UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION, a federally recognized
Indian tribe,

Plaintiff,

vs. 18-cv-00429-LJV

Andrew CUOMO, in his official capacity as
Governor of New York;
Letitia JAMES, in his official
capacity as New York State Attorney General;
Paul A. KARAS, in his official capacity as
Acting Commissioner of the New York State
Department of Transportation;
Thomas P. DiNAPOLI, in his official capacity as
Comptroller of the State of New York; and
The New York State Thruway Authority,

Defendants.

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW
IN FURTHER OPPOSITION TO PLAINTIFF'S OBJECTIONS
TO THE REPORT AND RECOMMENDATION**

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PRELIMINARY STATEMENT

The Defendants, Andrew Cuomo, Letitia James, Paul A. Karas, Thomas P. DiNapoli, and the New York State Thruway Authority, submit this Memorandum of Law at the request and invitation of the Court solely to address the following questions:

> (1) Is a sovereign a necessary party in a case adjudicating the ownership of property the sovereign claims it owns?
>
> (2) Is there any case law in which a lawsuit brought into question a state's valid ownership of property and the plaintiffs were able to proceed under *Ex parte Young*?

(ECF No. 39). These questions arose during oral argument on Plaintiff's objections to Magistrate Judge Scott's Report and Recommendation (ECF No. 29) recommending that Defendants' Motion to Dismiss (ECF No. 16) be granted.

Plaintiff now argues that this Court can adjudicate the property rights of the State of New York under the *Ex parte Young* exception to Eleventh Amendment immunity without the State being a party to this action. This argument is a day late and a dollar short. As outlined in Defendants initial moving papers, Plaintiff could have, and should have, made this argument when it sued the Governor in his official capacity when it first challenged the State's easement in *Seneca Nation of Indians v New York* (WDNY Case No. 93-CV-688), *affirmed Seneca Nation of Indians v New York*, 383 F.3d 45, 46 - 47 (2d Cir. 2004) (hereafter the "1993 case"). In that case, the Second Circuit found that the State of New York "was an absent and indispensable party under Rule 19 of the Federal Rules of Civil Procedure, and that the action was thus barred by sovereign immunity." *Id.* at 46. The Court further ruled that the State, not the Thruway Authority, was the true owner of the easement and, as such, an indispensable party that could not be sued under the Eleventh Amendment. *Id.* at 47 - 48. Magistrate Judge Scott found in his Report and Recommendation in this case that this holding precluded Plaintiff from relitigating

the same issue in this case. Nevertheless, Plaintiff is back before this Court some twenty-five years later attempting to minimize the nature of the State's property interest as "only an easement" (ECF No. 41 at 2) and again attempting to litigate the validity of that easement without the presence of the State. This belated and misplaced argument ignores the obvious: that a valid easement exists and that it has been adjudicated to be the property of the State of New York.

Even if this Court disagrees with the Magistrate Judge's conclusion that the 1993 case is preclusive of this one, it should be noted that the Plaintiff has offered no reason why the decision in the 1993 case is not binding on it. *See Kansas v United States*, 249 F3d 1213, 1230 (10th Cir 2001) ("Because the Tribe did not appeal Miami Tribe I, the district court's findings and conclusions regarding the status of the tract, including its construction of the relevant legislation and treaties, are now *res judicata* and we need not revisit them here."). Indeed, the 1993 case and the factual conclusions contained therein are binding precedent not just on Plaintiff but throughout the jurisdiction of the Second Circuit. Just because twenty-five years later the Plaintiff thought up a new theory for challenging the validity of the State's easement (i.e. an official capacity suit pursuant to *Ex parte Young* seeking relief that is purportedly prospective in nature), it does not change the fact that the Second Circuit has already ruled that in order to get to the relief Plaintiff seeks in this case, this Court would have to invalidate the easement and in order to do that, the State would have to be party but it cannot be because it enjoys sovereign immunity.

Yet Plaintiff comes to this Court with a theory that could have been, and should have been, advanced in the 1993 case, acting as if the 1993 case never occurred. For that reason alone, there is no reason to consider the application of *Ex parte Young*. Notwithstanding,

Defendants answer the Court's two questions as follows: 1. yes, a sovereign is a necessary party in a case adjudicating the ownership of property the sovereign claims it owns; and, 2. the prevailing case law is that a lawsuit cannot be brought to question a state's valid ownership of property under *Ex parte Young*. *Ex parte Young* does not apply in this case and the cases cited by Plaintiff are legally and factually distinguishable.

