IN THE UNITED STATES COURT OF FEDERAL CLAIMS

SHINNECOCK INDIAN NATION,	)	**NO. 1:12-CV-00836-ECH**
Plaintiff,	)	**Chief Judge Emily C. Hewitt**
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE AND QUESTIONS PRESENTED

This case seeks money damages from the United States for a judicial taking[1] in relation to Plaintiff's traditional Tribal lands and Plaintiff's claim against other parties for violation of the federal Indian Non-Intercourse Act, 25 U.S.C. § 177, with respect to the taking of those lands. Compl. ¶ 8. The judicial taking occurred six years before the filing of the complaint in this action, when the U.S. District Court for the Eastern District of New York entered judgment against Plaintiff on its Non-Intercourse Act land claim. Compl. ¶ 49. Plaintiff's land claim sought to regain possession of a portion of those traditional Tribal lands of which Plaintiff was dispossessed in the late Nineteenth Century, and damages for the dispossession and for the taking of the balance of such Tribal lands. Compl. ¶ 1.

The Shinnecock Nation's claims seek money compensation for the dismissal and entry of judgment against the Nation on the Nation's land claim. Compl. at Prayer for Relief ¶ 1. The dismissal and entry of judgment were based on application to the Nation's land claim of the newly-formed so-called "equitable" defenses announced and applied in the Second Circuit Court of Appeals' decisions in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005). Compl. ¶ 47. *See Shinnecock Indian Nation v.*

---

[1] In the hope of avoiding further unnecessary confusion, in this Memorandum, Plaintiff will refer generally to the 2006 judicial action underlying its claims for money damages in this case as a "judicial taking." As explained in more detail below, only one of Plaintiff's causes of action is brought, and invokes the jurisdiction of this Court under the Tucker Act, based on the Takings Clause of the U.S. Constitution, U.S. Const. Amend. V.

In its Complaint, Plaintiff generally referred to the 2006 judicial action at issue in this case as a "denial of any and all means of (effective) redress," which is a description on the effect of the "judicial taking," since what was taken was Plaintiff's right of "redress," including compensation, for the past taking of Plaintiff's traditional Tribal lands. The reference to "effective redress" is drawn from the international law-based rights of indigenous peoples relevant to this case, as articulated in, e.g., Articles 28 and 40 of the U.N. Declaration on the Rights of Indigenous Peoples. *See* Complaint ¶ 30.

New York, No. 05-cv-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006). Judgment was entered against the Nation on its land claim on December 5, 2006. Compl. ¶ 8.

Plaintiff invokes the jurisdiction of this Court in this case, and states claims for relief, based upon three substantive "money-mandating" sources of law: 1) the Takings Clause of the Fifth Amendment to the U.S. Constitution, U.S. Const. Amend. V; 2) the Indian Non-Intercourse Act, 25 U.S.C. § 177, which created (or confirmed) a fiduciary obligation of the United States government to the Indian tribes whose lands the Act was enacted to protect; and 3) the common law, not sounding in tort, based on violation of a international law norm.[2]

Defendant moves to dismiss Plaintiff's Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim for relief. Def. Mem. at 1. Defendant asserts that Plaintiff's claims are "not ripe," and therefore fail to present a Case or Controversy sufficient to invoke this Court's jurisdiction under Article III of the U.S. Constitution, and that Plaintiff fails to identify any "money-

[2] Although Plaintiff indicated that this case arises, in part, under the Fifth Amendment to the U.S. Constitution, U.S. Const. Amend. V, *see* Complaint ¶ 8, Plaintiff did not expressly indicate upon which clause(s) of the Fifth Amendment it relies, nor did it expressly enumerate a Fifth Amendment "Takings" claim among its "Claims for Relief." *See* Complaint ¶¶ 57-67. Nevertheless, Plaintiff pleaded *facts* that Plaintiff believes are sufficient to state such a claim under RCFC Rule 8(a). *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct.1937, 1949 (2009) ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)).

Plaintiff's counsel apologizes to the Court and to Defendant's counsel for any confusion or other difficulty this may have engendered. Of course, Plaintiff will be happy to amend its Complaint should the Court so direct. In the event that the Court should grant Defendant's Motion to Dismiss, Plaintiff requests that such dismissal be without prejudice, with leave to amend.

mandating" source of law upon which its claims are based sufficient to invoke this Court's jurisdiction under the Tucker Act.[3]

Defendant's motion raises the following questions: 1) whether Plaintiff has based its claims upon money-mandating sources of law over which this Court may exercise subject matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491; and 2) whether Plaintiff has stated claims upon which relief may be granted.

ARGUMENT

I. STANDARD APPLICABLE TO MOTION TO DISMISS

A substantive cause of action is not created by the Tucker Act. Plaintiff is therefore aware of the need to identify a separate source of substantive law that creates the right to money damages in order to come within the jurisdiction of the Tucker Act. *See United States v. Mitchell*, 463 U.S. 206, 216 (1983); *United States v. Testan*, 424 U.S. 392, 398 (1976). As stated in *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005),"[i]n the parlance of Tucker Act cases, that source must be 'money-mandating.'" (citing *Mitchell*, 463 U.S. at 217, and *Testan*, 424 U.S. at 398).

Typically, it is not difficult to separate the question of a federal court's subject matter jurisdiction over a cause from the question of what a plaintiff must prove in order to prevail in the cause. *See Fisher*, 402 F.3d at 1172. In Tucker Act jurisprudence, however, "this neat division between jurisdiction and merits has not proved to be so

[3] Defendant also asserts that any claims based upon certain matters (but not the facts upon which Plaintiff's claims are based) are or would be barred by the statute of limitations applicable to claims before this Court, 25 U.S.C. § 2501, or applicable to claims that arose prior to 1946 and were within the jurisdiction of the Indian Claims Commission, established by the Indian Claims Commission Act of Aug. 13, 1946, as amended, formerly codified at 25 U.S.C. §§ 70 to 70n-2.

neat… the question of the court's jurisdictional grant blends with the merits of the claim." *Id*. at 1171-1172.

Whether a source is money-mandating is determined by a two-step process. *See Gollehon Farming v. United States*, 207 F.3d 1373, 1378-80 (Fed.Cir.2000) (citing *Banks v. Garrett*, 901 F.2d 1084, 1087-88 (Fed.Cir.1990)). The process is as follows:

> As a first step, and for purposes of satisfying the jurisdictional requirement that a money-mandating statute or regulation is before the court, the plaintiff need only make a non-frivolous allegation that the statute or regulation may be interpreted as money-mandating. The non-frivolous allegation satisfies the jurisdictional requirement. If, as a second step, the issue of jurisdiction is later pressed and it is subsequently decided that the statute or regulation is not money-mandating, then the case is dismissed for failure to state a claim upon which relief can be granted.

Fisher, 402 F.3d at 1172 (citing *Gollehon*, 207 F.3d at 1379).

If the Court finds that the money-mandating test is met by a Constitutional provision, statute, or regulation, "the court shall declare that it has jurisdiction over the cause, and shall then proceed with the case in the normal course." *Fisher*, 402 F.3d at 1173. Moreover, a positive determination by this Court that the source is money-mandating "shall be determinative both as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action." *Id.*

II. BACKGROUND FACTS UNDERLYING THE CLAIMS IN THIS CASE

(A) The District Court Decision And Judgment In Shinnecock Land Claim

The Nation brought suit against the State of New York and others in the United States District Court for the Eastern District of New York, styled *Shinnecock Indian Nation v. State of New York*, No. 05-cv-2887 (Complaint filed Jun. 15, 2005). The Nation claimed a violation of the Indian Non-Intercourse Act, 25 U.S.C. § 177, arising

out of the 1859 State-authorized transfer of approximately 3,600 acres of the Nation's aboriginal territory in the Town of Southampton, New York. The defendants filed motions to dismiss the case pursuant to Fed. R. Civ. Pro. 12(b)(6), asserting, *inter alia*, that the Nation's claims were barred by the "equitable" defenses identified and applied in the recent decision of the U.S. Court of Appeals for the Second Circuit in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005). The District Court granted the defendants' motions to dismiss the Nation's complaint based on the *Cayuga* decision, and entered judgment against the Nation on December 5, 2006.

