctly noted, in considering the Defendants' Motions to Dismiss, this Court "must accept the Plaintiffs' allegations as true and draw all reasonable inferences in Plaintiffs' favor." Dancks Report at 14 (citing *DiFolco v. MSNBC Cable LLC*, 662 F.3d 104, 110-11 (2d Cir. 2010). 2005 and 2007 population data provided by the MCA Aboriginal Rights and Research Office.

We think it will assist the Court to review the attached maps, which we have filed electronically and also mailed in full-sized hard copy to the Court and to all parties. *See* Exhibits 1-2. These maps, which are derived from the MCA's Aboriginal Rights and Research Office, show the extent of current Mohawk territory on both sides of the St. Lawrence River, in both the United States and Canada. In Exhibit 1, the green-shaded area is the current Mohawk land in the United States, and the yellow-shaded area shows the current Mohawk land in Canada (including many islands up and down the St. Lawrence River, on both sides of the Island claims). The red-shaded area shows the Mainland claims – including the Hogansburg Triangle, Fort Covington, Massena, and the Grass River meadows. The orange-shaded area shows the Island claims: Barnhart Island, Baxter (Croil) Island, and the Long Sault Islands. The map enclosed at Exhibit 2 shows the Mohawk lands, but in a larger scale, including additional Mohawk islands to provide a broader perspective of the region.

The New York Mohawk Reservation, defined in the 1796 Treaty approved by the United States,[10] was relatively small: some 24,900 acres (i.e., the combined green and red areas on the Exhibit 1 map). The Mohawks gave up their other aboriginal lands in the 1796 Treaty, retaining only this long-established Mohawk area. 7 Stat. 55. This consisted of a rectangular tract of land equivalent to a six-mile square that included the long-established Mohawk Village of St. Regis, two one-mile squares which protected mills established by the Mohawks before the Treaty, and pasturage along the Grass River. *Id*. The greater part of this treaty reservation, some 14,500 acres in the United States (the green-shaded area on the Exhibit 1 map), remains wholly intact today and is the home and center of government of the New York portion of the Tribe. These 14,500 acres are not disputed and are not part of the land claims in this case.

[10] Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55.

The Village of St. Regis, as a result of the boundary drawn later between the United States and Canada,[11] is now mostly in Canada and is the headquarters of the Mohawk Council of Akwesasne ("MCA"). The Canadian portion of the reserve includes not only the Village of Saint Regis (south of the St. Lawrence and adjacent to the United States portion of the reserve), but also Cornwall Island (a large island in St. Lawrence River, entirely Mohawk owned and populated), St. Regis Island, and Chenail (a mainland area south of the Saint Lawrence also heavily Mohawk populated and adjacent to the United States portion of the reserve). In addition to Cornwall Island and St. Regis Island, the MCA also owns 16 other islands in the St. Lawrence. Ex. 3 at 1 (list of islands). These islands range in size from 1 acre to 175 acres each. *Id.* Individual Mohawks own another 40 islands in the area. *Id.* at 2-3. The entirety of these Canadian Mohawk lands is shown in yellow on the Exhibit 1 and 2 maps and adds greatly to the Mohawk character of the whole area.

The Mohawk population in the area has always been substantial. Rather than diminishing in population in New York like the other tribes, the Mohawk population has grown steadily and remained centered in the Akwesasne mainland and island areas (in both the United States and Canada):

- 1852: 1,120 St. Regis Mohawks, 632 on the British side and 488 on the American Side;
- 1885: 1,870 Indians attended the St. Regis Catholic Church;
- 1890-1892: U.S. Census shows over 2,300 St. Regis Indians in both Canadian and American side;
- 1910: 1,368 on the U.S. side alone;
- 1940: over 2,500 on both sides;

[11] *See infra* at 9-10 (discussing the clarification of the boundary).

- 1970: at least 3,000 on both sides;
- 2005: at least 10,000 on Canadian side alone; and
- 2007: at least 12,000 on U.S. side alone.

Whiteley at 24-26 (Response to Question 29), 63 (Response to Question 37). Therefore, the total Mohawk population at Akwesasne is at least 20,000 people – an entirely different situation from that of *Cayuga*, *Oneida*, or *Onondaga*.

