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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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)
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UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS TO REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE DANCKS

Introduction

The United States, by and through their attorney and pursuant to Local Rule 72.1(c), submit this Memorandum of Law in Support of their Objections to the Report and Recommendation of United States Magistrate Judge Dancks, filed September 28, 2012 (Dkt. No. 581) ("Report").[1/] That Report recommends granting Defendants' motions for judgment on the pleadings with regard to all of the Mohawk[2/] land claims before the Court except for the claim to the Hogansburg Triangle.

With *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), the Second Circuit created a new kind of equitable defense (referred herein as "the *Cayuga* defense") applicable specifically to longstanding Indian land claims. Although application of that defense has resulted in the dismissal of several land claims, beginning with *Cayuga*, *see Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Onondaga Nation v. New York*, No. 10-4273-cv, 2012 WL 5075534 (2d Cir. 2012) (unpublished disposition); *Shinnecock*

[1/]The Magistrate Judge, at pages 5-14 of the Report, provides a thorough and accurate description of the background of this case, including the claims asserted by Plaintiffs and the procedural history leading up to Defendants' motions to dismiss. For sake of judicial economy, the United States will not repeat that background information here.

[2/]Besides the United States which intervened in this litigation, Plaintiffs include the St. Regis Mohawk Tribe, the People of the Longhouse at Akwesasne and the Canadian St. Regis Band of Mohawk Indians, and they are collectively termed the "Mohawks."

Indian Nation v. New York, No. 05-cv-2887 (TCP), 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006), the Second Circuit has not gone so far as to hold that all land claim disputes that arose many years ago must be dismissed on equitable grounds. Instead, the Second Circuit's formulation of the *Cayuga* defense requires dismissal where, in view of the facts, a claim is disruptive and equitable considerations collectively preclude judicial consideration of the merits of the claim. *Cayuga*, 413 F.3d at 277 (identifying equitable factors for consideration). The equitable factors essentially involve consideration of the length of time between Indian dispossession and the filing of the land claim, the departure of the Indians and tribal governance from the region, and the settlement and development of the land by non-Indians in the interim. The court, pursuant to this defense, then gauges whether, over time, "developments have given rise to *justified* societal expectations" of land ownership that warrant dismissal of the claim. *Oneida*, 617 F.3d at 127 (emphasis added).

In the other New York land claims that have been dismissed by the Second Circuit, it was inarguable that the lands at issue had become heavily populated and developed by non-Indians in the years since New York unlawfully acquired the lands, and those lands, according to the Second Circuit, had consequently lost their Indian character. That is not true here. Although the Mohawks lost land, they retained a sizeable Reservation in the area, never departed the region and have remained a powerful enduring presence both as a government and as a population in the region and within the specific claim areas. The Mohawk Reservation includes both the Hogansburg Triangle claim area and the Fort Covington claim area, and these areas include numerous Mohawk lands and abut major Mohawk population areas. Moreover, the three Islands

involved in the Islands claim are in close proximity to many islands under Mohawk ownership. Further, many of the claim areas are, and have been, largely uninhabited and sparsely developed since passing from Mohawk hands.

The Magistrate Judge correctly concluded with regard to one claim area (the "Hogansburg Triangle"), that the equitable considerations fail to tip decisively in favor of the Defendants, making discovery necessary before the Court can properly weigh the equities and determine whether the *Cayuga* defense precludes any consideration of the merits. Report at 41-46. Although the Magistrate Judge appropriately recognized that the *Cayuga* defense requires discovery and a solid record regarding the Hogansburg Triangle, she erred as a matter of law in recommending dismissal of the claim for the Islands and for the Town of Fort Covington area. Where the facts of non-Indian settlement and development of the lands are in dispute, as here, the Court should deny Defendants' motions to have claims dismissed on the pleadings.

The Magistrate erred in two other respects with regard to the Islands claim. First, the *Cayuga* defense seeks to protect expectations that land long developed under state jurisdiction will continue under state jurisdiction. But the only development on the Islands is a power plant that is under federal jurisdiction and which could not operate in the absence of federal licensing. Any relief on the land claim will have to comport with the terms of the federal license regulating the plant. In short, the fact and the degree of specificity of the federal regulation both alters the calculus of justified expectations with regard to the Islands claim and precludes the kind of disruption the *Cayuga* defense bars. Second, the *Cayuga* defense subjects the United States to equitable defenses in the context of Indian land claims because the Second Circuit views the

United States' role in such suits as limited to protecting the rights of tribes, rather than enforcing its own sovereign interests. But with regard to the Islands claim, the United States, as owner of the underlying fee title, is also enforcing its own rights over the Islands. The Islands lay outside the United States when New York was established and thus New York has never held any legitimate right of preemption or property interest in the lands they encompass, which only became part of the United States in the 1820s in the wake of the War of 1812. There is no binding legal precedent that equitable principles can preclude the United States from vindicating its own interest in land. The *Cayuga* defense is therefore inapplicable.

