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 REPLY TO OPPOSITIONS TO STOCKBRIDGE-MUNSEE MOTION TO INTERVENE

DON B. MILLER, P.C.

Don B. Miller (Bar Roll No. 502538)
1305 Cedar Avenue
Boulder, CO 80304
Telephone: (303) 545-5533
(719) 489-3151
(303) 885-1992
dbmiller01@msn.com

Counsel for the Stockbridge-Munsee Community, Band of Mohican Indians

Dated: December 30, 2013

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I. The Stipulation and Order of Dismissal will Impair Stockbridge's Interests because it would be a Federal Court Judgment Which Binds the United States.

The United States repeatedly asserts that it is not a party to the Settlement Agreement, did not participate in the negotiation of its terms, has no obligations under it and is only agreeing to dismissal of the case. U.S. Response at 4. Thus, upon approval by this Court, it will not be bound by the Agreement's terms, which will be enforceable only "between the parties to that agreement – the State, the Counties and the Oneidas." *Id*. at 1. For these reasons, the Federal Defendants emphasize, "the Agreement will not impact Interior's future consideration of how to treat lands within the area claimed by Stockbridge. . . . . That agency cannot and will not be influenced by the Settlement Agreement – and the Court's approval of it – in any fashion." *Id*. at 11. Thus, "the Settlement Agreement is nothing more than a federally enforceable settlement contract and Stockbridge is simply wrong when it asserts that court approval of the Agreement 'would result in a federal court order defining the subject Stockbridge treaty reservation lands as Oneida treaty reservation lands.'" *Id*. at 9.[1]

The United States strenuously denies that "incorporation of the Agreement in a court order will somehow ratify and elevate the Agreement's definition of 'Reservation' into a federal court pronouncement on the non-existence of a Stockbridge reservation in New York" and asserts that the only effect of incorporating the Agreement into the Court's dismissal order and retaining enforcement jurisdiction is ensuring that the Agreement will be enforceable as among the signatory parties in federal court rather than in state court. *Id*. at 8. But the United States is

[1] Defendant-Intervenor the Oneida Indian Nation of New York (OIN) joins in this interpretation, stating flatly that this Court's "approval of the settlement agreement would not be a 'judicial determination' regarding the claimed Stockbridge reservation or 'judicial approval' of Oneida trust transfers," OIN Opposition at 1, and that the Settlement Agreement "is not even enforceable against the United States." *Id*. at 3. The State and County Plaintiffs, however, apparently do not share in this limited view of the Settlement Agreement's enforceability, as they merely note that "[t]he United States takes the position that it is 'not bound by any of [its] terms.'" Plaintiffs' Opposition at 16, n. 7.

mistaken, because conditioning the effectiveness of the Settlement Agreement upon the incorporation of its terms into the dismissal order and the express retention of enforcement jurisdiction does indeed elevate the terms of what otherwise would be a private contractual settlement into an enforceable federal court judgment. And, while the United States may not have been a party to the Settlement Agreement itself, by signing the Stipulation and Order of Dismissal under Fed. R. Civ. P. 41(a)(2) which provides that "all Plaintiffs, all Defendants, and Defendant-Intervenor stipulate to the dismissal with prejudice of this action on the terms in the form of the order set forth below," (Dkt. No. 319-1), the United States will be bound to the Settlement Agreement's terms – not by the Settlement Agreement itself, but by its stipulation and this Court's order of dismissal which (if approved as proposed) will provide that "the terms of the attached Settlement Agreement are **INCORPORATED** into this Order [and] this Court **RETAINS JURISDICTION** to enforce the Settlement Agreement." (Dkt. No. 321).

In *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003), the Second Circuit considered whether, under *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994), judicial action other than a judgment on the merits or a consent decree could support a court's retention of jurisdiction over a settlement contract. There, the parties had entered into a settlement agreement that conditioned its effectiveness on the Court's dismissal order retaining enforcement jurisdiction. The agreement was provided to the Court together with the order dismissing plaintiff's claims with prejudice and providing for the retention of enforcement jurisdiction. The order did not, however, incorporate the terms of the settlement agreement. Thereafter, the District Court denied plaintiffs' request for attorneys' fees because, while the agreement did effectuate a material change in the relationship between the parties, the retention-of-jurisdiction provision in the dismissal order did not constitute a sufficient judicial

sanctioning of the change to support continuing jurisdiction. The Second Circuit reversed, and its analysis is controlling here.

