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 Main Case (LEK/TWD)

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.

CONSOLIDATED WITH: Civil Action Nos. 89-CV-114 and 89-CV-829

(LEK/TWD)

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INTRODUCTION

Pursuant to Local Rule 7.1(b) (1) the United States submits the following Memorandum of Law ("Memorandum") to accompany its United States' Motion for Partial Summary Judgment ("Motion"). The Memorandum cites to various facts set forth in the United States' Statement of Undisputed Material Facts ("SMF"), which is filed pursuant to Local Rule 56.1.

SUMMARY OF ARGUMENT

The United States' Motion seeks partial summary judgment regarding the four elements of proof of its Non-Intercourse Act 25 U.S. ¶177 ("NIA") claim against New York. The United States asserts that land transactions entered into by New York in 1824 and 1825 ("Land Transactions")[1], in which New York purportedly purchased tribal lands set aside as part of the 1796 St. Regis Reservation, are illegal and void *ab in initio* because none of the transactions were approved by Congress or by treaty, in violation of the NIA. As a result, those lands were never lawfully alienated and continue to be held by the successor in interest of the St. Regis Indians. Such a claim, whether characterized as a federal common law trespass claim or an action for violation of the NIA, must satisfy four elements: (1) it is or represents an Indian tribe within the meaning of the NIA; (2) the parcels of land at issue are covered by the NIA as "tribal land"; (3) the United States has "never consented to or approved" the alienation of the tribal land; and (4) "the trust relationship between the United States and the tribe has not been terminated or

[1]This Court dismissed all claims asserted by the United States except for claims relating to lands located in the Hogansburg Triangle. Corrected and Clarified Memorandum Decision and Order, Dkt. 641. Three transactions involve lands in the Hogansburg Triangle. SMF No. 23. This Court ruled in 2001, *Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170 (N.D.N.Y. 2001) ("*St. Regis I*"), that the United States is precluded by *res judicata* from asserting an NIA claim in connection with the transaction on December 24, 1824. *Id*. at 192. There are therefore two transactions at issue in this case: one in 1824 and the other in 1825.

abandoned." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994); *Canadian St. Regis Band of Mohawk Indians v. New York,* 278 F. Supp. 2d 313, 349 (2003) ("*St. Regis 2003"*). The United States' NIA claim satisfies all four elements.

As to the first and fourth elements, the United States is the trustee of the Indian beneficiaries of the 1796 Treaty, and has the legal right, as trustee, to assert its NIA claim to enforce federal restrictions against alienation of Indian property. The United States has the right, on its own, to assert an NIA claim based on violation of federal law, as well as to assert a trespass action under federal law.[2]

As to the second element of an NIA claim, the parcels of land purportedly purchased by New York in the subject Land Transactions were expressly reserved for the Tribe by the 1796 Treaty and termed part of the reservation; thus, the lands are Indian lands within the meaning of the NIA. New York's contention that the lands are not Indian lands because the State has "full title" to the lands is not correct, the text of the Treaty on its face states otherwise and, in any event, Judge McCurn rejected the "State Title" defense in his 2003 decision in this case.

Finally, the third element of the United States' NIA claim is satisfied, as none of the Land Transactions were either by a treaty or statute, and thus the Land Transactions violated the NIA and are void.

As to New York's Affirmative Defenses, the defenses of Abandonment, Release, and Extinguishment are without merit because the 1796 Treaty bestowed a permanent, recognized property interest to the "reserved" land on the St. Regis Indians. If a treaty bestows a recognized property interest, Congress, and *only Congress,* may divest the tribe of its property interest, and

[2] Hereinafter, the claim by the United States will be referred to as the "NIA claim," regardless whether that claim arises in trespass or as a direct violation of the NIA.

the defenses of abandonment, release and extinguishment are not legally viable. If permissible, such defense, in effect, would rewrite the NIA to allow alienation of tribal lands without congressional ratification, contrary to the plain language of the Act. In this case, the plain text of the 1796 Treaty, as well as the Proceedings of the Treaty (history of the negotiations) indicate an unambiguous intent to create a permanent property interest to the St. Regis Indians. Finally, to the extent there are any ambiguities, federal canons of construction regarding interpretation of Indian treaties require this Court to interpret such ambiguities in the Indians' favor, and to interpret the Treaty as the Indians would have understood it. The Indians understood the Treaty as recognizing a permanent property interest in them.

New York's Counterclaims of Disestablishment and Diminishment and of Quiet Title also lack merit. As to Disestablishment, the two treaties New York relies on, the 1832 Menominee Treaty and the 1838 Buffalo Creek Treaty, did not disestablish or alter the St. Regis Reservation. Once an Indian reservation is created, the reservation remains intact unless Congress clearly provides otherwise in a statute or treaty. *McGirt v. Oklahoma*, 140 S. Ct. 2542, 2462-63 (2020). There is no language in either the 1832 Menominee or 1838 Buffalo Creek Treaties indicating intent, let alone clear intent, to disestablish the St. Regis Reservation. Although the Treaties include language regarding the cession of Indian lands, those cessions were either by other tribes (in the case of the Menominee treaty, only the Menominee ceded lands) or (in the Buffalo Creek Treaty) or, where by the New York Indians (including the St. Regis), the cession involved lands located in the Green Bay area in the State of Michigan[3] , not those located in New York. Nothing in these treaties clearly cedes land or alters the lands set

[3]At the time of the Treaties, land in the Green Bay area was in the Michigan territory. CITE. The Green Bay area is now in Wisconsin.

aside in the 1796 Treaty for the St. Regis.

Further, although both the 1832 Menominee Treaty and the 1838 Buffalo Creek Treaty contained language regarding the setting aside of lands for the future settlement by the New York Indians (including the St. Regis), in furtherance of what came to be known as the federal "Indian Removal Policy," neither Treaty required the St. Regis to leave their lands in New York or disposed of those lands or in any way altered the Reservation. In fact, the Buffalo Creek Treaty includes a Supplemental Article expressly providing the St. Regis with the choice whether to remove to the west, and that the St. Regis could not be compelled to remove. Further, even if extratextual evidence were relevant (which the United States denies, as the plain text of the Treaties are not ambiguous), contemporaneous documents related to negotiation of the Treaties further demonstrate that the St. Regis Indians did not cede any of their lands in New York, nor did they agree to remove to the lands set aside for them in Michigan (Menominee Treaty) or in Kansas (Buffalo Creek Treaty).

The Second Circuit in *Oneida Indian Nation of New York v. City of Sherrill,* 337 F.3d 139 (2d. Cir. 2003) ("*Oneida v. Sherrill*"), rev'd on other grounds, 544 U.S. 197 (2005) held that the Buffalo Creek Treaty did not disestablish the Oneida Reservation. The rationale of the Second Circuit's decision applies with equal force to this case, as all the relevant facts the court relied on for its holding apply with equal force to St. Regis Reservation. Finally, to the extent there are any doubts as to whether either the 1832 Menominee Treaty or the 1838 Buffalo Creek Treaty indicated an intent by Congress to disestablish the St. Regis Reservation, all ambiguities must be resolved in favor of the St. Regis.

New York's Diminishment defense is also without merit. Once an Indian reservation is created, only Congress can diminish or alter the boundaries of the reservation. New York cites

to no congressional acts or federal treaties to support its Counterclaim of Diminishment and instead relies on the Land Transactions that New York refers to as "treaties." The Land Transactions did not include the United States as a party and they were not ratified by Congress. Without an act of Congress, a reservation cannot be diminished, and New York's Diminishment Counterclaim, therefore, should be summarily rejected.

Finally, New York's Quiet Title Counterclaim is groundless. The lands at issue in this case are located on a federal Indian Reservation created by the 1796 Treaty, which bestows permanent property rights to the land. The Reservation has not been disestablished or diminished. Thus, there is no basis for New York's contention that the Plaintiffs have no possessory rights to the land.

ARGUMENT

I. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986); *Gallo v. Prudential Residential Servs., Ltd. Partnership,* 22 F.3d 1219, 1223 (2d Cir. 1994). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 57 (2d Cir.1987), and in assessing the record to determine whether there is a genuine issue as to any material fact, the trial court is required to resolve all ambiguities and draw all inferences in favor of the party against

whom summary judgment is sought. *Gallo,* 22 F.3d at 1223; *Donahue,* 834 F.2d at 57.

