UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,

Plaintiff,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,

Defendants.

Civil Action Nos. 82-CV-783 82-CV-1114 (NPM)

THE ST. REGIS MOHAWK TRIBE, by THE ST. REGIS MOHAWK TRIBAL COUNCIL and THE PEOPLE OF THE LONGHOUSE AT AKWESASNE, by THE MOHAWK NATION COUNCIL OF CHIEFS,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,

Defendants.

Civil Action No. 89-CV-829 (NPM)

PLAINTIFF SAINT REGIS MOHAWK TRIBE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff Saint Regis Mohawk Tribe (Tribe) seeks partial summary judgment on three legal questions which go to establishing the prima facie case that the Tribe has stated a valid claim under the Nonintercourse Act, 25 U.S.C. §177, and resolving whether the Defendant's

defenses of abandonment, release and relinquishment, and their counter claims of disestablishment or diminishment can stand.

First, the Tribe seeks summary judgment that the Tribe holds recognized title to the land set aside by the 1796 Treaty with the Seven Nations of Canada. We will establish that (1) the land was explicitly reserved for the "St. Regis Indians," the group to which the Tribe is the successor, out of a treaty land cession, (2) the treaty does not indicate any intention the set aside be temporary, (3) the treaty negotiations indicate the Tribe sought and understood it obtained a permanent home, and (4) the reservation of land was ratified by the United States Senate. These facts establish that the Tribe has recognized title.

Aside from proving a prima facie case under the NIA, the Defendants have asserted by defense that the Tribe abandoned and relinquished its interest in these lands through the conveyances at issue in this case.[1] These defenses cannot stand if the Tribe has recognized title.

Second, the Tribe seeks a ruling that the conveyances or so called "treaties" by which the State of New York purchased land from the St. Regis Indians were not ratified by the U.S. Senate as required by the Nonintercourse Act. As a result, the conveyances were invalid.

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[1] *See Canadian St. Regis Band of Mohawk Indians v. New York,* 278 F.Supp.2d 313, 347-348 (N.D.N.Y. 2003). The Municipal Defendants' Amended Answer to the American Tribe and the Longhouse, Dkt. No. 89-cv-829, Doc. 51, allege as defenses that the conveyances at issue here were "valid conveyances" and therefore, the Plaintiffs "released and relinquished all claims" in the land at issue in this case. Amended Answer, ¶98, 100. The Municipal Defendants also allege an affirmative defense, ¶¶112-117, and a counterclaim that the Plaintiff Tribe's rights created by the 1796 Treaty were "ceded, released, relinquished and/or disestablished by" the state treaties at issue or by the 1838 Treaty of Buffalo Creek. Amended Answer, ¶119

The State alleges defenses of both abandonment, State Amended Answer, ¶65, and release and/or relinquishment, State Amended Answer, Dkt. No. 89-cv-829, Doc. 53, ¶66. The State Amended Answer also sets out counterclaims of diminishment and disestablishment, Counterclaims, ¶ 80, either through the State purchases or the Treaty of Buffalo Creek. Amended Answer, ¶84-85 and 90-92.

Third, relatedly, the Tribe seeks a ruling that the 1838 Treaty of Buffalo Creek, 7 Stat. 550, did not ratify the conveyances. There is no evidence that Congress intended to approve the prior state purchases by way of the Treaty.

Finally, the Tribe seeks a judgment, in relation to the counterclaims, see note 1, that the Tribe's 1796 Reservation has not been diminished or disestablished.

II. STATEMENT OF FACTS

A. The Nonintercourse Act

In 1790, the United States enacted the first Nonintercourse Act. Material Fact (MF) 4. The law was revised again in 1793, 1796, 1802 and 1834. The 1802 law provided that,

> SEC. 12. And be it further enacted, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty, or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Act of March 30, 1802, Pub. L. No 7-13, § 12, 2 Stat. 139, 143, MF 5. In sum, a conveyance shall not be valid unless made by treaty or convention entered into pursuant to the Constitution. A State may lawfully participate in treaty negotiations to address compensation and extinguishment of land claims so long as the treaty is under the authority of the U.S. and with the approbation of a U.S. Commissioner. The terms of this law were met in 1796. They were not met in 1824-1825.

B. Treaty Negotiations

The 1796 Treaty with the Seven Nations of Canada, 7 Stat. 55, was the result of a years-long effort by the representatives of the St. Regis Mohawk Indians and the Caughnawaga Tribe of the Seven Nations to negotiate a treaty to address the non-Indian intrusion into Mohawk territory because of the State's sales of land in Northern New York.