In *Shinnecock Indian Nation v. New York*, Slip Op., 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2005), the District Court held that the fact that the Shinnecock Nation had not unreasonably delayed its land claim was found to be "unpersuasive". *Id.* at *5. The District Court acknowledged that the Shinnecock Nation had "objected to the 1859 Taking in the very year it occurred, and that institutional barriers prevented the Nation from having a forum to subsequently vindicate its rights." *Id.* (citing Compl. at ¶¶ 36, 44-45; Plaintiffs' Memorandum of Law in Opposition to Defendant Long Island Railroad Company's Motion to Dismiss at 3). However, the Court noted that similar arguments did not preclude the Second Circuit in *Cayuga* from denying plaintiffs' request for relief. *Id.* (citing *Cayuga*, 413 F.3d at 279-80).

(B) The Change in the Law Applicable to Indian Non-Intercourse Act Land Claims in the Second Circuit

In *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 277 (2d Cir. 2005), the U.S. Court of Appeals for the Second Circuit held that "the doctrine of laches bars the possessory land claim presented by the Cayugas here." In doing so, the three-judge panel ruled contrary to the prior "law of the circuit," established in *Oneida Indian Nation*

of New York v. New York, 691 F.2d 1070 (2d Cir. 1982), and followed by *Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 525 (2d Cir. 1983). The panel asserted that the intervening Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), had "effectively overruled our Court's holding in *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1084 (2d Cir.1982), that laches and other time-bar defenses should be unavailable and that 'suits by tribes should be held timely if such suits would have been timely if brought by the United States.'" 413 F.3d at 277 n. 6.

In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Supreme Court faced a claim by the Oneida Nation "for declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations." 544 U.S. at 214. The Court rejected the Nation's claim and held "that 'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew old." *Id.*

The *Pataki* panel chose to read *City of Sherrill* extremely broadly:

> We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations. *See, e.g., id*. at 1494 ("[T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate."). *Sherrill* clarified that the decision does not "disturb" the Supreme Court's holding in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 229-30, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) ("*Oneida II*"), which allowed Indian Tribes to seek fair rental value damages for violation of their possessory rights following an ancient dispossession. *See Sherrill*, 125 S.Ct. at 1494 ("In sum, 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*."). Because the Supreme Court in *Oneida II* expressly declined to decide whether laches would apply to such claims, *see Oneida II*, 470 U.S. at 244-45, 253 n. 27, 105 S.Ct. 1245, this statement in *Sherrill* is not dispositive of whether laches would apply here.

413 F.3d at 273-74.

In *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982), the Second Circuit had addressed three potential defenses asserted by defendants to the Oneida Nation claims, "the Eleventh Amendment and the non-justiciability doctrine, and that they are time-barred[.]" 691 F.2d at 1079. The Court began its discussion of "Time-Bar" defenses by explaining that "Defendants contend as a third defense that the Oneidas' claims are barred by the nearly 200 years that have elapsed since the New York treaties were concluded. We reject this contention." 691 F.2d at 1083. After further discussion, the Court "conclude[d], therefore, that state law cannot operate subsequently to validate land transactions that occurred in violation of federal law." 691 F.2d at 1084. The Court then addressed time-based defenses under federal law.

> *There remains the question whether a delay-based defense founded on federal law may be asserted*. See *Mohegan Tribe, supra*, 638 F.2d at 615 n.3 (alluding to but not reaching existence of defense based on "federal common law of laches"). Assuming some federal time-bar might be applicable, we can turn for guidance to 28 U.S.C. § 2415, which provides a federal statute of limitations for suits brought by the United States on behalf of tribes. Under § 2415(a) & (b), an action for money damages based on a contract or tort that accrued prior to the section's enactment on July 18, 1966, is timely if filed prior to December 31, 1982, and under § 2415(c) there is no time limit for an action to "establish the title to, or right of possession of, real or personal property." Without having to decide whether § 2415 applies to restrict suits by tribes, *we believe for reasons elaborated above that at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States. Accordingly, since the instant action accrued prior to 1966 and was filed in 1979, we hold that it is timely*.

691 F.2d at 1084 (emphasis added; footnote omitted).

The Court also "affirm[ed] the holding below that the claims raised in this lawsuit are justiciable." 691 F.2d at 1080-81.

> The defendants contend that: (1) the claims raise nonjusticiable political questions; (2) the duty asserted by the Oneidas cannot be judicially determined; and (3) an appropriate judicial remedy cannot be molded. Because we agree substantially with the reasoning of the district court in dismissing these contentions, we confine ourselves to those arguments requiring additional discussion or which were not addressed below.

691 F.2d 1081 (footnote omitted). After rejecting defendants' first two items contentions, the Court turned to the third:

> We also reject the contention that an appropriate judicial remedy cannot be molded. Even were no other relief appropriate, the request for declaratory relief would alone render the claims justiciable. *Powell v. McCormack*, 395 U.S. 486, 517-18, 89 S.Ct. 1944, 1961-62, 23 L.Ed.2d 491 (1969). Moreover, as the Supreme Court held in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an "impossible" remedy, id. at 357, 47 S.Ct. at 143, the court has authority to award monetary relief for the wrongful deprivation. *Id*. at 359, 47 S.Ct. at 144. The claim for "fair rental value" is not so vague or indeterminable that an appropriate remedy could not be designed.
>
> The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable. *We do not doubt that a declaratory judgment declaring the New York treaties invalid could cause substantial dislocations in the affected lands casting a cloud over all current title holders, and that the impact of a monetary award could be heavy. Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and "disruptive" remedies.* See, e.g., *Baker v. Carr, supra* (wide-scale reapportionment); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, supra*, 443 U.S. at 677 n.22, 685, 99 S.Ct. at 3070 n.22, 3074 (increasing Indians' share of salmon run from 2% to 50% of industry catch); see generally Fiss, "The Supreme Court, 1978 Term- Foreword: The Forms of Justice," 93 Harv.L.Rev. 1 (1979) (structural reform litigation involving large social institutions). Thus the First Circuit treated as justiciable claims

> tested in Joint Tribal Council of the *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), and its holding that the Nonintercourse Act applied to the subject land transactions cast a cloud over the title to the 12 million acres of land sought by the plaintiffs and raised the specter of a possible award of $25 billion in alleged trespass damages. See Paterson & Roseman, ["A Reexamination of *Passamaquoddy v. Morton,*"] 31 Me.L.Rev. 115.
>
> *Courts have not been blind to the disruption caused by the mere filing of such lawsuits*, see, e.g., *Oneida Indian Nation v. County of Oneida*, 434 F.Supp. 527, 530-32 (N.D.N.Y.1977), on remand from 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), *and may take into account the "impossibility," Yankton, supra, of repossession in designing an appropriate remedy*. Alternatively, legislative solutions may be available. Indeed, plaintiffs point out that every major Indian land claim to date has been settled with the United States and states, not private parties, providing the settlement funds. See, e.g., Alaska Native Claims Settlement Act, supra; Rhode Island Indian Claims Settlement Act, P.L. 95-395, 92 Stat. 813, Sept. 30, 1978, 25 U.S.C. §§ 1701-1716; Maine Tribes Settlement Act, P.L. 96-420, 94 Stat. 1785, Oct. 10, 1980, 25 U.S.C. §§ 1721-1735. However preferable a legislative solution might be, in its absence the Oneidas' claims are justiciable notwithstanding the complexity of the issues involved and the magnitude of the relief requested.

691 F.2d at 1082-83 (emphasis added; footnote omitted).

The following year, in *Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 525, 537-39 (2d Cir. 1983), the Second Circuit again rejected a defense based on state statutes of limitations, citing to and quoting from its earlier opinion in *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982). The Court also rejected a defense of non-justiciability, first denying defendants' contention that "the exclusive remedy against illegal occupiers is committed to the President[,]" then defendants' contention that the district court must "'defer to the political departments.'" 719 F.2d 538 (quoting *Baker v. Carr*, 369 U.S. 186, 215 (1962)), then observing that:

> Finally, the Counties assert that our holding will have catastrophic ramifications. We rejected this argument in *Oneida Indian Nation v. New York*, in which we stated "we know of no principle of law that would relate

> the availability of judicial relief inversely to the gravity of the wrong sought to be addressed." *Id.* at 1083; *see generally id*.