2. The Island claims.

The Island claims present an even more distinct factual scenario than anything found in *Cayuga*, *Oneida*, or *Onondaga*. The Island claims are for three Islands (one of them a set of small islands): Barnhart Island, Baxter Island (also known as Croil Island) and the Long Sault Islands. Dancks Report at 9. At the time of the 1796 Treaty, as Judge Dancks correctly stated, each party understood that Barnhart Island, Baxter (Croil) Island, Long Sault Islands, and various other islands in the St. Lawrence River were not part of the State of New York, but part of British North America (Canada), and "belonged to the Indians of the Village of St. Regis," with "ownership confirmed and protected by the British Royal Proclamation of 1763." Dancks Report at 9. *See also* Whiteley at 8-9 (Responses to Questions 19, 20). These were three of the many islands in the Saint Lawrence River near the Village of St. Regis that formed a part of the Mohawk territory. *See* Exhibits 1-2 (maps of Akwesasne). The Mohawks used the Islands for hunting and fishing, and archaeological evidence indicates their aboriginal importance. Whiteley at 13-14 (Response to Question 23). Portions of Barnhart and Baxter Islands were leased by the Mohawks to non-Indians in the late 18th and early 19th centuries but with hunting, gathering, and fishing rights retained, as well as the right of the Mohawks to build mills. Whiteley at 14 (Response to Question 23), 45-46 (Response to Question 31).

A precise boundary between this area of Canada and the United States was not drawn until a commission was set up to establish such a boundary in the Treaty of Ghent, which ended the War of 1812. Dancks Report at 9; Treaty of Ghent, art. 6, Dec. 24, 1814, 8 Stat. 218, 221. In 1822, that commission ran the boundary between Canada and the United States directly through the village of St. Regis and around various islands, placing islands that initially were thought to be in Canada in the United States. Dancks Report at 10; 5 *American State Papers-Foreign Relations*, 241-244 (1858). This line was confirmed as the boundary between the United States and Great Britain (Canada) in the Boundary Treaty of 1842, art. 2, Aug. 9, 1842, 8 Stat. 572, 573. Importantly, it was not until this 1842 treaty that the boundary became final.

These treaties – by their terms and well-established international law – explicitly did not change the ownership of any property. *See* Treaty of Ghent, art. 8, 8 Stat. 222; Boundary Treaty of 1842, art. 4, 8 Stat. 574-575.[12] However, the treaties did put some of the Indians of the Village of St. Regis into Canada and put Barnhart Island, Baxter (Croil) Island, and the Long Sault Islands into the United States for the first time. Dancks at 10.

The State of New York, however, ignored the terms of these treaties between the United States and Great Britain and patented Barnhart Island and Baxter (Croil) Island to land speculators – the Ogden brothers – in disregard of the rights of the Mohawks and of the United States as their trustee. Dancks Report at 10; Whiteley at 10 (Response to Question 20).[13] The Ogden brothers brought suit in New York courts and evicted both the Barnharts and the Baxters, who had previously entered into leases with the St. Regis Indians. Dancks Report at 10-11; *St. Regis Mohawk Tribe v. New York*, 5 N.Y.2d 24, 30-31 (1958). As Judge Dancks points out, in

[12] *See also* discussion *infra* at 17-19.

[13] There is no indication that any action was taken by the State of New York concerning the Long Sault Islands, which remain uninhabited.

1850 and 1855, after receiving petitions from Barnhart[14] and Baxter, the New York State Assembly recognized that they had a valid leases from the St. Regis Indians and had been dispossessed by the Ogdens. Dancks Report at 10. This was approximately 30 years after New York had illegally sold the two Islands to the Ogdens. The New York State Assembly agreed to pay Barnhart and Baxter for their leasehold interests. *Id.* The Mohawks then petitioned the State, as well. *Id.* 10-11. An additional Assembly report recognized the "unquestioned" St. Regis ownership, and the Assembly passed legislation in 1856 to pay the St. Regis Indians the equivalent of back rent for Barnhart Island and Baxter (Croil) Island for certain years, along with additional compensation.[15] *Id.*; *St. Regis Mohawk Tribe*, 5 N.Y.2d at 33-35 (noting that New York had determined that "[t]he rights of the lessee cannot well be sanctioned and respected without, at the same time, sanctioning the title of the lessor."). There are issues over whether the money was ever paid, whether it was for lost rent or title, and to whom it was paid, but the Mohawks were satisfied that they had again established their ownership of the Islands. *See* Whiteley at 16-17 (Response to Question 25).[16]

In the early 1950s, the State of New York began ejecting private residents on Barnhart Island and Baxter (Croil) Island and transferred possession to NYPA to build the Robert Moses Dam project. *See* Whiteley at 73 (Response to Question 38); Dancks Report at 11. By 1954 the State of New York acquired all remaining lands by appropriation. N.Y. Pub. Auth. Law, § 1007 (McKinney 2012). There have subsequently been no private owners of the Island lands.