The St. Regis Indians had been using and occupying lands and islands along and in the St. Lawrence River for hunting and fishing for generations. A large group settled and established the Village of St. Regis in 1755. MF 1-3. Still, declaring some of the same land claimed and occupied by the Tribe as waste and unappropriated, the State sought buyers for the land in Northern New York. MF 6. In 1791, the State sold millions of acres to Alexander Macomb in a transaction known as Macomb's Purchase.[2] MF 9. His initial offer too large, MF7, Macomb agreed to except from his application some islands and a six-mile square tract that would be reserved for the use of the St. Regis Indians. MF 8. This excepted tract, while not specifically identified or surveyed at the time of his application, was intended to include the Village of St. Regis and its surrounds. MF 9. The exception did not encompass all of the lands being claimed by the Seven Nations and the Tribe, however. Whether the St. Regis Indians were aware of this set aside is not clear.[3]

Beginning in 1792, with the influx of non-Indian settlers brought on by Macomb's Purchase, the St. Regis Indians and the Caughnawaga Tribe sought to resolve their claim to land

[2] The issue of whether this transfer to Macomb was legal because it transferred Mohawk aboriginal lands in violation of the NIA is not at issue in this case.

[3] The view of one historian is that the Tribe was not aware the land was kept out of the Purchase. See Exh. 1, p. 129. In any event, since the set aside was not surveyed as part of Macomb's Purchase, see Exhs 5A-D, it could not be identified by subsequent land purchasers and it did nothing to protect Mohawk land interests from further encroachment.

in the State, visiting Albany in the hopes of meeting with the Governor. MF 10-12. In 1795, Thomas Pickering notified the State that the U.S. had to be involved in any negotiations, citing to, and providing a copy of an opinion by Attorney General William Bradford. MF 13. The Governor agreed that the NIA required federal involvement in any negotiations, and he requested President Washington send commissioners. Washington agreed. MF 14-15. In 1795, the State legislature authorized State agents to negotiate. MF 16. The efforts at negotiation failed. MF 17. The parties decided to try again in 1796. To that end, the findings of a state committee mirrored the requirements of the NIA, stating:

> "it will be proper whenever a treaty shall be held for the purpose by the United States with the said Indians, that agents for this State should again attend, in order further to examine and discuss the said claim, and if they shall deem it eligible, then also further to propose and adjust with the said Indians, the compensation to be made by this State for the said claim."

MF 18. Governor John Jay once again asked President Washington to name a commissioner to attend talks in 1796. MF 19. Washington appointed Abraham Ogden as the U.S. commissioner and the negotiations began on May 23, 1796. MF 20-21.

During negotiations, the St. Regis Indians and the Caughnawaga were intent on reserving land for their use and the use of their children, i.e., for permanent occupation:

> as to our lands, we wish our children after us to share their part of the lands, as well as us that are now living; and we are sensible, Brothers, that, if you do by us as you would be wish to be done by, were it your case, as it is ours, and let justice speak and make us an offer for our lands, yearly, exclusive of a small piece we wish to reserve for our own use, we are satisfied that, as you know the value of the lands so much better than we do, that your offer will prevent an further contention on the business.
>
> MF 22.

The tribal representatives emphasized the need for a large tract of land: "we are not able to bring the reserve into as small a compass as possible without interfering with our plantations;

which will be resigning up to you about two thirds of the reserve which we never intended to dispose of on any occasion whatsoever." MF 25. They outlined a much larger area that the six miles square tract because they sought land to "reserve for our own use" and to be "reserved for the maintenance of our children after us." MF 23, 25. The tribal negotiators also expressed their belief that "a nation of people without lands are like rogues without friends." MF 24. They understood the value of land and stated never intended to part with any land because they had learned from their fathers that it was best to lease land, not sell it. MF 23.

The State did not express any opposition to a permanent reservation. There was no discussion of the Macomb set aside and the State did not assert that the six-mile square exception to the Macomb Purchase controlled the status or the nature of the reservation. Instead, the State agents confessed that they had no authority to agree to reserve more land than was set aside from the Macomb sale without the agreement of subsequent purchasers. MF 26. To that end, the State did procure more a few more parcels of land with the agreement of two men who had purchased from Macomb. MF 27. The State agents stated:

> "If you had seasonably informed the state of your claim, they might have reserved land for your use, to any extent which might have been judged proper, but they have now sold all the land on that quarter to Mr. Macomb, and as reservations cannot be made without the consent of the persons who have purchased from him, we have spoken to them on the subject, and they have consented, that we should further offer to you, that a convenient tract at each place where the mills are built, and the meadows on both sides of the Grass river, although they may hereafter be discovered to be not within the tract equal to six miles square, shall be reserved to the use of the St. Regis Indians."
>
> MF 26.

With that offer, on May 31, 1796, the State, the St. Regis Mohawks, and the Seven Nations entered into a treaty in which the Seven Nations ceded all claims to land in New York, with a reservation of land (MF 28):

> "*Provided nevertheless,* That the tract equal to six miles square, reserved in the sale made by the commissioners of the land office of the said state, to Alexander Macomb, to be applied to the use of the Indians of the village of St. Regis, shall still remain so reserved." (emph. added)

The State further set aside land not mentioned in Macomb's Purchase by convincing two landowners who had purchased land from Macomb to cede two mile-square parcels and land along the Grass River, to be "reserved" from the cession (MF 29):

> "[T]hat there shall be reserved to be applied to the use of the Indians of the said village of St. Regis, in like manner as the said tract is to remain reserved, a tract of one mile square at each of the said mills, and the meadows on both sides of the said Grass river, from the said mills thereon, to its confluence with the river St. Lawrence."

The State also agreed to pay annual compensation to the tribal signatories "yearly and forever thereafter." MF 30.