Rejecting the prior law of the Circuit, in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 277 (2d Cir. 2005), the Court explained that *"[t]he nature of the claim as a '"possessory claim,' as characterized by the District Court, underscores our decision to treat this claim like the tribal sovereignty claims in Sherrill*. Under the *Sherrill* formulation, this type of possessory land claim-seeking possession of a large swath of central New York State and the ejectment of tens of thousands of landowners-is indisputably disruptive. Indeed, this disruptiveness *is inherent in the claim itself*-which asks this Court to overturn years of settled land ownership-rather than an element of any particular remedy which would flow from the possessory land claim. Accordingly, we conclude that possessory land claims of this type are subject to the equitable considerations discussed in *Sherrill*." 413 F.3d at 275 (emphasis added).

Nevertheless, the doctrine of laches barred the Cayuga Indian Nation's claim "even though some delay on the part of the Cayugas is explainable, [for the reason that] in the context of determining whether ejectment is an appropriate remedy, ... the delay factor tips decidedly in favor of the defendants." *Cayuga,* 413 F.3d at 277 (citing *Cayuga Indian Nation v. Cuomo,* No. 80-CIV-930, 1999 U.S. Dist. LEXIS 10579, at *86 (N.D.N.Y. July 1, 1999). The Cayugas and the United States had highlighted the District Court's findings that the Cayugas were not "responsible for any delay in bringing this action" and that the "delay was not unreasonable, insofar as the actions of the Cayuga are concerned." *Id.* at 279 (citing Cayuga Letter Br. at 3, United States Letter Br. at 3.) The Second Circuit acknowledged these findings, but did not believe they were dispositive of the laches question stating, "[t]he equitable considerations relevant

to an assessment of a possessory land claim…differ dramatically from the equitable considerations in a claim for prejudgment interest..." The Second Circuit in *Cayuga* thereafter repeated the finding of the District Court, stating:

> [r]egardless of when the Cayugas should have or could have commenced this lawsuit, the court cannot overlook the prejudicial consequences which the defendants would sustain if the court were to order ejectment," and found that the "prejudice factor" was "a factor which is far too important to ignore."

Id. at 279-80 (citing *Cayuga X,* 1999 U.S. Dist. LEXIS 10579, at *85-86.).

What is most important about what the Court did in *Cayuga*, (and solidified in its decision five years later in *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010)), is that it changed the law of property itself. It did this by creating a new "equitable" defense that it called *laches* at first (in *Cayuga*), but following scathing criticism pointing out that the Court had not applied the elements of *laches* at all, later (in *Oneida*) simply claimed was in the nature of *laches* and similar time-based equitable defenses. *See generally*, Fort, *The New Laches: Creating Title Where None Existed*, 16 Geo. Mason L. Rev. 357 (2009).

The legal harm that the Second Circuit Court thereby inflicted, (and commanded the District Courts within the Second Circuit to inflict), is at the heart of the instant case—"sovereignty" is not protected by the Takings Clause of the Fifth Amendment, but "property" is; "sovereignty" is not protected by the Indian Non-Intercourse Act, but "property" and "claims" to property are; and "sovereignty" is not the subject of the international law norms that Plaintiff invokes in this case, but the "property' rights of Indian peoples to their traditional Tribal lands are.

(C) United States' Current And Recent Litigation Position Regarding The Second Circuit's *Cayuga* And *Oneida* Decisions

The United States has taken a position supporting the rights of tribes and the United States to seek recourse for the unlawful taking of tribal property. In its arguments, the United States clearly asserts that the position taken by the Second Circuit was "unpredictable in terms of the relevant precedents" and therefore no deference is warranted. *Hughes v. State of Washington*, 389 U.S. 290, 296 (1967) (Steward, J., concurring). The United States further asserts that it and tribes relied on decades of prior case law and acts of Congress prior to investing significant time and resources into pursuing land claims, which even the Court acknowledges were justified in that there was no delay on the tribes part.

In the petition for certiorari filed by the United States in *United States of America v. Pataki*, 2006 WL 1069126 (U.S.), the United States asserted the following reasons the Supreme Court should grant the petition: 1) the Second Circuit's decision below conflicts with the Supreme Court's decisions in *Oneida II* and *City of Sherrill*; 2) the decision below conflicts with Congress's judgment and intent, reflected in a series of limitations acts, that claims like these should be permitted to go forward; 3) the Court of Appeals' application of laches to the claims of the United States is particularly unwarranted; and 4) the decision below is of substantial practical and legal importance.

The United States' petition for a Writ of Certiorari in *United States of America v. Pataki*, 2006 WL 285801 (U.S.), summarizes the 20-year history of New York land claim litigation starting with *Oneida II*, where the Supreme Court held the Oneida Nation could maintain a federal common-law action for damages based on the acquisition of Oneida lands by the State of New York in 1795 in violation of federal law.

> After [the Court's] careful consideration of the governing law, including statute-of-limitations provisions enacted by Congress specifically to

> preserve such claims, this Court concluded that neither the defendants in that case nor the Court itself had 'found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.' [*Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y. State*] 470 U.S. at 253. A number of tribal land cases have proceeded in reliance on *Oneida II* and have consumed an extraordinary amount of party, attorney, and judicial time and resources (including the resources of the federal government) during the past two decades.

United States of America v. Pataki, 413 F.3d 266 (2d Cir. 2005), *petition for cert. filed*, 2006 WL 285801, at *12 (U.S. Feb 3, 2006).

The United States further recognized that the Supreme Court "in *City of Sherrill* specifically disavowed any intent to 'disturb [its] holding in *Oneida II*.'" *Id.* It stated:

> The practical effect of the Second Circuit's decision is to "disturb [this Court's] decision in *Oneida II*." The decision below deprives the Cayugas and similarly-situated Tribes of any remedy for the State's unlawful acquisition of their lands and renders superfluous the protracted litigation that was the natural and foreseeable consequences of this Court's earlier ruling in *Oneida II*. In light of the gravity of the wrongs alleged and proved in this and similar cases, the substantial interest in affording a remedy to the Tribes that suffered those wrongs, and the significant resources consumed in the litigation of tribal land claims in the State of New York in reliance on this Court's decision in *Oneida II*, the proper reconciliation of the decisions in *Oneida II* and *City of Sherrill* should be determined by this Court rather than by a divided panel of the court of appeals.

Id. at *12-13.

The United States asserted that the court of appeals' analysis was "deeply flawed":

> Even apart from its inconsistency with this Court's decisions in *Oneida II* and *City of Sherrill*, the court of appeals' analysis is deeply flawed. The court held land claims here to be barred by the equitable defense of laches notwithstanding the legal character of the underlying ejectment action and of the damages remedy awarded by the district court, the enactment by Congress of detailed limitations provisions under which the claims at issue here are expressly deemed to be timely, and the participation as a plaintiff of the United States in its sovereign capacity, which independently renders laches inapplicable. In light of the magnitude

> of the court of appeals errors, the importance of the legal issues involved, the practical significance of these and similar land claims to Tribes and to the United States, and the reliance interests engendered by the decision in *Oneida II*, this Court's review is clearly warranted.

Id. at *13.

The United States further noted its commitment to the tribes, stating:

> In the Trade and Intercourse Acts and the Treaty of Canandaigua, the United States committed the Nation to protecting the interests of the Cayugas and other New York Indian Nations in their lands. This Court should ensure that the United States is able to honor that commitment by affording some measure of recompense for New York's clear violation of that undertaking.

Id. at *14 (emphasis added). The United States referred to the court of appeals' conclusion that the district court's "substitution of a monetary remedy for plaintiffs' preferred remedy of ejectment cannot salvage the claim, which was subject to dismissal *ab initio* as "fundamentally misguided." See *Id.* at *18.

