UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

SALLY JEWELL, et al.,

Defendants.

No. 6:08-cv-00644 LEK/DEP

MEMORANDUM IN SUPPORT OF STOCKBRIDGE-MUNSEE MOTION TO INTERVENE

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

The Stockbridge-Munsee Community, Band of Mohican Indians ("Stockbridge") moves this Court for leave to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2). Stockbridge claims an ownership interest in some of the lands that are the subject of this action and the disposition of this action may impair or impede Stockbridge's ability to protect that interest. Stockbridge's interest is adverse to that of all existing parties and its interest therefore is not represented by any of them. Rule 24(a) states:

> On timely motion, the court must permit anyone to intervene who:
> . . . .
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

I. INTRODUCTION

The State of New York, joined by Madison and Oneida Counties, have entered into a Settlement Agreement ("Settlement Agreement" or "SA") with the Oneida Indian Nation of New York (OIN) to resolve, among other things, this action and two related tax-foreclosure actions that are the subject of a review petition before the United States Supreme Court and which concern the same lands that are the subject of this action. To become effective, the Settlement Agreement requires the approval of the Department of the Interior ("DOI"), followed by this Court's approval in the form of a stipulation and order of dismissal that incorporates the terms of the Settlement Agreement into the order.[1] Stockbridge believes that this stipulation and order of

[1] In a letter dated June 17, 2013, Stockbridge-Munsee Community President Wallace A. Miller wrote to New York Governor Cuomo and lodged several narrow objections to the Settlement Agreement. The letter requested that the Settlement Agreement be modified to protect Stockbridge's rights before implementing legislation was passed by the New York Legislature. The letter also stated that Stockbridge representatives were available to discuss Stockbridge's

dismissal is likely to be presented to this Court for approval in the near future. Because the Settlement Agreement has yet to be presented to this Court, this motion is timely.

Stockbridge seeks to participate in this action for the limited purpose of objecting and seeking minor modifications of this Court's order approving the Settlement Agreement insofar as it affects the status of lands that are the subject of this action, the tax-foreclosure litigation and the Stockbridge land-claim action which is presently on appeal to the Second Circuit. *See* Notice of Appeal (Dkt. No. 304 in Civil Action No. 3:86-cv-1140). Although the Stockbridge treaty lands have never been a part of any Oneida reservation, the Settlement Agreement erroneously treats them as reacquired Oneida Reservation lands.[2] If approved by this Court, the Settlement Agreement would resolve in the OIN's favor a central issue in Stockbridge's pending land-claim action by defining the Stockbridge treaty reservation as part of the Oneida Treaty Reservation.

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concerns with the Governor or his staff at the Governor's convenience. Thereafter, Stockbridge received no acknowledgement or reply from the Governor's office.

[2] Section II.Q of the Settlement Agreement defines the land acknowledged to be the Oneida reservation by the 1794 treaty of Canandaigua, 7 Stat. 44, as the land within the reservation that is "depicted on the map attached as Exhibit I." *See* SA at 3, Exhibit 12 to the supporting Declaration of Don B. Miller (Declaration exhibits are hereinafter cited as "Decl. Ex. __"). But the Agreement's Exhibit I (Decl. Ex. 1) inaccurately depicts the boundaries of the Oneida Reservation, improperly "airbrushing" out the 23,000-acre New Stockbridge reservation. *Compare* the Agreement's Exhibit I with the Bureau of Land Management (BLM) maps prepared by the United States in connection with the now-dismissed Oneida land claim (Decl. Ex. 2). The attached BLM maps prepared for that litigation accurately depict the 1788 New Stockbridge reservation as situated outside the exterior boundaries of the 1788 Oneida reservation, as do eighteenth and nineteenth century maps (Decl. Ex. 3). In the Oneida land claim, neither the Oneida tribal plaintiffs nor the United States as intervenor asserted any claim to, or interest in, the New Stockbridge Reservation. In fact, New Stockbridge was expressly excluded from that land claim. *See* Amended Complaint at 4, note 1, filed November 9, 2000 in *Oneida Indian OIN of New York, et al. v. State of New York*, No. 74-cv-187 (NDNY) (Decl. Ex. 4).

Because the Stockbridge treaty reservation lands are the subject of the pending Stockbridge land-claim action,[3] they are under the jurisdiction of the federal courts in that action and are not subject to having their status altered in this action in a manner that would preclude the relief sought in the land-claim action. In addition, by defining the Stockbridge treaty reservation lands as part of the Oneida treaty reservation, the Settlement Agreement changes the status of an 81.761-acre parcel (Parcel ID no. 136 on Ex. A to the SA, Decl. Ex. 12) that the DOI's 2008 Record of Decision removed from the list of accepted parcels because it was not contiguous to the Oneida reservation.