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[14] The petition for Barnhart Island was actually filed by Mr. Barnhart's heirs. *See* State of N.Y. Report No. 34 (Feb. 15, 1853) (report by the Commissioners of the Land Office).

[15] There is no record that any payment was ever made for the Long Sault Islands.

[16] The State took the position that it acquired title by this payment, although there was no agreement signed by the Mohawks, much less an agreement approved by the United States. *See* 1856 N.Y. Laws 173.

The Federal Power Commission (now FERC) issued a final license for the project in 1953 under the Federal Power Act, now codified at 16 U.S.C. §§ 791a -828c. *See In re Power Auth. of N.Y.*, 12 F.P.C. 172 (1953). The power project, as FERC has recognized, did great harm to the Mohawks. By building the power project, the State flooded Mohawk lands, eroding "shoreline . . . on traditional cultural properties," diminishing "treaty-protected fish species," and making it more difficult to access "waters for hunting, fishing, gathering, and traditional cultural purposes." *N.Y. Power Auth. v. Power Auth. of N.Y.*, 105 F.E.R.C. 61,102, 61,584 (2003); *see also* Whiteley at 34-35 (Response to Question 31) (describing the damage to the river's ecosystem due to the power project). FERC renewed NYPA's license in 2003, providing specifically for the possibility of Indian ownership of the Islands without disruption of the project. *N.Y. Power Auth.*, 105 F.E.R.C. at 61,604. *See* discussion *infra* at 14-17.

III. EQUITABLE "LACHES" AS DEFINED BY THE SECOND CIRCUIT IN *CAYUGA*, *ONEIDA*, AND *ONONDAGA* IS HIGHLY FACT-DEPENDENT AND IS NOT JUSTIFIED HERE.

A determination of whether the Second Circuit's version of "laches" bars a claim is extremely fact-dependent. The Court must look beyond generalized statements about "disruption" and examine the details of the case at hand. The Second Circuit said so explicitly in the other tribal land cases, and also implicitly by detailing the facts of those claims extensively before ruling on the "laches" question. As noted above, the Second Circuit dismissed the Oneida claims because it found them "indistinguishable from *Cayuga* in terms of the underlying factual circumstances that led the *Cayuga* court to conclude not only that the laches defense and other equitable defenses were available, but also that laches actually barred the claims at issue in the case." 617 F.3d at 126 (emphasis added). *See* discussion *supra* at 4-5. In short, the *Oneida*, *Cayuga*, and *Onondaga* courts found that award of title or damages would be so disruptive of

"settled land ownership" and "justified societal expectations" as a matter of fact to justify application of "laches" as a matter of law. *Oneida*, 617 F.3d at 126-27. In contrast, "laches" is not justified here because the factual details of the Mohawk claims dramatically differ from the factual circumstances in *Cayuga*, *Oneida*, and *Onondaga*.

IV. JUDGE DANCKS SHOULD NOT HAVE RECOMMENDED DISMISSAL OF THE ISLAND CLAIMS.

Judge Dancks erred in recommending dismissal of the Island claims. First, the underlying law is different than in the other New York Indian land claims. The Mohawk Island claims involve not only the Non-Intercourse Act, 25 U.S.C. § 177, and federally-approved Indian treaties with the Mohawks, but also treaties between the United States and Great Britain and an additional Act of Congress: the Federal Power Act, a statute that includes detailed and specific provisions to assure continual operation of power projects, whether the land on which they are located is Indian-owned or not. Second, the other cases also involved thousands of individual non-Indian occupants, whereas the Island claims involve only one "owner" other than the Mohawks: the State of New York (the original wrongdoer in this case) and its state entity NYPA. Finally, Judge Dancks was also factually incorrect when she found that the Mohawks had long delayed pursuing legal action on the Island claims. Therefore, "laches" should not bar the Island claims.

A. The Federal Power Act inherently prevents any "disruption" even if the Islands are held to be owned by the Mohawks.

Judge Dancks' recommended decision concludes that, despite the Federal Power Act's application, the Island claims are inherently disruptive and subject to dismissal based on *Cayuga* and *Oneida*, because the claims are predicated on possession of land. Dancks Report at 30-31. But importantly, those cases did not involve a statute like the Federal Power Act that inherently

prevents the kind of disruption that the Second Circuit deemed fatal in the *Cayuga* and *Oneida* claims, such as potential uprooting of non-Indian landholders. The Federal Power Act – and NYPA's license under that Act – prevent any disruption to NYPA's use of the Islands, whether Mohawk ownership is recognized or not. Indeed, similar power plants are operated under Federal Power Act licenses throughout the United States, where some or all of the underlying land is held in trust by the United States for Indian tribes.

