UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,

Plaintiff,

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

-vs-

THE STATE OF NEW YORK, HUGH CAREY, as Governor of the State of New York, THE COUNTY OF ST. LAWRENCE, THE COUNTY OF FRANKLIN, THE VILLAGE OF MASSENA, THE TOWN OF MASSENA, THE TOWN OF BOMBAY, THE TOWN AND VILLAGE OF FORT COVINGTON, FARMERS NATIONAL BANK, n/k/a KEY BANK OF NORTHERN NEW YORK, N.A., NATIONWIDE MUTUAL INSURANCE CO., NIAGARA MOHAWK POWER CO., MARINE MIDLAND PROPERTIES CORP., WALSH REALTY CORP. AND CANADIAN NATIONAL RAILWAYS,

Defendants.

AND RELATED CASES

5:82-CV-783 (Lead)
5:82-CV-1114 (Member)
5:89-CV-0829 (Member)

(LEK/TWD)

STATE DEFENDANTS' AND NEW YORK POWER AUTHORITY'S SURREPLY BRIEF IN RESPONSE TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S SEPTEMBER 28, 2012 REPORT AND RECOMMENDATION

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Preliminary Statement

NYPA and the State Defendants submit this response to Plaintiffs' Reply Briefs objecting to the Magistrate Judge's recommendation that the Island Claims be dismissed.[1]

The Treaty of Ghent, and the land commission that it created, conclusively determined that the Islands were part of New York since at least 1783. Plaintiffs argue that the commission's 1822 determination established a new boundary and effected a transfer of land. That argument overlooks binding Supreme Court precedent. The law is clear that an international treaty that resolves an existing boundary is just that, and nothing more. The Treaty of Ghent expressly settled existing boundaries, rather than create new ones, and definitively put the Islands within New York as of 1783. The United States' purported claim to title in the Islands, therefore, fails as a matter of law.

Separately, Plaintiffs' latest filings make clear that the Indian reservation provisions of the Federal Power Act cannot possibly distinguish this case from *Cayuga* and its progeny. Plaintiffs now argue that the FPA protects NYPA from ejectment, and that any resulting license changes might be tempered by review in an appellate court. These arguments come up short. The Second Circuit held the claims in *Cayuga* and *Oneida* were barred regardless of whether available remedies included ejectment. The Second Circuit also expressly held that a court's efforts to carefully shape remedies cannot prevent dismissal, as such claims are by their nature inherently disruptive. Under *Cayuga*, therefore, as the Magistrate correctly held, the FPA's supposed "protections" are illusory. In reality, if the FPA's Indian reservation provisions were to

[1] This surreply brief is submitted in response to the United States Reply to Defendant NYPA's Response to Plaintiffs' Objections (Dkt. No. 619) ("U.S. Reply Br.") and to the Reply of Mohawk Nation Council of Chiefs and Mohawk Council of Akwesasne to NYPA's Response to Plaintiffs' Objections (Dkt. No. 621) ("MCA Reply Br."). The MCA Reply Brief was joined in and adopted by the St. Regis Mohawk Tribe (Dkt. No. 618 at 1 n.1).

This surreply brief uses the abbreviations and capitalized terms defined in Defendant NYPA's Response to Plaintiffs' Objections to Magistrate Judge Report and Recommendation (Dkt. No. 610).

apply to the Islands, the Project would be subject to a divisive regulatory scheme, a result all the more disruptive to settled expectations.

For these reasons, and those set forth in the Magistrate Report and in earlier briefing, the Island Claims should be dismissed.