> Viewed in the light of *Kokkonen*, the district court's retention of jurisdiction in this case is not significantly different from a consent decree and entails a level of judicial sanction sufficient to support an award of attorney's fees. First, despite the district court's statements that it had not specifically reviewed or approved the terms of the settlement agreement, the district court retained jurisdiction to enforce the Agreement. Under *Kokkonen*, when the district court retained jurisdiction, it necessarily made compliance with the terms of the agreement a part of its order so that "a breach of the agreement would be a violation of the order." 511 U.S. at 381. Further, because the court has the general responsibility to ensure that its orders are fair and lawful, it retains some responsibility over the terms of a settlement agreement as the parties' obligation to comply with the agreement was made a part of its order. We agree with the Fourth Circuit that:
>
> > A court's responsibility to ensure that its orders are fair and lawful stamps an agreement that is made part of an order with judicial imprimatur, and the continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement.
>
> *Smyth*, 282 F.3d at 282.[2] Thus, when the district court retained jurisdiction according to the procedures approved in *Kokkonen* it gave judicial sanction to a change in the legal relationship of the parties, regardless of the actual scrutiny applied.
>
> Second, while the district court was correct that courts have inherent jurisdiction to enforce consent decrees, that jurisdiction is no different from the jurisdictional basis in

[2] In *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), the Fourth Circuit emphasized the duty of a court entering a dismissal order containing a settlement agreement, which it concluded was the functional equivalent of a consent decree, *id*. at 282, to scrutinize its terms. Earlier in its opinion, the Fourth Circuit explained that:

> The parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order. See, e.g., *United States v. Miami*, 664 F.2d 435, 439-40 (5th Cir. 1981) (en banc) (concurring opinion of Rubin, J., joined by Brown, Anderson, Randall, and Thomas A. Clark, JJ.) ("A consent decree, although founded on the agreement of the parties, is a judgment. It has the force of res judicata, protecting the parties from future litigation. As a judgment, it may be enforced by judicial sanctions, including citation for contempt if it is violated.").
>
> > Because it is entered as an order of the court, the terms of a consent decree must also be examined by the court. As Judge Rubin noted in *United States v. Miami*, Because [sic] the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence.
>
> 664 F.2d at 441 (Rubin, J., concurring). In other words, a court entering a consent decree must examine its terms to ensure they are fair and not unlawful.

> this case. Consent decrees are enforceable in federal court because they are orders of the court; the Agreement is enforceable in federal court because a violation of the Agreement is a violation of the court's dismissal Order. Both are, in the terms used by the *Buckhannon* Court, "court-ordered change[s] in the legal relationship between the plaintiff and the defendant." 532 U.S. at 604.

346 F.3d at 82-83.

More recently, in *Perez v. Westchester County Dep't of Corr.*, 587 F.3d 143 (2d Cir. 2009), the Second Circuit reaffirmed *Roberson* and explicitly expanded its rationale to include dismissal orders that incorporate the terms of a settlement agreement:

> [In *Roberson*, w]e held that, as the Fourth Circuit had previously also concluded, "[a] court's responsibility to ensure that its orders are fair and lawful stamps an agreement that is made part of an order with judicial imprimatur." *Id*. at 83 (quoting *Smyth v. Rivero*, 282 F.3d 268, 282 (4th Cir. 2002)). Such ongoing inherent authority made orders of dismissal in which the district court retained jurisdiction to enforce the underlying settlement agreement indistinguishable from consent decrees for the purposes of *Buckhannon*.

Id. at 152. The Court of Appeals then concluded that the second *Kokonnen* "scenario," an order of dismissal that incorporates the terms of a settlement agreement, likewise carries a sufficient judicial imprimatur to support continuing jurisdiction, explaining that:

> The Order of Settlement provided that Plaintiffs' lawsuits would only be dismissed "[u]pon the Court's approval and entry of this Stipulation and Order." This is not a case where "[d]ismissal was effectuated by stipulation, or mutual agreement of the parties, and did not require any judicial action," *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998); rather, the settlement was only made operative by the Court's review and approval. In a quite literal sense, it was the District Court's imprimatur that made the settlement valid.

Id. See also *Anderson v. Beland (In re Am. Express Fin. Advisors Secs. Litig.)*, 672 F.3d 113, 134-35 (2d Cir. 2011) (Following *Perez* and *Roberson* to find judicial imprimatur on class-action settlement agreement sufficient to support continuing jurisdiction over some arbitration claims by class members and emphasizing the importance of minimizing the number of "loose ends that

remain" after "complicated, expensive proceedings involving a multitude of different parties" has been resolved.).