Finally, the Settlement Agreement broadens the scope of this litigation to include the tax-foreclosure litigation and resolve the reservation boundary question that was the basis for Stockbridge's motion to intervene in the tax-foreclosure litigation. In that litigation, Stockbridge's intervention was denied because the Oneida reservation boundaries were not being determined in those actions. *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 163 (2d Cir. N.Y. 2010); *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 442-443 (2d Cir. 2011). Now, however, the Settlement Agreement seeks an order of this Court that approves the Settlement Agreement and resolves the reservation-boundary issue in the OIN's favor. Broadening the scope of this litigation to include a resolution of the reservation boundary issue in Stockbridge's absence is inconsistent with the Second Circuit's rulings on Stockbridge intervention in that litigation. *See* SA, Ex. D at 2 (Decl. Ex. 12) (Proposed Amended Judgment in *Oneida Indian Nation v Oneida County*, Case No. 6:05-cv-0945, dismissing tax-foreclosure action and denying Stockbridge's motion to intervene).

[3] *See* First Amended Complaint in *Stockbridge-Munsee v. N.Y.*, No. 86-cv-1140 (Decl. Ex. 5).

For the foregoing reasons, Stockbridge must be permitted to intervene under Rule 24(a)(2) for the limited purpose of objecting to the Settlement Agreement insofar as it affects the status of Stockbridge treaty reservation lands and requesting that this Court's order approving the Settlement Agreement provide that nothing in the order shall be construed as: a) a judicial determination of the boundaries of the 1794 Oneida treaty reservation or, more specifically, a determination that the 1788/1794 Oneida treaty reservation includes the lands that Stockbridge asserts in its land-claim action and the tax-foreclosure litigation were set aside as a permanent Stockbridge treaty reservation by the 1788 Treaty of Fort Schulyer and its 1789 implementing act and which, Stockbridge asserts, were acknowledged as a permanent Stockbridge reservation by the 1794 Treaty of Canandaigua; or, b) this Court's approval of DOI's acquisition in trust of any lands that are situated within the area claimed by Stockbridge but not contiguous to the undisputed (by Stockbridge) Oneida reservation acknowledged by the 1794 Treaty of Canandaigua.

II. BACKGROUND

A. Historical Background

Long before the Colony of New York or the United States came into existence, the Mahican (Mohican) and Munsee Indians occupied vast adjacent areas on the East Coast.[4] The Mahicans, an ethnically distinct, politically autonomous native people, were the direct cultural and political antecedents to the present-day Stockbridge. The historical and archeological record establishes that the Mohican Indians' occupancy of the mid-and-upper Hudson Valley, as well as the Capital Region of New York State, dates back centuries. In 1609, the Mohican Indians

[4] *See* Wm. C. Sturtevant, "Early Indian Tribes, Culture Areas, and Linguistic Stocks," Smithsonian Institution (1967) (Map). (http://llmap.org/images/Smithsonain/Sturtevant.jpg).

greeted Henry Hudson near the site of present-day Albany.[5] In the early part of the eighteenth century, the Mohicans, under pressure from expanding colonial settlement, consolidated at Stockbridge, Massachusetts,[6] where they were joined in the 1750s by a large band of Munsee Indians.[7] By the end of the Revolutionary War, the further reduction of their lands through sales and other takings made it impossible for the Stockbridge to remain on their Massachusetts reservation. Sometime around 1785, they accepted an Oneida invitation to settle on a six-mile-square tract (23,040 acres) carved out of Oneida aboriginal territory in Oneida and Madison Counties in central New York.

This tract was surveyed and granted by the Oneida OIN to Stockbridge in 1785, was known as New Stockbridge, and was confirmed by state[8] and federal treaty. In his recently published book, "From Homeland to New Land: A History of the Mahican Indians, 1600 – 1830," (University of Nebraska Press, 2013), respected scholar and professor emeritus of anthropology Dr. William A. Starna confirms that this land, which is the subject of Stockbridge's land-claim action currently on appeal in the United States Court of Appeals for the Second Circuit (No. 13-3069cv), has never been a part of the Oneida reservation. Starna (2013) at 204 – 214. In the Stockbridge land-claim action before this Court (Civil Action No. 86-cv-1140), Dr. Starna's conclusions and opinion were submitted in the Affidavit of William A. Starna, Exhibit A to the Declaration of Don B. Miller in (Dkt. No. 288 in No. 86-cv-1140). In this action, the

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[5] *See* William A. Starna, From Homeland to New Land: A History of the Mahican Indians, 1600 – 1830, University of Nebraska Press (2013); Campisi, Hudson Valley Indians; Gehring and Starna, Dutch and Indians.

[6] *See* Starna (2013) at 179; Hopkins, Historical Memoirs; Frazier, Mohicans of Stockbridge; Colee, "Housatonic Stockbridge Indians."

[7] *See* Grumet, Colonial Hudson Valley; Handlin and Mark, eds., "Chief Daniel Nimham."

[8] Hough, Proceedings of the Commissioners of Indian Affairs Appointed by Law for the Extinguishment of Indian Title in the State of New York, Albany (1861) at 230.

same Starna Affidavit containing his conclusions and opinions regarding the nature and extent of Stockbridge and Oneida land rights recognized and extinguished by state and federal treaties and statutes during the period 1788-1794 and in 1856 is attached as Exhibit 7 to the supporting Declaration of Don B. Miller and will be cited as "Starna Aff. at __."