When a party moves for summary judgment or partial summary judgment, an opponent cannot "rest upon … mere allegations" or "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 585-86 (1986); see *also Quarles v. General Motors Corp.,* 758 F.2d 839, 840 (2d Cir. 1985) ("[M]ere conjecture or speculation by the party resisting summary judgment does not provide a basis upon which to deny the motion."). There must be "some hard evidence showing that its version of the events is not wholly fanciful," *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998).

II. The Trade and Intercourse Act

Congress passed the first Indian Trade and Intercourse Act in 1790. 1 Stat. 137. The Act, at section 4, prohibited the conveyance of Indian land except where such conveyances were entered into pursuant to the treaty power of the United States.[4] In 1793 Congress passed a stronger, more detailed version of the Act, which provided that no "purchase or grant of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" shall be of "any validity in law or equity" unless the same be "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." *Id.* at 232 (citations and footnote omitted). The Act was amended and made permanent in 1834 to drop the reference to "Indians," and has since then

[4]Section 4 of the 1790 Act declared that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138.

remained substantially the same. *Golden Hill,* 39 F.3d at 56; *see also Mohegan Tribe v. Connecticut,* 638 F.2d 612, 616-18 (2d Cir. 1980) (providing history of the Act). Any conveyance by an Indian tribe to a State in violation of the NIA is *void ab initio*. *Oneida County, New York v Oneida Indian Nation of New York State*, 470 U.S. 226, 245 (1985). *See also Oneida Indian Nation v. Cnty. of Oneida*, 617 F.3d 114, 136 (2d Cir. 2010)*; Cayuga Indian Nation of New York v. Cuomo*, 667 F. Supp. 938, 946 (N.D.N.Y. 1987) ("any conveyance of land in contravention of the dictates of the Non Intercourse Act is invalid, as if it did not occur at all").

III. THE UNITED STATES IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALL THE ELEMENTS OF ITS NIA CLAIM.

As will be explained below, the United States' claim meets all four elements of an NIA claim.

A. The United States is Trustee of the Successors in Interest to the St. Regis Indians in the 1796 Treaty and has the Right to assert NIA Claims to Protect the Tribal Interest, thus Satisfying the First and Fourth Elements of an NIA Claim

The first and fourth elements of an NIA claim are that the plaintiff is or represents an Indian tribe and that the trust relationship between the United States and tribe has never been terminated. *Golden Hill*, 39 F.3d at 56. The United States, as trustee of the Indian beneficiaries of the 1796 Treaty, satisfies both of these elements. The Supreme Court has held, numerous times, that the United States has standing in its own right to bring an action, as trustee for tribal interests, to seek relief regarding unlawful conveyances of Indian lands, independent of the rights or participation of the Indian tribe or tribal members.

In *Heckman v. United States* , 224 U.S. 413 (1912), the United States brought suit to

cancel certain conveyances of allotted lands by members of the Cherokee Nation, based on a violation of federal restrictions on alienation. *Id*. at 415, 428. With respect to standing, the Court noted that the United States was the guardian of Indians' interests, and that "during the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid," and that "[w]hile relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States." *Id*. at 437. The Court held that the United States had standing, irrespective of the participation of the Indian parties, to enforce federal restraints on the alienation of Indian lands. *Id.* at 434.

Similarly, in *Bowling v. United States*, 233 U.S. 528, the heirs of an Indian allottee entered a contract to sell the land, and brought suit in federal court to enforce the contract, from which they obtained a judgment sustaining its validity. *Id*. at 532. The United States thereafter brought suit to cancel the conveyances. Citing *Heckman*, the Supreme Court stated that "it is no longer open to question that the United States has the capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed." *Id*. at 534. The Court added that "as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligations to a dependant people, no stipulations, contracts, or judgments rendered in suits to which the government is a stranger can affect its interest." *Id*. at 535.[5]

[5] *See also United States v. Candelaria*, 271 U.S. at 443-44 (1926) (the United States "has an interest in maintaining and enforcing" restrictions on alienation which cannot be affected by a prior judgment where the United States has not appeared); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (the NIA "imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by

Based on this longstanding precedent, the United States, as guardian/trustee, as well as based on the violation of federal law, has the authority "to protect the treaty-recognized rights of the Indians of the village of St. Regis and/or all their present-day successors-in-interest." United States' Amended Complaint, ¶ 5. Thus, the United States satisfies the first and fourth elements of an NIA claim: the United States is, and always has been to the present day, trustee of the Indian beneficiaries of the 1796 Treaty and consequently represents the interests of an Indian tribe under the NIA.

This is also law of the case. Judge McCurn expressly recognized in his 2001 decision in this case that the United States, as guardian of the Indians' interests, has the right to bring an NIA claim in its own right. One of the issues addressed in the 2001 decision was the legal impact of a 1958 New York Court of Appeals decision, *St. Regis Tribe of Mohawk Indians v. State*, 5 N.Y.2d 24, 152 N.E.2d 411 (1958). The St. Regis Tribe claimed that New York illegally appropriated certain Tribal lands, including Barnhart Island. The New York Court of Appeals rejected the Tribe's arguments and, in the course of its discussion, it addressed the NIA, noting that the court had previously questioned whether the NIA applied to the State of New York. 152 N.E.2d at 419 The court did not expressly rule the NIA did not apply; instead, it held that "this was not the negotiation of a new purchase of property from an Indian tribe, but rather the adjustment of a claim that had arisen as the result of the ambiguous language of the 1796 treaty." *Id*. New York and other defendants in this case argued that the 1958 *St Regis* decision precludes the tribal plaintiffs and the United States

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the Act seems to us beyond question . . . The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.") (citations omitted).

from asserting NIA claims related to the Islands claims, due to *res judicata*. The tribal plaintiffs asserted that the New York Court of Appeals never issued a ruling on an NIA claim and thus *res judicata* was not applicable.

Judge McCurn did not rule on whether *res judicata* applied to the tribal plaintiffs because he noted that, in any event, the United States was not a party to the *St. Regis* case and could not be bound by it. *St. Regis I*, 146 F. Supp. 2d at 193. The court recognized that the United States has an independent interest, as guardian of Indians' interests, in maintaining and enforcing federal restrictions against alienation of Indian property. *Id*. The court then concluded that, because the United States had the right to assert the NIA claims to the Islands as trustee, it was not relevant whether the tribal plaintiffs could or could not bring the same claims, stating that "because the United States may properly assert Nonintercourse Act claims challenging the various conveyances of the subject islands by the State of New York in this action, the issue whether St. Regis Tribe is res judicata to the tribal plaintiffs is irrelevant*." Id.* at 194. *See Heckman*, 224 U.S. at 434; *United States v. City of Tacoma*, 332 F.3d 574, 579 (9th Cir. 2003).

Judge McCurn's ruling squarely holds that the United States has the right to assert NIA claims in this case, and it does not matter whether the tribal plaintiffs can assert the same claims. Thus, as a matter of law, the first and fourth prongs of an NIA claim are met in this case, as the United States is, and has always been, the trustee of the Indian beneficiaries of the 1796 Treaty and, as trustee, has the right to assert its NIA claims.

B. The Parcels of Land at Issue are Tribal Lands and the Second Element of an NIA claim is Satisfied

The NIA, at the time of the 1824 and 1825 Land Transactions, applied to "any purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians."

The lands at issue here are Indian lands. The 1796 Treaty expressly reserves various parcels of land, including a "six mile square" area, for the use of the Indians of the village of St. Regis. SMF No. 18. In 1824 and 1825, New York entered into so-called "treaties" with agents purporting to represent the St. Regis Indians. In the documents, the St. Regis ceded the land at issue to New York. SMF No. 22. The 1824 and 1825 Land Transactions are located within the boundaries of the "six mile square" area referenced in the 1796 Treaty. *Id* There are no factual issues this Court needs to resolve regarding the second element of the United States' NIA claim, as the lands at issue are unquestionably Indian lands.