Roberson, *Smyth* and *Perez* establish that, by virtue of the Settlement Agreement's effectiveness being conditioned on the incorporation of its terms in this Court's order of dismissal and this Court's retention of enforcement jurisdiction, the terms of the Settlement Agreement will be enshrined in an enforceable federal court judgment. And, by virtue of the United States' stipulation to dismissal on the terms of the dismissal order, it too will be bound to make future decisions in accordance with the Settlement Agreement's terms –not because it was a party to the Settlement Agreement but because it was a party to and is bound by its stipulation and this Court's dismissal order. After all, it will be what is contained in this Court's judgment that will ultimately define obligations and circumscribe future actions and decisions by the parties to the Stipulation and Order of Dismissal, not what they asserted in their legal memoranda in opposition to Stockbridge's intervention motion.

Thus, the parties are mistaken when they argue that the proposed Stipulation and Order of Dismissal will change nothing with regard to Stockbridge's claims or its ability to protect its interests in future administrative proceedings in the Department of the Interior. The United States signed the Stipulation and Order of Dismissal on the terms of the dismissal order which includes the terms of the Settlement Agreement. As the United States recognizes, "with regard to future trust applications. . . . Interior will be guided . . . by the relevant federal laws and regulations governing such trust applications." U.S. Response at 12. By virtue of the Settlement Agreement's definition of the Oneida reservation becoming part of this Court's judgment by

operation of the dismissal order, that definition becomes part of the body of "relevant federal laws" governing Interior's decisions on future trust applications.[3]

II. Stockbridge's Motion to Intervene is Timely.

As the United States correctly points out in its Response at 6 – 7, Dkt. No. 329, and as Stockbridge explained in its opening memorandum at 16, Dkt. No. 303-1, the question of the existence of the New Stockbridge reservation is not at issue in the merits of this case, as the 2008 Record of Decision challenged in this action expressly avoided making a determination on that question. Now, however, the Settlement Agreement has made it an issue in this action by defining the 1788 Oneida reservation acknowledged by the 1794 Treaty to encompass all lands within the area depicted on the Agreement's Exhibit I map (Decl. Ex. 1).

The State and the OIN argue that Stockbridge had the opportunity to litigate the rights upon which it now seeks to base its objection to settlement in the APA case or the injunction request that were filed in 2008 and later withdrawn without prejudice. This is inaccurate.

[3] This Court's duty to "ensure that its orders are fair and lawful," *Perez*, 587 F.3d at 152, and avoid untidy "loose ends" that threaten the integrity of its orders with the risk of future litigation, *Anderson*, 672 F.3d at 134, conflicts with the United States' (understandable) desire to disavow and not be bound by the Settlement Agreement's terms. The Settlement Agreement appears to pose several problems for the United States. In addition to the Oneida-reservation-definition problem – the Federal Defendants agree that "Interior is not free to arbitrarily determine whether to apply its 'on-reservation' or 'off-reservation' regulation to a trust application," U.S. Response at 11 – the Agreement's gaming exclusivity provisions are troublesome, as the Cayuga Nation has pointed out. And the Agreement may well present additional difficulties for the United States. For example, it seems doubtful that the Federal Defendants could lawfully commit to honoring the Settlement Agreement's cap limitation on the amount of land that may be held in trust by the United States. *See* SA § VI(B)(4). As another example, it appears that the Agreement's provisions allowing the OIN to deploy full slot machines exclusively in a 10-county area in exchange for their agreement to pay the State 25% of the revenue generated by those machines, *see* SA §§ III and IV, would constitute a gaming-compact revision requiring approval by the Secretary pursuant to the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2710. The Department of the Interior has carefully scrutinized similar gaming-compact provisions in recent years, and has disapproved some agreements that unlawfully required tribes share revenues with states, as well as agreements that addressed issues that were not directly related to gaming. *See, e.g.*, Letter of 10-12-12 from Asst. Sec'y – Indian Affairs to MA Gov. Deval Patrick (disapproving 7-12-12 Mashpee Wampanoag Tribe/State of Massachusetts tribal-state compact), available at: http://www.bia.gov/WhoWeAre/AS-IA/OIG/index.htm; Letter of 2-18-11 from Principal Dep. Asst. Sec'y – Indian Affairs to NY Gov. Andrew Cuomo (disapproving 11-22-10 Stockbridge-Munsee Community/State of New York tribal-state compact), available at: http://www.bia.gov/WhoWeAre/AS-IA/OIG/index.htm.