The United States then cited extensively to the dissent in *Cayuga*, stating:

> There is nothing novel or anomalous about the entry of a damages award in an ejectment action. In his concurring opinion in *Oneida I*, then Justice Rehnquist described a similar claims as follows:
> "The complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as state in *Taylor v. Anderson*, 234 U.S. 74 (1914)."

Id. at *19 n.1.

The United States also notes that that "[i]t is a well-settled principle of federal civil procedure however, that a 'meritorious claims will not be rejected for want of a prayer for appropriate relief.'" *Id*. at *19 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978), and citing Fed. R. Civ. P. 54(c)). Thus, the United States argued

that the Second Circuit's conclusion that an initial request for a remedy later found to be inappropriate rendered their complaints "subject to dismissal *ab initio*" was contrary to established federal pleading rules. *Id.* at 19-20.

In sum, the United States has adopted the position that the Indian tribes and the United States are not barred from suing the State of New York for money damages as compensation for the State's acquisition of tribal lands in violation of federal law, and that the Second Circuit's *Cayuga* and *Oneida* decisions along those lines are "fundamentally misguided" and contrary to Supreme Court precedent and Congressional intent.

III. PLAINTIFF'S CLAIMS ARE RIPE FOR CONSIDERATION BY THIS COURT

In its motion to dismiss, the United States asserts that the Nation's claims are not ripe. Def. Mem. at 8-11. There is no doubt that litigation of the Nation's land claim has not run its entire course. A motion Fed. R. Civ. Pro. 59€ to alter or amend the judgment and allow the Nation to file an amended complaint remains pending before the U.S. District Court for the Eastern District of New York, and the United States is continuing to consider whether to intervene in that litigation on the Nation's behalf.[4] *See supra* at Def. Mem. at 9. However, this does not mean that the Nation's claims before this Court are not "ripe." Rather, this case is "ripe" for consideration because the issues in this case are fit for judicial decision *and* Plaintiff would suffer hardship from withholding court consideration. *See Caraco Pharm. Labs.*, 527 F.3d 1278, 1294-95 (Fed. Cir. 2008).

[4] Defendant is incorrect that "Plaintiff has recently resubmitted a new request to the federal government" seeking litigation assistance in Plaintiff's land claim. Def. Mem. at 8 *See also id.* at 11. The request that the Interior Department is considering is continues to be the Plaintiff's 2005 request, which the District Court in *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013, 2008 WL 4455599 (E.D.N.Y. Sept. 30, 2008), ruled had not yet been finally acted upon.

Plaintiff is challenging a "judicial taking" occasioned by dismissal and entry of final judgment against Plaintiff on its Non-Intercourse Act land claim. The legal effect of that judgment was immediate. Claim preclusion of Plaintiff's land claim is not contingent, it is current. It is only the possibility of reversal of final judgment that is contingent. But that is true of any case, even when all direct appeals have been finally exhausted, since a District Court always has jurisdiction in the proper case to grant relief from a final judgment. *See* Fed. R. Civ. Pro. 60 (Relief from a Judgment or Order). Plaintiff's claims in this case therefore are not "premised upon contingent future events" as asserted by the Defendant. Def. Mem. 9 (quoting *Bannum, Inc. v. United States*, 56 Fed.Cl. 453, 462 (2003). Rather, Plaintiff's action is "fit for judicial review [because] further factual development would not 'significantly advance [this Court's] ability to deal with the legal issues presented.'" *Caraco Pharm. Labs.*, 527 F.3d at 1295 (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003).

Further, in this case "withholding court consideration" would cause hardship to Plaintiff because "the complained-of conduct has an 'immediate and substantial impact' on the plaintiff." *Id*. (quoting *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967)). A sufficient risk of immediate hardship may warrant prompt adjudication. *Yakama Nation v. United States*, 89 Fed. Cl. At 604 (citing *Cedars-Sinai Med. Ctr. V. Watkins*, 11 F.3d 1573, 1580-81 (Fed. Cir.1993).

Plaintiff's claims in this case accrued upon entry of final judgment, which was when claim preclusion attached and barred Plaintiff's land claim. It is the preclusion of Plaintiff's land claim which "fix[ed] the alleged liability of the defendant and entitle[d] the plaintiff to institute an action." *Hopland Band of Pomo Indians v. United States*, 855

F.2d 1673, 1577 (Fed. Cir. 2011). *See, e.g., Smith v. United States*, No. 11-719C, 2012 WL 1950148 (Fed.Cl. May 30, 2012), *aff'd Smith v. Untied States*, No. 2012-5105, 2013 WL 646332 (Fed. Cir. Feb. 22, 2013), where plaintiff's claim for a judicial taking "accrued when courts took actions to disbar him[,]" notwithstanding that the following year the court that originally disbarred plaintiff (and upon whose final action subsequent reciprocal disbarments had been based) allowed his motion for reinstatement. 2012 WL 1950148 at *3. *See also Catawba Indian Tribe v. United States*, 982 F.2d 1564, 568 & n. 6, 570-571, 572 (Fed. Cir. 1993), where a cause of action for taking of a vested property right—a chose in action, the *claim* to Tribal land, rather than the land itself—was held to have accrued when injury to the Tribe occurred as a result of 1962 Termination Act, or alternatively the end of the state 10-year adverse position period in 1972 (which had become applicable to the Tribe and its property as a result of the Termination Act). The "fact that the existence of the legal harm was not finally adjudicated until the Supreme Court opinion in 1986 is not determinative of the basic question of when the injury to the Tribe occurred." 982 F.2d at 1570-571. Any equitable tolling ended by 1983, and "the causes of action should have been sued upon at the latest by 1989, six years after the district court decision dismissing the Tribe's claim." 982 at 572. *And see*

This case is similar to *Confederated Tribes of the Yakama Nation v. United States*, where the Y 89 Fed. Cl. 589 (2009), where the Yakama Nation and tribal landowners sued United States, claiming breach of trust and fiduciary duties by failing to collect rent from lessees of allotments held in trust for plaintiffs by the Secretary of the Interior. The Government moved to dismiss, arguing that plaintiffs' claim was not yet

ripe because the Government continued to explore available judicial and non-judicial debt-collection mechanisms making it "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." *Id.* At 600.

> In the final analysis, the statute of limitations applicable to plaintiffs' claim has not yet expired, although it is running. . . . This uncertainty and the time-barred action to which it may lead are sufficient to satisfy the hardship prong of a ripeness inquiry. Because 1) plaintiffs' claim is fit for judicial review and 2) plaintiffs would suffer hardship if the court were to withhold its review, plaintiffs' claim is ripe.

Id. At 617. In the current case, Plaintiff calculates that the six-year statute of limitations began to run when final judgment barring its land claim was entered on December 5, 2006—one day less than six years before Plaintiff filed the instant action. That fact is "sufficient to satisfy the hardship prong of a ripeness inquiry." *Yakama Nation*, 89 Fed. Cl. At 617.

IV. PLAINTIFF'S COMPLAINT STATES CLAIMS FOR RELIEF UNDER MONEY-MANDATING PROVISIONS OF SUBSTANTIVE LAW OVER WHICH THIS COURT HAS JURISDICTION UNDER THE INDIAN TUCKER ACT

(A) Plaintiff States A Claim For A Judicial Taking In Violation Of The Fifth Amendment To The U.S. Constitution

"The general rule is that whether or not the United States so intended, '(i)f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.'" *Blanchette v. Connecticut Gen. Ins. Corporations*, 419 U.S. 102, 126 (1974) (quoting *United States v. Causby*, 328 U.S. 256, 267 (1946). In addition, "[t]here is no question that claims for compensation are property interests that cannot be taken for public use without compensation." *Causey v. Pan American World Airways, Inc.*, 684 F2d. 1301 (9th Cir. 1982).