The Magistrate Judge's Report and Recommendation.

On September 28, 2012, Magistrate Dancks issued her Report in which she recommended that Defendants' motions for judgment on the pleadings be granted in part and denied in part. The Magistrate Judge divided the claims into the Original Reservation claims (for land acquired through state "treaties" with the Mohawk) and the Islands claim (for three Islands the State took without any pretence of a treaty). Report at 31, 34. While Defendants contended the Court had to consider all the land at issue together for purposes of determining whether the *Cayuga* defense applies, the Magistrate Judge correctly concluded that, at a minimum, the overall claim area could be divided into those areas involved in discrete land acquisition transactions by the State. Report at 36 (noting that the "Hogansburg Triangle claim involves three discrete treaties that include only land located within the Triangle").

With regard to the Hogansburg Triangle claim area, the Magistrate Judge concluded that the "pleadings and other materials and information that may properly be considered on a Rule 12

(c) motion fail to establish that the Hogansburg Triangle and its inhabitants have a 'longstanding, distinctly non-Indian character.'" Report at 42. In reaching this conclusion, the Magistrate Judge took note of census data indicating that Indians constituted over 70% of the population of the Triangle. Report at 44.

The Magistrate Judge, in contrast, recommended that Defendants' motions be granted with regard to all the remaining claims, even though Plaintiffs had proffered evidence demonstrating that much of the area in the Town of Fort Covington claim area, as well as the Island claim area, were lightly inhabited or not inhabited at all and not subject to significant development since the time they were taken from the Indians. Report at 38-40 (Town of Fort Covington claim area); 36-38 (remaining Original Reservation claim areas); 31-34 (Island claim area).

With respect to the Islands claim area, the Magistrate Judge rejected arguments that provisions of the Federal Power Act ("FPA"), 41 Stat. 1063 as amended, 16 U.S.C. § 791a *et seq.*, would prevent disruption to the New York Power Authority's ("NYPA") St. Lawrence-FDR Power Plant. Report at 28. A federal license for NYPA's plant issued pursuant to the FPA precludes any relief forcing NYPA to cease operating its power plant, instead providing that, should the Mohawk Island claim succeed, the Mohawks would be entitled to a reasonable rental charge for NYPA's use of its Reservation land and such other conditions necessary to protect and use the Reservation. Report at 30 (quoting *New York Power Authority*, 105 FERC ¶ 61102, at *61604, 2003 WL 22422346, at **55). The Magistrate concluded that even if the FPA limited the relief available to the Mohawks, the underlying claim remained necessarily disruptive.

Report at 31.

The Magistrate Judge also rejected the United States' argument that evidence indicates the underlying fee of the Islands belongs to the United States, rather than New York. The United States contended that it is not subject to the *Cayuga* defense because, in this instance, the United States has its own, independent property interest in the Islands. Report at 26-27. In rejecting this argument, the Magistrate Judge relied on the United States' Amended Complaint-in-Intervention to conclude that United States' involvement in this lawsuit was solely to benefit the Mohawk. Report at 27-28. Nevertheless, the Magistrate Judge conceded that "the subject of the ownership of the underlying fee interest in the Islands and its impact on the availability of the [*Cayuga*] defense might arguably be open to question." Report at 27. However, the Magistrate Judge failed to permit exploration of that relevance, recommending that judgment on the pleadings be granted for the Islands claim. Report at 34.

Summary of Argument

The United States objects to the Report on the ground that there are significant factual issues regarding the development, population, and Indian character of the Islands claim area and the Town of Fort Covington claim area. These factual issues require the creation of a record to ground and guide the Courts' assessment of the equities and, therefore, the claims to these areas are not subject to dismissal based on the pleadings.

The United States also objects that the Islands claim is not subject to the *Cayuga* defense because the FPA limits and controls the kinds of relief available against NYPA, the sole occupant of the Islands. Even if the Court disagrees, at a minimum, the fact that NYPA only can

operate on the Islands with federal approval and subject to federal conditions (mandated by the FPA and imposed on NYPA through federal licenses) affects the equitable considerations of *Cayuga* insofar as the "justified expectations" that NYPA may have formed through operating its power plant involve governance by federal law as well as, and to a lesser degree, state law. Finally, also with regard to the Islands claim, United States' ownership of the underlying fee of the Islands means that the United States, in vindicating Indian rights to the land, is also vindicating its own governmental rights to real property and thus cannot be said to be acting like a private litigant subject to equitable defenses. Finally, the United States preserves its objections to the Second Circuit's *Cayuga* and *Oneida* decisions as they are applied here.