The Federal Power Act regulates the use of navigable waters by States and private utilities for the production of electrical power and establishes the law and Federal policy on use of Indian lands for such federally licensed power projects. 16 U.S.C. §§ 791a -828c. Section 10(e) of the Federal Power Act provides in pertinent part:

All licenses issued under this Part shall be on the following conditions:

> (e)(1) . . . . That when licenses are issued involving the use of . . . tribal lands embraced within Indian reservations the Commission shall, . . . in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in [25 U.S.C. § 476], fix a reasonable annual charge for the use thereof . . . .

16 U.S.C. § 803(e). The Act thus sets a fair policy of compensation to the Indians for the use of their land,[17] and also authorizes the Secretary of the Interior to seek provisions for the Indians' protection, including environmental protections. 16 U.S.C. § 797(e).

FERC and the courts have construed the Section 10(e) language "subject to the approval of the Indian tribe" not as providing tribes with a right of veto over the Commission's determination of an annual charge or over the use of the land – but rather providing tribes, as well as licensees, a right to judicial review if the annual payment set by the Commission is unreasonable. According to FERC, "the purpose of section 10(e) both of the Federal Water

[17] The Federal Power Act thus also provides an objective standard for computing damages to the Mohawks. 16 U.S.C. § 803(e).

Power Act and the Federal Power Act was to provide that the Indian proprietors of the land would be compensated for use of their lands by reasonable rentals thereon." *Mont. Power Co.*, 38 F.P.C. 766 (1967), *aff'd sub nom. Mont. Power Co. v. F.P.C.*, 459 F.2d 863 (D.C. Cir. 1972). Thus, while the Federal Power Act provides reasonable compensation to tribes for use of tribal land, it does not permit tribes to interfere with the production of electricity from federally licensed projects.

The original 1953 FERC license for the NYPA project expired after 50 years, and a new license was issued in 2003. NYPA and FERC had long been aware of the Mohawks' claim to the islands, and FERC discussed the relicensing not only with NYPA but with the Tribes, Interior, the State, and local residents before granting the new license to NYPA. In the relicensing FERC noted:

> As previously noted, three entities from the Mohawk Community have intervened in this proceeding [Lists the Mohawk plaintiffs in this case]. The Mohawks have a particular interest in this proceeding because the Project is located in and near historical Mohawk territory, the [Mohawk] reservation boundary is close to the Project boundary, and the Project's location on the St. Lawrence River bisects the Mohawk communities on either side of the international border.

N.Y. Power Auth., 105 FERC at 61,583. FERC granted the new license and, at the Interior Department's request, required environmental protections for the Mohawks to be included. FERC also specifically reserved its "authority to establish reasonable annual charges for the use of subject lands should they be determined to be reservation lands during the term of the new license." *Id.* at 61,587. To reflect this authority FERC inserted Article 418 into the NYPA license, which provides:

> 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 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 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, 89-cv-783, in such a manner sufficient as to cause the land and waters subject to the referenced land claims to become Federal Reservations for purposes of the Federal Power Act.

Id., at 61,604. This condition makes clear that, should the Mohawks succeed in their claim, even as to their title to the Islands, NYPA will not lose its license to provide power to the State of New York, and NYPA's interest in the project will be protected through the Federal Power Act and FERC's exercise of jurisdiction. In other words, FERC has already determined that – if the Mohawks should prevail on the Island claims – NYPA's use of the land for power production is not inconsistent with the reservation. *Id.* NYPA accepted the renewed license with these terms and operates under these conditions. Thus, if the Mohawks establish they have never lost title to the Islands, it simply does not follow that the NYPA power project will be disturbed or disrupted in any way.

A federally-licensed power project utilizing Indian lands under the Federal Power Act is not novel or unusual. There are many power dams located wholly or partially on Indian lands and licensed by FERC. To name just three examples: Montana General Electric operates Kerr Dam on the Flathead Reservation in Montana; Portland Power Company operates two dams on the Warm Springs Reservation in Oregon; and the Douglas County PUD operates a dam on the Colville Reservation on the Columbia River in the State of Washington.[18] Another example, and a dam much larger than Robert Moses Dam, is the Grand Coulee Dam on the Columbia River, which as a federal project under a special act of Congress uses part of the Colville Reservation

[18] *See* Fed. Energy Regulatory Comm'n, Complete List of Issued Licenses (2012), *available at* http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls.

and makes annual payments to the Colville Tribes. *See* Act of August 30, 1935, § 2, 49 Stat. 1028, 1039-1040 (1935); Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, Pub. L. No. 103-436, 108 Stat. 4577, 4579 (1994). These power projects have run for decades without any problems related to the tribal ownership of the underlying land. This is ordinary statutory procedure for electrical production in the United States, nothing unusual or "disruptive."