In a recent decision, the Court of Appeals for the Federal Circuit observed that, in its decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S.Ct. 2592 (2010), "the [U.S. Supreme] Court recognized that a takings claim can be based on the action of a court." *Smith v. United States*, No. 2012-5105, 2013 WL 646332 at *2 (Fed. Cir. Feb. 22, 2013) (citing to 130 S.Ct. at 2602 (opinion of Scalia, J.)). "[I]t was recognized prior to *Stop the Beach* that judicial action could constitute a taking of property. *See generally* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) (examining the history and evolution of judicial taking jurisprudence). . . . The Court in *Stop the Beach* did not create this law, but applied it." *Smith v. United States*, 2013 WL 646332 at *2. *See also, Petro-Hunt, L.L.C. v. United States*, 105 Fed.Cl. 37, 42, 44-45 (2012), *reconsideration den.* 108 Fed.Cl. 398 (2013); *Ultimate Sportsbar v. United States*, 48 Fed.Cl. 540, 550 (2001). *And see Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), *rev'd on other grounds*, 477 U.S. 902 (1986), *dism'd as unripe*, 887 F.2d 215 (9th Cir. 1989); *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J. concurring). *But see Brace v. United States*, 72 Ct.Cl. 337 (2006).

To be sure, *Stop the Beach* was a plurality decision, with only four of the eight justices participating in the case joining in Justice Scalia's entire opinion, only Parts I, IV and V of which were the opinion of the entire Court. All eight justices, however, joined the portion of the Court's opinion that held:

> Petitioner argues that the Florida Supreme Court took two of the property rights of the Members by declaring that those rights did not exist . . . . There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in

> its submerged land. Though some may think the question close, in our view the showing cannot be made.

Stop the Beach, 130 S.Ct. at 2610-2611 (emphasis added). Four justices declined to join in Parts II and III of Justice Scalia's opinion, which broadly addressed issues relating to alleged judicial takings. In his concurring opinion, after identifying specific conclusions expressed by Justice Scalia in Parts II and III of his opinion, Justice Breyer explained that "I do not claim that all of these conclusions are unsound. I do not know. . . . There is no need now to decide more that what the Court decides in Parts IV and V, namely, that the Florida Supreme Court's decision in this case did not amount to a 'judicial taking.'" 130 S.Ct. at 2618-2619 (Breyer and Ginsburg, JJ. concurring). *See also id.* at 2313 (Kennedy and Sotomayor, JJ., concurring). As Justice Kennedy explained, "If and when future cases show that the usual principles . . . that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented."

This is such a case. The District Court, commanded by the Second Circuit, but unconstrained by "the usual principles . . . that constrain the judiciary like due process," 130 S.Ct. at 2313 ((Kennedy and Sotomayor, JJ., concurring), took Plaintiff's property—not only its existing title to its traditional lands, which up until the District Court's judgment was fully protected by federal statute and judicial decisions, but also its cause of action to recover possession and damages for dispossession from those traditional lands, which cause of action also had been fully protected by federal statute and judicial decisions. *See Catawba Indian Tribe v. United States*, 982 F.2d 1564, 568 & n. 6, 572 (Fed. Cir. 1993); *see also* Non-Intercourse Act, 25 U.S.C. § 177; Indian Claims

Limitations Act of 1982, P.L. 97-394, §§ 2-6, 96 Stat. 1976, 28 U.S.C. § 2415 & § 2415 note; Statute of Limitations Claims List, 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983) (listing Shinnecock Nation "Nonintercourse Act Land Claim"); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235-236 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Plaintiff's Non-Intercourse Act claim is a chose in action, a right of action that arose as a result of the wrongful taking of Plaintiff's lands in violation of the without Plaintiff's consent and without payment of compensation and in violation of the express statutory laws of the United States at the time of the taking.

Although a judicial taking is recognized in the law, the test for when such a taking has occurred is less than clear. In his concurrence in *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967), Justice Stewart characterized a test variously:

> To the extent that the decision of the Supreme Court of Washington . . . constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. The Washington court insisted that its decision was 'not startling.' What is at issue here is the accuracy of that characterization.
> * * *
> I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

(Emphasis added.) Relying upon Justice Stewart's concurrence in *Hughes*, 389 U.S. at 295-298, in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), the Ninth Circuit observed that "[t]he state may also change its laws by judicial decision as well as by legislative action. Insofar as judicial changes in the law operate prospectively to affect

property rights vesting after the law is changed, no specific federal questions is presented . . . . New law, however, cannot divest rights that were vested before the court announced the new law." (Emphasis added.) Accordingly, the Court ruled that, because "the plaintiffs in this case, having acquired through judicial process a *de jure* vest right . . ., cannot now be divested of this right without just compensation." *Id*. Six years later, in *Ultimate Sports Bar, Inc. v. United States*, 48 Fed.Cl. 540, 550 (2001), the Court of Federal Claims found that "the real issue in this case is whether a judicial taking was effected[,]" and indicated that [t]o resolve this issue, we would have to determine whether the Bankruptcy Court acted in a novel and unexpected matter . . . ." However, because "the judicial taking argument was withdrawn by plaintiff," the Court did not decide the issue. Nevertheless, in *dicta* the Court declared that "[a] judicial taking occurs where a court's decision that does not even 'arguably conform[] to reasonable expectations' in terms of relevant law of property rights effects a 'retroactive transformation of private into public property.'" *Id*. (quoting Justice Stewart's concurrence in *Hughes*, 389 U.S. at 296) (emphasis added). Finally, in *Stop the Beach*, the Supreme Court agreed with the principle (but not necessarily the test) expressed in Justice Stewart's concurrence in *Hughes*, and which had been applied by the Ninth Circuit in *Robinson v. Ariyoshi*, 753 F.2d at 1474, where the Court had held that a court cannot effect a taking of previously "vested rights" without just compensation being required. Although the Supreme Court agreed that no judicial taking had occurred in *Stop the Beach*, the Court was able to agree only upon the following bare statement of the applicable test: "There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions

and contact with the water superior to the State's right to fill in its submerged land." 130 S.Ct. at 2611 (emphasis added).

The present case presents a judicial taking under any of the tests applied or suggested in the previous cases. The change in the law by the Second Circuit was surely "sudden" and "startling," and Plaintiff submits that it was "unpredictable in terms of the relevant precedents[.]" *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J. concurring). The Second Circuit's decision in *Cayuga* "does not even 'arguably conform[] to reasonable expectations' in terms of relevant law of property rights effects a 'retroactive transformation of private into public property.'" *Ultimate Sports Bar, Inc. v. United States*, 48 Fed.Cl. 540, 550 (2001) (quoting Justice Stewart's concurrence in *Hughes*, 389 U.S. at 296).

The *Oneida Nation* land claim had been upheld twice before by the U.S. Supreme Court. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). There had been dozens of decisions in the Second Circuit and federal District Courts in the *Oneida* and *Cayuga* land claims cases. *See generally Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 116-122 (2d Cir. 2010), and *Cayuga Indian Nation v. Pataki*, 413 F.2d 266, 268-273 (2d Cir. 2005) (both detailing prior histories). As detailed *infra* at 7, the Second Circuit had already twice ruled that no "federal common law" time-based defenses applied. When the Second Circuit reversed itself, it claimed it was justified based on the Supreme Court's decision in *City of Sherrill*, but *City of Sherrill* involved immunity from County taxation, not claims to the land itself, or damages for the taking of the land. *City of Sherrill* also had expressly found that the Oneida Nation had unreasonably delayed, while the Second Circuit in *Oneida* and

Cayuga land claims cased noted that the District Court had held that the neither of the tribes themselves had been responsible for delay in the bringing of their land claims. In doing so, the Court also invoked equity in favor of actual wrong-doers such as the State of New York itself, in violation of the time-honored adage that a party invoking equity must themselves have "clean hands." The Second Circuit also singled out *Indian* land claims for special treatment, rather than applying the well-established principles of *laches*, as it had previously done with respect to "ancient" *non-Indian* land claims. *See Robins Island Preservation Fund, Inc. v. Southold Development Corp*, 959 F.2d 409 (2d Cir. 1992). Finally, as detailed *infra* at 11-15, the United States has continued to assert the wrongness of the *Cayuga* decision and its fundamental departure with prior precedent.

(B) Plaintiff States A Claim For A Judicial Breach Of The United States' Trust Obligations Under The Indian Non-Intercourse Act

Defendant' assertion that "[t]he Non-intercourse Act does not set forth a specific duty making the United States liable in money damages for land transactions that were conducted without the United States' consent[,]" Def. Mem. at 20, is contrary to the caselaw.