Argument

1. Standard of Review

This Court reviews a Magistrate's recommendations in a report de novo. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

2. Standard under Fed. R. Civ. P. 12(c)

Defendants seek relief pursuant to Fed. R. Civ. P. 12(c). In deciding a Rule 12(c) motion, courts apply the same standard as that applicable to a motion under Rule 12(b)(6): the allegations contained in the complaint are accepted as true and all reasonable inferences are drawn in favor of the nonmoving party. *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 89 (2d Cir. 2006). A complaint may be dismissed pursuant to Rule 12(c) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). Defendants bear the burden of

establishing "that no material issue of fact remains to be resolved and that [they] are entitled to judgment as a matter of law." *Juster Assocs. v. City of Rutland, Vt.*, 901 F.2d 266, 269 (2d Cir. 1990) (citation and internal quotation marks omitted).

Rule 12(d) provides that "if matters outside the pleadings are presented to and not excluded by the court", the motion shall be treated as one for summary judgment, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Fed. R. Civ. P. 12(d). The Magistrate declined to treat Defendants' motions as ones for summary judgment. Report at 15 n.11.[3/] Accordingly, the Court restricted itself to the pleadings and whatever facts that could be judicially noticed. For reasons asserted below, the United States contends that the Magistrate Judge committed error in relying on certain facts, which she took judicial notice of, to reach conclusions on the justified expectations issues, as those facts (even if presumed to be true) do not establish that the factors leading to dismissal under the *Cayuga* defense apply here.

[3/]Although the Magistrate Judge did not convert Defendants' motions into motions for summary judgment, this Court is not constrained by the Magistrate's decision. See Fed. R. Civ. P. 72(b)(3) (district judge may "receive further evidence" in reviewing magistrate judge's disposition). If the Defendants' motions are treated as motions for summary judgment, they must be denied, as there are material issues of fact in dispute. Further, discovery has not yet taken place in this case and summary judgment is therefore not appropriate. *Global Network Communications, Inc. v. City of New York*, 562 F.3d 145, 150 (2d Cir. 2009); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 555 (2d Cir. 1977) (when there has been virtually

3. The Islands Claim should not be dismissed on the pleadings

A. The Magistrate Judge erred in assuming Cayuga bars the Islands claim

The Magistrate Judge erred in failing to recognize that the Islands claim is factually distinguishable from typical land claims subject to the *Cayuga* defense. *Cayuga* identifies a number of equitable concerns (adopted from *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 215 (2005)) that a court must consider prior to barring a claim. The relevant ones here are: (1) "generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation"; (2) "the longstanding, distinctly non-Indian character of the area and its inhabitants"; and (3) "developments in the area spanning several generations." *Cayuga*, 413 F.3d at 277 (internal quotations and brackets omitted). These factors focus on the inequity of allowing a possessory claim to go forward when the area at issue has long been under non-Indian governance and in the hands of private non-Indian landowners who for years have developed the land, towns, and even cities in the area. *See Oneida*, 617 F.3d at 127. *See also Onondaga Nation v. State of New York*, No. 5:05-cv-0314, 2010 WL 3806492 at *8 (N.D.N.Y. Sept. 22, 2010) (land claim for area occupied by present day city of Syracuse, New York subject to judicial notice that "the contested land has been extensively populated by non-Indians, such that the land is predominantly non-Indian today, and has experienced significant material development by private persons and enterprises as well as by public entities"); *Shinnecock* , 2006 WL 3501099 at *5 (noting "there has been a dramatic change in the demographics of the area and the character of the property"). These developments, in turn, the

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no discovery in an action, a district court should rarely grant summary judgment).

Second Circuit has explained, may give rise to "justified societal expectations" which are protected through application of the *Cayuga* defense.

If development of land, the change of its character, the history of non-tribal governance and its non-Indian population provides an equitable basis for concluding that justified expectations of non-Indians mandate dismissal under *Cayuga*, it follows that the equities are different where the land has not been subject to development, has not been populated by non-Indians, and has not surrendered its original Indian character. A court may not assume or take judicial notice of non-Indian development or settlement where those facts are not borne out. Otherwise, these factors become meaningless.