In sum, Congress has decided that paying tribes for use of tribal lands for hydro-electric projects based on their contribution to the production of electricity is a proper recompense for the use of the land, but that in return the tribes cannot prohibit such a use of their land. Thus, Congress has resolved the equities in situations like this, from the time of the passage of the Federal Power Act in the 1920s.

B. The Mohawk Island claims also involve New York's violation of international treaties between the United States and Great Britain – treaties that were not involved in the *Cayuga*, *Oneida*, or *Onondaga* claims.

The Island claims also concern the violation by New York of international treaties between the United States and Great Britain: the Treaty of Ghent and the subsequent Boundary Treaty, as described above. *Supra* at 9-10. Those international treaties, by their explicit terms, preserve tribal ownership of lands moved from one jurisdiction to another. The Treaty of Ghent provides:

> It is further agreed between the two contracting parties, that in case any of the islands . . . which were in the possession of one of the parties prior to the commencement of the present war between the two countries, should . . . fall within the dominions of the other party, all grants of land made previous to the commencement of the war . . . shall be as valid . . . .
>
> The United States of America engage . . . forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, prior to such hostilities . . . And his Britannic majesty

> engages . . . forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, prior to such hostilities.

Arts. 8-9, 8 Stat. 222. The Boundary Treaty provides:

> All grants of land heretofore made by either Party, within the limits of the territory by which this Treaty falls within the dominions of the other Party, shall be held valid, ratified, and confirmed to the persons in possession under such grants, to the same extent as if such territory had by this Treaty fallen within the dominions of the Party by whom such grants were made.

Art. 4, 8 Stat. 574-575.

The State of New York violated these treaty provisions in not recognizing Mohawk ownership of Barnhart Island, Baxter (Croil) Island, and the Long Sault Islands when they became part of the United States. *See Canadian St. Regis Band of Mohawk Indians v. New York*, 573 F. Supp. 1530, 1538 (N.D.N.Y. 1983) ("The Treaty of Ghent provided, in essence, that the United States and Great Britain would honor the property rights of those in possession of any of the islands before the War of 1812 despite any transfer of sovereignty."). As the Supreme Court has emphasized from its earliest days, the courts of the United States are obligated to enforce treaties made by the United States. *See* U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch.) 103, 109 (1801) ("The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted."); *Baldwin v. Franks*, 120 U.S. 678, 682-83 (1887) ("That the treaty-making power has been surrendered by the states, and given to the United States, is unquestionable . . . [T]reaties made by the United States, and in force, are part of the supreme law of the land, and . . . are as binding within the

territorial limits of the states as they are elsewhere throughout the dominion of the United States."). *See also Missouri v. Holland*, 252 U.S. 416, 433 (1920) (holding that the Federal Government may even make binding law through the Treaty Power which would otherwise be within the exclusive province of the states). Neither *Cayuga*, *Oneida*, nor *Onondaga* presented this issue of rights based on international treaties. The Mohawk Island claims therefore cannot be dismissed based on those cases – and given the clear provisions of the Constitution, the claims should not be dismissed at all.

C. Only the State of New York, the original wrongdoer, and its agency NYPA occupy the Islands, preventing any disruption to the legitimate expectations of innocent non-Indian landholders.

Importantly, no land on any of the islands is possessed by an individual, only by creatures of the State of New York, the very entity which illegally took ownership of the land in the first place. Thus, even apart from the Federal Power Act issue, the Mohawk Island claims do not pose the "disruptive" threats that doomed the *Cayuga*, *Oneida*, and *Onondaga* claims.