Argument

I. Any Right of Preemption Rests with the State of New York, Not with the United States

A. The Treaty of Ghent Boundary Commission Established that the Islands Were Located Within New York Prior to the Adoption of the Constitution

The Islands became part of New York State no later than 1783. The Treaty of Ghent and the resulting Boundary Commission of 1822 placed the Islands within New York State as a definitive resolution of the "true intent of the said treaty of [1783]." Treaty of Ghent, 8 Stat. 218, 221, Art. VI (1814) (attached at Dkt. No. 611-16). The 1822 Commissioners' decision expressly found that the Islands "belong to the United States of America, in conformity with the true intent of the 2nd article of the said treaty of 1783." Decision of the Commissioners under 6th Article of Treaty of Ghent, 8 Stat. 274 (1822) (the "Commissioners' Decision").[2] As the Treaty says, that finding is "final and conclusive." Treaty of Ghent, 8 Stat. at 221, Art. VI.

Plaintiffs argue otherwise, contrary to directly binding Supreme Court precedent. Plaintiffs contend that the Treaty of Ghent and Commissioners' Decision, despite what they say, can be construed, not as a resolution of the 1783 boundary, but as the United States acquiring new lands. The Supreme Court, however, squarely rejects such reasoning, and instead faithfully enforces treaties that settle pre-existing boundaries. In *Harcourt v. Gaillard*, 25 U.S. 523 (1827), the petitioner asserted title in a tract of land, citing a colonial Florida governor's land grant

[2] A true and correct copy of the Commissioners' Decision, as published within a Department of the Interior bulletin of the U.S. Geological Survey, was attached with NYPA's Response at Exhibit 17. (Dkt. No. 611-17.) Although identical in content, for the Court's convenience, the Commissioners' Decision as published in the Statutes at Large is attached hereto at Attachment 1.

issued in 1777. Later, the 1783 Treaty of Paris declared the land was part of the United States, and not within the as-yet colony of Florida. The petitioner argued, however, that the land grant was valid because the land had been part of Florida when the grant was made.[3] *See Harcourt*, 25 U.S. at 525 ("That ground would admit the original right of the governor of West Florida to grant, and if so, his right to grant might have continued in force until the [1783] treaty of peace . . . ."). The Supreme Court held that the 1783 Treaty itself foreclosed that argument.

The Court held that that a treaty to resolve an existing international boundary could not be construed as a transfer of lands. Thus, the Court explained that the 1783 Treaty of Paris did not create a new boundary, but resolved where the southern states' boundaries had been as of 1776:

> It has never been admitted by the United States, that they acquired any thing by way of cession from Great Britain, by that treaty. ***It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limits, were as much theirs at the declaration of independence as at this hour.*** By reference to the treaty, it will be found, that it amounts to a simple recognition of the independence and the limits of the United States, ***without any language purporting a cession, or relinquishment of right, on the part of Great Britain.***

Harcourt v. Gaillard, 25 U.S. 523, 527-28 (1827) (emphasis added).[4] Notably, the result is the same even when one nation had exercised *de facto* jurisdiction over lands that were later adjudged by treaty to belong to the other nation. *See Robinson v. Minor*, 51 U.S. 627, 642-43 (1850) ("The treaty with Spain established a disputed boundary; there was no cession of

[3] The petitioner relied on a land grant issued in 1777 from the governor of the then-British colony of West Florida (later ceded to the Spanish colony, Florida). The 1783 Treaty of Paris declared the land to be within the United States, either within South Carolina or Georgia, but not within Florida (a colony not yet admitted to the Union). *See Harcourt*, 25 U.S. at 524-25.

[4] *See also Henderson v. Poindexter's Lessee*, 25 U.S. 530, 534 (1827) (Spanish land grant from June 1795 not binding where subsequent October 1795 boundary treaty determined the land was in the United States; noting "[the treaty with Spain] does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States.").

territory. The jurisdiction exercised by Spain over [the land] was not claimed or occupied by force of arms, against an adversary power; but it was a naked possession, under a misapprehension of right.").

This principle forecloses Plaintiffs' argument regarding the Islands. The Treaty of Ghent does what it says. It resolves the United States' northern boundary as of no later than 1783, what *Harcourt* describes as "a recognition of pre-existing rights." 25 U.S. at 527.[5] There was not, as Plaintiffs insist, one boundary in 1783 and another in 1822.