The State argues to the contrary, contending that it holds "full title" to the lands reserved for the St. Regis Indians in the 1796 Treaty and that these lands, therefore, are not Indian lands. See New York Sec. Am. Answer at 9, ¶ 60 ("By the Treaty of 1796 . . . any and all right, title or interest held by the historic Indians of the Village of St. Regis in its New York lands was lawfully extinguished and the State acquired full title to such lands"). The Treaty on its face, however, does *not* grant title to New York to all lands in the State held by the St. Regis Indians. The Treaty contains an express *exception* to the Indians' land cession: the six mile square area (where all Land Transactions are located) is reserved by the Treaty for the Indians.[6] As will be explained in more detail at Section V.B. of this Brief, dealing with New York's abandonment, release and extinguishment counterclaims, the reservation of the six mile square bestowed a recognized, permanent property interest to the St. Regis.[7]

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[6] The Treaty also reserves other lands for the St. Regis, SMF No. 19, but those lands are not at issue in this case, as the Land Transactions all relate to lands in the six mile square area.

[7] New York also alleges that the 1796 Reservation was disestablished and/or diminished and thus the lands at issue are not Indian lands. New York's contentions are wrong. The disestablishment and diminishment issues are addressed later in this Brief, at Sections V.A and V.B.

Judge McCurn, in the court's 2003 decision in this case, expressly rejected New York's argument that, because it held "full title" to the lands reserved to the St. Regis in the 1796 Treaty, the NIA allegedly did not apply to the lands within the six mile square. New York argued that the Treaty granted "full title[8]" of the St Regis' interests in lands located in New York to the State, that any interest the St. Regis held under the Treaty was a "right of use only," and that, "federal law, whether based on the NIA or earlier federal treaties, does not apply to the Tribes' interest in the subject land*." St. Regis 2003,* 278 F. Supp. 2d at 349. The court rejected New York's argument, which the court referred to as the "State Title" defense. *Id*. at 348-49. The court described New York's position as follows: "evidently the State believes that, based upon its title to the subject land, the State could validly extinguish the interest in the land through the 1796 Treaty." *Id*. at 348. The court stated that New York's theory was inconsistent with "rudimentary" federal law, as the State's theory "directly conflicts with the rudimentary proposition that Indian title is a matter of federal law and can be extinguished only with federal

[8] The following concepts are necessary to understand the land tenure of Indian tribes. Beginning with the European discovery of North America, the tribes were understood to be "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but . . . their power to dispose of the soil at their own will, to whomsoever they pleased, was denied. " *Johnson v. McIntosh*, 1 U.S. (8 Wheat), 543, 574 (1823). A tribe's interest pursuant to the discovery doctrine is variously termed the "right of occupancy," "right of possession," or "aboriginal" title. The discovering nations, in contrast, possessed the underlying fee – termed the "right of preemption" – which constitutes the right to purchase land from tribes. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Oneida Indian Nation*, 860 F.2d 1145, 1150 (2nd Cir. 1988). Prior to adoption of the United States Constitution, the underlying title and the right of preemption (i.e. the right to purchase Indian lands) was thought to lie in the original thirteen states, while the tribes had a right to occupancy. *Id.* The right of extinguishment (i.e. the right to extinguish Indian title) in contrast, was exercised by both states and the Confederal government prior to the adoption of the Constitution. *Id*. However, once the Constitution took effect "there has been broad agreement that the power of extinguishment belongs to the federal government." *Id*. (citing *Oneida Indian Nation of New York State v. Oneida County, New York*, 414 U.S. 661, 667 (1974)). Although "fee title to Indian lands [was] in [the original 13] States," federal law protected the Indian right of occupancy and "its termination was exclusively the province of federal law." *Id*. at 670.

consent '' *Id*. (citing *Oneida II,* 414 U.S. at 669–70). Judge McCurn added that "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 from the Indians, was in the State'' as opposed to the U.S." *St. Regis 2003*, 278 F. Supp. 2d at 94. The court ruled that the ''State Title'' defense was insufficient "as a matter of law. " *Id*. The Court's 2003 decision is dispositive here: the lands at issue are subject to the NIA, notwithstanding New York's allegation that it holds "full title" to the lands.

C. The United States Never Consented to the Alienation of the Indian Lands at Issue, and the Third Element of an NIA Claim is satisfied

i. Federal Cnsent must be by a Treaty, Ratified by the Senate or by Explicit Congressional Statutory Ratification.

The NIA is explicit and precise: no alienation of Indian land "shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. This language is unambiguous. In. *Oneida VI,* the Supreme Court confirmed this plain reading of the NIA, stating that the NIA "prohibited the conveyance of Indian land except where such conveyances were entered pursuant to the treaty power of the United States." 470 U.S. at 231. The Second Circuit, in *Oneida Indian Nation v. City of Sherrill*, 337 F. 3d 139 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 214 (2005), listed as a "basic principle" of federal law that "the sale or conveyance of reservation land can only be made with congressional sanction, that is, 'by treaty or convention entered into pursuant to the Constitution." *Id*. at 153.

In *Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485 (D.N.Y. 1990) ("*Cayuga III*"), Judge McCurn held that federal consent under the NIA must be made pursuant to the treaty provisions of Article II, Section II of the United States Constitution. *Id*. at 488-89. In

reaching this conclusion, Judge McCurn revisited his earlier decision in *Cayuga Indian Nation of New York v. Cuomo,* 667 F. Supp. 938 (N.D.N.Y 1987*) ("Cayuga II")*, where the court had indicated that, at that time, there appeared to be unresolved issues of law regarding whether federal approval of a land conveyance, to satisfy the NIA, must be in the form of a federal treaty or convention, or whether some other form of federal approval or ratification was possible. The court ruled in *Cayuga II* that "the form that ratification must take is, at least in this court's view, not completely settled." *Cayuga II,* 667 F. Supp. 938.

In *Cayuga III*, Judge McCurn reexamined the ratification issue and ruled that there no longer was any doubt in the court's mind: ratification under the NIA must be pursuant to a treaty confirmed by the Senate. In so holding, the court cited to language in the Supreme Court's decision in *Oneida* (quoted above) and *Mashpee Tribe v. Watt*, 542 F. Supp. 797, 805 (D. Mass. 1982), *aff'd* , 707 F.2d 23 (1st Cir.), *cert denied*, 464 U.S. 1020 (1983) ("under the Nonintercourse Act, the restraint on alienation could be released only by treaty or convention. Treaties or convention are made by the President with the advice and consent of the Senate"). The court then stated that "it is clear that the 1795 and 1807 land conveyances could only be valid if they were entered into pursuant to the treaty power of the United States." 730 F. Supp. at 489.

Although the NIA states that federal consent of alienation of land must be by a treaty ratified by the United States Senate, Congress has the authority to enact laws that modify or are even inconsistent with earlier federal statutes. The later statute controls, to the extent there are irreconcilable differences. *United States v. Mohammed*, 27 F.3d 815, 820 (2nd Cir. 1994). As a result, it follows that, even though the NIA requires that the transfer of Indian land be pursuant to a treaty ratified by Congress, if a subsequent Congress enacts a statute *after* passage of the NIA

which approves of a particular alienation of Indian land, the later statute controls and validates the alienation, as to the particular transaction identified in the later statute. The intent by Congress to approve the alienation of Indian land by statute, however, must be explicit and unambiguous. *Oneida Indian Nation of New York v. Oneida County,* 719 F.2d 525, 539 (2d Cir. 1983), citing *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339 (1941).[9] This is a moot point here, as there is no act of Congress that mentions, much less approves, any of the Land Transactions.