Here, development on two of the three Islands involved in the claim has been limited and the lands at issue have largely not been occupied by anyone. The Court is not free to simply assume "a dramatic change in the demographics of the area and the character of the property." *Shinnecock* , 2006 WL 3501099 at *5 Absent evidence of such dramatic changes, the equities do not support a finding of justified expectations in continued State governance of the land such that the *Cayuga* defense bars the claim. In *Cayuga*, the Second Circuit relied upon in promulgating the *Cayuga* defense; *Sherrill*, in turn drew on the "different, but related, context of the diminishment of an Indian reservation," to conclude that the changing character of an area may give rise to "justifiable expectations." *Sherrill,* 544 U.S. at 215 (internal quotations omitted). The bare fact of non-Indian settlers or development is not enough to tip expectations against the Mohawks, however. The Court, in a diminishment case, examines if "non-Indian settlers *flooded* into the opened portion of a reservation," which is to say, the Court asks not just whether non-

Indians populated an area, but to the manner in which they have done so. *Solem v. Bartlett*, 465 U.S. 463, 471 (1984) (emphasis added); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (Court evaluates "the pattern of settlement").[4/]

The Magistrate Judge erred because, instead of recognizing that there were factual issues needing resolution on the justified expectations issue, the Magistrate took judicial notice of certain "facts" and erroneously presumed they were dispositive. The Magistrate Judge noted that Barnhart, Croil, and Long Sault Islands have not been occupied by the Mohawks since New York unlawfully took them in 1822. Report at 32. The Magistrate further took judicial notice of the fact that "the Islands have not been populated or developed by the Mohawks for nearly 190 years." Report at 32-33. However, whether the Indians have subsequently developed lands unlawfully taken from them is not one of the equitable factors the Second Circuit instructs courts to consider. The question is whether *non-Indians* "populated or developed" the lands in question such that justifiable expectations of continued occupation under the laws of the State would be disrupted. In this case, the answer has to be negative, because, as the Magistrate explained, "the Islands remained in the hands of private owners until the State condemned them at the request of the NYPA." Report at 32. This quote highlights that, whatever non-Indian population and development of the Islands that was underway after Indian dispossession was summarily halted in the mid-twentieth century when the State de-populated the Island and condemned all private

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[4/]In this respect it should be noted that the Islands claimed by the Mohawk in the St. Lawrence River are, themselves, surrounded by other islands presently owned by the Mohawks. *See* Exhibits to Objections of the Mohawk Council of Akwesasne to the Report and Recommendation Issued by Magistrate Judge Dancks on September 28, 2012 (filed today).

ownership interests.[5] And in condemning those ownership interests, the State in essence extinguished all private expectations regarding holding title to the lands and in continuing to live and conduct enterprises under the laws of New York. Moreover, the Magistrate failed to take into account the difference between the Islands and the claim areas previously considered by the Second Circuit, namely that the existing development of the Islands date from the 1950s, not the nineteenth century. At a minimum, there are genuine issues of fact regarding the expectations of landowners relating to the Islands.

The Magistrate Judge found the Islands claim barred primarily on the fact that in the 1950s NYPA acquired beneficial title and constructed the St. Lawrence-FDR Power Project, "a massive hydro-electric power Island [sic] that has dramatically changed the character of the Islands." Report at 32-33. However, judicial notice of the power facility amounts only to a recognition that there is a development on one of the Islands. That does not answer the question of how expansive the development is, how many people are connected with it and whether

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[5] To the extent the Magistrate Judge found expectations of continued State ownership of the Islands based on the reliance of persons privately developing the Islands pursuant to state law, those expectations were eradicated when the development was condemned and the persons evicted. Even if evicted persons might still have expectations (much less justified ones) about property condemned decades ago, there remains the question of what kind of development was in place when condemnation proceedings began. It is unlikely extensive development and intensive population of the Islands would have made condemnation a feasible proceeding, and so one cannot simply assume that development occurred on the Islands comparable to other more populous parts of New York. Moreover, after the lands were condemned, the land may have begun to resume its prior Indian character insofar as it may have become repopulated by wildlife, and the lands, now uninhabited, were once again available for their prior Indian uses and, in fact, may have been used once again by Mohawks (assuming that they were not always used by Indians regardless of private ownership claims).

anybody actually resides on the Island or whether, for most of the people concerned, they are simply employees whose interest in the Islands begins and ends with their workday. Moreover, the Magistrate failed to take into account that there are two other Islands in the claim area that have no population and are essentially unoccupied. The Court should consider NYPA's development in weighing the equities, but that development is only one part of the broader picture.

Finally, the Magistrate Judge noted that "except for FERC's regulatory power with regard to the power plant, the Islands have been under the governmental regulation and control of the State of New York since 1823." Report at 33. This is true, but that alone does not support a finding that the equitable considerations espoused in *Cayuga* bar the Mohawk from seeking redress for their dispossession at the hands of the State. First, the only party to rely upon New York's past, present, and future governance of the Islands is NYPA. To the extent that the Second Circuit requires consideration of the changing demographics (i.e., the growing number of people developing expectations) of an area along with transformational development, the degree that the development stems from one party is relevant to the Court's analysis of whether the Mohawk possessory claim ought to be barred.