The record of the treaty negotiation was forwarded along with the treaty to President Washington who submitted it for final Senate approval on January 4, 1797. MF 31. On January 16, 1797, the Senate adopted a resolution ratifying the 1796 Treaty. MF 32. On February 20, 1797, New York Governor John Jay presented the treaty ratification to the State Senate with the message that the U.S. Senate had adopted a resolution "advising and consenting to the ratification of the treaty...." MF 33.

This Treaty is a model of compliance with the NIA and is illustrative of the process that any purchase from the Tribe had to follow to be valid under federal law. It was negotiated under the auspices of the United States, as requested by the State of New York. The President named Treaty Commissioners. After an agreement was reached, the United States Senate ratified the treaty based on a record of proceedings presented by the President of the United States.

After the treaty, the Mohawks found that settlers continued to encroach on their lands, and they requested the reservation boundaries be surveyed. MF 34. In 1799, the New York State legislature ordered the surveyor general to survey the boundaries of the reservation "in such manner as the chiefs of the St. Regis Indians shall deem satisfactory, all the lands reserved to the said Indians by the [1796 treaty]...." MF 35. Simeon DeWitt, the surveyor, laid out the reservation as a rectangle with one of the mile squares (Fort Covington) set adjacent to the northeast corner. MF 36. DeWitt's account of the survey shows that the St. Regis Indians met with him to discuss the boundaries of their reservation, including objecting to DeWitt's work surveying the Grasse River lands. MF 37.

At this time, New York was well aware that the land set aside by the 1796 treaty was federally recognized and would require NIA compliance to purchase. In 1801, the State sought to extinguish the Tribe's title to the Massena Mile Square and the Grasse River lands. Hough, Exh. 1, p. 151-152. The State legislature enacted a law requesting a U.S. Commissioner be appointed. Exh. 25 and a commissioner was named. Exh. 1, p. 152. This transaction was never completed because the Tribe sought assistance with lease enforcement, not a land sale. *Id.* at 153. But it exemplifies the State's understanding at the time that the U.S. was to be an integral part of any effort to buy St. Regis land.

Nearly a decade later, the State's position changed, and it began whittling away at the lands set aside in the 1796 treaty. At issue in this case are two state "treaties" and one quit claim deed, by which the State of New York purported to purchase land from the St. Regis Indians that would comprise the Hogansburg Triangle. On June 12, 1824, the State of New York purchased a 1000-acre tract of land located in what is now the Hogansburg Triangle. MF 38. The later survey established that the area in question totaled 1023.34 acres. MF 39. The treaty recognizes

that the land is reserved in the 1796 treaty: "The said Indians sell and hereby convey to the People of the State of New York One thousand acres of land out of the lands reserved by the said Indians...." MF 38.

On December 14, 1824, the parties entered into an agreement whereby the St. Regis Mohawks quit claimed to the State another 144 acres that had been leased to Michael Hogan in 1817.[4] MF 41.

Then on September 23, 1825, the State purchased from the Mohawks an 840-acre tract. MF 42. The later survey established that the area in question totaled 888 acres. MF 43.

New York did not request federal commissioners and federal commissioners did not attend any negotiations. MF 40, 43. Although the "purchases" were denoted as "treaties" by the State, there is no record that they were submitted for ratification or that there was a federal treaty ratified by the U.S. Senate. MF 44.

C. The 1838 Treaty of Buffalo Creek

As the U.S. grew, the federal government sought to remove Eastern Tribes west to make way for settlement. The 1838 Treaty of Buffalo Creek was intended to remove the New York Indians to Kansas and to obtain a cession of treaty lands the Six Nations held in Wisconsin. *See Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003) *rev'd on other grounds, City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

[4] Based on the Court's previous ruling, the Tribe is precluded from pursuing a claim for this acreage. *Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F.Supp.2d 170, 192 (N.D.N.Y. 2001). However, the Tribe reserves its right to appeal that ruling on the grounds that intervening case law requires a rejection of the application of res judicata. For the record, the Tribe states that the quit claim transfer was not ratified by the U.S. Senate.

The treaty was initially signed by several tribes on January 15, 1838, with the expectation was that each tribe would consent to the treaty individually. MF 45. Ransom Gillet, the U.S. Treaty Commissioner, traveled to the Tribe's reservation to gain their consent. The Tribe and Gillett met at the Tribe's council house where Gillett explained the terms of the Treaty. MF 46. Unwilling to unconditionally agree, the Tribe requested a supplement to the Treaty whereby the Tribe said it would accept the treaty on the condition that "any of the St. Regis Indians who do wish to do so, shall be at liberty to remove to the said country at any time hereafter within the time specified in this treaty; but under it the Government shall not compel them to remove." Supplemental Article to the Treaty dated Feb 13, 1838 (emph. added). MF 47; Exh. 22.

In his reports to the Commissioner of Indian Affairs over the course of negotiations, Gillet set forth the history of his meetings with the Tribes. For the February 1838 meeting, Gillet noted that, in order for the St. Regis to remove, they would first have to enter into a treaty with New York "for the relinquishment of their interests in these lands. They cannot sell to him until they are certain of another home." MF 48.