The historical record shows that in 1785, Oneida and Stockbridge leaders attempted to secure the enactment of state legislation "for confirming a grant from the Oneida to the Stockbridge Indians, under proper restrictions." In that same year, a bill to confirm the grant passed the New York State Senate but died in the Assembly. Starna (2013) at 202 quoting *Journal of the Senate*, 10-11; Starna Aff. at 3 and 6-8 (Decl. Ex. 6).

In 1788, at the proceedings culminating in the Treaty of Fort Schuyler between the State and the Oneidas, Oneida leaders again sought to have the state confirm the 1785 grant to Stockbridge. Oneida leaders insisted to Governor Clinton that Stockbridge "must be established in their Settlements by you." *Id*. at 204, quoting Hough, *Proceedings of the Commissioners*, 1:243-44. This time they were successful. The 1788 Treaty established an initial reservation for the Oneidas and a separate, smaller reservation of six miles square for the Stockbridge:

> and further *notwithstanding any reservations of lands to the Oneidas for their own use*, the New England Indians (. . . Brothertown . . .) and their posterity forever, and *the Stockbridge Indians [sic] and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say*, a tract of two miles in breadth and three miles in length for the New England Indians, and *a tract of six miles square for the Stockbridge Indians*.

(emphasis added). The Second Circuit has expressly held that the 1788 Treaty of Fort Schuyler was a valid exercise of the sovereign power to extinguish Indian title. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2d Cir. 1988), *cert. denied* 493 U.S. 871 (1989).

In 1789, the New York Legislature implemented the 1788 Treaty by statute and permanently established the Stockbridge Reservation, decreeing: "that the tract of land,

confirmed by the Oneida Indians to the Stockbridge Indians at the said treaty, shall be and remain to the said Stockbridge Indians and their posterity . . . ." Starna (2013) at 205, quoting *Laws of the State of New York,* 70 [*AN ACT for the sale and disposition of lands, belonging to the people of this State*], Laws of the State of New York, Vol. III, Chap. 32, 69-72 (Albany, 1877)]; Starna Aff. at 3 and 8-10 (Decl. Ex. 6).

During the Revolutionary War, the Stockbridge Indians were allied with the United States and suffered heavy casualties. Shortly after the War, the United States entered into several treaties with the Stockbridge.

In the Article of April 23, 1792, a Senate ratified agreement between the United States and the "Five Nations of Indians, so called, being the Senecas, Oneidas, and the Stockbridge Indians," the United States agreed to expend $1500 annually to purchase "clothing, domestic animals, and implements of husbandry, and for encouraging useful artificers to reside in their villages." AGREEMENT WITH THE FIVE NATIONS OF INDIANS, April 23, 1792, American State Papers, Indian Affairs, Vol. 1, p. 232; Kappler's Indian Affairs, Laws and Treaties, Vol. II, 1027 (Gov't Printing Office 1904) (Decl. Ex. 7).

In the 1794 Treaty of Canandaigua, 7 Stat. 44, the United States renewed and expanded its obligations to Stockbridge (Decl. Ex. 8). In Article VI of the 1794 Treaty, the United States promised to add $3000 to the $1500 annual expenditure promised under the 1792 Article:

> making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing cloathing (sic), domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendant (sic) appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

As a signatory to the 1794 Treaty, Stockbridge, like other signatory tribes, received annuities under the Treaty from the United States.[9]

In article II of the Treaty of Canandaigua, the United States promised never to disturb any of the signatory tribes in the "free use and enjoyment" of their Confederal-period reservations, thereby extending federal recognition and protection to the New Stockbridge Reservation. In 1971, the Indian Claims Commission found that "Stockbridge had a compensable property interest in New Stockbridge," that article II of the 1794 Treaty "related to the lands of the Stockbridges" and that "[a]rticle II pledged the United States never to disturb them in their free use and enjoyment of New Stockbridge." *The Stockbridge Munsee Community v. United States*, 25 Ind. Cl. Comm. 281, 291, 295 (1971) (Decl. Ex. 9).[10] *See* Starna Aff. at 5-6 and 10-12 (Decl. Ex. 6).

The State of New York later acquired possession of New Stockbridge in a series of 15 "treaties" executed without federal participation or approval between 1818 and 1842. 25 Ind. Cl. Comm. at 282-283 (Decl. Ex. 9). Beginning in about 1820, the Tribe began its relocation to present-day Wisconsin.

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[9] *See Six Nations, et al. v. United States*, 32 Ind. Cl. Comm. 440 (1973) which dealt with claims arising under "an Article dated April 23, 1792" and the "Treaty of November 11, 1794." The Stockbridge-Munsee Tribe shared in the final award based on the United States' failure to pay the annuities due the tribes under the two instruments. H.R. Doc. No. 477, 29th Cong., 1st Sess. 29 (1846) describes the annuities paid by the United States to the Stockbridge Tribe as a signatory to the 1794 Treaty of Canandaigua. Starna (2013) at 206 (Decl. Ex. 10).