As discussed in detail in the next section, NYPA is not comparable to an individual developing land with a reliance on state law. NYPA has constructed a power project involving a dam in public waterways. Such a project is subject to federal regulation and may only go forward with a license issued by a federal agency, the Federal Energy Regulatory Commission ("FERC"). Thus the sole development on the Islands, which forms the basis for any finding of

justified social expectations is a power project licensed under federal law and subject to federal regulation. Under these circumstances, the equitable considerations the Court must consider do not warrant barring the Islands claim on the pleadings.

B. The Federal Power Act Mitigates any Potential Disruption

The Islands claim is not subject to the *Cayuga* defense for an additional reason: the provisions of the FPA governs NYPA's operation of the St. Lawrence-FDR Power Project. Those provisions ensure that any finding of Mohawk ownership of the Islands will not disrupt NYPA's operations. 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 FERC shall afix reasonable annual charges for the use thereof. 16 U.S.C. § 803(e). Thus, NYPA's ability to use the Islands to operate its facilities is not threatened by the land claim. NYPA, as a licensee, may continue to operate a power project free from disruption or interference, even if the Mohawks prevail on their land claim.

Because the FPA sets up a scheme which, by its design, prevents disruption to NYPA, *Cayuga* is distinguishable and not controlling here. Moreover, NYPA's necessary expectation is that the FPA will regulate its operations and impose fees permitted under the statutory scheme, something that will not be upended by a finding of tribal ownership of the Islands because any charges due to the tribes will be exacted through the same regulatory scheme to which NYPA is currently subject.

The Magistrate Judge's Report erred by concluding that the FPA would not prevent disruption. Report at 28-31. The Magistrate noted that NYPA was granted a fifty-year license to

operate the St. Lawrence-FDR Power Project in 1953. Report at 28-29. Without the consent of the federal government, NYPA would have no authority to build and operate a power project utilizing a public waterway. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 427 (1940) (noting that "the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms."). NYPA's development of the Islands could not proceed without a FERC license, and its development was subject to conditions imposed by FERC. *See In the Matter of the Power Authority of the State of New York*, 12 F.P.C. 172, 1953 WL 1128 (July 15, 1953). Thus, from the outset, NYPA understood that its construction and use of facilities for the generation and sale of hydro-electric power on a public waterway is subject to the oversight and regulation of federal authorities. *See Appalachian Elec. Power Co.*, 311 U.S. at 419 n. 65 (summarizing license conditions FPA allows FERC to impose on licensees seeking to operate facilities using public waters); *California v. F.E.R.C.*, 495 U.S. 490, 502 (1990) (noting the Court has "rejected the possibility of concurrent jurisdiction" with the states under the FPA); *First Iowa Hydro-Elec. Co-op. v. Federal Power Comm'n*, 328 U.S. 152, 172-73 (1946) (noting "[t]he closeness of the relationship of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness").

In fact, when NYPA sought, and received, a renewal of its license in 2003, *see New York Power Authority and Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York*, Order Approving Settlement Agreements, Dismissing Complaint, and Issuing New License, 105 FERC 61102, 2003 WL 22422346 (October 23, 2003), 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, and that federal restrictions could, therefore, be imposed on the renewed license. 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 to recompense the Mohawks 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.

New York Power, 105 FERC P 61102 at *61604, 2003 WL 22422346 at **55.

The Magistrate Judge recognized that the FPA protected NYPA's ability to continue operating its facility, stating that "were Plaintiffs to prevail on their possessory claim, the FPA and FERC would protect the NYPA from being ejected from the property, being forced to dismantle the power project, and losing its license in the event the Plaintiffs were awarded possession of the Islands." Report at 30-31. Nevertheless, she then erroneously concluded that "[t]he only way in which Sections 4(e) and 10(e) of the FPA would have any application to the St. Lawrence-FDR Power Plant is if the Mohawks were successful on their claim for possession of the Islands, and the Islands were given reservation status." Report at 31. That is wrong because NYPA is, and will be, subject to the FPA and FERC regardless of the outcome of the present land claim. *See California*, 495 U.S. at 494 (quoting 16 U.S.C. § 797(e)) (Section 4(e) of the FPA, 16 U.S.C. § 797(e)), "empowers FERC to issue licenses for projects 'necessary or convenient . . . for the development, transmission, and utilization of power across, along, from,

or in any of the streams . . . over which Congress has jurisdiction'."). Thus, federal regulation of NYPA does not depend on judicial vindication of Mohawk rights to the Islands. Instead, any relief available to the Mohawks will be channeled through the FPA and FERC's pre-existing licensing authority over NYPA, thereby precluding the land claim from being disruptive to NYPA.