Gillet met with the St. Regis Council again on October 9, 1838 to review the treaty with later amendments and to gain their final consent. MF 49. Gillet reported that no "definite arrangement" had been made for the removal from the State. MF 50. The Tribe agreed to the Treaty but signed with the statement that, "The St. Regis Indians shall not be compelled to remove under the treaty or amendments." MF 51

There is no indication in the record presented to Congress that the 1824 and 1825 transactions were discussed or even mentioned during these negotiations. No treaty of relinquishment was ever entered into and the St. Regis Indians never moved from its

reservation in New York under the Treaty of Buffalo Creek. MF 52-53. The St. Regis Mohawks today remain on their reservation set aside under the 1796 Treaty.

III. STANDARD OF REVIEW

The Tribe has moved for partial summary judgment on specific legal issues pertinent to establishing the prima facie case that its Nonintercourse Act claim is valid. A ruling on these issues will also address certain defenses alleged by Defendants.

Under Fed. Rule Civ. Pro. 56(a) summary judgment may be granted "if there is no genuine issue as to any materials fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Id*. at 323. If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-248 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Summary judgment is appropriate where the nonmoving party fails to "'come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on' an essential element of a claim." *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013). "The district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). Still, the nonmoving party "must do more than show there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co v. Zenith Radio Corp,* 475 U.S. 574, 586 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for

summary judgment." *Knight v. U.S. Fire Ins. Co.* 804 F.2d 9, 12 (2d Cir. 1986). Furthermore, mere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist. *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010).

IV. ARGUMENT

In order to establish a violation of the Nonintercourse Act, the Tribe must show: (1) it is an Indian Tribe within the meaning of the Act;[5] (2) the parcels of land at issue are covered by the NIA as tribal land; (3) the United States never consented to the alienation of the land; and (4) there is a trust relationship between the United States and the Tribe that has never been terminated or abandoned.[6] *Oneida Indian Nation v. Oneida County*, 434 F.Supp. 527, 537-538 (N.D.N.Y. 1977); *Cayuga Indian Nation v. Cuomo*, 667 F.Supp. 938, 941 (N.D.N.Y. 1987).

A. The Land Set Aside in the 1796 Treaty is Federally Recognized Reservation Land.

In order to establish a claim under the Nonintercourse Act, the Tribe must show that the parcels of land at issue are covered by the NIA as tribal land. Whether the land is aboriginal or recognized title is a legal question that is key to resolving not only the second prong of the NIA

[5] In 2003, this Court held that because the tribe is listed in the Federal Register as a recognized tribe and based on an Affidavit from the Department of Interior, Exh. 26, the Tribe has shown it can satisfy the first element of the NIA. *See Canadian St. Regis Band,* 278 F.Supp.2d at 329. The affidavit states unequivocally that the Tribe is the successor in interest to the St. Regis Indians named in the treaty. The court must defer to this conclusion since the issue of tribal status is a binding political determination. *Cayuga Indian Nation v. Cuomo*, 667 F.Supp. at 942-943 *citing United States v. State of Washington,* 384 F.Supp. 312, 401 (W.D.Wa.1974), *aff'd,* 520 F.2d 676 (9th Cir.1975); *United States v. Aam,* 670 F. Supp. 306, 309 (W.D.Wa. 1986)("The Court must extend great deference to the political departments in determining whether Indians are recognized as a tribe. This determination closely resembles a political question, which should not be resolved by the courts. *Baker v. Carr,* 369 U.S. 186, 215 (1962).")

[6] As a federally recognized tribe, there is no question that the Tribe has a continuing trust relationship with the United States government.

test, but also the applicability of certain defenses put forth by the Defendants. *Canadian St. Regis Band,* 278 F.Supp.2d at 343-348.

"Recognized Title" is a distinct term of art of recent vintage. Cohen, *Handbook of Federal Indian Law*, §15.04[3] (2012 ed.). Under federal law, recognized title need not be derived from aboriginal land. For recognized title, the land only needs to be set aside by federal treaty for the permanent use and occupation of the Tribe with a statute or treaty defining the boundary of the land rather than relying on proof of use and occupation:

> "The lands which Indians hold by recognized title may be lands formerly held by them under mere aboriginal use and occupancy title or may be lands which they never previously occupied and which the Government conveyed or granted them. The land which an Indian tribe holds by recognized title may be called a 'reservation' in the applicable treaty, agreement or statute, or it may not be called a reservation."

Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926, 940 (Ct.Cl. 1959). Thus, this Court may make a finding of recognized title without regard to whether the Tribe had aboriginal title (although the land reserved in the treaty is a set aside from ceded aboriginal land claimed by the St. Regis).