At the time the Mohawk complaints were filed in the 1980s, the three Islands had long been out of private "ownership." The fear about upsetting thousands of land titles held over hundreds of years – which was key to the "laches" holdings in *Cayuga*, *Oneida*, and *Onondaga* – simply does not exist here. *See, e.g.*, *Cayuga*, 413 F.3d at 274-75 ("[T]his type of possessory land claim – seeking possession of a large swatch of central New York State and the ejectment of tens of thousands of landowners – is indisputably disruptive."); *Oneida*, 617 F.3d at 126-27 ("[T]he subject lands have passed into the hands of a multitude of entities and individuals, most of whom have no connection to the historical injustice the [tribe] assert[s]."); *Onondaga*, 2010 WL 3806492 at *8 ("The Court takes judicial notice that the contested land has been extensively populated by non-Indians" including "countless innocent purchasers.") (emphases added). Long

Sault Island remains entirely uninhabited to this day. At the time of the first license to NYPA under the Federal Power Act in the early 1950s, the State of New York ejected any remaining private residents on Barnhart Island and Baxter (Croil) Island and transferred possession to NYPA. *See* Whiteley at 73 (Response to Question 38); *In re Power Authority, supra*. The Saint Lawrence Hydro-electric Project uses Barnhart Island and part of Baxter Island as anchors for the Robert Moses Dam and for various NYPA installations. A small State park (a traditional Mohawk hunting ground) is located on Barnhart Island within the boundaries of the power project. These two Islands are otherwise uninhabited. Thus, only the original wrongdoer, the State, and its power arm NYPA occupy the Islands – so there would be no disruption to justified expectations of non-Indian population, and the existing landholder (New York) has the most direct connection possible to the historical injustice in this case.

D. The Mohawks did not delay in seeking relief for the Islands, contrary to Judge Dancks' assertion.

One of Judge Danck's chief rationales in recommending against the Mohawk Island claims is that "there has been a long delay in seeking equitable relief against New York or its local governmental units in court" and that this "weighs against the claim." Dancks Report at 33. She measures that period as from 1823 until this suit was filed in 1982, a period of 160 years. *Id.* This is factually incorrect as to court action, and it also ignores the serious attempts of the Mohawks over many years to assert their obvious ownership of these Islands outside of court. In addition, Judge Dancks failed to recognize that the Islands were only confirmed to be part of the United States beginning in 1842, nearly 20 years after her start date of 1823.

Judge Dancks did recognize that in 1856, the Mohawks went to the New York legislature to assert ownership of the Islands. *Id.* at 10-11. As described above, the legislature paid the

Mohawks back rent for Baxter (Croil) Island and Barnhart Island, and the Mohawks understood this payment as a confirmation of their Island ownership. *Supra* at 10-11.[19]

After the failure of the case *Deere v. New York*, 22 F.2d 851 (N.D.N.Y. 1927),[20] a resolution by the Six Nations' chiefs petitioned Congress to redress the claimed illegal transfer of lands reserved by the 1796 Treaty and Barnhart Island. Whiteley at 68-69 (Response to Question 38). In 1935, a St. Regis leader filed a similar petition with the State government in Albany, and in 1947, the St. Regis Council again petitioned Congress asserting their land claims, with three Akwesasne/St. Regis chiefs attending congressional hearings in Washington, D.C. *Id.* at 70-71 (Response to Question 38).

But most importantly, in 1954, only one year after NYPA received its license from FERC to build the Robert Moses Dam, the New York St. Regis Tribe brought suit against NYPA in the New York Court of Claims, asserting its ownership of the Islands. Judge Dancks omitted this attempt by the Mohawks to assert their rights to the Islands. The New York courts ruled against the Tribe. *See* Whiteley at 73 (Response to Question 38); *St. Regis Mohawk Tribe*, 5 N.Y.2d at 46.[21]

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[19] This payment, as noted above, was never approved by the United States as a sale or transfer of land. *Supra* at 11 n.16.

[20] In *Deere*, a St. Regis Tribal member sued the State of New York and the St. Lawrence River Power Company in this Court, alleging that certain mainland lands reserved pursuant to the 1796 Treaty remained in the Tribe's reservation and had been transferred in violation of the Indian Non-Intercourse Act, 25 U.S.C. § 177. *Deere*, 22 F.2d at 851; Whiteley at 67 (Response to Question 38). This Court dismissed the claim for want of federal question jurisdiction, 22 F.2d at 855, a holding which the Supreme Court later overruled in *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666-67, 675 (1974) ("*Oneida I*"). The Supreme Court clarified in *Oneida I* that there was indeed federal jurisdiction over the question of Non-Intercourse Act violations. *Id*. It would be unfair to hold the Mohawks accountable for any supposed "delay" in pursuing land claims between the *Deere* decision against them in 1927 and the contrary *Oneida I* Supreme Court decision in 1974, nearly 50 years later.