If the St. Lawrence-FDR Power Plant is held to operate on Mohawk reservation land, it will continue to operate as normal although it may be subject to new license conditions in accord with Article 418 of its current license. NYPA might object that but for the land claim litigation, it would not be subject to new conditions, but as a licensee, it had *no* expectation, much less a justified one, that the terms of the licenses which regulate it would not change over time. That is the very purpose of the relicensing requirement. Indeed, the current license, to which NYPA assented in exchange for the continued privilege of operating its power plant along public waters, expressly puts NYPA on notice of the potentiality of new conditions specifically relating to the Indian reservation status of the Islands.

Because the FPA provides a precise 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 provision mandating annual charges for use of tribal lands provides a mechanism through which Congress balanced a power project licensee's need to operate a project on tribal lands versus the protection and vindication of tribal interests in the land. The remedy Congress mandated is designed to eliminate disruption to a project licensee, while providing just compensation to the tribe. This Court should not second-guess Congress's weighing of the equities.

C. The United States claims the underlying fee title to the Islands

i. The Cayuga defense is inapplicable where the United States owns the underlying fee of Indian land

As a result of boundary determinations rendered by a Boundary Commission created by the Treaty of Ghent, Dec. 24, 1814, 8 Stat. 218, Barnhart, St. Croil, and Long Sault Islands were transferred from Great Britain directly to the United States. U.S. Supp. Br. at 9-12 (Dkt. 557) . Since the Islands were not part of the original State of New York, which pre-existed the United States, the underlying title transferred from Great Britain to the United States. These facts provide a strong foundation for the claim that underlying title to the Islands rests with the United States. Ownership of title by the United States makes the *Cayuga* defense inapplicable. *Cayuga* recognized that equitable defenses generally do not apply to the United States, but found its application permissible where the United States was acting to vindicate a tribal interest rather

than to enforce sovereign rights.[6] *Cayuga*, 413 F.3d at 278-79. However, an action to recover the Islands is not simply an action for the sake of the tribal beneficiary, but an action to protect the United States' own real property and governmental interest in those Islands. The Supreme Court has repeatedly held that equitable defenses do not preclude the United States from vindicating its interest in real property. *See U.S. 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, 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"). *See also Cayuga*, 413 F.3d at 279 n.8 (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'."). The Magistrate Judge rejected this argument, concluding that regardless of whether the underlying fee of the Islands

[6] To be clear, the Second Circuit did not simply hold that laches applies to the United States when it is acting on behalf of tribes under federal protection; it held that laches may apply because the United States was acting on behalf of a tribe, bringing a suit concerning events that happened hundreds of years ago, and raising a claim that had not been governed by a statute of limitations until 1966. *Id.* at 279.

properly belongs to the United States, the United States in its Amended Complaint brought the action solely on behalf of the present day successors of the Indians of the Village of St. Regis and not on its own behalf. Report at 26-28.[7]

Because the United States claims title to the underlying fee,[8/] vindicating tribal rights to the land will also vindicate the United States' sovereign interest in the lands as well. No one disputes that the United States brings this suit on behalf of the Indians of the Village of St. Regis and their successors. Until their Indian title is validly extinguished, their rights to the Islands are paramount. *Oneida I*, 414 U.S. at 667 ("Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States."). Until Indian title is extinguished, the public purpose of those federal lands is to fulfill federal obligations to Indians, in particular the Mohawks. The fact that the United States, as a trustee, filed this action to protect the rights of the Mohawks does not eliminate the United States' additional purpose in filing this action: to

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[7] The Amended Complaint in Intervention actually makes clear that the United States also brings this action to enforce federal laws and treaties. Paragraph 5 states "The United States intervenes in these consolidated actions to enforce the provisions of the Treaty of 1796, to enforce the restrictions on alienation found in the Trade and Intercourse Act, 25 U.S.C. § 177," as well as to protect the treaty rights of the Mohawks. Report at 28 (quoting Amended Complaint). The United States certainly acts in a sovereign role when enforcing federal laws and treaties.

[8/] In the United States Supplemental Brief, we noted that the United States "may own title," Dkt. No. 557 at 10. That cautious locution reflects the fact that Defendants will likely contest ownership as a matter of law, *id.* at 12 ("the United States recognizes that Defendants are likely to dispute the United States' contention that it holds underlying title to the Islands"), rather than any ambiguity in the evidence supporting the federal claim to the Islands.

protect its own governmental interest in the underlying title to the Islands.[9] Nor does it eliminate the United States' evidence of title.