It should also be noted that, while the Plaintiff asserts that it is simply answering the two questions framed by this Court's Order following oral argument, much of the Plaintiff's supplemental brief consists of reargument of its initial opposition papers. The issues Plaintiff puts before the Court include the validity of the *Ex parte Young* doctrine, whether the State is a necessary party, and the propriety of the relief Plaintiff requests in its Complaint. None of these issues are responsive to this Court's specific questions and the Court should ignore them.

Point I

A SOVEREIGN IS A NECESSARY PARTY IN A CASE ADJUDICATING THE OWNERSHIP OF PROPERTY THE SOVEREIGN CLAIMS IT OWNS

At the outset, when discussing *Ex parte Young*, it is worth keeping in mind that the state of the law on this issue is less than crystal clear. As stated by the Supreme Court seventy years ago:

> There are a great number of such cases and, as this Court has itself remarked, it is not "an easy matter to reconcile all the decisions of the court in this class of cases."

Larson v Dom. & Foreign Commerce Corp., 337 U.S. 682, 697-698 (1949) (quoting *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 451 (1883). As the past disputes over the meaning of *Idaho v Coeur D'Alene Tribe*, 521 U.S. 261 (1997) make clear, the murkiness of the law has grown no clearer.

Plaintiff primarily relies on three cases that it cites on page 7 of its Supplemental Brief[1] to argue that this Court can adjudicate the property interests of the State without its presence in this lawsuit. All three of those cases are distinguishable from the instant case for the same reason. In each of those three cases, the plaintiff alleged that an officer of the state acting in their official capacity had illegally obtained title to property by acting unilaterally and without legal authority to do so. Here, there is no claim that the State acted without legal authority in obtaining title to the Thruway easement. There is no dispute that when, in 1946, the New York Department of Public Works began negotiating the Thruway easement with the SNI that it had the legal authority to do so. Similarly, there is no dispute that when the Thruway Authority was created that it also had the authority to negotiate and enter into permanent easements on behalf of the People of the State of New York. Accordingly, unlike the three primary cases that Plaintiff relies on, it cannot be seriously disputed that the transaction that took place between the Thruway Authority and the SNI in 1954 "clearly convey[ed] the easement to the State" and that the State officials that negotiated the easement had the sovereign's (i.e. the State's) authority to engage in that transaction. *Seneca Nation v. New York*, 383 F.3d 45, 47, (2nd Cir. 2004) (quoting Magistrate Judge Heckman's Report and Recommendation dated July 12, 1999 at pg. 17).

The three cases are also distinguishable because in none of them was the court actually adjudicating a state's property interest after the state had legally obtained title to that property. Rather, in each of the cases title to property had either been asserted by a state official on behalf of the state and that assertion of title was what was alleged to have constituted an ongoing violation of federal law, or the state official was not claiming title to the property. *See In re Deposit Ins.*, 482 F.3d 612, 619 (2nd Cir. 2007) (title to funds not vested in state and state not

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[1] *In re Deposit Ins. Agency*, 482 F.3d 612 (2nd Cir. 2007); *Severence v. Patterson*, 566 F.3d 490 (5th Cir. 2009); *Seneca Nation of Indian v. New York*, 397 F. Supp. 685 (W.D.N.Y. 1975).

claiming right to beneficial ownership of assets); *Severence v. Patterson*, 566 F.3d 490 (5th Cir. 2009) (plaintiff's "suit is not the functional equivalent of a quiet-title action: Title to the properties at issue rests with [plaintiff], not the State). *Seneca Nation of Indian v. New York*, 397 F. Supp. 685 (W.D.N.Y. 1975) (suit was not barred by the eleventh amendment because it alleged that a state official has exceeded the authority conferred upon him in attempting to take title to land by operation of state law). These cases contrast with this case, where there is no question that the State of New York obtained a valid property interest in the Thruway easement. The Second Circuit in *In re Deposit Ins.* specifically contemplated suits like the one at bar when it reasoned that "[t]here may well be, as the Superintendent contends, strong arguments that the Eleventh Amendment precludes a quiet title suit in federal court against a state, absent state consent, based on the fact that such an action would adjudicate the state's beneficial ownership of property, regardless of whether it is nominally asserted against a state official." *In re Deposit Ins.*, 482 F.3d at 619