[10] Dr. Starna notes "the following facts" regarding the Treaty of Canandaigua: "(1) the Stockbridge were a party and signatory to [the Treaty]; (2) they were the 'Indian friends' of the Oneidas, *their six-mile square grant of land located outside of the boundaries of the Oneida reservation established by the September 1788 treaty at Fort Schuyler*; and (3) that by having been a party to the Canandaigua treaty, the Stockbridge received an annuity . . . ." Starna (2013) at 206 (emphasis added) (Decl. Ex. 10).

B. Litigation Background

1. The Stockbridge Land Claim.

In 1986, Stockbridge filed its land claim against the State of New York, Madison and Oneida Counties and several municipal governments. Stockbridge asserts that the 1788 New Stockbridge reservation in central New York still belongs to it because the State's purchases in the early 1800s were never approved by Congress. In 1987, the New York Oneidas intervened as a defendant and asked the court to dismiss Stockbridge's claim. They claimed that the New Stockbridge reservation was really part of the Oneida reservation because the Oneidas had merely allowed the Stockbridge to stay on the Oneida reservation as temporary guests and Stockbridge acquired no permanent property rights in its reservation.

In the late 1990s, the New York Oneidas began buying land in Madison and Oneida Counties. While most of the more than 17,000 acres lies within the boundaries of the 1788 Oneida treaty reservation, approximately 3,700 acres lie outside the Oneida treaty reservation and within the 1788 New Stockbridge reservation. Consequently, in 2004, Stockbridge amended its complaint to seek the return of the 3,700 acres the New York Oneidas had recently purchased together with the lands that were subject to the original complaint (those claimed by the State and Madison and Oneida Counties and several municipal governments). *See* Decl. Ex. 5.

In an Order and Judgment issued July 23, 2013 (Civil Action No. 86-cv-1140, Dkt. Nos. 302 & 303), this Court dismissed the Stockbridge land-claim action against the State defendants (parties herein) as barred by the State's Eleventh Amendment sovereign immunity, against the county and municipal defendants (parties herein) as barred by *Sherrill* laches and against the OIN (a party herein) as barred by the doctrine of tribal sovereign immunity.

In resolving the motions to dismiss, the Court took the factual allegations in the Amended Complaint as true. Memorandum Decision and Order at 2, n. 1 (Dkt. No. 302 in Civil Action No. 86-cv-1140) (Decl. Ex. 11). This Court therefore did not reach the merits of the title dispute, i.e., whether Stockbridge possesses constitutionally protected property rights in the subject lands because they are situated within the Stockbridge treaty reservation or whether those lands are part of the Oneida treaty reservation, which the Settlement Agreement now purports to resolve in the OIN's favor.

2. The Federal-Tax-Foreclosure Litigation.

In the tax-foreclosure litigation, the OIN asserted that, because no act of Congress had diminished or disestablished the Oneida reservation, all of its purchased lands – including the lands it had purchased within the Stockbridge treaty reservation after intervening as a defendant in the Stockbridge land-claim action – were once again Oneida reservation lands and therefore non-taxable. But in *City of Sherrill v Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the Supreme Court held that the OIN could not unilaterally re-constitute its sovereign territory because that would be too disruptive to settled expectations. Instead, the Court pointed the Oneidas to Interior's on-reservation fee-to-trust regulations under the IRA and 25 C.F.R. Part 151 as the proper way to go about rebuilding its sovereign land base.

Although *Sherrill* had held that the lands were taxable, the OIN continued to refuse to pay property taxes and the Counties moved in state court to foreclose. The OIN then sought injunctive relief in federal district court to stop the foreclosures, claiming that sovereign immunity and Non-intercourse Act protections barred foreclosure. The OIN also claimed that the way in which the Counties had conducted the foreclosure proceedings violated the OIN's 14th Amendment Due Process rights. Finally, the OIN argued that state law itself made the land non-

taxable based on state statutes that prohibit taxation of land that is within the boundaries of a federal Indian reservation so long as it is the reservation belonging to the tribe that is being taxed.

At this point, Stockbridge attempted to intervene in the case because the court appeared to be treating all of the OIN's land as if it were part of the Oneida reservation when, in fact, the Stockbridge reservation lands had never been a part of any Oneida reservation. The district court denied Stockbridge intervention because the boundaries of the Oneida reservation were not at issue and Stockbridge therefore had no interest in the litigation. *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285 (N.D.N.Y 2006).

On appeal, the Second Circuit upheld the district court, finding that the OIN's sovereign immunity precluded the Counties from foreclosing. It did not reach the district court's rulings on the OIN's other defenses. The Second Circuit also affirmed the denial of Stockbridge's motion to intervene, ruling that because the boundaries of the Oneida reservation were not being decided in the case, Stockbridge would not be harmed by the court's going ahead and deciding the case without Stockbridge's participation. *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 163 (2d Cir. N.Y. 2010).