New York is well aware of the fact that alienations of Indian land requires express approval either by treaty or statute. As will be discussed below in connection with the "recognized title" issue, New York expressly requested a federal commissioner to be present at the negotiations of the 1796 Treaty and was aware of the fact that the treaty, to be valid, needed to be ratified by the United States Senate. SMF No. 4. New York complied with the provisions of the NIA in 1796, but chose not to do so in the Land Transactions in 1824 and 1825.

ii. None of the Land Transactions at Issue were Treaties Ratified by the United States Senate

To prove the third element of an NIA, the United States need not "prove a negative." *See, e.g., Blue Lake Rancheria v. Lanier*, 106 F. Supp. 3d 1134, 1139 (E.D. Cal. 2015) (Plaintiff may meet its burden by 'pointing out through argument [ ] the absence of evidence' to support other party's case.") (citations omitted). The State has not identified any treaty or statute expressly ratifying the transactions, and a search by counsel

[9] Further, although the NIA refers to approval by treaty, it is now understood that a subsequent Congress, which has plenary authority over Indian affairs, *United States v. Lara*, 541 U.S. 193, 200 (2004), may expressly ratify a transfer of tribal land by statute, without resorting to treaty. Congress' specification of ratification by treaty in the NIA does not bind a future Congress from ratifying such a transaction by statute.

for the United States of the following sources failed to locate such a ratification: (1) the United States Statutes at Large, Title 7, titled "Treaties Between the United States and Indian Tribes 1789-1845; (2) a compilation of treaties involving Indian tribes ratified by Congress, compiled by Charles J. Kappler, LL.M., Clerk to the Senate Committee on Indian Affairs in 1904; and (3) an 1873 "Compilation of All the Treaties Between the United States and the Indian Tribes Now in Force as Laws," prepared pursuant to a March 3, 1873 act of Congress, 17 Stat. 579. None of these sources included a reference to an act of Congress even mentioning, much less ratifying, any of the Land Transactions at issue in this case. See Declaration of James B. Cooney, at ¶¶ 5-7. In addition, counsel for the United States conducted searches on Westlaw in the United States statutes database, using the words "Regis" and "New York" and "1824" and "1825" to determine if Congress enacted any statutes ratifying the Land Transactions. The word searches did not retrieve any such acts of Congress. *Id*. at ¶ 8. These facts set forth a prima facie case on the third element of an NIA claim: the United States did not consent to the transactions at issue.[10]

In summary, Section III above demonstrates that the United States' NIA claim against New York satisfies all four elements of an NIA claim. There are no facts in dispute that need to be resolved by this Court, and the Court should therefore grant partial summary judgment on all four elements of the United States' NIA claim.

IV. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW ON NEW YORK'S AFFIMATIVE DEFENSES OF

[10] New York asserts, as an Affirmative Defense, that the Land Transactions were ratified by the United States through various actions years after the transactions took place. Ratification is discussed in this Memorandum at the Section IV.A below.

RATIFICATION, ABANDONMENT, RELEASE, AND EXTINGUISHMENT

A. New York's Affirmative Defense of Ratification is without Merit as a Matter of Law

New York asserts as an affirmative defense that the United States "consented to, approved, and/or encouraged the grants, transfers, conveyances or other alienation of that land in a manner that bars the Plaintiff Tribes and the United States from making any claims against the State." NY Sec. Am. Ans. at ¶¶42 -43. New York has the burden of proving that its affirmative defense, hereinafter referred to as the "ratification" defense, applies. Fed. R. Civ. P. 8(c); *Cayuga III*, 730 F. Supp. at 489. For the reasons set forth below, the ratification defense has no legal merit and should be stricken as a matter of law.

As demonstrated above in Section III.C.i of this Memorandum, only a ratified treaty or act of Congress is sufficient to constitute federal consent to alienation of Indian land. New York's Answer fails to identify any acts of Congress that ratified the Land Transactions and, therefore, appears to contend that something *other than* an act of Congress is sufficient to constitute federal approval. New York is wrong, for the reasons explained in Section III above, which will not be repeated here.

The United States recognizes that this Court, in addressing the ratification defense in *Oneida Indian Nation of New York v. New York,* 194 F. Supp. 2d 104 (N.D.N.Y 2002), stated that "while the law is clear that congressional intent to terminate title to Indian land must be plain and unambiguous, it is far from clear that ratification of Indian land transactions must necessarily be by treaty or statute." 194 F. Supp. 2d at 121 (citations omitted). The United States respectfully submits that the cases this Court cited to do not support the position that ratification can be by anything other than a congressionally ratified treaty or other explicit act of Congress.

In *Seneca Nation of Indians v. State of New York*, 26 F. Supp. 2d 555, 571 (W.D.N.Y.

1998), defendants contended that the land transactions at issue were ratified by a 1927 act of Congress. The court held that the 1927 Act did not constitute a plain, unambiguous ratification of the land transactions at issue and noted that, in 1928, Congress enacted a statute which expressly stated that a "certain instrument of conveyance" from the Seneca Nation to Seneca Oil Spring Association is "hereby confirmed" *Id*. at 572. The court found it significant that the 1928 Act expressly confirmed and approved a transfer of Indian land, but that the 1297 Act did not. The court in *Seneca* focused on two acts of Congress. There is no language in the *Seneca* decision, however, finding that, contrary to the NIA, ratification can be accomplished by anything other than by a treaty or an act of Congress.

In the Oneida "Test Case" referred to by this Court, *Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 524 (2d Cir. 1983), the issue the Second Circuit addressed was whether the land transaction at issue in 1795 was ratified by two subsequent treaties. One treaty in 1798 mentioned that the Oneida Nation ceded lands to New York, including its "last purchase" of land (which defendants contended was the land transaction at issue). Id. at 539. The second treaty in 1802 mentioned "all lands heretofor ceded." *Id*. Both treaties mentioned lots 54 and 59, which were part of the 1795 transaction. *Id*. The Second Circuit held that these treaties did not contain plain, unambiguous language indicating an intent to approve the 1795 transaction. *Id*. The Second Circuit's focus was on language in the treaties. The court did not assert, or in any way suggest, however, that federal ratification of a land transaction involving Indian lands could be by anything other than by a ratified treaty or other act of Congress. *See also Oneida County, New York v. Oneida Indian Nation*, 470 U.S. 226, 231-32 (1985).

Finally, this Court's citation to Judge McCurn's 1987 decision in *Cayuga II* is misplaced. As noted at Section III.C.i of this Memorandum, Judge McCurn expressly amended his finding

on the ratification issue in a 1991 decision, holding that federal ratification must be pursuant to a ratified treaty or convention. *Cayuga III*, 730 F. Supp. at 489. This Court referred to Judge McCurn's 1991 decision in a footnote, stating that "after two years of discovery the court determined that the transactions had not been federally ratified." *Oneida*, 194 F. Supp.2d at 121 n.15. Judge McCurn did more than hold that the transactions had not been ratified; he expressly held that his earlier view that ratification may not need to be by a treaty ratified by Congress was incorrect.

This Court denied the Oneida Nation's motion to strike New York's ratification defense because of the "uncertainty of the law in this area and lack of facts supporting either party's position." *Id*. at 122. The United States respectfully submits that this Court was mistaken in concluding that this area of law is uncertain. Ratification of an alienation of Indian land must be pursuant to a ratified treaty or other act of Congress. *McGirt*, 140 S. Ct. at 2462. There is no authority to the contrary. Because there is no treaty or act of Congress ratifying the Land Transactions, as a matter of law, New York's affirmative defense of ratification is without merit.

B. The 1796 Treaty Bestowed A Recognized Property Interest to Indians of the village of St. Regis, and Defendants' Affirmative Defenses of Abandonment, Release and Extinguishment are Without Merit as a Matter of Law.

In his 2003 decision, Judge McCurn, in addressing the affirmative defenses of abandonment, release and extinguishment, held that the whether or not these defenses are viable is directly linked to whether or not the 1796 Treaty bestowed "recognized fee title" on the Indians of the village of St. Regis. The court, referring to its 1991 decision in *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991), stated that when a tribe has aboriginal title, "a tribe's voluntary abandonment of property" is a viable defense to an NIA

claim. *St. Regis 2003 Decision*, 278 F. Supp. 2d at 343. On the other hand, ''if an Indian tribe possesses *recognized* title in certain land, then Congress, and *only Congress,* may *divest* the *tribe* of its *title* to such land.'' *Id*. *See also Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) (same). The critical issue here, then, is whether the 1796 Treaty bestowed a recognized property interest on the St. Regis Indians. As demonstrated below, the term "recognized title" under federal law has a specific meaning, and the term does not require a tribe to possess fee title to land; rather, the term "recognized title" refers to a permanent property interest, which may be less than fee title.

i. Standard to Establish Recognized Title

In *Tee Hit Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court explained what is meant by the term Indian "recognized title." The issue in *Tee Hit Ton* was whether the government, after disposing of Indian property, had an obligation to pay compensation to a tribe under the takings clause of the Constitution. The Court held that compensation was required *only if* the tribe had recognized title. *Id*. at 278. The Court stated that, to bestow recognized title, Congress must have indicated an intent to recognize a right of permanent occupancy:

> There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

Id. Hence, "[w]here the Congress by treaty or other agreement" has recognized a tribe's title to land, aboriginal title is converted to "treaty" or "fee" title, and "compensation must be paid for subsequent taking." *Id*. at 277-78. *See also United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). The Court in *Tee Hit Ton* did not state that a tribe must own fee title; rather, the critical

factor is whether a treaty or act of Congress accords permanent legal possessory rights to a tribe. *See Strong v. United States*, 518 F.2d 556, 563 (Ct. Cl. 1975) ("where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land").