Plaintiffs, nonetheless, advance that very position, seeking a factual hearing on a matter already dispositively resolved by the 1822 Commissioners. Plaintiffs claim there was an "understanding" that the Islands were part of Canada before 1822, for which they cite anything *other* than a boundary treaty. Plaintiffs quote state assembly reports, passing comments in state court decisions, even a "renowned map" from the early 1800s.[6] On this basis they purport to distinguish *Seneca Nation v. New York*, 382 F.3d 245 (2d Cir. 2004), because the Niagara Islands at issue in that case had supposedly been "definitively" within New York. (MCA Reply 8.) No facts, however, could trump how two nations legally clarified their longstanding boundary. Regardless of how one government previously exercised *de facto* jurisdiction,[7] regardless of any

[5] In light of *Harcourt*, even the 1783 Treaty of Paris settled pre-existing boundaries as of the Declaration of Independence. Thus, the Islands became part of New York no later than 1783, the date specifically referenced in the Treaty of Ghent and the Commissioners' Decision, and perhaps as early as 1776. Either way, the Islands were part of New York prior to the Constitution, and the right of preemption was retained by New York, not the United States.

[6] In *St. Regis Tribe of Mohawk Indians v. State of New York*, 5 N.Y.2d 24 (1958), the Court of Appeals held that the St. Regis tribe's claims should be dismissed because any ownership rights had been extinguished by the State's 1856 payment to the tribe. The Court therefore did not reach any holding as to when the Islands became part of New York State. Rather, the Court of Appeals reviewed at length the various reports of state legislative assembly committees on the issue, which in turn are now cited by Plaintiffs here. As the Court of Appeals noted, however, the committee reports cited by Plaintiffs were sometimes in "direct conflict" with each other. *See* 5 N.Y.2d at 32. More importantly, the boundary reports cited in that case were issued by the Commissioners of the New York State Land Office, who admittedly "have no peculiar means of knowing whether the two islands were within the jurisdiction of the United States before the treaty of Ghent . . . ." 5 N.Y.2d at 33.

[7] The Treaty of Ghent expressly contemplated that certain islands previously in *de facto* possession of one nation might be adjudged to have belonged to the other. *See* Treaty of Ghent, 8 Stat at 222, at Art. VI (addressing scenario

purported "general understandings," and regardless of other "facts" cited by Plaintiffs, the Islands were part of New York State by 1783 as a matter of law. *Seneca Nation*, which also involved islands that were within New York's pre-existing boundaries as conclusively settled in 1822, is thus directly on point.[8] Here, the Islands were part of New York State before the Constitution. New York, and *not* the United States, therefore held any right of preemption in the Islands. The United States has no legal claim of "title" here. Accordingly, the United States is plainly subject to the *Cayuga* laches defense, which bars the Island Claims.

B. The Tribal Plaintiffs' "Law of the Case" Argument is Baseless

In an obvious misreading of Judge McCurn's 2001 decision, the Tribes argue that this Court has already found that the Islands were not part of New York State until 1822. This Court has never ruled on that issue, and the Tribes' "law of the case" argument has no merit.

Law of the case "presumes a hearing on the merits." *U.S. v. Hatter*, 532 U.S. 557, 566 (2001). The doctrine applies "only if the 'court was ever squarely presented with the question . . . .'" *Cobalt Multifamily Investors I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 430 (S.D.N.Y. 2012), quoting *Stichting Ter Behartiging v. Schreiber*, 407 F.3d 34, 44-45 (2d Cir. 2005).

Although the Tribes cite a purported a "holding" from Judge McCurn, the cited passage was nothing of the kind. The Tribes instead have quoted part of the decision's Background section, which merely recited the legal and factual assertions in the complaints. *See* MCA Reply Br. at 6 (quoting *Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170,

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in which islands in "possession" of one party before the War of 1812, "should, by decision [of the commissioners] fall within the dominions of the other party").