There is no particular language used by Congress for recognition of a "tribe's right to occupy permanently land and that right may be established in a variety of ways." *Tee-Hit-Ton v. United States*, 348 U.S. 272, 278 (1955); *McGirt v. Oklahoma,* __U.S. __, 140 S.Ct. 2452, 2461 (2020)("early treaties [1832-8133] did not refer to the Creek lands as a 'reservation'—perhaps because that word had not yet acquired such distinctive significance in federal Indian law"); *Cayuga Indian Nation v. Cuomo,* 758 F.Supp. 107, 111 (N.D.N.Y. 1991)(formal statements of recognition not necessary). The language of the treaty in combination with the intention of the parties as to whether a permanent homeland was being set aside ultimately controls. *Id.* (there must be an intention to accord legal rights not merely permissive occupation). In *New York*

Indians v. United States, 170 U.S. 1 (1898) the Supreme Court found that land "set apart" by treaty was enough to establish in context the intention to vest a present legal right. Treaties may use phrases such as "use and occupancy" or "reserved for the sole use and occupancy" or lands "to be held as Indian lands are held." *See Menominee Tribe v. United States,* 391 U.S. 404, 405-406 (1968) ("to be held as Indian lands are held" was sufficient to create a reservation with hunting and fishing rights); *Oneida Tribe v. United States,* 165 Ct. Cl. 487, 491 (1964). A treaty may also state the land may be held as long as a tribe wishes and still qualify as recognized title. In *Miami Tribe,* 175 F. Supp. at 940, the court found that a treaty providing the tribe a right to use and occupy "as long as they please" without interference created recognized title. Similar to the language in *Miami Tribe,* in *Cayuga*, 758 F.Supp at 112, the Court found recognized title in a treaty that provided the "reservation shall remain theirs until they choose to sell the same to the people of the United States...."

In assessing the treaty terms, this court must apply the canon of construction that treaties are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985)(*Oneida II*). In addition, consideration should be given to the history of the treaty and negotiations. *City of Sherrill*, 337 F.3d at 158.

In this case, the language, and the intention and the understanding of the parties establish that the Tribe holds recognized title. The Tribe and the Caughnawaga had two goals--to address what they saw as an improper encroachment by non-Indians with compensation for the lands and to establish a permanent homeland to be reserved for the St. Regis Indians. The Mohawks had established "plantations" and hunted extensively on vast tracts of land that were the subject of the negotiations. They sought a large tract of land to continue those practices, seeking an area to

"reserve for our own use" and to be "reserved for the maintenance of our children after us." The State resisted the Tribe's request for a larger area because of the previous sale to Macomb. But the State agreed to continue the reservation of the six-mile square excluded from Macomb's Purchase to be used as the Tribe's reservation. The final Treaty language stated:

> "provided nevertheless, that the tract equal to six miles square reserved in the sale made by the commissioners of the land office of the said state to Alexander Macomb, **to be applied to the use of the Indians of the village of St. Regis, shall still remain so reserved.**"

In addition, the State agreed that other parcels the Tribe sought would be reserved under the Treaty. The State added (MF29):

> "The said deputies having suggested that the Indians of St. Regis have built a mill on Salmon River and another on Grass river and that the meadows on Grass river are necessary for hay, **in order therefore to secure to the Indians of the said village, the use of the said mills and meadows, in case they should hereafter appear not to be included in the above tract [six mile square], so as to remain so reserved.** It is therefore also agreed and concluded between the said deputies and the said agents and the said William Constable and Daniel McCormick, for themselves and their associates, purchasers under the said Alexander Macomb, of the adjacent lands, that **there shall be reserved to be applied to the use of the Indians of the said village of St. Regis,** in like manner as the said tract is to remain reserved, a tract of one mile square at each of the said mills, and the meadows on both sides of the said Grass river, from the said mills thereon, to its confluence with the river St. Lawrence."

The language of the treaty that the land "reserved to be applied to the use of the Indians of the Village of St. Regis" as well as the provision for an annual payment forever indicates an intention to permanently set aside the reservation for the Tribe's benefit. There is no other indication in the treaty negotiations or in the treaty language to suggest this reservation was anything but permanent. During the negotiations, the Tribe sought land for generations to come, land that they were settled upon and actively using for plantations, for subsistence, for their sawmill and for the gathering of grasses along the river. The State Agents did not expressly or even impliedly explain to the tribal negotiators that the treaty granted only a temporary use right.

The State's answer, ¶80, 90, appears to suggest that the temporary nature of the reservation is a result of the Seven Nations having ceded *all* their lands to the State and the State then reserving land for the benefit of the St. Regis Indians. There is no indication in the treaty that all land was ceded to the State and it is, in fact, unlikely since in the context of land cessions, a "reservation" is usually a parcel of land that is reserved *from* a land cession. *See United States v. Winans*, 198 U.S. 371, 381 (1905)(a "treaty is not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted."). "Land cession agreements between the United States and Indian tribes are to be interpreted as grants *by* the Indians *to* the United States. Indians reserve any rights not explicitly granted." *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983). In other words, the Seven Nations ceded all land *but* the land reserved, to which the Tribe retained title. The Treaty itself says so: the "Seven Nations of tribes of Indians, cede, release and quit claim" to the State of New York "all the claim right or title...to lands with the said state: *Provided nevertheless,*" that the six mile square ... shall remain so reserved." This proviso is the reservation of land from the cession. The fact that the State had earlier retained its existing right (what could only be a preemption right) to this land by withholding it from Macomb's Purchase did not impact the Tribe's claim to title.[7]

Nor would it change the fact that no matter the provenance, i.e., even if it was true that the State reserved the land for the St. Regis Indians through Macomb's Purchase, once reserved by a ratified federal treaty, the title was recognized under federal law.