As demonstrated below, the plain text of the 1796 Treaty indicates an intent to create permanent legal rights to the St. Regis Indians, even though those rights might be less than full title.[11] The common law has long treated interests in land that amount to less than fee title, such as easements and leaseholds, as property interests. *See, e.g. Alamo Land and Cattle Co., Inc., v. Arizona*, 424 U.S. 295, (1976) (unexpired leasehold entitled to compensation under takings clause).

ii. Canons of Construction Regarding Interpretation of Indian Treaties

The Supreme Court has established important bedrock principles that courts must employ when interpreting Indian Treaties: (1) treaties are to "be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit," *Oneida VI,* 470 U.S. at 247; and (2): "in interpreting treaties and agreements with the Indians, they are to be construed, so far as possible, in the sense in which the Indians understood them." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). In addition, as with all treaties and acts of Congress, whether applying to Indians or not, the plain text is the primary source. If the text is unambiguous, it controls. It is only when the text is subject to more than one reasonable construction that extratextual evidence is relevant. *Chan v. Korean Air Lines, Inc.*, 490 U.S. 122, 134 (1989) ("[W]here the text is clear

[11]As discussed at footnote 8 above, the original thirteen states held fee title to lands occupied by Indians, or the right of preemption (to purchase the lands). *Oneida*, 860 F.2d at 1150. The right to extinguish the Indians' property interests, referred to as the right of extinguishment, lies only in the United States. *Id*.

... we have no power to insert an amendment."); *The Amiable Isabella,* 19 U.S. 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions."). The interpretation of treaty language is "a question of law for a court to decide." *St. Regis 2003*, 278 F. Supp. 2d at 345. See also *Cayuga III*, 758 F. Supp. at 111 (same); *United States ex rel Chunie v. Ringrose*, 788 F.2d 638 n.2 (9th Cir.1968) ("interpretation of a treaty is a question of law for the court and not of fact").

iii. The Treaty Language is Unambiguous: it Creates a Permanent Right to the St. Regis Indians to Use the Reserved Lands

In the Treaty, the Seven Nations of Canada cede to New York all rights to lands within the State with *the proviso* that certain lands are to be "reserved" for the use of the Indians. The text of the Treaty states the Seven Nations or tribes of Indians "cede, release and quit claim" to New York all claims, right and title "to lands within said State: 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." 7 Stat. 55.[12]

The Treaty bestows immediate legally protected rights on the St. Regis Indians, as the six mile square area is expressly "reserved" for their use. There is no language suggesting anything other than a permanent right to use such "reserved" lands. If the Treaty intended to bestow only a temporary right, it would have (and should have) said so. Although no magic language is

[12] The Treaty also "reserves" one mile square parcels of land related to mill operations and hay meadows near the Grass river historically used by the St. Regis; the lands are separate from the six mile square area. None of the Land Transactions at issue in this Motion involve land in these areas.

necessary to create recognized title, the use of the word "reserved" is a plain indication that the intent of the Treaty was to recognize a permanent property interest to the Indians. In *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 2001), Judge McCurn found it determinative that the treaty at issue stated that lands were "reserved" for the Cayugas, holding that "the Treaty's plain language confers reserved title to the Cayugas. The Treaty acknowledges lands "reserved" to the Cayugas, and refers to such land as their "reservation"". *Id*. at 115.

The State contends in its Answer that the 1796 Treaty extinguished "any and all right, title or interest held by the historic Indians of the Village of St. Regis in its New York lands." NY Am. Ans. at ¶ 60. The 1796 Treaty language on its face refutes New York's allegation. Contrary to New York's contention, the cession of land by the St. Regis is not unlimited: there is a *specific proviso* limiting the extent of the Indians' cession. A six mile square (as well as other land related to mills and hay operations in the Salmon river and the Grass river, referred to later in the Treaty) were expressly *carved out* of the Indians' land cession and were reserved for the Indians' use. The plain language of the Treaty does not cede to New York all lands located in the State.

The United States anticipates that New York will focus on language in the Treaty that refers to a sale of land, by the State, to Alexander Macomb in 1791. The Macomb sale, however, is not relevant. In 1791, Alexander Macomb, a land speculator, purchased 3,840,000 acres from the state of New York, including land in northern New York where the St. Regis Mohawk resided. In the documents executing the 1791 sale, which became known as "Macomb's Purchase," Macomb exempted existing St. Regis settlements from his grant by submitting an agreement to the State that "a tract of land equal to six miles square in the vicinity of the Village of St. Regis, be excepted." SMF No. 3. According to the agreement, the underlying title to this

tract would "remain the property of the State provided always that if the said tract shall not hereafter be applied to the use of the Indians of the said Village that the same shall be considered as included in this Contract, and that I shall be entitled to a grant of the same." *Id*. The Macomb transaction solely involved the State and Macomb; the St. Regis Indians were not a party and they were not bound by it. The Treaty merely refers to the sale; it does not state that the St. Regis agreed with the terms of the sale of land to Macomb, or that they were in any way bound by its terms. A cession of land by an Indian tribe in a treaty must be clear and explicit. Further, the NIA voids any "sale" of land without congressional consent, and thus no transfer of the Indians' property rights would have been valid. A vague reference to an illegal sale of land that the St. Regis was not a party to is a far cry from an explicit, unambiguous agreement by the St. Regis to cede land. Moreover, the Treaty expressly says that the land subject to the Macomb sale "shall still remain so reserved." This is not cession language. It expressly indicates an intent to "reserve" the land for the St. Regis, thereby recognizing a federally protected property interest.

iv. Documents memorializing the negotiations of the Treaty demonstrate that the intent of the Treaty was to bestow permanent property rights on the St. Regis Indians

To the extent this Court believes it is necessary to examine extratextual evidence, such evidence demonstrates that the intent of the Treaty was to bestow permanent property rights to the St. Regis. In the summer of 1795, John Jay, who had recently assumed the post of governor of New York, informed Secretary of War Timothy Pickering that the St. Regis Indians "and also some other Tribes who distinguish themselves by the name of the Seven Nations of Canada have set up a Claim to lands in the Northern part of this State." SMF No. 4. He asked

Pickering "to request the President of the United States to appoint one or more Commissioners to hold a Treaty with these Indians at furthest by the middle of September," and recommended that either "Mr. Sedgwick, Mr. Wadsworth, Mr. Elsworth" or "other proper persons" be appointed so the State could negotiate with the Indians in conformity with the Trade and Intercourse Act of 1793. *Id.*

On May 23, 1796, the parties met at New York City to begin the negotiations. See Exhibit 4, Treaty Proceedings, at 617. The Seven Nations' representatives asserted that the state agents "brought in several objections against our claims, but we could not find either of them to be reasonable, or in any measure sufficiently weighty." *Id*. at 617. The New York commissioners mentioned a 1788 deed from "several Mohawks," which the State contended indicated a session of the St. Regis lands to the State. The Indians responded that "those Mohawks had as good a right to sell as they have to come and dispose of the city of New York." *Id*. The Indian delegates ended their speech by stating that: "As to *our lands* . . . 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." Id*. at 618 (emphasis added).

The New York agents responded that "without some further evidence, it appears to be scarcely reasonable in you to expect we should admit your claim." *Id*. However, because the agents wanted to maintain "peace and good neighborhood and avoid all controversy in the future," they offered $3,000 for the land. *Id*. The Seven Nations' delegates replied that it was their understanding that the commissioners had offered them "three thousand dollars for a release, or quit claim, for all the lands *in our claim*, *exclusive of six miles square, to be reserved for the use of the village of St. Regis*." *Id*. (emphasis added). The Indians stated that, although New York "still cannot see fit to admit our claim . . . we have told you time past and we tell you

now that our claim is just." *Id*. The Indians then explained that they wanted to "reserve for our own use" a parcel of land substantially larger than the six mile square. *Id*.