It has long been held that the Non-Intercourse Act imposes a fiduciary obligation on the United States in favor of Indian tribes with lands subject to the protections of the Act. "The obvious purpose of [the Non-Intercourse Act] is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, other than the United States, without the consent of Congress, and to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of

their lands made without its consent." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

> That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question, both from the history, wording and structure of the Act and from the cases cited above and in the district court's opinion.

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (emphasis added). In affirming the determination of an enforceable fiduciary obligation by the District Court in that case, the First Circuit Court explained that the District Court had "relied on a series of decisions by the Court of Claims," including *Fort Sill Apache Tribe v. United States*, 201 Ct.Cl. 630, 477 F.2d 1360 (1973); *United States v. Oneida Nation of New York*, 201 Ct.Cl. 546, 477 F.2d 939 (1973); and *Seneca Nation v. United States*, 173 Ct.Cl. 917 (1965), "while also finding support in an extensive body of cases holding that when the federal government enters into a treaty with an Indian tribe or enacts a statute on its behalf, the Government commits itself to a guardian-ward relationship with that tribe." 528 F.2d at 379 (citing to *Heckman v. United States*, 224 U.S. 413 (1912); *United States v. Kagama*, 118 U.S. 375 (1886); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

"[I]n *Seneca* [*Nation v. United States*, 173 Ct.Cl. 917 (1965)], the Court of Claims held that the Indian Trade and Intercourse Act of 1790 'created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and that the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions.... The concept is obviously one of full fiduciary responsibility, not solely of traditional market-

place morals.'" *Alabama-Coushatta Tribe of Texas v. United States*, 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000) (quoting *Seneca Nation*, 173 Ct.Cl. at 925) (emphasis added). In *Alabama-Coushetta Tribe of Texas v. United States*, the Court of Federal Claims panel found that the Act guarantees the United States "to avoid improper and unfair disposition of Indian lands and to allow the federal government to act as parens patriae to effectuate this purpose.... [T]he relationship is more than that of a nonparticipating bystander, or of a sovereign toward its ordinary citizens. It is a special relationship necessitating a special responsibility." 2000 WL 1013532 *50 (Fed. Cl. Jun. 19, 2000) (citing *United States v. Oneida Nation of New York*, 477 F.2d 939, 943 (Ct.Cl.1973). "In light of that guarantee, the government may be statutorily obligated to protect the tribe's interests even if it did not actually participate in or assist a third party in the acts that harmed an Indian tribe." *Id.* (citing *Oneida Nation of New York*, 477 F.2d at 944)

In *Passamaquoddy v. Morton*, the First Circuit held that "The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy . . . , and *clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances*." 528 F.2d at 379 (citing to *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 348 (1941))(emphasis added). Although the First Circuit determined that "it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship[,]" under the circumstances, *id.*, in fact the District Court had ordered the United States to file a lawsuit on the Tribe's behalf in the fact of the impending expiration of the statute of limitations. 388 F.Supp. 649, 654 (D. Me. 1975). Although the United States had

appealed the order, the appeal had been dismissed on motion of plaintiffs and the United States. 528 F.2d at 373.

Breach by the United States of its fiduciary obligations under the Non-Intercourse Act has been held to be compensable by an award of damages. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 at *4-*5 (1965). In that case, the Court of Claims held that the United States was liable for such breaches under the Indian Claims Commission Act of Aug. 13, 1946, c. 959, § 2, 60 Stat. 1049, formerly codified at 25 U.S.C. § 70a. Liability was found not only under clause (5) of section 2, which granted the Claims Commission jurisdiction over and waived the United States' immunity for pre-1946 "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity[,]" but also under clause (3) of section 2, for pre-1946 "claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity[.]" *See also Oneida Nation of New York v. United States*, 26 Ind. Cl. Comm. 138, 139 (1971) (liability for breach of fiduciary duty under Non-Intercourse Act under clauses 3 and 5 of section 2 of the Indian Claims Commission Act); *Cayuga Nation of Indians v. United States*, 28 Ind. Cl. Comm. 237, 239 (1972), and 36 Ind. Cl. Comm. 75 (1975) (same); *Stockbridge Munsee Community v. United States*, 41 Ind. Cl. Comm. 192 (1978) (same); *Alabama-Coushetta Tribe of Texas v. United States*, 28 Fed. Cl. 95 (Fed. Cl. 1993), *aff'd in part, rev'd in part* 2000 WL 1013532 *50 (Fed. Cl. Jun. 19, 2000)(same; congressional reference case waiving late filing under the Indian Claims Commission Act).

These cases upholding damage awards under clause 3 of section 2 of the Indian Claims Commission Act measure the compensability of breaches by the United States of its fiduciary obligations under the Non-Intercourse Act under existing law "which would result *if* the treaties, contracts, and agreements" were revised in equity. The Non-Intercourse Act is thus "a source of substantive of law [that] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). This is particularly appropriate because the underlying claim "taken" by the District Court in *Shinnecock* was a claim for compensation for violation of the Non-Intercourse Act.

As with the Takings Clause of the Fifth Amendment, Plaintiff submits that the fiduciary obligation of the United States is broad enough to apply to the judicial branch as well as the legislative and executive branches.

The First Circuit Court in *Passamaquoddy* held that its fiduciary obligation under the Non-Intercourse Act required the federal government to "take such action as may be warranted in the circumstances." 528 F.2d at 379. In a similar context, where the fiduciary obligation was based on a treaty, the Court of Claims ruled that "The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration. The real question is: Did the Federal Government do whatever it was required to do, in the circumstances . . . ." *Oneida Tribe of Indians of Wis. v. United States*, 165 Ct. Cl. 487, 494 (1964) (breach of obligation under 1838 Treaty).

In the case of the judicial branch, Plaintiff submits that in the context of a federal court presented with Plaintiff's Non-Intercourse Act land claim, that "whatever it was required to do, in the circumstances" included *enforcing the statute in accordance with its terms—i.e.*, adjudicating the claim on the merits—instead of simply holding the claim barred by the *nature of the claim itself*. *Cf. Boddie v. Connecticut*, 401 U.S. 371 (1971) (state court legally obligated to adjudicate marriage dissolution case notwithstanding indigents' inability to pay court fees and costs).

(C) Plaintiff States A Non-Tort Claim Under The Common Law For A Judicial Breach Of The United States' Human Rights Obligations Under International Law

In additional to claims founded on "the Constitution and any Act of Congress[,]" the Tucker Act grants the Court of Federal Claims jurisdiction over "any claim against the United States . . . for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a). The U.S. Supreme Court has explained that this final clause creates the fourth of four classes of cases under the Tucker Act. *Dooley v. United States*, 182 U.S. 222, 224, 226 (1901); *see also United States v. Lockheed L-188 Aircraft*, 656 F.2d 390, 394 n. 8 (9th Cir. 1979) (same). The U.S. Court of Claims and the U.S. Claims Court have observed that the final clause is "the least developed and least known of our kinds of jurisdiction[,]" *Menominee Tribe of Indians v. United States*, 607 F.2d 1335 (Ct.Cl. 1979), and "'has never been fully and authoritatively construed.'" *Cape Fox Corp. v. United States*, 4 Cl.Ct. 223, 230 (1983) (quoting *Mitchell v. United States*, 664 F.2d 265, 270 n. 7 (Ct.Cl. 1981)).

Plaintiffs in *Cape Fox* and *Mitchell* did not rely on the clause and accordingly the Court did not apply it or elaborate on it. *Cape Fox*, 4 Cl.Ct. at 230; *Mitchell*, 664 F.2d at

270 n. 7. In *Inupiat Community of the Arctic Slope v. United States*, 230 Ct.Cl. 647, 680 F.2d 122, 132 (Ct.Cl. 1982), the held that the final clause of the Tucker Act did not give jurisdiction over a claim for breach of a trust duty by Congress in having enacted the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601-1628, holding, *inter alia*, that the Non-Intercourse Act did not "waive[the United States'] sovereign immunity." 680 F.2d at 131. However, the case was decided before the U.S. Supreme Court clarified the "confusion that has arisen as to whether the Tucker Act constitutes and waiver of sovereign immunity, and the relationship of the waiver to the requirement for a money claim," in *United States v. Mitchell*, 463 U.S. 206 (1983), *Cape Fox*, 4 Cl.Ct. at 230. The same is true of *Menominee Tribe*, 607 F.2d 265, where the Tribe asserted that Congress had breached only a "general trust obligation" by having terminated the Tribe. 607 F.2d at 1340.