The Plaintiff relies heavily on this Court's 1975 decision in *Seneca Nation of Indians,* 397 F. Supp at 685, claiming that it is directly on point. In the first instance, as noted above, that case is distinguishable because it alleged that a state official had acted without legal authority. Secondly, in that case there was no agreement between the Nation and the State for the transfer of lands. The State acted unilaterally and simply "appropriate[d]" the land. *Seneca Nation of Indians,* 397 F. Supp at 685. In this case, there is no dispute that the Nation transferred to the State, in writing, an easement (ECF No. 1, ¶15); *see also Seneca Nation of Indians*, 383 F.3d at 47. In consideration thereof, it accepted seven hundred-five thousand dollars (ECF No. 1, ¶32); *see also Seneca Nation of Indians*, 383 F.3d at 47. Finally, the Court's decision in *Seneca Nation of Indians,* 397 F. Supp at 685, can hardly be viewed as a deep dive into *Ex parte Young*

jurisprudence. In fact, Judge Curtin characterized his Eleventh Amendment analysis as "preliminary matters which ought to be discussed briefly." *Id*. at 686. The reason for this is clear: the defendants in that case did not assert Eleventh Amendment sovereign immunity as defense in their answer and, therefore, the Court found that they had waived such immunity. *Id.* (citing *Petty v. Tennessee-Missouri Bridge Commissions*, 359 U.S. 275 (1959)).

The other cases that Plaintiff cite in its supplemental brief as support for the proposition that a federal court can adjudicate a state's validly obtained property interests without the state being a party to the action are likewise inapposite for similar reasons. For example, in *United States v. Peters*, 9 U.S. (5 Cranch) 115, the State of Pennsylvania made a "suggestion" of ownership of proceeds from the sale of a ship, the Active, seized from the British during the Revolutionary War. *Id.* at 136. The proceeds from that sale were in the personal possession of one David Rittenhouse (at the time he received them, the Treasurer of Pennsylvania), "who drew the interest on them during his life, and after his death they remained in possession of his representatives." *Id.* at 138. It was his representatives, not any state official, who were the named defendants in the case. *Id.* Although the Court in *Peters* discussed the Eleventh Amendment, there was no state official sued in that case, in either their personal or official capacity. It is also worth noting though, that in quoting *Peters* (ECF No. 41 at 4), the Plaintiff omits the following language that is applicable to the instant matter:

> If these proceeds had been the actual property of Pennsylvania (sic), however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion… .

Id. at 139 – 140. The Second Circuit has already ruled that the challenged easement is the property of the State of New York. Indeed, there is no "suggestion of ownership" but a written Indenture granted to the State by the Plaintiff, in exchange for consideration. Therefore, under

Peters this Court should find "it is unnecessary to give an opinion".

It is not clear why the Plaintiff cites to *United States v Lee*, 106 US 196 (1882), which involved property of the United States, not an individual State, and whose validity has been called into question. *See Block v North Dakota*, 461 US 273, 281 (1983); *Young v. Anderson*, 160 F.2d 225, 227 (D.C. Cir. 1947). It is worth noting, however, that in that case the land had been "seized," which is not the situation in this case. As noted above, the Nation transferred the disputed easement in writing for monetary consideration.

Plaintiff's reliance on *Tindal v Wesley*, 167 US 204 (1897), is also misplaced. The allegation in that case was that state officials committed common law torts, an allegation which no longer provides relief in federal court. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 109 n.19 (1984) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)); see also *Susquehanna Bank v Stewart*, 2014 US Dist LEXIS 136893, at 10, n 8 (D Md, 2014).

Salt Riv. Project Agric. Improvement & Power Dist. v Lee, 672 F3d 1176 (9th Cir 2012), also cited by Plaintiff, did indeed apply *Ex parte Young*, in holding that the Navajo Nation was not a necessary party. However, no sovereign land or property was at issue in *Salt Riv.*, only the application of tribal law to nonmembers. *Id.* at 1177. Worthy of contemplation, however, is the cite by the *Salt Riv.* Court to *Dawavendewa v Salt Riv. Project Agric. Improvement & Power Dist.*, 276 F3d 1150 (9th Cir 2002). In that case the Ninth Circuit held that:

> As a signatory to the lease, we conclude the Nation is a necessary party that cannot be joined because it enjoys tribal sovereign immunity. We further conclude that tribal officials cannot be joined to replace the immune Nation; rather, the Nation itself is indispensable to this suit. Accordingly, we affirm the district court's dismissal of Dawavendewa's complaint without prejudice."

Id. at 1153. Similarly, in *Mille Lacs Band of Chippewa Indians v Minnesota*, 124 F3d 904 (8th

Cir 1997), the issue was tribal members treaty rights to hunt and fish on non-tribal land. The state's stake in the case was its ability to regulate such activities on private lands. Possession and title of state land was not an issue. Crucially, the United States had intervened on the part of the Indian bands, eliminating any Eleventh Amendment issues. *Id.* at 910. This, of course, is not the case herein.