Because the ROD being challenged did not purport to resolve the issue of whether Stockbridge possessed treaty-recognized property rights in the New Stockbridge reservation, Stockbridge's APA action did not address the title/Oneida-reservation-boundary question and was limited to challenging Interior's decision-making process. Stockbridge's injunction request sought a temporary injunction prohibiting DOI from acquiring title to the New Stockbridge treaty reservation lands until there had been a final judgment in Stockbridge's land-claim action. This motion for extraordinary relief was withdrawn without prejudice primarily because there was no "necessity of pursuing the relief sought at the present time in light of existing and potential stay agreements between the United States and the State of New York and the Counties of Madison and Oneida in *State of New York, et al. v. Kempthorne*, No. 6:08-cv-644." Dkt. No. 267 in 86-cv-1140 (7-23-2008).

With respect to the New Stockbridge reservation lands that are adjacent to the Oneida reservation boundary – which, until the Stipulation and Order of Dismissal was signed by the United States, were the only New Stockbridge lands at issue in this action – Stockbridge had determined that its interests could best be protected through means other than attempting to pursue its APA action or intervene in this action. As soon as it appeared to Stockbridge that the United States would probably endorse the settlement and sign the Stipulation and Order of Dismissal – thereby altering the law that would control DOI's future decision making by expanding the scope of this litigation to include a resolution of the Stockbridge-treaty-rights/Oneida-reservation-boundary question in the OIN's favor and bring about through settlement a result that the OIN has been unable to achieve through 27 years of litigation – it moved to intervene for the limited purpose of protecting its interests in the non-adjacent New Stockbridge lands.

The cases relied on by the State and the OIN to support their assertion that Stockbridge's intervention motion is untimely are inapposite. Each involved circumstances where granting intervention would have resulted in severe prejudice to the settling parties.[4] In contrast, the limited relief Stockbridge seeks here is not nearly so disruptive or prejudicial to the settling parties. Stockbridge does not seek to block the settlement, nor does it seek an amendment to the Settlement Agreement or to send the parties back to the bargaining table. Rather, it seeks protective language in this Court's order of dismissal that neither the United States nor the OIN finds objectionable.[5]

III. An Intervention Application cannot be Decided by Reference to the Ultimate Merits of the Interest Sought to be Protected: Stockbridge Asserts Non-Frivolous Rights that May Be Impaired by the Disposition of this Action.

The OIN mistakenly asserts that Stockbridge has no legally protectable property right that could be impaired by a trust acquisition because, as a result of this Court's dismissal of Stockbridge's land claim action, Stockbridge has no right to seek possession before a trust transfer. OIN Opp. at 5. However, in dismissing the land-claim action, this Court did not address the merits of Stockbridge's title claims and held only that the claims were barred by sovereign immunity and *Sherrill* laches. Stockbridge is therefore presumed to retain

[4] See *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 948 (7th Cir. 2000) ("intervention by the St. Croix serves no conceivable purpose other than to block a settlement agreement that it does not like"); *Weisshaus v. Swiss Bankers Ass'n (In re Holocaust Victim Assets Litig.)*, 225 F.3d 191, 199 (2d Cir. 2000) ("intervention at this late stage would prejudice the existing parties by destroying their Settlement and sending them back to the drawing board"); *United States v. Pitney Bowes, Inc*., 25 F.3d 66, 72 (2d Cir. 1994) (intervention "would have resulted in a postponed cleanup effort at the [CERCLA] Site . . . [and] required a reopening and a renegotiation of the consent decree").

[5] *See* U.S. Response at 2 and 12 ("the Federal Defendants do not oppose the Court conditioning its dismissal . . . on the ground that the Court's order not be misconstrued as having any bearing on the question of whether Stockbridge has reservation lands in New York and whether the Department of the Interior may lawfully take such alleged reservation lands in trust for the benefit of the Oneidas."); OIN Opp. at 1 and 2 ("approval of the settlement agreement would not be a 'judicial determination' regarding the claimed Stockbridge reservation or 'judicial approval' of Oneida trust transfers. An order that denies intervention and makes the foregoing clear will provide the Stockbridge all the relief they seek.").

unextinguished treaty property rights for purposes of this intervention motion and is not collaterally estopped by the land-claim judgment, which did not address the title question.

Moreover, Stockbridge's interests in the non-contiguous New Stockbridge reservation lands may be impaired by defining them as Oneida reservation lands. Stockbridge currently owns 122 acres within the New Stockbridge boundaries. Should Stockbridge request DOI to accept that or future-acquired land in trust, the agency's decision could turn in large part on whether the judgment in this action defines the New Stockbridge lands as Oneida reservation lands.