The Counties appealed to the Supreme Court (Stockbridge did not). In 2010, the Supreme Court granted Certiorari to review the issue of whether the OIN's sovereign immunity from suit barred the Counties' foreclosure suits. The OIN then passed an ordinance waiving its sovereign immunity in property tax cases. Thereafter, the Supreme Court vacated and remanded, instructing the Second Circuit to reconsider in light of the OIN's waiver of sovereign immunity. On remand, the Oneidas also abandoned the argument that the Non-intercourse Act protected the property from foreclosure, leaving the 14th Amendment and state-law questions. Stockbridge

argued that if the case was now going to be decided on the basis of the state-law question – i.e., the state statute that prohibits taxation of land that is within the boundaries of a federal Indian reservation so long as it is the reservation belonging to the tribe that is being taxed, then that *would* raise the question whether the 3,700 acres are within the Oneida reservation and Stockbridge should now be permitted to intervene as to the Stockbridge treaty reservation land.

In 2011, the Second Circuit upheld the Counties' tax-foreclosure processes against the OIN's 14th Amendment Due Process challenge, held that the federal courts should not exercise jurisdiction over the OIN's state-law claim, affirmed its earlier ruling that the 1794 Oneida Treaty reservation had never been diminished or disestablished and ordered the District Court to dismiss the cases without prejudice. The Second Circuit once again denied Stockbridge's motion to intervene because, if the federal courts would not be deciding the state-law question, the issue of whether the 3,700 acres are within the Oneida reservation would not be before the court. *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 442-443 (2d Cir. 2011).

In November, 2012, the Counties petitioned for a Writ of Certiorari to review the Second Circuit's ruling that 1794 Oneida Treaty reservation has never been diminished or disestablished. In the spring of 2013, the Supreme Court requested the views of the United States on the Counties' petition. The Counties' have now advised the Supreme Court of that one term of the Settlement Agreement would resolve the question pending before the Court. Counsel's letter advises the Court that the Settlement Agreement provides that the Counties' petition for certiorari will not be withdrawn until all approvals are obtained and the Effective Date has occurred and asks the Court to defer any further action on the petition while the settlement is pending approval.

3. Litigation Opposing DOI's Decision to Acquire Land in Trust for the NY Oneidas.

This action is one of five challenges to DOI's 2008 decision to accept over 13,000 acres in trust for the exclusive benefit of the OIN. Sept. 24, 2012 Memorandum Decision and Order at 2-3 (Dkt. No. 276) (describing actions). In 2005, following the *Sherrill* decision, the OIN submitted to DOI a fee-to-trust application for more than 17,000 acres. Interior acted favorably on the application, agreeing to accept over 13,000 acres, including about 3,400 acres located within the New Stockbridge reservation. [11]

In its Sept. 24, 2012 Memorandum Decision and Order (Dkt. No. 276), this Court remanded the 2008 ROD to DOI to consider whether it has authority under the Indian Reorganization Act as construed in *Carcieri v.Salazar*, 555 U.S. 379 (2009) – i.e., whether the OIN was under federal jurisdiction in 1934. The Department has not yet issued an amended ROD. The parties to the five actions may re-file their motions for summary judgment within

[11] Sweeping aside Stockbridge's objections, DOI decided it could accept the Stockbridge land in trust for the Oneidas even if the land does not lie within the Oneida Reservation because the 3,400 acres were contiguous to the Oneida Reservation and DOI's on-reservation trust acquisition regulations permit land that is contiguous to a reservation to be acquired. The ROD acknowledged the OIN-Stockbridge dispute and omitted from the trust acquisition one non-contiguous parcel included by the preferred alternative in the Final EIS. Section 7.1 of the 2008 ROD states:

> Certain lands now owned by the nation and located in the Town of Stockbridge are claimed by the Stockbridge-Munsee Community Band of Mohican Indians to be within a Stockbridge reservation. The Nation contends that all of these lands are located within the Oneida reservation. This dispute does not prevent the United States, through the Secretary, from acquiring title to the Subject Lands in trust for the Nation. . . . . [T]he Nation-owned parcels that are both (a) located within the disputed area and (b) included in the Subject Lands are all located contiguous to the undisputed (by the Stockbridge-Munsee Community) Oneida Reservation. Lands that are located "within or contiguous to" the Oneida reservation are subject to the on-reservation trust acquisition criteria. *See* 25 C.F.R. § 151.10. The Department considered the reservation dispute in its selection of the Preferred Alternative (Alternative I) in the Final EIS. This final determination differs from the Preferred Alternative identified in the Final EIS in that the Department has removed one parcel (Parcel 136) located in the Town of Stockbridge that is not contiguous to the undisputed Oneida reservation.

thirty (30) days of DOI's entry of an amended ROD. Memorandum Decision and Order at 44-45 (Dkt. No. 276).

III. STOCKBRIDGE QUALIFIES FOR INTERVENTION AS OF RIGHT UNDER RULE 24(A)

To intervene as a matter of right, the Second Circuit requires that the proposed intervenor " (1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not adequately protected by the parties to the action. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (citations omitted); *accord Hoblock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 97 (NDNY 2005).[12]

A. Stockbridge's Motion to Intervene is Timely.

This motion is timely as the Settlement Agreement was made public approximately four months ago and has not yet been presented to this Court for approval. *See D'Amato*, 236 F.3d at 84; *Hoblock* 233 F.R.D. at 98.