Plaintiff premises jurisdiction in this Court over Plaintiff's claim against the United States based upon the common law as being among the "fourth class of cases" authorized under the Tucker Act—claims for "liquidated or unliquidated damages in cases not sounding in tort."

It is well-established that the common law incorporates international law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). "International law and international agreements of the United States are law of the United States and supreme over the law of the several States. . . . Cases arising under international law . . . are within the Judicial Power of the United States

and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts. Restatement (3d) of Foreign Relations Law of the United States § 111(1) and (2) (International Law and Agreements as Law of the United States) (hereinafter "Rest. (3d) Foreign Relations"). *See also generally,* Koh, *International Law As Part of Our Law*, 98 Am. J. Int'l L. 43 (2004); Young, *Sorting Out the Debate over Customary International Law*, 42 Va. J. Int'l L. 365 (2002).

As with the Takings Clause of the Fifth Amendment, the obligation of the United States under customary international law is broad enough to apply to the judicial branch as well as the legislative and executive branches. In fact, several recent cases have involved alleged (and even admitted) breaches of international obligations by courts. *See, e.g., Medellin v. Texas*, 552 U.S. 491 (2008) (breaches by Texas State courts of United States' obligations under the Vienna Convention on Consular Relations)

When it comes to its international legal obligations, different parts of the national government, as well as the state, local and tribal governments, each have obligations to act within their respective spheres in accordance with the United States' obligations. The United States fulfills its obligations through each of these branches and parts of the nation so acting. As the U.S. State Department recently explained, "We believe the best human rights implementation combines overlapping enforcement *by all branches of the federal government* working together with state and local partners." *Response of the United States of America to Recommendations of the United Nations Human Rights Council*, ¶ 10, Remarks of Harold Hongju Koh, Legal Advisor, U.S. Department of State (Nov. 9, 2010) (emphasis added), http://www.state.gov/s/l/releases/remarks/150677.htm (last visited April 12, 2013).

In its Motion to Dismiss, Defendant does not directly take issue with Plaintiff's allegations that federal common law, based upon international law, proscribes the refusal of the federal courts to entertain and adjudicate Plaintiff's land claim on the merits in a manner consistent with contemporary norms of international law. Rather, Defendant simply asserts that the U.N. Declaration on the Rights of Indigenous Peoples does not constitute a money-mandating source of law sufficient to provide a basis for jurisdiction under the Tucker Act. Def. Mem. at 22-23. But Plaintiff does not claim that it does. Nor does Plaintiff claim that the Indigenous Rights Declaration creates a "Trust Duty" or "fiduciary duty[.]" Def. Mem. at 22-23.

Plaintiff's express pleading of the provisions of the U.N. Declaration on the Rights of Indigenous Peoples, (along with the United Nations Charter, the Universal Declaration on Human Rights, and the International Covenant on Civil and Political Rights,) is not intended to indicate that Plaintiff is seeking to enforce the Indigenous Rights Declaration as positive law, but rather to rely on the Declaration as being an important and authoritative articulation of the broad and perhaps universal global consensus of the application of the broader international Human Rights norms in the specific context of the world's indigenous peoples, including Plaintiff, *so far as is applicable to Plaintiff's claims in this case*. United Nations declarations generally do not in and of themselves have any binding force, but they are relevant to determining the content of international law. *See* Rest. (3d) Foreign Relations §§ 102 (Sources of International Law) and 103 (Evidence of International Law) & esp. comment *c (Declaratory resolutions of international organizations*) ("Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual

unanimity, are given substantial weight."). *Cf.* J.Y. Henderson, *Indigenous Diplomacy* 82 (Saskatoon: Purich 2008) ("The usual interpretation of a declaration as a non-binding instrument on nation-states is challenged in the Declaration [on the Rights of Indigenous Peoples] by its relations to the Human Rights Covenants, it long history of legalistic negotiations, the wording of the text, and its institutional or systematic commitments.").

Accordingly, Plaintiff urges the legal sufficiency of the factual allegations contained in the Complaint—allegations that international law so provides under circumstances such that such international law is incorporated into United States common law—together with allegations of exemplary instruments and decisions such as to demonstrate a factual and legal basis for such claim being sufficiently "plausible" to survive a motion to dismiss under Rule 12(b)(6). Nor should the assertion seem implausible in any way—that the common law itself, based on international law which itself owes much of its content to the law, initiative and practice of the United States, provides a basis for Plaintiff's claim—when (as Plaintiff alleges) the U.S. Constitution and a federal statute themselves also so provide. "A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; . . . or (c) by derivation from general principles common to the major legal systems of the world." Rest. (3d) Foreign Relations § 102(1)(a) & (c) (Sources of International Law). "General principles common to the major legal systems of the world, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate." *Id.*, § 102(4). As Defendant points out in its Motion to Dismiss, in announcing its support for the Indigenous Rights Declaration, the United States declared that the "United States

will interpret the redress provisions of the Declaration to be consistent with the existing system for legal redress in the United States, while working to ensure that appropriate redress is in fact provided under U.S. law." Def. Mem. at 23. But that is all that Plaintiff asks for in this case—"that appropriate redress is in fact provided under U.S. law." Nor is it relevant that "the United States clearly emphasized that the [Declaration] contains aspirational goals . . . ." Def. Mem. at 23. As Justice Ginsburg pointed out several years ago, "'Equal Justice Under Law' is etched about the U.S. Supreme Court's grand entrance. It is an ideal that remains aspirational." Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 Wash. U. J.L. & Pol'y 1 (2001). But of course, being "aspirational" doesn't mean that "equal justice under law" isn't required by law. *See, e.g.*, U.S. Const. Amend. XIV, § 1; *Lawrence v. Texas*, 539 U.S. 558 (2003).[5]

Of course, Plaintiff bears the burden of demonstrating this Court's jurisdiction, whether or not Defendant challenges it, and the Court is free to go beyond the factual allegations contained in Plaintiff's Complaint for that purpose. * * * However, while "[t]he determination or interpretation of international law or agreements is a question of law and is appropriate for judicial notice in courts in the United States without pleading or proof[,] . . . Courts may in their discretion consider any relevant material or source, including expert testimony, in resolving questions of international law." Rest. (3d) Foreign Relations § 113. *And see id., comment c* (*Expert witnesses and other relevant* evidence). With the Court's permission, Plaintiff intends to fully document the content of

[5] It is also not relevant that in announcing support for the Declaration, the United States in 2012 indicated that it did "not view the Declaration 'as legally binding or a statement of current international law.'" Def. Mem. at 23. As indicated above, Plaintiff agrees that the Declaration is not legally binding *in and of itself*, *infra* at 32, and the assertion that the Declaration does not state "current" international law" is overly broad and thus too vague with respect to any specific rule as to be probative of whether the United States may have "dissociated itself during the process of its formation" such as to not be bound by any specific rule. Rest. (3d) Foreign Relations Law § 111, *comment b.*

relevant international law, including customary law, including through expert witness testimony, as is applicable to Plaintiff's limited claim in this case.

As indicated in the Complaint, Plaintiff claims that federal common law (based on international law) provides a right to compensation itself. Such a source of law is necessarily money-mandating for its violation. "Statutes that have been 'interpreted as mandating compensation by the Federal Government for the damage sustained,' . . . [are those that] attempt to compensate a particular class of persons for past injuries or labors." *Bowen v. Massachusetts*, 487U.S. 879, 907 n. 42 (1988) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct.Cl. 1967)).