Three days later, the state agents answered by stating that the St. Regis' claim to title "is not only disputed, but utterly denied by us." *Id*. at 619. The commissioners nevertheless stated that they were "still willing, however, but from motives of prudence and good will only" to offer that a tract, equal to six miles square, near the village of St. Regis" would still "be applied to your use, as reserved in the sale to Alexander Macomb." *Id*.

On May 28, 1796, the Indian deputies stated that they did not agree with New York's proposal to limiting the reserved area to a six mile square and they proposed a different parcel of land, again substantially larger than the six mile square, stating that "in respect of your last offer *to use for our lands* in this State . . . we will now make you an offer . . . we are not able to bring the reserve into so small a compass as six miles square, but, for the anxiety we have for settling this matter to your satisfaction, as well as for our own, *we will bring our reserve* into as small a compass as possible, *without interfering with our plantations*." *Id*. at 620 (emphasis added). The Indians added that "this reserve, brothers, we will not be able to make any less, without interfering with the plantations of our people, which is out of our power so to do." *Id*.

Two days later, New York responded. The commissioners stated that "after we had made our speech to you the day before yesterday" the Indians had "verbally suggested to us" that the Indians had built a mill on Salmon river and a mill on Grass river and "it is uncertain whether they, and especially the place on where the mills are built, will be included in the tract, equal to six miles square, reserved in the sale to Mr. Macomb. " *Id*. The Commissioner then stated that "if you had seasonably informed the State of your claim, they might then have reserved lands for your use, to any extent which might have been judged proper; but they have now sold all the

lands in that quarter, to Mr. Macomb. " *Id*. The commissioners stated that "reservations cannot be made without the consent of the persons who have purchased from him," and that the commissioners had spoken to William Constable and Alexander McCormick, who represented those who had purchased land from Macomb, and they had agreed that the State could offer the Seven Nations a tract at "each place where the mills are built, and the meadows on both sides of the Grass river." *Id*.

The next day, the Proceedings note that the Indians "declared their acceptance of the compensation as proposed to them by the agents." *Id*. Therefore, Ogden, together with the Indians, the New York Commissioners, and McCormick and Constable, signed the 1796 Treaty on May 31.

The Proceedings of the 1796 Treaty indicate the following: (1) the St. Regis believed that they had a legitimate, unextinguished claim to a large area of land, much larger than the six-mile square tract at issue in this case; (2) the State disputed the Indians' land claims; (3) the parties made a compromise to resolve the land dispute: the St. Regis agreed to cede (i.e., sell) to New York most, but not all, of the lands located in New York; with specific exceptions –certain lands were not ceded, but instead reserved for their own use. The St. Regis consistently referred to the lands to be reserved as "our" lands and that they were being reserved by *them*, not the State.

Treaties are to "to be construed, so far as possible, in the sense in which the Indians understood them." *Choctaw Nation*, 318 U.S. at 432. If there are doubts regarding what the St. Regis intended when they agreed to the Treaty, this Court must construe the Treaty "liberally in favor of the Indians with ambiguous provisions interpreted to their benefit," *Oneida VI*, 470 U.S. at 247; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (citations omitted).

In summary, both the plain text of the 1796 Treaty and the Treaty Proceedings, especially when construed in the Indians' favor, lead to only one reasonable conclusion: the lands "reserved" for the St. Regis were not ceded by them, they were reserved for the Indians' use, and the Treaty created a permanent property interest. The 1796 Treaty, therefore, bestowed recognized title on the St. Regis Indians. New York's affirmative defenses of Abandonment, Release, and Extinguishment are, as a matter of law, without merit.

V. NEW YORK'S COUNTERCLAIMS OF DISESTABLISHMENT AND DIMINISHMENT ARE, AS A MATTER OF LAW, WITHOUT MERIT

A. New York's Counterclaim of Disestablishment is Without Merit as a Matter of Law.

New York's Counterclaim of "Disestablishment" is predicated on its contention that the Menominee Treaty of 1832, 7 Stat. 405, and the Buffalo Creek Treaty of 1838, 7 Stat. 561, disestablished the 1796 Reservation. New York's Sec. Am. Answer at 9-10, ¶¶ 63-65.[13] New York's reliance on these two Treaties is misguided. Only Congress has the authority to alter the boundaries of an Indian reservation, and congressional intent to disestablish must be plain, unambiguous and explicit. *McGirt,* 140 S. Ct. at 2462. Neither of the Treaties that New York cites to meet the stringent requirement of an indicating an express intent to disestablish the 1796 Reservation.

i. Legal Standard for Disestablishment of an Indian Reservation: Clear, Explicit Congressional Intent

[13] New York also alleges in its Disestablishment Counterclaim that the Treaty of 1796 extinguished the St. Regis Indians interests to all lands in New York, New York Sec. Am. Answer at 9, ¶ 60, and that "certain described lands were reserved by the State for specified uses of the historic St. Regis Indians." Id. at ¶ 61. These allegations focus on whether the Treaty created a federal Indian reservation at all, not whether the Reservation, once created, was disestablished.

The Supreme Court in *McGirt* recently reaffirmed the well-entrenched rule of law that "only Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 2462. The Court has "never required any particular form of words . . . But it does require that Congress clearly express its intent to do so. *Id*. at 2463.

ii. Congress Did Not Indicate an Intent in Either the 1832 Menominee Treaty or the 1838 Buffalo Treaty to Disestablish the 1796 St. Regis Reservation

As demonstrated below, neither the 1832 Menominee Treaty, 7 Stat. 405, nor the 1838 Buffalo Creek Treaty, 7 Stat. 550, disestablished the 1796 St. Regis Reservation. These two Treaties are related to each other, as the Buffalo Creek Treaty expressly refers to and, in effect, supersedes the 1832 Menominee Treaty. Further, an understanding of the 1832 Menominee Treaty requires a review of two earlier Treaties in 1831, which are discussed below.

a. The 1832 Menominee Treaty

The 1832 Menominee Treaty states in the recitals that, on June 25, 1832 the Senate of the United States ratified an earlier February 8, 1831 Treaty with the Menominee. The earlier Treaty, 7 Stat. 342, states that the Menominee Nation had a "long existing dispute between themselves and the several tribes of the New York Indians, who claimed to have purchased a portion of their [Menominee's] lands." *Id.*[14] The Menominee Nation agreed to cede portions of its lands to the

[14] The New York tribes purchased lands from the Menominee and Winnebago Nations in 1822 and 1823. SMF No. 30. The 1821 and 1822 agreements focus only on the cession of lands by the Menominee and Winnebago to the New York Indians. There is no language in either document that requires the cession of, or even mentions, lands held by any of the New York Indians in New York. Disputes arose thereafter between the New York Indians and the Menominee Nation as to the land purchases in the 1821 and 1822 Treaties. See Treaty of Buttes de Morts, 7 Stat. 303 (referring to the dispute between the New York Indians and the Menominee and Winnebagos. See SMF No. 32. Among the disputes were boundary and tenure issues and authority of the chiefs who signed the treaties. *Id*.

United States, and those lands would be "set apart as a home to the several tribes of the New York Indians, who *may* remove to, and settle upon the same within three years from the date of this agreement." *Id*. (emphasis added). The entire focus of the Treaties was on lands in the Green Bay area, ceded by the Menominee. There is no language requiring the New York Indians to cede any lands. Although the Treaty stated the lands ceded by the Menominee were "intended as a home for several tribes of the New York Indians," the Treaty recognizes, at Article 6, that the Indians may choose not to remove. The Treaty provides that its terms be "immediately submitted" to the representatives of the New York Tribe, and if the New York Indian "refused to accept the provision made for their benefit and to remove upon the lands set apart for them," that the President of the United States would "direct their immediate removal *from the Menominee country*." *Id*. (emphasis added). *Id*. Art. 6. There is no mention or removal of Indians from lands in New York.