[21] This Court, through Judge McCurn, correctly ruled in this case that the New York state court decision is not *res judicata* as to the Island claims, because the United States was not a party to

More recently, after this case was filed, the Mohawks intervened in the 2003 license renewal proceeding for the Robert Moses Dam before FERC. *See N.Y. Power Auth., supra.*

It is thus clear that the Mohawks have not ignored their Island claims, and Judge Dancks' finding – which she relied upon in recommending dismissal of the Island claims – that no suit or other attempt to assert the Island claims was brought by the Mohawks over a span of 160 years is clearly incorrect.

V. CONGRESS AND THE SUPREME COURT CLEARLY AND EXPLICITLY INTENDED TO PRESERVE CLAIMS LIKE THE MOHAWK CLAIMS.

The law, as established by specific acts of Congress and rulings of the Supreme Court, expressly preserves the Mohawk and other New York Indian land claims. It is only the extreme facts of *Cayuga*, *Oneida*, and *Onondaga* that led the Second Circuit to create an exception. The exception created in those cases should not be extended further, and certainly not to the facts of the Mohawk claims.

Congress already weighed the issues at play here, making deliberate and explicit policy choices that (1) tribal land may not be purchased or otherwise conveyed without Federal consent; (2) so-called "ancient" tribal land claims brought by the United States or the tribes themselves are not time-barred; and (3) power projects such as NYPA's may operate on tribal lands with a federal license, without any disruption to power production. These choices by Congress, which makes the law, should be respected and enforced by the courts.

First and foremost, Congress, in the Indian Non-Intercourse Act of July 22, 1790, § 4, 1 Stat. 137, 138, (codified as amended at 25 U.S.C. § 177) made clear that no conveyance of Tribal

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that case. Memorandum Decision and Order of May 30, 2001 (McCurn, J.). Nor were the MCA or the Longhouse parties in the New York case.

land is valid without Federal approval. The Act includes no equitable exceptions to its mandate. *Id*.

Moreover, for many years, Congress passed no statute of limitations on claims that could be brought by the United States – or by the Indians themselves – to remedy violation of laws like the Non-Intercourse Act.[22] In 1966 Congress enacted a statute of limitations on certain federal claims. Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304; Pub. L. No. 96-217, 94 Stat. 126 (1980). In 1982, Congress passed the Indian Claims Limitation Act (ICLA), which required the Secretary of the Interior to publish a list of Indian claims "identified or submitted to the Secretary" which were to be preserved from the statute of limitations. Pub. L. No. 97-394, tit. I, § 3(a), 96 Stat. 1966, 1976 (codified as amended at 28 U.S.C. § 2415). The Mohawk claims were published on the list, and thus preserved. 48 Fed. Reg. 13,920 (Mar. 25, 1983).

Strikingly, Congress knew that some of these Indian land claims – including specifically the Mohawk land claims[23] – went back to the early days of the Republic,[24] and consequently Congress vigorously debated whether preserving so-called "ancient" Indian land claims brought by the United States (or tribes) would be unfair and disruptive to settled expectations of land-

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[22] *See, e.g.*, S. Rep. No. 89-1328, at 11 (1966) ("The general rule is that there is no limitation of time against the Government for bringing an action unless it is specifically authorized by statute."); Pub. L. No. 89-505, § 1(c), 30 Stat. 304, (1966) ("Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or the right of possession of, real or personal property."); 28 U.S.C. § 2415(b), (c) (same today).

[23] In clarifying the limitations statute during the 1970s, Congress specifically considered the Mohawk land claims not to be time-barred. *See, e.g., To Extend the Time for Commencing Actions on Behalf of an Indian Tribe, Band, or Group: Hearing on S. 1377 Before the Select Comm. on Indian Affairs*, 95th Cong., 24 (1977) (listing the Mohawks' "Non-Intercourse Act claim for recovery of tribal lands" against "New York and individual titleholders"); 123 Cong. Rec. H6900 (daily ed. July 12, 1977) (same); *id.* at H6821 (describing the Mohawk land claims during debate).

[24] *See, e.g.*, 123 Cong. Rec. H6895-96 (daily ed. July 12, 1977) (noting that certain Tribal land claims go "back to 1790" or "back as far as 180 years"); S. Rep. No. 95-236, at 2 (1977) (noting that "[m]any of these claims go back to the 18th and 19th centuries").

owners and States. *See, e.g.*, 123 Cong. Rec. H6894 (daily ed. July 12, 1977) (Rep. Foley speaking against preserving such claims); *id.* at H6898 (Rep. Risenhoover expressing concern that "[i]f this Congress forces the trustees to end their guardianship at this point of incompletion, we will have broken the faith"). But Congress ultimately chose to allow such claims to remain alive, despite these equitable concerns. *See, e.g.*, H.R. Rep. No. 96-822, at 4 (1980) ("The Committee determined that as a matter of equity and in the interest of all concerned, the statute of limitations for these Indian claims should be extended.").