B. Stockbridge has an Interest in this Litigation.

Stockbridge has an interest in the litigation because it claims unextinguished property rights in approximately 3,400 acres that are the subject of this action and the proposed agreement to settle this action between the State of New York, the (OIN) and Madison and Oneida Counties. By defining the boundaries of the Oneida treaty reservation as including the lands of the Stockbridge treaty reservation in Stockbridge's absence, s*ee* SA § II.Q (Decl. Ex. 12) and

[12] In *Hoblock*, this Court found that "a protectable interest alone, even apart from any actual claim or the ability to file a separate action, may be sufficient for a court to grant intervention under rule 24(a). 'The strongest case for intervention is not where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit.' (*Quoting Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996) (citation omitted).

agreeing to settle the tax-foreclosure litigation while denying Stockbridge's intervention in the Oneida County tax-foreclosure action, *see* SA § VI.A.2 and Exhibits C & D (Decl. Ex. 12), the scope of this action has been broadened to affect the status of almost 3,400 acres of Stockbridge treaty reservation land that is the subject on-going litigation presently before the Second Circuit Court of Appeals in *Stockbridge-Munsee Community v State of New York*, (No. 13-3069cv, Notice of Appeal filed August 14, 2013).

In 2005, Stockbridge moved to intervene in the federal-tax-foreclosure litigation that would be resolved pursuant to this Court's approval of the Settlement Agreement, *see* SA § VI. A. 2 (Decl. Ex. 12). In the federal-tax-foreclosure litigation, Stockbridge's motion to intervene and Madison County's motion to dismiss for failure to join Stockbridge as an indispensable party were denied because those actions did not address the boundaries of the Oneida treaty reservation or whether the subject lands are situated in the Stockbridge treaty reservation or the Oneida treaty reservation. *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 442-443 (2d Cir. 2011), ("Here, as in Oneida I, the manner in which we resolve these appeals does not bear upon the question of the disputed boundaries between the OIN's and Stockbridge's respective land claims.") (*citing Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 163 (2d Cir. N.Y. 2010). Consequently, it was determined Stockbridge did not have an interest in the subject matter of that litigation, which is the same land that is the subject of this action.

Now, however, the Settlement Agreement and the proposed Stipulation and Order of Dismissal plainly do "bear [directly] upon the question of the disputed boundaries between the OIN's and Stockbridge's respective land claims," *id*. Section II.Q of the Settlement Agreement provides:

> **'Reservation',** as used in this Agreement, means the land within Madison and Oneida County acknowledged as the reservation of the Oneida Nation in Article II of the Treaty of Canandaigua, 7 Stat. 44 (1794), *as depicted on the map attached as Exhibit I.*

(emphasis added), *see* SA at 3 (Decl. Ex. 12). The Agreement's Exhibit I map (Decl. Ex. 1) depicts the land within the Stockbridge reservation that was guaranteed and acknowledged by the treaties of 1788 and 1794 to be a part of the Oneida reservation that was created by those same treaties. Indeed, the historical New Stockbridge reservation has disappeared – airbrushed out as though it never existed.

By providing in the proposed Stipulation and Order of Dismissal that the terms of the Settlement Agreement are incorporated into this Court's order, the Settlement Agreement asks this Court to endorse an act of outright historical revisionism that, in addition to impairing Stockbridge's legal interests, robs it of a significant portion of its heritage. Neither the 2008 Record of Decision that spawned this action[13] nor the tax-foreclosure litigation that would be resolved pursuant to this Court's approval of the Settlement Agreement purported to define the lands set aside as an Oneida reservation by the 1794 Treaty of Canandaigua as including the Stockbridge treaty lands. In the tax-foreclosure litigation, Stockbridge's intervention was denied because the Oneida reservation boundaries were not being determined in those actions. *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 163 (2d Cir. N.Y. 2010); *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 442-443 (2d Cir. 2011). Now, however, the Settlement Agreement seeks an order of this Court that, by approving the Settlement Agreement and incorporating its terms into the order, judicially resolves the reservation-boundary issue in the OIN's favor. Broadening the scope of this litigation to include a resolution of the reservation boundary issue in Stockbridge's absence is inconsistent with the Second Circuit's rulings on

[13] *See* discussion *supra* at 13 and n. 10.

Stockbridge intervention in tax-foreclosure litigation. *See* SA, Ex. D at 2 (Decl. Ex. 12) (Proposed Amended Judgment in *Oneida Indian Nation v Oneida County*, Case No. 6:05-cv-0945, dismissing tax-foreclosure action and denying Stockbridge's motion to intervene).[14]

Stockbridge has demonstrated an interest in this litigation that satisfies Rule 24(a)'s requirements.