The Magistrate's Report notes that the United States has not pled a claim for the Islands in its own behalf. Report 28 n.23. That is beside the point, however. The United States has pled a Nonintercourse Act claim -- that the State unlawfully took possession of Mohawk land -- and this claim is viable as long as an Indian tribe retains a possessory interest (which includes a right of occupancy) in the land. *See Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170, 185 (N.D.N.Y. 2001) (Nonintercourse Act claim requires a plaintiff to show tribal land taken and "the United States has never consented to or approved the alienation of this tribal land"). Whether the United States brought the suit to vindicate its own title or to vindicate Mohawk title to the land, the end result will be the same so long as Mohawk title remains unextinguished. Lands owned by the United States in trust for a tribe and lands owned by a tribe in restricted fee are generally functionally equivalent. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 618 (power of Congress over restricted fee lands owned by a tribe and trust lands owned by the United States but held for a tribe's benefit are the same and "in practice the terms are used interchangeably").

Thus, the United States in its Amended Complaint[10] properly did not focus on whether it owns underlying title to the Islands, as that was not pertinent to the question of whether the State

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[9] Thus it cannot be said the United States interest in the lands amounts to no more than that of a private party. See NYPA Supp. Rep. at 10 (Dkt. 564). The United States would not momentarily hold land to simply convey it to a third party (the Indians). It would retain title to the land itself.

[10] The allegations in the United States' Amended Complaint support the United States' claim to

violated the Nonintercourse Act. Only now that the Second Circuit has crafted a new defense has it become relevant whether the United States owns the underlying fee of the Islands. Under well established rules regarding notice pleading, the United States was not required to allege facts in its complaint to rebut affirmative defenses. Fed. R. Civ. P. 8(a)(2) (pleading setting forth a claim for relief needs only "a short and plain statement of the claim showing that the pleader is entitled to relief"). Rather, such defenses only become an issue after they have been properly pled in an Answer. Fed. R. Civ. P. 8(c) (party responding to Complaint "must affirmatively state any avoidance or affirmative defense, including . . . . laches"); *see also Spagnola v. Chubb Corp.*, 574 F.3d 64, 73 (2d Cir. 2009) (plaintiff "not required to include facts in complaint in anticipation of affirmative defense"). Thus, the fact that the United States did not expressly allege that it owned underlying title to the Islands in its Amended Complaint is not relevant, because notice pleading does not require a plaintiff to anticipate and rebut potential affirmative defenses that might be pled in a subsequent Answer. The United States pled facts to establish its Nonintercourse Act claim; that is all the United States was required to do.

The issue of ownership of title to the Islands is a genuinely disputed material issue of fact. As discussed previously, the question is material to whether the United States can be regarded as acting outside its sovereign capacity. And it is a genuine issue of fact because, as we show next,

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the 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 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.

the evidence shows that the underlying fee of the Islands has been held by the federal government ever since the Islands became part of the United States after the War of 1812.

ii. The evidence concerning the Islands demonstrates United States' Ownership

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). The discovering nations, in contrast, possessed the underlying fee – termed the "right of preemption" – which constitutes 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). 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 original thirteen states "had sovereign authority over the lands within their borders," while territory outside their borders, when acquired, belonged to the federal government. *Andrus v. Utah*, 446 U.S. 500, 522 (1980) (Justice Powell dissenting) (noting that for States admitted to the Union subsequently, the federal government typically required the State not to tax federal lands in exchange for a grant of federal lands to the State for school purposes); *Utah v. Kleppe*, 586 F.2d 756, 758 (10th Cir. 1978) *rev'd on other grounds by Andrus* (contrasting the absence of federal lands in the original thirteen states with subsequent states "'carved' from federal territories).

The Islands at issue constitute lands not originally within the bounds of New York and thus the United States, and not New York, holds the right of preemption and the underlying fee of those lands. 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, 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 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. Because this determination was made after the United States Constitution went into effect, there is a strong foundation for the claim that underlying title passed to the United States, not the State of New York.

Because the United States can and has articulated a set of facts which support the conclusion that it owns title to the Islands, Defendants' motions for judgment on the pleadings should be denied.[11/] *See Burnette*, 192 F.3d at 56 (judgment on the pleadings only proper where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). To the extent Defendants dispute these facts, discovery is

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[11/]Again, the United States did not have to expressly state that it held title to the Islands in its Amended Complaint, as issues relating to ownership of title are only relevant here regarding an affirmative defense.

warranted to develop a record to enable the Court to determine whether, in fact, lands acquired from Britain in 1822 constitute federal lands.