[8] For example, the Second Circuit noted that "[a]lthough originally it was thought that the boundary between the United States and Canada (then governed by Great Britain) bisected Grand Island," one of the islands in dispute in that case, "it was finally determined in 1822 that . . . Grand Island [was] within the United States." 382 F.3d at 249. Nonetheless, the Second Circuit found that "British title to the Islands passed to New York after the Revolution, and that New York's western boundary *vis-a-vis* the United States was established by 1782." 382 F.3d at 265

179 (N.D.N.Y. 2001)).[9] The Court noted that "the allegations contained in the complaint and amended complaints are taken as true." *See* 146 F. Supp. 2d at 183 n.12. The issue of when the Islands became part of New York state was not addressed in Judge McCurn's substantive rulings at all. Thus, the language quoted by the Tribes was not part of any "holding." The Tribes' law of the case argument fails. Moreover, as described above, the 1783 Boundary has already been adjudicated, not by this Court, but by the 1822 Commissioners' Decision. The Commissioners' Decision is law of the land, and the United States can claim no right of preemption.

II. The Federal Power Act Does Not and Cannot Rebut the Type of Disruption Contemplated in *Sherrill*, *Cayuga* and *Oneida*

In their reply briefs, Plaintiffs insist that the FPA bars their previously asserted (and never formally withdrawn) claim for ejectment, so there cannot possibly be any disruption. (MCA Reply Br. 2 n.3; U.S. Reply Br. at 8-9 & n.14.) What they fail to mention is that the District Court rulings in *Cayuga* and *Oneida* also had eliminated the possibility of ejectment, and yet the Second Circuit determined that the surviving claims were nonetheless inherently disruptive and therefore barred. *See Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 122 (2d Cir. 2010) (describing District Court's summary judgment rulings dismissing all claims other than reformation of contract against State), *cert. denied* 132 S. Ct. 452 (2011); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 271 (2d Cir. 2005) (noting District Court's rejection of ejectment remedy).

Application of the FPA to this claim actually magnifies the disruption in ways not present in other cases. Unlike the *Cayuga* plaintiffs who sought and were awarded a well-defined monetary judgment, Plaintiffs here apparently seek potentially unlimited post-judgment

[9] The language now quoted by the Tribes matches the language used in the Complaints nearly verbatim. *See* MCA Cplt. ¶¶ 36-37; SRMT Cplt. ¶¶ 36; U.S. Cpt. ¶¶ 27, 29.

proceedings in pursuit of unenumerated remedies. Their papers assume that (a) this Court will award them title to the Islands; (b) the Secretary of the Interior will then recognize the Islands as an Indian Reservation; (c) FERC will then impose as-yet undetermined annual charges; and (d) FERC and/or the Secretary of the Interior may impose other conditions the Tribes seek. As previously shown, such pursuits promise to compound any resulting disruption to NYPA, its customers and the public. (Dkt. No. 610, NYPA Resp. 12-15.)

Thus, under the FPA, the implications of Plaintiffs' assumed reservation status are dramatic. NYPA's license assumes and requires that NYPA and the State exclusively hold possession and title to the Islands, with no provision for an on-site Indian reservation. It is absurd to suggest that such a unilaterally established reservation would not impact the Project. FERC itself has decried the FPA's divided jurisdictional scheme for Indian reservation lands as dangerously dysfunctional.[10] The FPA most assuredly is *not* the panacea Plaintiffs claim it to be.