C. Stockbridge's Interest May be Impaired by the Disposition of the Action.

This Court's approval of the Settlement Agreement would result in a federal court order defining the subject Stockbridge treaty reservation lands as Oneida treaty reservation lands. *See* SA § II.Q (Decl. Ex. 12). This, in turn, will pave the way for DOI's acquisition in trust for the OIN of those Stockbridge treaty reservation lands that previously were ineligible for trust acquisition under the Department's "on-reservation" fee-to-trust regulations in 25 C.F.R. § 151.10. Should DOI, while the Stockbridge land-claim action is still pending, conclude that the OIN was under federal jurisdiction in 1934, *see* Sept. 24, 2012 Memorandum Decision and Order (Dkt. No. 276 in this action), and go forward with either the trust acquisition proposed in the remanded 2008 Record of Decision (ROD) or the expanded trust acquisition envisioned by

[14] Should this Court approve the Settlement Agreement but decline to clarify that the Stockbridge treaty reservation is not being judicially determined to be part of the Oneida treaty reservation, as Stockbridge seeks to request upon intervention, it may call into question the Court's jurisdiction to act regarding the Stockbridge treaty reservation lands that are the subject of both this action and the tax-foreclosure actions. Stockbridge's motion to intervene as a required party without waiving its sovereign immunity in the Oneida County tax-foreclosure action was denied because that litigation did not address the 1788/1794 Oneida treaty reservation's boundaries. But if this Court, by approving the Settlement Agreement and incorporating in its order a definition of the Oneida treaty reservation that includes the Stockbridge treaty lands, can be said to be expanding the scope of this action to include the tax-foreclosure litigation and thereby include and resolve the Oneida reservation-boundary question in such a way that would influence resolution of the reservation-boundary question in the tax-foreclosure litigation, then this Court must consider whether this litigation, insofar as it affects the Stockbridge treaty lands, must be dismissed because Stockbridge is now a required party that cannot be joined. *See Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 163 (2d Cir. N.Y. 2010); *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 442-443 (2d Cir. 2011).

the Settlement Agreement, *see* SA § VI.B.1 (Decl. Ex. 12), the federal courts would be divested of jurisdiction in *Stockbridge-Munsee v State of New York*. There, federal jurisdiction was invoked to determine, *inter alia*, whether Stockbridge acquired and retained recognized property rights by virtue of the 1788 and 1794 treaties. DOI's acquisition of the subject lands in trust therefore might deprive the courts of the ability to adjudicate the title interest because, once accepted into trust, the Quiet Title Act, 28 U.S.C. § 2409a(a) bars challenges by competing claimants to the federal government's interest in trust or restricted Indian lands. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (U.S. 2012).

Judicial approval and enforcement of the Settlement Agreement, as required by its terms, may therefore impair or impede Stockbridge's ability to protect the property rights that are the subject of claims now on appeal before the Second Circuit. In addition, defining Stockbridge reservation lands as Oneida reservation lands will permit the DOI to acquire in trust 81.76 acres of Stockbridge treaty reservation lands that were not accepted in trust in the 2008 ROD because they were not adjacent to Oneida reservation lands as required by the DOI's "on-reservation" trust-acquisition regulations at 25 C.F.R. §151.10. *See* SA § VI.B.1 (Decl. Ex. 12) and 2008 ROD § 7.1. Moreover, because the Settlement Agreement provides for the acquisition of up to an additional 1,000 acres in Madison County and 7,000 acres in Oneida County, it is likely that the Settlement Agreement's re-definition of Oneida reservation boundaries will result in the acquisition in trust of additional Stockbridge treaty reservation lands for the exclusive use and benefit of the OIN. *See* SA § VI.B.4 (Decl. Ex. 12).[15]

[15] The DOI is not free to arbitrarily designate lands as "reservation" lands for purposes of trust acquisitions under the Indian Reorganization Act and its fee-to-trust regulations in 25 C.F.R. Part 151. Having the revised definition of the Oneida reservation incorporated into the Court's order may therefore provide DOI with a sufficient "fig leaf" to proceed with "on-reservation" trust acquisitions in the Stockbridge treaty reservation that are not contiguous to the Oneida

But Stockbridge invoked federal-court jurisdiction in 1986 and 2004 to determine whether it retains Fifth Amendment protected property rights – i.e., treaty-recognized Indian title, in the lands that the Settlement Agreement purports to define as Oneida treaty reservation lands. Thus, these lands were drawn into this Court's possession or control when Civil Action No. 86-cv-1140 was filed in 1986 and the complaint was amended in 2004 and they are now under the Second Circuit's possession or control. They are not subject to having their status altered in this action. The Settlement Agreement, if approved by this Court, may therefore interfere with the Second Circuit's jurisdiction in Appeal No. 13-3069cv.

In addition, in dismissing Stockbridge's land-claim action, this Court did not address the underlying merits of the claim. The only (quasi) judicial body to address the merits of the claim – the Indian Claims Commission – concluded that "Stockbridge had a compensable property interest in New Stockbridge," that article II of the 1794 Treaty "related to the lands of the Stockbridges" and that "[a]rticle II pledged the United States never to disturb them in their free use and enjoyment of New Stockbridge." *The Stockbridge Munsee Community v. United States*, 25 Ind. Cl. Comm. 281, 291, 295 (1971) (Decl. Ex. 9). Therefore, even if the Stockbridge land-claim litigation ultimately results in affirmance of this Court's judgment that Stockbridge's claims are barred by *Sherrill* laches and sovereign immunity, Stockbridge must be presumed to retain unextinguished property rights arising out of recognized Indian title to the lands of its 1788/1794 Treaty reservation, see *United States v. Sioux Nation*, 448 U.S. 371 (1980), albeit a right for which no judicial remedy would exist. Because Indian title is defined simply as the right of use and occupancy, *see County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234(U.S. 1985), and, once acquired in trust for the exclusive use and occupancy of the OIN, the

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reservation depicted in the BLM maps prepared for the Oneida land-claim litigation. *See* Decl. Exs. 2, 3 & 4.