The OIN devotes approximately 40% of its Opposition (Dkt. No. 327, pp. 6-12) in support of a request that this Court rule, in Stockbridge's absence, that Stockbridge has no right to the New Stockbridge reservation under applicable treaties. However, "except for allegations frivolous on their face, an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (granting motion to oppose a settlement agreement) quoting *Oneida Indian Nation v. New York*, 732 F.2d 261, 265 (2d Cir.1984) (internal citation omitted); see *Seneca Nation of Indians v. New York*, 213 F.R.D. 131, 136 - 137 (W.D.N.Y. 2003) ("legitimacy of the proposed intervenor's interest in the . . . lands cannot be determined by way of this motion to intervene."). Thus, for purposes of this intervention motion, Stockbridge's non-frivolous allegations must be assumed.[6]

[6] Stockbridge's treaty-based New York reservation claims plainly are not frivolous, as demonstrated by the brief historical background at pp. 4-8 of Stockbridge's memorandum of law (Dkt. No. 303-1). Even if the United States' assertion that the 1794 Treaty does not acknowledge the New Stockbridge (NY) reservation were accurate, and it is not, tribal claims to land need not be based on federal treaty or formal federal governmental action. *United States v. Santa Fe Pacific R. Co.* 314 U.S. 339, 347 (1941). The historical record establishes with certainty that Oneida aboriginal title to the lands comprising the New Stockbridge reservation was extinguished and Stockbridge title thereto recognized in 1788-89. Because recognition and extinguishment of Indian title and reservation status became the exclusive province of the Federal Government upon the effective date of the Constitution, March 4, 1789, only clear and unambiguous Congressional action after that date could change those results. *Id.* at 354. No

IV. CONCLUSION

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 in New York and requesting that this Court's order approving the Settlement Agreement and dismissing this action contain the protective language proposed at page 4 of Stockbridge's Memorandum in Support of Motion to Intervene (Dkt. No. 303-1). In the alternative, permissive intervention should be granted.

Respectfully submitted,

Dated: December 30, 2013.

DON B. MILLER, P.C.

/s/Don B. Miller

Don B. Miller (Bar Roll No. 502538)
1305 Cedar Avenue
Boulder, CO 80304
Telephone: (303) 545-5533
(719) 489-3151
(303) 885-1992
dbmiller01@msn.com

Counsel for the Stockbridge-Munsee Community, Band of Mohican Indians

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such action was ever attempted. The United States concedes that Art. II of the 1794 Treaty does not mention Stockbridge, Resp. at 3. The 1794 Treaty cannot be read to contain extinguishment language. Nor does the 1856 Treaty establishing a reservation in Wisconsin, 11 Stat. 663, extinguish Stockbridge's title. The claims-relinquishment provision in article 1 of the 1856 Treaty is not a global abrogation, OIN Opp. at 9-10, but applies only to claims to particular lands in Wisconsin and Minnesota. Moreover, that provision applies only to claims against the United States, providing that "all such and other claims set up by or for them or any of them are hereby abrogated, *and the United States released and discharged therefrom*." The abrogation of claims provision makes no mention of New York reservation lands and is plainly limited to claims against the United States. Were it not so limited, its effect would be to abrogate all Stockbridge claims against everybody in the world, thus rendering the language quoted above meaningless. See *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 161-62 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S.197 (2005) (treaty providing Kansas lands for New York Indians did not affect Oneida rights in New York reservation; it did not require removal and Oneidas did not release their claims to their New York lands). Similarly, the provisions of the Act of Feb. 6, 1871, 16 Stat. 404, Ch 38, which provide merely that the Stockbridge Tribe "may be located" on certain Wisconsin lands, cannot be read to "restrict" Stockbridge to those lands, much less extinguish property rights that are not mentioned in the Act. Nor can Stockbridge's constitution be read as a relinquishment of treaty property rights in New York. Whether Stockbridge's governmental jurisdiction is limited to its Wisconsin reservation can have no bearing on the question of whether it retains its Fifth Amendment protected property rights, and Stockbridge does not assert that it retains governmental jurisdiction over its New Stockbridge reservation.

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Defendants.

Certificate of Service

I hereby certify that on the 30h day of December, 2013, I electronically filed, on behalf of Applicant-Intervenor Stockbridge-Munsee Community, the attached Memorandum in Reply to Oppositions to Motion to Intervene with the Clerk using the CM/ECF system, which would then electronically notify the following CM/ECF participants in this case:

David Schraver & David Tennant
Dwight Healy
Aaron Baldwin, David Roberts & Lisa Burianek
Michael R. Smith, Peter Carmen & Meghan Murphy Beakman
Daniel French, David DeBruin, Joshua M. Segal & Lee Alcott
Steven Miskinis
Philip G. Spellane

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

Don B. Miller, PC
1305 Cedar Avenue
Boulder, CO 80304
(303) 545-5533 (o)
(303) 885-1992 (m)
dbmiller01@msn.com
donbrantleymiller@comcast.net