Unable to identify how the FPA protects NYPA from disruption, Plaintiffs can only argue at the margins. The Tribes argue that any conditions imposed by FERC or the Secretary of the Interior would be tempered by appellate court review. (Dkt. No. 621, MCA Reply Br. 1-3.) It is inexplicable how this meager response makes the Island Claims less disruptive than any other ancient land claim. Court review is always available to shape remedies. Adroit manipulation of

[10] In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984), FERC urged against the reading of the FPA Indian reservation provisions that ultimately prevailed, which now requires FERC to adopt any condition proposed by the Secretary of the Interior, even if FERC opposes it. (*See* Dkt. No. 610, NYPA Resp. at 13 n.11.) In its brief to the Ninth Circuit in that case, for example, FERC warned that such unilateral conditioning authority by the Secretary of the Interior would "frustrate the Commission's ability to [] exercise its judgment to adopt the plan 'best adapted' to improving the waterway involved." Br. for Resp. FERC at 33-34, in *Escondido Mutual Water Co. v. FERC*, Nos. 79-7625, et al. (9th Cir. filed Apr. 29, 1981) (excerpts at attachment 2); *see also id.* at 34 ("Under Interior's interpretation, however, the greater power of the Commission is apparently held hostage to the lesser power of the Interior."); *id.* at 36 ("But even passing this flaw, the Commission, after extended consideration, concluded that eight of the conditions asserted by Interior would so encumber the license so as to defeat the very purpose for its issuance.").

remedies, in any form, however, does not rebut the disruptiveness inherent in the underlying claim. *See Oneida*, 617 F.3d at 138.

Finally, Plaintiffs ignore the law and badly misstate the record when they argue that NYPA should have expected to find its $2 billion Project someday sitting on an Indian reservation. As detailed in NYPA's Response brief, every act of the United States government for decades confirmed that the Project was not located on federal or Indian lands. (Dkt. No. 610, NYPA Resp. 9-11, 19-20, 33-34.) Plaintiffs argue, nonetheless, that the 1954 Court of Claims suit by the chiefs of the St. Regis Tribe of Mohawk Indians put NYPA on notice of their claims to title. (Dkt. No. 619, U.S. Reply Br. 8; Dkt. No. 621, MCA Reply Br. at 1 n.2.)

This argument fails on two counts. First the defendants' awareness of ancient land claims is irrelevant to disruption under *Cayuga*. *See Onondaga Nation v. State of New York*, -- Fed. Appx. --, No. 10-cv-4273, 2012 WL 5075534, at *2 (2d Cir. Oct. 19, 2012) (summary order).

Second, the 1954 lawsuit could not conceivably have triggered the FPA provisions for an Indian reservation. As the Magistrate found, in its New York Court of Claims suit, the tribe sought only "just compensation" for the State's eminent domain taking of Barnhart Island; the Tribes never sought possession, nor sought to prevent the State's assumption of title by eminent domain.[11] (Report at 33 n.27.) Thus, the State would have owned the Islands free and clear even if the tribe's 1950's lawsuit had succeeded. And the tribe's 1954 lawsuit certainly did not assert there was a federal Indian *reservation* on the Islands (as there never was one). The fundamental prerequisite for the FPA's "Indian reservation" provisions was not even a thought.

[11] *See St. Regis Tribe of Mohawk Indians v. State of New York*, 5 N.Y.2d 24, 35 (1958) (noting tribe's "present claim for $33,800,000"); *see also St. Regis Tribe of Mohawk Indians v. State of New York*, 5 A.D.2d 117, 123 (3d Dep't 1957) ("St. Regis Tribe of Mohawk Indians, alleging an interest in the appropriated property, has filed a claim for damages for $33,800,000 in the Court of Claims.").

In short, the FPA certainly does nothing to *lessen* the disruption to NYPA, much less to settled expectations, inherent in Plaintiffs' claims. Magistrate Judge Dancks reached the same conclusion, finding that the FPA's "Indian reservation" provisions would significantly disrupt the Project. (Report at 30-31 & n.24.) That conclusion should be adopted and the Island Claims should be dismissed.

Conclusion

For the above reasons, as recommended by the Magistrate Report, the Island Claims should be dismissed in their entirety.

DATED: March 11, 2013
Respectfully submitted,

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