The United States Senate ratified the 1831 Treaty, but included certain provisos to the Treaty requiring changes to boundaries of the lands to be ceded by the Menominee. The Menominee did not consent to the changes proposed by the Senate, and as a result, a new Treaty was negotiated in 1832. The 1832 Treaty, 7 Stat. 405, explains in the Recitals that the Menominee did not assent to the changes to the 1831 Treaty proposed by the Senate regarding the new boundary line. *Id*. The 1832 Treaty, in the Second Article, then sets forth the Menominee's cession of 500,000 acres of land, to be set apart "for the use of the Six Nations of New York Indians and the St. Regis tribe of Indians," but the location of these lands differed from those proposed by the Senate. *Id*. In an Appendix to the 1832 Treaty on October 27, 1832, 7 Stat. 409, various representatives of the New York Indians indicated that the lands ceded by the Menominee "contains a sufficient quantity of good land, favorably and advantageously situated, to answer all the wants of the New York Indians, and the St. Regis Tribe." *Id*.

Like the 1831 Treaties, the 1832 Treaty addresses cessions of land located in *the State of Wisconsin, by the Menominee Nation* to the United States. There is no language in the Treaty requiring *any* cession of lands by the New York Indians, or the St. Regis Tribe of Indians in particular. Finally, like the 1831 Treaty, although it was contemplated that the New York Indians *may* remove to the lands set apart in Wisconsin, there is no language in the 1832 Treaty requiring the New York Indians, or the St. Regis Indians in particular, to remove to or settle on the lands ceded by the Menominee.

In *McGirt*, the Court, in discussing the Allotment Act, noted that Congress at the turn of the 20th century ‘‘believed to a man’’ that the reservation system would cease. 140 S. Ct. at 2465. The Court stated that the expectation that reservations would cease was not enough, as Congress had to expressly state the intent to disestablish a particular reservation:

> Still, just as wishes are not laws, future plans aren’t either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.

Id.

Similarly here, the fact that it was contemplated in the 1831 and 1832 Treaties that the New York Indians would possibly remove to lands in the west was not, by itself, enough to disestablish the New York reservations. The Treaties, by setting aside lands for use by the New York Indians, created conditions for removal, but unless and until the New York Tribes agreed to cede their lands or reservation in New York and to relocate to the lands in the west after such cession, the 1831 and 1832 Treaties, at most, were the first steps of initiating the federal removal policy and were not sufficient, without more, to disestablish the New York reservations.

b. <u>The Buffalo Creek Treaty</u>

The Buffalo Creek Treaty, 7 Stat. 550, executed on January 15, 1838, refers at Recital paragraph to the 1832 Menominee Treaty and states that "by the provisions of that treaty, five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they all remove to the same, within three years" and that "the President is satisfied that various considerations have prevented those still residing in New York from removing to Green Bay, and among other reasons, that many who were in favour of emigration, preferred to remove at once to the Indian territory, which they were fully persuaded was the only permanent and peaceful home for all the Indians." *Id*. The New York Indians "therefore applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian territory" *Id*.

The Buffalo Creek Treaty in effect supersedes the 1832 Menominee Treaty, as it requires the New York Indians to cede all interests in lands set aside in Wisconsin by the 1832 Treaty and, in consideration of such cessions, the United States agrees to set aside new tracts of land in Indian country, located in Kansas. The Buffalo Creek Treaty provides, at Article 1, that "the several tribes of New York Indians . . . hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them *at Green Bay* by the Menomonie treaty of 1831, excepting the following tract, on which apart of the New York Indians now reside. " *Id*., Art. 1. (emphasis added).

Article 2 states that the United States agrees to "set apart" lands located in Kansas, and that the land was "intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of New York. " Id., Art. 2.

With two exceptions, the Treaty does not require any of the New York tribes to cede

lands located in New York. Article 10 of the Treaty states that "at the making of this Treaty" the Seneca Nation sold parcels of land in the State of New York to two individuals. The Treaty confirms the sale and requires the Seneca to relinquish all rights to the land. Article 14 states that the Tuscarora Nation agrees to convey to the United States land located in Niagara County, New York, and that the United States agrees to sell and convey the land, to invest the proceeds of the sale, and to make annual payments to the Tuscarora Nation. The Treaty expressly required cessions of land in New York by these two specific tribes only; there is no language requiring cessions of land in New York by any of the other tribes.

Although the Treaty attempts to induce the New York Indians to move to the west and settle on land set aside for their "future homes," the Treaty does not require the tribes to remove. To the contrary, the Treaty at Article 3, expressly states if the New York tribes "do not accept and agree to remove to the country set apart for their new homes" the Indians shall "forfeit all interests in the lands *so set apart*." *Id*., Art. 3 (emphasis added). The lands "so set apart" are those in Kansas, not the lands in New York. The Treaty does not extinguish any interests in *New York lands* to those who do not remove.

In fact, the issue of removal regarding the St. Regis Indians in particular was explicitly addressed in a Supplemental Article to the Treaty. The Supplemental Article, signed on February 13, 1838 (about one month after the January 15, 1838 Treaty), expressly states that the St. Regis Indians would not be required to remove to the lands near Missouri. The Supplemental Article states that "any of the St. Regis Indians who 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" Supp. Art. to Buffalo Creek Treaty, 7 Stat. 561. The language in the Supplemental Article is unambiguous: the St. Regis could not be compelled

to remove and only those St. Regis Indians who "wish to do so" were "at liberty" to remove to the lands in the west.

iii. Contemporaneous documents related to the Buffalo Creek Treaty confirm that the St. Regis did not Cede lands in New York and Had the Option, but not the Requirement, to Remove West

To the extent the Court believes it is necessary to consider extratextual sources, contemporaneous documents related to negotiation of the Buffalo Creek Treaty confirm that the St. Regis (1) had no intent to cede their lands in New York and (2) did not agree to, and were not required to remove west. In a report dated December 29, 1837 (about six weeks before the Buffalo Creek Treaty was signed), R. H. Gillett, the federal commissioner at the Buffalo Treaty, describing a meeting with the St. Regis, indicates that "before this Tribe can bind itself positively to emigrate, it must be certain of a new home, and also make a treaty with the Governor of the State for the relinquishment of their interest to these lands." Report, R.H. Gillet, December 29, 1837. SMF No. 54. Mr. Gillet's report emphasizes that the St. Regis considered it necessary, before agreeing to emigrate, to make a treaty with the Governor of New York to sell the interests the Indians held in lands located in New York. No such treaty was ever signed. The Buffalo Creek Treaty does not refer to any sales of land by the St. Regis.

In a report dated February 27, 1838, R.H. Gillet, discussing the St. Regis, states that "it is expected the Governor of New York will purchase their lands in that State within the current year." Report, R.H. Gillet, February 27, 1838**.** This Report was written a few weeks *after* the St. Regis had signed the Supplemental Article to the Treaty. By indicating an intent to sell their lands "within the current year," the St. Regis demonstrated that they did not believe that they had ceded their lands to New York a few weeks earlier in the Buffalo Creek Treaty. SMF No 55.

Eight months later, Mr. Gillet prepared an additional report. Referring to the St. Regis.

Mr. Gillet noted that the Indians were concerned about the quality of the lands to be set aside for their use in Kansas and stated that "they think it a matter of right to be permitted to see the country *before they sell where they now are* and agree to remove west." Report, R.H. Gillet, October 25, 1838. SMF No. 56 (emphasis added). This Report was written nine months after the Buffalo Creek Treaty and eight months after Supplemental Article were signed. The St. Regis, many months after the Treaty, still were contemplating whether to sell their lands in New York. They clearly did not believe they had ceded lands earlier.

iv. The Second Circuit's Decision in *City of Sherrill*, Which Held that the Buffalo Creek Treaty did not Disestablish the Oneida Reservation, is Dispositive, as all Relevant Facts in the Case at Bar are the Same as in *Sherrill*

In *Oneida v Sherrill,* the Second Circuit squarely addressed the issue as to whether the Buffalo Creek Treaty disestablished the Oneida Reservation. The court held that the Treaty did not disestablish the Reservation.[15] 337 F.3d at 165. Although the court's holding focused on the Oneida Reservation in particular, the facts relating to the St. Regis Reservation are in all pertinent aspects the same, and the bases of the court's holding applies with equal force to the Reservation for the St. Regis Indians created by the 1796 Treaty.