Nothing provided to the Senate and nothing in the Senate ratification of the Treaty indicated the reservation was temporary, and only Congress could make it so. The State

[7] Since the State only held a preemption right to Indian land, the most Macomb received was the State's right of preemption. *Oneida Indian Nation of New York v. Oneida County*, 414 U.S. 661, 670 (1974).

understood this as well. State officials and agents, including the legislature in 1801 recognized the need to engage with the federal government on any potential land purchase. The illegal conveyances at issue reference the lands as "reserved" under the 1796 Treaty MF 34, 37. In fact, if the Tribe did not have a permanent right to the land, it is hard to understand why New York thought it necessary to pursue the Treaty of Buffalo Creek or the earlier Treaty with the Menominee. If the interest created by the 1796 treaty was not recognized title but only temporary, or if the interest was only a state right and not a federal one, then why seek Congressional assistance to remove the Indians from the State? The State sought a federal treaty of removal because it knew this was the only legal way to overcome the treaty recognized land rights held by the Tribe and other nations in New York.

In sum, as the Indians understood it, the land was to be theirs for generations. Under the canons of treaty construction, if there is any doubt about this, this court must resolve the ambiguity in favor of the tribe and as the Indians would have understood it.

B. As Recognized Title, the Land Could not be Abandoned, Released or Relinquished.

If the Tribe has recognized title, its title cannot be abandoned, released or relinquished. *See Canadian St. Regis Band*, 278 F.Supp.2d at 345, 437 (nature of title is critical and dispositive to determining abandonment defense and release and relinquishment); *Cayuga Indian Nation*, 758 F.Supp. at 117(only Congress can divest a tribe of recognized title and physical abandonment is only a defense to a claim based on aboriginal title). Here, the Tribe was granted a permanent right to occupy the land set aside in the 1796 Treaty, i.e., recognized title. The Tribe therefore seeks summary judgment that, with recognized title, the Tribe cannot be found to have abandoned or released and relinquished its land.

The Defendants main theory appears to be that the Tribe obtained only a temporary use right. The State posits that "[a]ny right or interest the historic Indians of the Village of St. Regis had that was created by the Treaty of 1796 was derived solely from that Treaty." See State Amended Answer, ¶¶ 80, 90. The State goes on to allege that the lands reserved by the State for the Tribe were for "specified uses of the St. Regis Indians." ¶81, 91. The implication is that because the Tribe's interest "derived from the treaty," the interest is less than permanent and can be taken by the State without federal approval.

This theory is simply a rehash of a defense theory this Court ordered stricken in 2003. As explained by the Court, the Defendants claimed that the 1796 Treaty extinguished all Tribal title to lands in New York and granted full title to the State. 278 F.Supp.2d at 349. The Defendants further alleged that the Tribe lacked aboriginal title in the land because the State held title. From that premise, they contended, the Tribe was only a beneficiary of a contract right created in Macomb's Purchase. *Id.* In other words, the Tribe was a beneficiary of a set aside of land in a separate contract. In the 1796 Treaty, the State extinguished the Tribe's rights and granted only a temporary use right to the land as set aside by that contract.

In response to the motion to strike, this Court held that the State had no authority to extinguish tribal interests granted by the 1796 treaty without federal approval based on some theory of underlying State title:

> Evidently the State believes that based upon its title to the subject land, the State could "validly extinguish the interest" which the Tribes acquired in that land through the 1796 Treaty. That theory directly conflicts with the "rudimentary proposition[ ] that Indian title is a matter of federal law and can be extinguished only with federal consent[.]" *See Oneida Indian Nation of New York v. Oneida County,* 414 U.S. 661, 669–70, 94 S.Ct., 772, 778, 39 L.Ed.2d 73 (1974) ("*Oneida I* "). What is more, the Supreme Court in *Oneida I* explicitly found that "rudimentary proposition" to apply to states, such as New York, where "fee title to Indian lands ..., or the pre-emptive right to purchase form the Indians, was in the State" as opposed to the U.S. *Id.,* 94 S.Ct. at 778–79, 94 S.Ct. 772 (citation and

> footnote omitted). Accordingly, this court finds that the "State Title" defense is insufficient as a matter of law, and thus grants the Tribes' motion to strike same.

278 F.Supp.2d at 349. Yet, the State repeated this theory in its Amended Answer. To the extent the State relies on this theory it should be rejected again.

C. The United States Never Approved the Land Purchases.

The next element of establishing a NIA violation is to show that the United States did not ratify the conveyances in question. The Supreme Court has held that the original NIA "prohibited the conveyance of Indian land except where such conveyances were entered pursuant to the treaty power of the United States." *Oneida II*, 470 U.S. at 232-233. The Court found that the 1793 version of the Act, which is nearly identical to the 1802 version, was even "stronger." *Id*. at 232. It provides that no purchase shall be valid unless "'made by a treaty or convention entered into pursuant to the constitution [and] in the presence, and with the approbation of the commissioner or commissioners of the United States' appointed to supervise such transactions." *Id.* at 233.