Plaintiff further claims that such common law-based right to compensation is mandatory by its terms. The universal (or near universal) global consensus, as articulated in the Indigenous Rights Declaration, but part of United States law as an international law norm, is that "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, *just, fair and equitable compensation*, for the lands, territories as resources . . . which have been confiscated, taken, used or damaged without their free, prior and informed consent[,]" and that compensation *shall* take the form of lands . . . or of *monetary compensation* or other appropriate redress. Indigenous Rights Declaration, art. 28 (emphasis added). Such mandatory language is indicative of a money-mandating source of law. "'We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating.'" *Greenlee County v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (quoting *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)). *See also Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 594 (Fed. Cl.

2011). Plaintiff submits that the same is true whether the money-mandating source of law is the Takings Clause, a federal statute or regulation, or the common law based on international law. Under the Tucker Act, it is only "a separate source of substantive law that creates the right to money damages . . . [that] a plaintiff must identify[.]" *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005).

Other cases holding that this Court does not have jurisdiction under the Tucker Act over claims based on "customary international law" or "growing out of treaties" are inapposite. *See, e.g., Pikullin v. United States*, 97 Fed.Cl. 71, 77-78 (2011), where the Court of Federal Claims held that "the court lacks jurisdiction over plaintiff's international law claims[,]" noting that "'the Tucker Act contains no language permitting this court to entertain jurisdiction over claims founded upon customary international law' and that language providing for judicial recourse 'is horatory and cannot be fairly interpreted as mandating compensation for violations thereof[.]'" (quoting *Phaidin v. United States*, 28 Fed.Cl. 231, 234 (1993); *see also Al-Quasi v. United States*, 103 Fed. Cl. 439, 444 (2012) (same). Plaintiff's claim is not based on "international law" *per se*, and does not "grow[] out of treaties, 28 U.S.C. § 1502, nor . . . grow[] out of international executive agreements." *Phaidin v. United States*, 28 Fed. Cl. at 234 n. 1 (citing *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976)); *see also Gimbernat v. United States*, 84 Fed. Cl. 350, 354-355 (2008) (same). Rather, Plaintiff's claim is based on federal common law.

The fact that the specific content of the applicable federal common law in this case is based upon developments in the law internationally is not only unremarkable, it actually is inherent in the area of federal common law known as "Federal Indian Law."

As the U.S. Supreme Court has explained, the origins of what we now call Federal Indian Law—and in particular the historical source of the States' and the United States' claim to Indian lands—is the customary international law of the European colonial powers that provided the legal basis for European colonialism. *See, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832). *See generally* F. Cohen, Handbook of Federal Indian Law §§ 102[1] and 5.07[1], pp. 8-17 and 451-453 (N. Newton, et al., eds. 2012).

As these sources generally indicate, the Non-Intercourse Act itself, (as well as the fiduciary obligation it creates,) is simply a statutory codification of the restraint on alienation of Indian lands imposed under European customary international law. But that law has been developing since World War II, and currently no longer supports the legality of certain past practices, and further provides substantive rights to remediation (which may include money damages) for the harm that resulted from application of certain of those colonial international law-based practices—including the taking of Indian lands such as underlies the Shinnecock Nation land claim. *See generally* F. Cohen, Handbook of Federal Indian Law § 5-07, pp. 451-482.

V. NONE OF THE OTHER LEGAL DEFENSES RAISED BY DEFENDANTS BAR PLAINTIFF'S CLAIMS

(A) Plaintiff Does Not State A Claim Based Directly Upon The Indigenous Rights Declaration Or Upon Any Treaty Or Convention.

Defendant further asserts that the 2007 U.N. Declaration on the Rights of Indigenous Peoples does not set forth a "specific, enforceable, mandatory trust duty requiring United States' Courts to not follow [U.S.] Supreme Court precedent." But Plaintiff does not claim that it does, not only because the U.N. Declaration does not address the question, but more importantly for this case, because there is no such U.S.

Supreme Court precedent that United States courts are following that is relevant to Plaintiff's claims. On the contrary, and as the U.S. Department of Justice has repeatedly explained to the United States courts in recent years, the *Cayuga-Oneida* "equitable defenses" created and applied by the Second Circuit Court of Appeals in recent Indian land claim cases is not required by, but rather is actually in conflict with, applicable U.S. Supreme Court precedent. The United States was a co-plaintiff in both the *Cayuga* and the *Oneida* land claim cases, and objected strenuously to the newly-crafted "equitable" doctrines. In both cases, the United States applied to the U.S. Supreme Court for a writ of certiorari, arguing that the Second Circuit Appeals Court decisions were contrary to existing precedent. The U.S. Supreme Court denied certiorari both times, which of course does not mean that the Court agreed with the Court below. There is no U.S. Supreme Court precedent on the legality of the Second Circuit doctrine. However, in another ongoing Indian land claim case, *Canadian St. Regis Mohawk Band v. New York*, 5:82-cv-00783 (N.D.N.Y.), the United States again within the past several months has formally taken the position that application of the *Cayuga-Oneida* "equitable" defenses violates existing law, including applicable U.S. Supreme Court precedent. *See* Doc. No. 592 at 29.

(B) Plaintiff Does Not State Claims For Federal Agency Action Or Inaction.

Defendant asserts that "any claims" based upon the Nation having requested litigation assistance from the United States Departments of the Interior and Justice in 1978 and again in 2005 are outside the statute of limitations. However, Plaintiff does not bring any such claims. Plaintiff's claims are based upon actions by the federal judicial branch, not actions or inactions by the federal executive branch. Plaintiff's

claims are based on the dismissal of Plaintiff's land claim and entry of judgment against it by the U.S. District Court in December 2006, *not* and previous "failures to provide an effective remedy" for the unlawful taking of Plaintiff's lands and dispossession of Plaintiff and its people in the several decades following 1859. However, even if Plaintiff's claim did relate to its 2005 request, however, the statute of limitations on any claim could not have begun to run, because the United States has never declined to act on the request and in fact is currently in the process of considering and making a decision on the request. *See infra* at n. 29. Defendant's assertion that the statute has run does serve to exemplify the reasonableness of Plaintiff's apprehension of the running of the statute of limitations on the claim it does bring in this case, however, and therefore the necessity of its protective filing of this lawsuit.

(C) Plaintiff Does Not State Claims That Were Within the Jurisdiction of the Indian Claims Commission

Defendant also asserts that the U.S. Congress previously provided means of effective redress to the Nation and other Indian tribes by having provided a forum through enactment of the Indian Claims Commission Act of 1946. But the Nation's claims in this case are not based on matters that were within the jurisdiction of the Indian Claims Commission, whose jurisdiction was limited to claims that had arisen prior to 1946. The Nation's claims in the current case are not based upon actions or inactions by either the federal executive branch or by the U.S. Congress (or for that matter the federal judicial branch) prior to 1946. Rather, the Nation's claims are based upon the post-1946 current failure by the federal judicial branch to adjudicate the Nation's land claims, filed in 2005, in a manner consistent with the requirements of applicable customary international law (which constitutes part of the federal common

law) and federal domestic statutory law and the interpretation and effect accorded that statutory law under the federal common law. Nor can the prior existence of the Indian Claims Commission alleviate or excuse the current violation of the law by the federal judicial branch or render it consistent with applicable law.

The courts have a legal obligation to adjudicate Plaintiff's land claim on the merits and its ability to refuse to do so is proscribed by applicable law. Applicable law does not allow the courts to refuse to entertain Plaintiff's land claim because of the prior existence of the Claims Commission, and the courts did not do so in fact. The federal judicial branch has not refused to adjudicate the merits of Plaintiff's land claim because of the Nation either having filed or not filed a claim under the Indian Claims Commission Act.

CONCLUSION

For the foregoing reasons, Plaintiff urges this honorable Court to deny Defendant's Motion to Dismiss.

Respectfully submitted this 22d day of April, 2013.

FREDERICKS PEEBLES & MORGAN LLP
John M. Peebles
Steven J. Bloxham
Darcie L. Houck
2020 L Street, Suite 250
Sacramento, California 95811
(916) 441-2700

By: /s
Steven J. Bloxham, Esq.
Attorneys for Plaintiff
E-mail: sbloxham@ndnlaw.com
T: (916) 441-2700
F: (916) 441-2067