4. The Mainland Claims should not be dismissed on the pleadings.

As discussed above, the Magistrate Judge recognized that the Mohawk land claim is different from the Cayuga, Oneida, and Onondaga land claims which were dismissed by the Second Circuit. While the members of many Iroquois tribes emigrated in the face of the hardships placed upon them by territorial dispossession, the Mohawk have remained an enduring presence in the State, and particularly in the vicinity of their lost lands. The Magistrate Judge also recognized that just because a land claim is subject to application of the *Cayuga* test, consideration of the equitable concerns identified by the Second Circuit is more than a mere formality before dismissal. Specifically, the Magistrate Judge rejected Defendants' contention that the Hogansburg Triangle has lost its Indian character based on "common knowledge." Report at 43. The Magistrate erred, however, in dismissing the Town of Fort Covington claim because there too Defendants' "common knowledge" is disputed based on the fact of that claim area's proximity to the undisputed Mohawk Reservation and the presence of Indians residing in the area.

The Town of Fort Covington, like the Hogansburg Triangle, lies adjacent to the current undisputed Mohawk Reservation lands which were never lost to New York. Report at 38. The Magistrate Judge also noted that the claim area was "sparsely developed in comparison to a more urban area," Report at 39, but proceeded as if any development at all tipped the equities against the Indians rather than raising a factual question of whether the "sparse development" had entirely denuded the area of its original Indian character, particularly when that area is historically adjacent to a thriving tribal community. A sparsely developed area can mean a rural area still sharing many of the same characteristics as the region before Indian dispossession. To be sure, development may mean some departure from its Indian character (although Indian lands

in the early nineteenth century were not devoid of improvements) but the question of what development has occurred and whether it is of such a nature as to warrant the drastic action of precluding any and all relief to the Mohawks requires a factual record. Such a record is not before the Court at this stage of proceedings. The inquiry is further complicated here (in contrast to the other land claims) because the enduring presence of the Mohawks in the claim area raises a question of the extent to which the Mohawks, rather than non-Indians, are responsible for or have contributed to the development of the land.

The Magistrate Judge also acknowledged census information showing an Indian population in the claim area ranging from 4.4% to 9.3%, but found such a population insufficient to suggest a surviving Indian character in the area. Report at 39.[12] The Magistrate, however, provided no principled basis on which to make this determination. Interpreting the census data most favorably to the party facing judgment on the pleadings, one in ten people residing in the area are Indian. This distinguishes this claim from the other claims considered by the Second Circuit. These other cases have not involved *any* substantive showing of a real and enduring Indian presence in the claim area. This Court should not assume facts that would support dismissal of the claims. Here, the Fort Covington claim concerns a sparsely populated area that includes a significant Indian minority population.

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[12] Elsewhere, the Magistrate Judge noted that in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the Supreme Court had concluded a 90% non-Indian population indicated justifiable expectations supporting a diminishment finding. Report at 43 n. 35. But the Supreme Court's diminishment jurisprudence offers no suggestion of a brightline rule as to when a certain population percentage triggers the existence of justifiable expectations as a matter of law. Moreover, as the Magistrate Judge then noted, the question of population is not dispositive alone: the Court must also consider the character of the land in the area: "it is not just the assumption of jurisdiction by the State that creates justifiable expectations, but the assumption of jurisdiction over land that is non-Indian in character and that has a population that is non-Indian in character as well." *Id.*

5. Preservation of Objections to *Cayuga* and *Oneida*.

The United States' Memorandum in Opposition to Defendants' Motions for Judgment on the Pleadings contained detailed objections to the reasoning of *Cayuga* in its application to the present case. Dkt. No. 484 at 14-21. Specifically, the United States objects that *Cayuga* erred in the following respects: (1) laches does not apply to the United States; (2) laches is applied to remedies, not claims; (3) laches does not apply to claims that are brought within the applicable statute of limitations; (4) money damages are not disruptive; (5) laches requires a showing that a plaintiff's delay is not excusable; and (6) laches requires findings of fact based upon a fully developed record. The discussion of these objections in the United States Opposition brief is incorporated here by reference.

The United States also preserves its objection to the Magistrate's holding, based on *Oneida*, that United States restitution claim is barred by the *Cayuga* defense. Report at 26 n.20. If the equitable concerns identified in *Cayuga* bar relief premised on a current right of possession, alternative relief for a violation of the Act may 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 illegally obtained profits. Such compensation 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.

CONCLUSION

For the reasons set forth above, the United States objects to the recommendations of the Magistrate Judge in her Report that Defendants' motions for judgment on the pleadings should be granted, except for those relating to the parcel of land known as the Hogansburg Triangle. The Magistrate Judge was correct in recommending that claims related to the Hogansburg Triangle

should not be dismissed. The Magistrate erred, however, in recommending that the Islands Claim be dismissed and that the Fort Covington area claim be dismissed.

Respectfully submitted,

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