This court has previously held that the Supreme Court was not unequivocal about the need for a treaty to meet the requirements of the NIA and that federal consent may be found in other ways so long as the federal consent is plain, unambiguous, and explicit. *Cayuga Nation of New York v. Cuomo,* 730 F.Supp. 485, 488-489, 490-493 (N.D.N.Y. 1990)(court looked to historical correspondence, and the Treaty of Buffalo Creek for evidence) and *Oneida Indian Nation v. New York*, 194 F.Supp.2d 104, 121-122 (N.D.N.Y. 2002)(court concluded that it had to look at the entire factual record of the sale before it could conclude whether the transaction was ratified).

In fact, the NIA itself states that no purchases shall be valid "unless made by treaty or convention" and a State may be present for *treaty* negotiations with the U.S. if it seeks to address

Indian claims to land within a state. Based on this language, the *Oneida II* court was abundantly clear that a ratified treaty was required to meet the terms of the NIA because consent to a sale of Indian land is an extinguishment of Indian title. Extinguishment of title can only be done through Congressional action. The *Oneida II* Court stressed the legal principle that *congressional* intent to extinguish Indian title must be plain and unambiguous and will not be lightly implied. 470 U.S. at 247-248. The Court applied this principle in rejecting a ratification defense based upon later federal treaties because there was no evidence of plain, unambiguous or explicit intention to extinguish title by those treaties. *Id.* at 248-249. The court gave no indication that other facts or circumstances less than a treaty might show consent to an extinguishment.

Recently, in *McGirt v. Oklahoma*, the Supreme Court emphasized its disapproval of using surrounding facts in assessing the status of a reservation. The *McGirt* Court examined whether Congress had disestablished a reservation by allotting lands that would later fall into the hands of non-Indians. The State argued that surrounding circumstances, including the actions of federal officials, supported their view that Congress intended to disestablish the reservation. 140 S.Ct. at 2473. *McGirt* emphasized that only Congress has authority over reservations and the only inquiry is the Act of Congress itself. There can be no inquiries into other facts such as "stray language from a statute that does not control here, a piece on Congressional testimony there, and scattered opinions of agency officials everywhere in between." 140 S.Ct. at 2475. Thus, to the extent this Court has previously engaged in examining historical facts outside of the context of Congressional action to identify federal consent for a conveyance, it was in error.

Here there is no evidence to support a finding that the conveyances were treaties ratified by the Senate, and this court has no basis to go beyond that fact because only the Senate has the power to ratify a treaty and only Congress has the power to extinguish Indian title.

Even if the Court were correct that a treaty is not necessarily required by the NIA to show consent to the transfer, the Defendants still cannot meet the test. The record of the purchases in this case shows that the Tribe and the State negotiated without any federal involvement and that the State never requested federal involvement.[8] In *Oneida II*, the Supreme Court noted the lack of federal commissioners was evidence of the lack of compliance with the NIA. 470 U.S. at 232-233. A search of databases, histories, and document collections reveals the complete lack of evidence that the federal government was involved in any way in the transactions. Affidavit of M.K. Schmidt, attached.

Nor is the Treaty of Buffalo Creek of any help in establishing ratification of the conveyances.[9] There is no language in the 1838 treaty that mentions the approval of the conveyances or even refers to the conveyances. There is no evidence in the 1838 treaty record that the United States gave any consideration whatsoever to the previous transactions in

[8] The State and other defendants have endeavored to use all manner of evidence such as historical correspondence and actions of federal agents in other land claims cases, and the courts have rejected this evidence as at best implicit but usually showing either the federal agents and officials believed a treaty *was* necessary, *see Cayuga*, 730 F.Supp. at 490-491, or that there was no effort to enlist the federal involvement as required and as President Washington tried to enforce. *Oneida*, 434 F.Supp. at 538-539.

[9] In 2003, the Tribe sought to strike the release and relinquishment defense to the extent the defenses were based on the Treaty of Buffalo Creek. *Canadian Band,* 278 F.Supp.2d at 348. The Court ruled that the Defendants could not use the Treaty of Buffalo Creek to show ratification in support of the release and relinquishment defense because the ratification theory had already been rejected in *Cayuga* and *Oneida*. *Id*. ("to the extent the defense of release and relinquishment is based upon ratification [by the Treaty of Buffalo Creek] the court strikes the same."). The Court did, however, leave open the question of whether the Treaty of Buffalo Creek ratified the conveyances since the Tribe had not moved to strike that defense. *Id.*

formulating the treaty terms and there is no evidence of explicit ratification of the conveyances. *See Cayuga*, 730 F.Supp. at 492 (the fact that the federal commissioner mentioned the prior sales and that the tribe agrees to remove were at best evidence of implicit approval, not explicit as required); *Oneida*, 434 F.Supp. at 539 (finding the treaty ceded land in Wisconsin not New York, and it failed to address the conveyances when it could have: "Had there been a desire to legitimize a transaction theretofore regarded as a contravention of the Nonintercourse Act, the opportunity was presented without question by the Treaty of Buffalo Creek.") The *Cayuga* and *Oneida* courts also found the larger policy of removal did not constitute ratification. 730 F.Supp. at 493; 434 F.Supp. at 538. Indeed, the Treaty of Buffalo Creek has been exhaustively examined in other cases to find evidence of ratification of prior conveyances violative of the NIA. There was no evidence in those cases and there is none here.