[15] The Supreme Court reversed the Second Circuit's decision, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 214 (2005), but on other grounds. The Court expressly stated that "the Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Buffalo Creek Treaty disestablished Oneida's Reservation, as Sherrill argues." *Id*. at 215n.9. Because the Supreme Court explicitly chose not to address the issue, the Second Circuit's decision that the Oneida Reservation was not disestablished by the Buffalo Creek Treaty "remains the controlling law of this Circuit." *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149, 157 n.6 (2d Cir. 2010). *See also Grand River Enters. Six Nations Ltd. v. Pryor*, 425 F.3d 158, 174 (2d Cir. 2005) (court cited *City of Sherrill* for position not reversed); *United States v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004) (court remains bound by circuit precedent when reversal is on other grounds).

The Second Circuit stated that Articles 1 and 2 of the 1796 Treaty "summarize the central bargain between the New York Indians and the federal government: the cession of the New York Indians' Wisconsin lands in exchange for reservation land in Kansas." *Id*, 337 F.3d at 160. The court then noted that, although the Treaty contains "explicit cession language for New York territory of two tribes, the Seneca, and the Tuscarora," the Treaty contains no such cession language regarding the Oneidas. *Id*, at 161. Rather, Article 13, dealing with the Oneidas, states that the Oneida "hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." 7 Stat. 550, Art. 3.

The Second Circuit found that "there is no specific cession language, and no fixed-sum payment for opened land in New York; rather there is only the possibility of a sale for "uncertain future proceeds." *Oneida v. Sherrill,* 337 F.2d at 161. Further, "while the Oneidas agreed to remove, removal was conditioned on speculative future arrangements between the Indians and a third party, New York's governor." *Id*. The court also found it instructive that Article 3 of the Treaty "contemplates that some tribes might not remove from their New York lands." *Id*. at 162. The Second Circuit concluded that "the Treaty's text contains neither an obligation to remove nor any indication of a congressional intention to disestablish the Oneidas' New York reservation." *Id*.

The court's rationale applies with apply with equal force to the St. Regis Indians. The facts are virtually the same, albeit the facts are more compelling in the case of the St. Regis to support a finding of no disestablishment. Like the case of the Oneidas, the Treaty contains no language with specific cession language or fixed payment language for St. Regis's land in New York. Moreover, like the case of the Oneidas, the Treaty does not require the St. Regis to

remove to the lands in Indian country. The Oneidas actually agreed to remove to Green Bay in the Treaty, but the Second Circuit found that the Oneidas' agreement to remove was conditional only. By contrast, the St. Regis never agreed to remove at all (instead a Supplemental Article expressly states that the St. Regis did not agree to remove). The facts regarding the St. Regis, therefore, are if anything more compelling than the case for the Oneidas that the Treaty indicated no intent to disestablish.

The Second Circuit also rejected New York's argument that federal Indian Removal Policy, reflected in the Indian Removal Act, combined with the Buffalo Creek Treaty, evidenced an intent to disestablish the Oneida Reservation. New York argued that "the removal policy's goal of reducing conflicting state and tribal sovereignty could be accomplished only if Oneida sovereignty over the area from which the Nation was obligated to remove was terminated." *Id.*, 337 F.3d at 163 (quoting New York's Brief.) The court stated that "this argument ignores both the requirement that removal language be "clearly expressed," as well as the text of the Removal Act, which permits the President to provide western lands to "such tribes or nations of Indians as may *choose* to exchange the lands where they now reside, and move there." *Id*. The court added that the fact that the Treaty provided for the cession of lands in New York for some tribes (Senecas and Tuscaroras) but no other tribes "demonstrates that when Congress wished to disestablish a reservation, it knew what language to employ." *Id*. The Second Circuit's decision is determinative here. On all relevant facts, its decision is on all fours with the facts in this case.

To the extent this Court believes that there are any ambiguities regarding the intent of the Buffalo Creek Treaty or the 1832 Menominee Treaty, the Court must employ the longstanding canons of construction regarding the interpretation of Indian treaties: (1) treaties are to "be construed liberally in favor of the Indians with ambiguous provisions interpreted to their

benefit," *Oneida XX,* 470 U.S. at 247; and (2): "in interpreting treaties and agreements with the Indians, they are to be construed, so far as possible, in the sense in which the Indians understood them." *Choctaw,* 318 U.S. at 432. Application of these canons supports only one reasonable conclusion: neither Treaty disestablished the St. Regis Reservation.

The United States anticipates that New York may argue to the Court that documents over the course of time, not limited to the time of the treaty and negotiations thereto, regarding the federal government's treatment of the St. Regis Reservation are relevant to the disestablishment issue. The Supreme Court in *McGirt* made it clear, however, that ''evidence of the subsequent treatment of the disputed land has 'limited interpretive value ''in resolving the disestablishment issue and that it "at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment. 140 S. Ct. at 2469. Further, the Court stated that:

> 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.

Id. at 2469. The 1832 Menominee and 1838 Buffalo Creek Treaties are not ambiguous. There is no language indicating an intent to disestablish the St. Regis Reservation. Thus, this Court has no reason to, and should not, consider any extratextual sources regarding the federal government's statements or other actions years after the Treaties were negotiated and executed. For similar reasons, demographic evidence regarding the Indian population of Hogansburg Triangle area over the course of time is not relevant. What matters is what was meant *at the time of the Treaties at issue.* The population over many years thereafter has "little interpretive value" and, pursuant to *McGirt*, is not necessary when the Treaties are, as here, unambiguous.

B. New York's Counterclaim of Diminishment is Without Merit, as a Matter of Law

New York asserts a Counterclaim of "Diminishment." NY Am. Ans. at ¶¶ 68-75. To support its claim of diminishment, the State asserts that "any rights that may have been created in favor of the Plaintiffs by the Treaty of 1796 were ceded, relinquished, and/or diminished by the treaties between the State of New York and the St. Regis Indians during the period 1816 to 1845." Id. at ¶ 74. New York's counterclaim of diminishment is defective on its face.

It is long established federal law that an Indian reservation can be disestablished or diminished only by an act of Congress or treaty. In *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), the Supreme Court held that "only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("only Congress can alter the terms of an Indian treaty by diminishing a reservation"). The Supreme Court reaffirmed this rule of law recently in *McGirt,* where the Court stated that "to determine whether a tribe continues to hold a reservation, *there is only one place we may look: the Acts of Congress*." *McGirt*, 140 S. Ct. at 2462 (emphasis added).

Ignoring such Supreme Court caselaw, New York bases its diminishment counterclaim on the "treaties" between New York and the St. Regis Indians during the period 1816 to 1845. NY Am. Ans. at ¶ 74.[16] The "treaties" to which New York refers are not federal treaties; they

[16] Similar to the Counterclaim for Disestablishment, New York also asserts allegations in its counterclaim for Diminishment that focus on whether the Treaty created a federal Indian reservation at all, not whether the Reservation, once created, was diminished. See NY Am. Ans. at ¶ 71-72. The issue as to whether the 1796 Treaty created a federally recognized reservation for the St. Regis Indians is addressed in detail in Section IV.B of this Memorandum.

were not ratified by Congress, nor did any federal statute authorize them. Because only Congress can diminish an Indian reservation, New York's diminishment counterclaim should be summarily rejected by this Court.[17]

C. **New York's Quiet Title Counterclaim is Without Merit**

New York asserts a Counterclaim based on the Quiet Title Act, requesting this Court to issue a declaratory judgment "determining that Plaintiffs have no aboriginal or reserved Indian title to the subject land." NY Sec. Am. Ans. at 17. The State's Quiet Title Counterclaim is groundless. The United States has demonstrated that: (1) the 1796 Treaty bestowed recognized title on the St. Regis Indians, creating a permanent property interest in the lands at issue in this case; and (2) the federal Reservation created by the 1796 Treaty has not been disestablished or diminished and remains fully intact today. Given these facts, the St. Regis have possessory rights to the land, and this Court should summarily reject New York's Quiet Title Counterclaim.

CONCLUSION

For the reasons set forth above, the United States moves this Court to grant its Motion.

Submitted on May 17, 2021 by:

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[17]New York contends that the United States ratified the Land Transaction "treaties". New York is incorrect; this issue is addressed in Section IV.A. of this Memorandum.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2021, I filed the foregoing UNITED STATES' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT with the Clerk of this Court using its CM/ECF system, which will transmit the foregoing to all counsel of record.