Stanley v Gallegos, 2018 US Dist LEXIS 38157, 2018 WL 1230485 (D. N.M. Mar. 8, 2018), is another case cited by Plaintiff, in which there was no state property involved. *Stanley* concerned a local rancher's ability to erect a fence across a road. It is not even clear from the case whether the road was a state road or a local road, or whether it was merely a right of way or the property was actually owned by a governmental body. Ownership, title, and possession of state property was simply not an issue in that case. This is equally true of *Merritt Parkway Conservancy v Mineta*, 2005 US Dist LEXIS 23893 (D Conn, 2005), another case cited by Plaintiff. That case involved various improvements to a state highway, but did not determine who owned the road, nor did it challenge the State's ownership, tile, or possession of that road.

Florida Dept. of State v Treasure Salvors, 458 US 670 (1982) is not responsive to this Court's questions because the four-judge plurality in that divided decision could not determine who owned the property in question, salvaged artifacts from a sunken Spanish galleon. In *Florida* the Court ruled that the State did not even have a "a colorable claim to possession of the artifacts" in question. *Id.* at 697. Therefore, the State of Florida could not even invoke the Eleventh Amendment. *Id.* That is hardly the case at bar. Even viewing the Plaintiff's Complaint in the light most favorable to the Nation, the State of New York has more than at least "a colorable claim" to the easement in question. The Nation granted it and the State paid for it.

The same is true for *In re Deposit Ins. Agency*, 482 F.3d 612 (2d Cir. 2007), in which the

money at issue was bank accounts that were seized by a state official and were in the official's custody but was not state property. *Id.* at 619. The relief requested by the plaintiff in that case was "a prayer for relief to dispossess a state official of assets and some of the incidents of ownership thereof under authority of controlling federal law." *Id.* at 620. In the case at bar the Plaintiff has alleged that the State has possessed the land for more than sixty years and constructed three miles of interstate highway across the easement (ECF No. 1, ¶¶ 15 and 36). This is not merely custody but title to the easement and *In re Deposit Ins. Agency* is therefore inapplicable to the questions raised by the Court.

The Plaintiff also cites to *Suever v. Connell*, 439 F.3d 1142, 1143 (9th Cir. 2006) in defense of its claim that *Ex parte Young* allows federal court's to adjudicate the ownership of state property in the absence of the state. But in *Suever*, as in *In re Deposit Ins. Agency*, a state official had seized bank accounts that were alleged to have been unclaimed property. The plaintiffs were the owners of those accounts. Again, the state was claiming possession of property to which it did not have title. The State of New York has title to the easement in question, therefore, *Suever* is not instructive.

The same is true of *Arnett v Myers*, 281 F3d 552 (6th Cir 2002), in which state authorities seized private duck blinds that it claimed to have been illegally erected. In that case the state was taking property without compensation and without the consent of the property owners, which is directly opposite of the facts in this case.

Elephant Butte Irrigation Dist. v DOI, 160 F3d 602, 612 (10th Cir 1998), is also distinguishable. That case involved a dispute over profits from leases that the state had been granted by the federal government, which grant was alleged by plaintiffs to be illegal. The court found that since the money at issue was alleged to be from leases that were improper under

Federal law, the suit could proceed against state officials in their official capacity. Further, if the plaintiffs prevailed in that claim of impropriety, they would be entitled to some of the money from the leases. It is important to note that in *Elephant Butte*, the continuing payments of profits were contemplated by the underlying Federal law. This is not true of the Federal law alleged to have been violated in the case at bar.

Lipscomb v Columbus Mun. Separate Sch. Dist., 269 F3d 494, 501 (5th Cir 2001), cited by plaintiff, is also inapplicable. In that case the federal court was asked to prevent the State of Mississippi from cancelling leases which the plaintiffs argued were subject to mandatory renewal. The court was not being asked to take state property from it but to prevent the state from seizing the property. This relief would prevent threatened future action, which is not the relief that the Plaintiff herein is asking for requests. The relief requested in *Lipscomb* is truly a request for prospective injunctive relief that involved land which the state held title to, but did not possesses, unlike the case at bar where the State of New York holds both title and possession of the easement.