Thus, the 1824 and 1825 conveyances were never ratified by the Senate as treaties. To the extent this court believes it can go beyond Congress and look to other circumstances to find federal consent to these conveyances, there is no evidence of any plain, unambiguous, and explicit federal approval.

D. The Reservation was Neither Diminished nor Disestablished.

The State seeks a declaration by counterclaim that the Tribe's reservation was diminished by the transactions at issue in this case. State's Amended Answer, ¶¶ 88-93. The State also seeks a declaration by counterclaim that the Treaty of Buffalo Creek disestablished the reservation. ¶¶78-86. The Tribe asks this court to rule that, as a matter of law, the reservation has been neither diminished nor disestablished by the illegal conveyances for which summary

judgment is sought here as well as by any of the other transactions alleged in the Amended Complaint.[10]

In *McGirt,* the Supreme Court has laid out the strict criteria for determining whether a reservation has been diminished or disestablished. The Court made the test crystal clear—

> **To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.** This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–568, 23 S.Ct. 216, 47 L.Ed. 299 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).
>
> **Under our Constitution, States have no authority to reduce federal reservations lying within their borders.** Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8; Art. VI, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.
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> 140 S.Ct. at 2462.

To the extent the Defendants contend that the unratified conveyances diminished the reservation, and they might show this through evidence other than Congressional action, they are engaged in the very actions that the Court in *McGirt* feared—a State encroaching on tribal rights and nullifying their interests despite Congress's supreme authority over reservation lands. By

[10] At minimum, this Court can address this issue as to the two conveyances that have not been dismissed. But the fact that some of the Tribe's claims for title to lands have been dismissed on laches or res judicata grounds should not impact the separate issue of the status of the reservation boundaries. The status of land titles has no impact on the reservation boundary. The only question is whether Congress has explicitly diminished or disestablished the reservation. *McGirt,* 140 S.Ct. at 2469 *citing cases*. The State's position by defense or counterclaim, is that *all* of the areas where there have been conveyances resulted in diminishment or disestablishment either through the NIA-violative conveyances or through the Treaty of Buffalo Creek. Thus, it is important for the Court to address the State's defenses and counterclaims as to all land claim areas asserted in the amended complaints, even if the claim for title was dismissed.

applying the strict rule that only Congress has power over a reservation land or boundaries, the Court in *McGirt* gave no leeway to States to make a case based on other facts.

Here, no Act of Congress addressed the illegal conveyances that would result in a diminishment or disestablishment. Nor does the 1838 Treaty serve as a basis to find diminishment of disestablishment. Indeed, to the contrary, the language of the treaty specifies the St. Regis Indians may not be required to remove, a condition diametrically opposed to disestablishment. The St. Regis sections of the Treaty are no different than those applicable to the Oneida—the removal was not required and the "removal was conditioned on speculative future arrangements between the Indian and a third party, New York's Governor." *See City of Sherrill*, 337 F.3d at 161-162 (Treaty of Buffalo Creek contains neither an obligation to remove nor any indication of congressional intention to disestablish the Oneidas' New York reservation), *rev'd on other grnds, City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 216 n. 9, court let stand the Second Circuit decision on the Treaty of Buffalo Creek and disestablishment).

According to *McGirt*, this court can look no further. The Supreme Court rejected in absolute terms the application of a lesser standard to determine reservation diminishment or disestablishment. As the Court emphasized:

> **To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms.** The only role such materials can properly play is to help "clear up ... not create" ambiguity about a statute's original meaning. ... And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S., at 470, 104 S.Ct. 1161 (citing *Celestine*, 215 U.S., at 285, 30 S.Ct. 93); see also *Yankton Sioux*, 522 U.S., at 343, 118 S.Ct. 789 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain.")(citation and internal quotation marks omitted).
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> 140 S.Ct. at 2469.

Finally, and significantly, the Court rejected the notion that there are three steps to determine if a reservation has been disestablished or diminished.

> [Oklahoma] reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State's account, we have so far finished only the first step; two more await.
>
> **This is mistaken.** When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. That is the only "step" proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs and practices to the extent they shed light on the meaning of the language in question at the time of enactment. ... Nor may a court favor contemporaneous or later practices instead of the laws Congress passed. As *Solem* explained, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."
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> 140 S.Ct. at 2468.

The first step and only step is to look for an Act of Congress. If no act exists, this Court may not look at any other factors such as surrounding circumstances. No Act of Congress other than the Treaty of Buffalo Creek is alleged here and there is nothing in its terms that support diminishment or disestablishment. This Court cannot look behind that text to surrounding circumstances to find diminishment or disestablishment.

Therefore, the Tribe requests this court rule that as a matter of law, the St. Regis reservation as set forth in the 1796 treaty was neither diminished nor disestablished by any of the conveyances or by the Treaty of Buffalo Creek.

V. CONCLUSION

The Tribe hereby requests the motion for partial summary judgment be granted.

Respectfully submitted,

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