Quiet Title Act would bar a Stockbridge challenge to DOI's title, DOI's acquisition of Stockbridge treaty lands will have the effect of extinguishing Stockbridge's recognized, constitutionally protected property rights in the lands of its 1788/1794 treaty lands. The potential harm to Stockbridge's interests is apparent and this Court should not dispose of this action in Stockbridge's absence.

Stockbridge therefore seeks to intervene in this action for the purposes of objecting and seeking modification of this Court's order approving the Settlement Agreement insofar as it affects the status of lands that are the subject of the title dispute presently before the Second Circuit in *Stockbridge-Munsee Community v State of New York*, (No. 13-3069cv). *See Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1125-28 (2d Cir. 1983) (granting intervention for purpose of objecting to settlement).

D. Stockbridge's Interest is Not Adequately Protected by the Parties.

Stockbridge's interest is adverse to that of all existing parties and is not represented by any of them. The State of New York and Madison and Oneida Counties, plaintiffs herein, and the OIN, Defendant-Intervenor herein, are defendants in *Stockbridge-Munsee v. State of New York*, where Stockbridge asserts unextinguished recognized Indian title to a six-mile-square tract containing lands that are or were also claimed by these defendants. In that case, OIN asserts that the 1788 and 1794 treaties did not create Stockbridge property rights and instead recognized these lands as Oneida reservation lands.

Stockbridge's interest is adverse to that of the United States, which, in the 2008 ROD, concluded that the Stockbridge land claim and the dispute between Stockbridge and the OIN as to whether the subject lands are situated in the Stockbridge or Oneida treaty reservation does not prevent the United States from acquiring title to the subject lands in trust for the OIN. 2008

ROD, § 7.1. In addition, § 7.9.2 of the 2008 ROD refers tribal "commenters" to Appendix M of the Final EIS for "information responsive to their comments and and/or to see how their comment was dealt with." Appendix M states that it the DOI position "that the Stockbridge claim area is located within the exterior boundaries of the Oneida's Reservation. See Introduction: Figure 1.1-3." Figure 1.1-3 is the same map attached as Exhibit I to the Settlement Agreement which depicts the 1788/1794 Oneida treaty reservation as including the lands of the Stockbridge reservation and which omits any depiction of or reference to the Stockbridge reservation created and acknowledged by the same 1788 and 1794 treaties (Decl. Exhibit 1). Moreover, if the parties to the Settlement Agreement submit a Stipulation and Order of Dismissal for this Court's approval, the federal defendants will have signed on and be requesting an order of this Court that defines the Oneida treaty reservation as including the lands of the Stockbridge treaty reservation.

IV. Alternatively, Stockbridge Should be Permitted to Intervene Under Rule 24(b).

In the alternative, Stockbridge seeks the Court's permission to intervene as a defendant under Rule 24 (b)(1)(B) for the purposes described above. Rule 24(b)(1)(B) provides that the court may, on timely application, permit anyone to intervene who "has a claim . . . that shares with the main action a common question of law or fact." Stockbridge's claim, by virtue of the Settlement Agreement's definition and treatment of the Stockbridge treaty reservation lands as Oneida treaty reservation lands, now shares a common question of law and historical fact with the main action, i.e., whether the almost 3400 acres that lie within the exterior boundaries of the 1788 Stockbridge treaty reservation are included in and a part of the Oneida treaty reservation. As the Settlement Agreement has not yet been submitted to this Court for approval, permitting Stockbridge to intervene will not cause undue delay or prejudice.

V. CONCLUSION

For the foregoing reasons, Stockbridge must be permitted to intervene under Rule 24(a)(2) for the limited purpose of objecting to the Settlement Agreement insofar as it affects the status of Stockbridge treaty reservation lands and requesting that this Court's order approving the Settlement Agreement provide that nothing in the order shall be construed as: a) a determination that the 1788/1794 Oneida treaty reservation includes the lands that Stockbridge asserts in its land-claim action and the tax-foreclosure litigation were set aside as a permanent Stockbridge treaty reservation by the 1788 Treaty of Fort Schulyer and its 1789 implementing act and which, Stockbridge asserts, were acknowledged as a permanent Stockbridge reservation by the 1794 Treaty of Canandaigua; or, b) this Court's approval of DOI's acquisition in trust of any lands that are situated within the area claimed by Stockbridge but not contiguous to the undisputed (by Stockbridge) Oneida reservation acknowledged by the 1794 Treaty of Canandaigua.

In the alternative, Stockbridge's request for permissive intervention under Rule 24(b)(1)(B) should be granted.

Respectfully Submitted,

Dated: September 25, 2013

/s/Don B. Miller
Don B. Miller (Bar Roll No. 502538)

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