In *Gila Riv. Indian Community v Winkleman*, 2006 US Dist LEXIS 33276 (D. Ariz. 2006) the Court found that the State of Arizona was a necessary, but not indispensable, party. That case involved a dispute over the use of a piece of land that the State of Arizona and an Indian community both claimed of. The Commissioner of the State’s Land Department had granted one of the defendants a “special land use permit” and the Indian Community sued seeking an injunction ending the encroachment and preventing future encroachments. In dismissing the Commissioner’s sovereign immunity defense the Court found that the requested injunctive relief if granted “would leave Arizona’s fee title undisturbed” and would “not result in extinguishing Arizona's title to the disputed property, at most Arizona's title would be subject to

the Community's right to occupy the property." *Id.* at 15. This is not the situation in the case at bar where the Plaintiff seeks a ruling from this Court declaring the State's easement to be void *ab initio,* effectively extinguishing New York's title to it. In such a case, the State is not only a necessary party but is also an indispensable one.

Univ. of Utah v Max-Planck-Gesellschaft zur Forderung der Wissenschaften E.V., 881 F Supp 2d 151 (D Mass 2012), was a case about a dispute between the University of Utah ("UUtah") and officials at the University of Massachusetts ("UMass") and other research institutes over patent rights to a gene silencing process. UUtah sought an order directing that the Patent Office correct the inventorship of the process and requiring the defendants to stop violating federal patent law by naming a UUtah professor as either the sole inventor or a joint inventor on two patents related to the process. This case is distinguishable from the instant case for several reason. First, unlike this case, the case did not involve the adjudication of a property interest claimed by the state of Massachusetts; rather, it dealt with the use by UMass officials of intellectual property that UUtah claimed to have the sole and exclusive right to grant based on the alleged holding of patents by one of its professors. The court allowed the case to proceed against the UMass officials under the *Ex parte Young* doctrine because the dispute did not implicate a core sovereign interest but instead "exactly the sort of quarrel over money and technology that the district courts hear frequently when brought by private litigants." *Id*. at 156 (quoting *Oregon v. Heavy Vehicle Elec. License Plate, Inc.*, 157 F.Supp.2d 1158, 1164 (D.Or.2001)). Clearly, in this case the operation and maintenance of roadways implicate one of the New York State's core sovereign interests.

Finally, a case that is very similar to the case at bar is *John G. & Marie Stella Kenedy Mem. Found. v Mauro*, 21 F3d 667 (5th Cir 1994). In that case the plaintiff asked the court to

compel the defendant, the Commissioner of the Texas General Land Office, to recognize the proper location of the border between its land and neighboring State land. The district court dismissed the claims against the State and the Commissioner which were based on 42 USC § 1983, finding its jurisdiction barred by the Eleventh Amendment. Citing *Florida*, 458 US at 670, the Fifth Circuit upheld the dismissal, stating that "a federal court does not have the power to adjudicate the State's interest in property without the State's consent. *Kenedy Mem. Found.* 21 F.3d at 671. The court further stated that:

> To provide the Foundation with the relief it requests would necessitate a determination by the district court that the State does not have title to the disputed property, title which the State has claimed for the past century and which was effectively adjudicated in the State in *Humble Oil.* Accordingly, the relief the Foundation requests, although nominally against Mauro, is retroactive relief *against the State.*

Id. at 671 – 672 (emphasis in original).

Point II

THE COURT SHOULD IGNORE EXTRANEOUS ISSUES

As noted above, Plaintiff has taken opportunity provided by the Court to answer two specific questions and used it as a spring board to reargue its entire opposition to the pending Motion to Dismiss. Specifically, plaintiff has chosen to reargue the validity and impact of *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281-88 (1997) (ECF No. 41, pgs. 8 – 10). Plaintiff has also decided to discuss cases in which *Ex parte Young* was applied and the case did not implicate the property rights of a sovereign (ECF No. 41, pgs. 10 – 11) as well as the propriety of the Plaintiff's prayer for relief (ECF No. 41, pgs. 11 – 12). Since the Court did not ask for further briefing on these issues, the Defendants will not be responding to these arguments and will rely on their previous submissions.

CONCLUSION

This action is barred as against the individual Defendants sued in their official capacities by Eleventh Amendment immunity. Moreover, the Defendants have shown that the issues in this case were, or should have been, litigated years ago. Finally, the Plaintiff has unduly delayed the claims in this action to the prejudice of the Defendants. Accordingly, Defendants are entitled to a judgment dismissing the Complaint in its entirety.

DATED: Buffalo, New York
January 3, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2020, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

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And, I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

NONE

DATED: Buffalo, New York
January 3, 2020

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