The Supreme Court in *Oneida I*, reversing the Second Circuit, held that alleged violations of the Non-Intercourse Act are federal questions with federal court jurisdiction. 414 U.S. at 666. Shortly thereafter, the Supreme Court reaffirmed *Oneida I* in *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 235 (1985) ("*Oneida II*"), holding that despite the passage of years, "Indians have a federal common-law right to sue to enforce their aboriginal land rights." The Supreme Court in *Oneida II* also specifically held for claims listed in accordance with the ICLA that "[s]o long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live." *Oneida II*, 470 U.S. at 243. The Mohawk suit was filed in July 1982, well before any cut-off date.

The *Oneida I* and *Oneida II* rulings were not altered in *Sherrill*. The Supreme Court in *Sherrill* made it very clear that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." 544 U.S. at 221. What the Supreme Court did hold in *Sherrill* was that the Oneidas, under the circumstances of their history, could not simply purchase land in their huge claims area and immediately have it under exclusive Indian jurisdiction. The Court required the Tribe to go through the established

procedure at Interior to return land to trust status, 25 U.S.C. § 465, and thus did not leave the Tribe without a remedy to achieve its goal. 544 U.S. at 221.

The Second Circuit's *Cayuga*, *Oneida*, and *Onondaga* decisions appear contrary to the scheme Congress enacted and to the holdings of the Supreme Court.[25] If *Cayuga*, *Oneida*, and *Onondaga* can be justified, this must be as the result of the extreme fact situations of those cases – circumstances that are not at all like the situation of the Mohawks. *Supra* at 3-12. Those rulings should not be extended to these far different Mohawk circumstances. Judge Dancks was correct not to extend the rulings in *Oneida* and *Cayuga* to the Hogansburg Triangle. She should also have not extended them to the Island claims.

VI. THE "DISRUPTION" HERE HAS BEEN TO THE MOHAWKS.

In considering "disruption," the Court should take note that the disruption here has been to the Mohawks, who never left their traditional and supposedly federally-protected homelands. Mohawk lives were greatly disrupted when, after receiving a federally-approved reservation smaller than needed and falling into poverty, the State preyed upon this poverty to obtain parts of the reservation, knowingly contrary to federal law. *See* Franklin B. Hough, *A History of St. Lawrence and Franklin Counties* 129-145 (1853); Whiteley at 8-11, 12-17, 34-35 (Responses to Questions 18-31). In addition, as FERC has recognized, the construction of the St. Lawrence Project has been very disruptive to the Mohawks. Not only was land illegally taken from them

[25] The Supreme Court's denial of a petition for a writ of certiorari to review the Second Circuit's holdings in *Cayuga* and *Oneida* is in no way a confirmation by that Court of those decisions, much less an invitation to extend them to different fact situations. It is well established that an order denying a petition for a writ of certiorari is of no precedential value. *See* Eugene Gressman et al., *Supreme Court Practice* § 5.7 (9th ed. 2007); *United States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."); *Bethley v. Louisiana*, 520 U.S. 1259 (1997) (Stevens, J.) ("It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought.")

by the State of New York and then used for the project, but in the 1950s, by building the power project, as FERC itself has stated, the State flooded Mohawk lands, eroding "shoreline . . . on traditional cultural properties," diminishing "treaty-protected fish species," and making it more difficult to access "waters for hunting, fishing, gathering, and traditional cultural purposes." *N.Y. Power Auth.*, 105 F.E.R.C. at 61,584.

VII. CONCLUSION.

The Mohawk Islands claim should not be dismissed. A straight application of the law provided by Congress, and confirmed by the Supreme Court, preserves this claim. The exceptions found by the Second Circuit under the facts of *Oneida*, *Cayuga*, and *Onondaga* should not be extended to the vastly different factual, legal and equitable issues of the Mohawk claims. Whether the Second Circuit was right or wrong in *Cayuga*, *Oneida*, and *Onondaga*, the Mohawk Island claims are in no way precluded by those decisions. None of those decisions considered a situation where the State had already dispossessed all private owners, where the State had violated an international treaty, and where a federal statute provides an equitable solution for a power company using Indian lands. Nor do any of those cases concern a tribe that remained in place and greatly expanded in number and influence in the area where it has always lived since European settlement. The Island claims should not be subject to any of the equitable considerations that barred the claims in those three other cases.

Dated this 16th day of November, 2012.

Respectfully submitted,

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