

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

ST. REGIS MOHAWK TRIBE,)
)
 Plaintiff,)
)
 v.)
)
 GOVERNOR DAVID A. PATERSON)
)
 and)
)
 FRANKLIN COUNTY, NEW YORK,)
)
 Defendants.)
)
 _____)

Civil Action No. 09-CV-0896
(NPM/GHL)

ST. REGIS MOHAWK TRIBE'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS

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UNITED STATES DISTRICT COURT FOR
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ST. REGIS MOHAWK TRIBE,)	
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Plaintiff,)	
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GOVERNOR DAVID A. PATERSON)	Civil Action No. 09-CV-0896
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FRANKLIN COUNTY, NEW YORK,)	
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Defendants.)	
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ST. REGIS MOHAWK TRIBE'S MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS

The St. Regis Mohawk Tribe ("Tribe") has filed a declaratory judgment action requesting this Court to declare the territorial boundary of the Tribe's 1796 reservation as it applies to a specific area known as the Hogansburg Triangle. Over the past few years, there have been ongoing and increasing disputes regarding the applicability of State and local laws. To rectify this situation, the Tribe asserts a claim that the Hogansburg Triangle is within the Reservation set aside for the Tribe by the 1796 Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55 ("1796 Treaty"), and that the Reservation has never been diminished by act of Congress. The Tribe seeks a declaratory judgment that (a) the boundaries of the reservation surrounding the Hogansburg Triangle, as set forth in the 1796 Treaty, have never been diminished by Congress and remain in force, (b) the Hogansburg Triangle continues to be part of the Reservation, and (c) the civil jurisdiction of the Tribe, State and local governments is governed by federal law,

including 25 U.S.C. § 233.¹ Significantly, the Tribe bases its claim on an interpretation of this statute and its applicability to an Indian reservation. The declaration sought will help to resolve whether the Defendants' interpretation and its ensuing pattern of actions in this area are legitimate. The Tribe does not ask that the Court make any specific finding regarding title to the land within Hogansburg Triangle.

Despite the clearly limited nature of this suit, the Governor and County ("Defendants") have moved to dismiss the Complaint on three grounds. The Defendants first contention is intended to tie this lawsuit to the Tribe's pending Land Claim, arguing the Boundary Claim is duplicative, and claim splitting, and should be dismissed. The Defendants also move for dismissal on the affirmative defenses of laches and other equitable considerations and the Eleventh Amendment. *See* Defendants' Joint Memorandum of Law In Support Of Defendants' Motion to Dismiss, [hereinafter Defs.' Memo.].

None of these defenses justify dismissal of the Complaint. The premise of the Defendants' duplicative claim/claim splitting argument is that the Land Claim seeks the same relief requested here and is based on a common set of facts. To the contrary, the Tribe's Land Claim seeks to resolve title to land illegally purchased from the Tribe. The Boundary Claim seeks to resolve jurisdictional disputes that have arisen long after the Land Claim complaint was filed 20 years ago. It presents an issue of federal statutory interpretation which would define the extent of the State's jurisdiction over these reservation lands under a federal law enacted some 100 years after the transactions at issue in the Land Claim. The operative facts are the enactment of this law, the absence of Congressional action to diminish the Tribe's reservation, and a pattern of ongoing assertions of jurisdiction by state agencies and the local government that have

¹ Jurisdiction of New York State Courts in Civil Actions, 25 U.S.C. § 233 (2006). The analogous statute governing criminal jurisdiction is found at 25 U.S.C. § 232.

occurred in the many years since the Land Claim was filed. The Tribe does not rely upon or challenge the transactions that are the subject of the Land Claim. Nor does the Tribe's Boundary Claim have anything to do with the Nonintercourse Act,² title, or possession.

Given that the disputes in this case have arisen after the filing of the Land Claim complaint and spring from a pattern of actions by the Defendants' that have occurred after that filing, and given that the Land Claim does not include any specific request to resolve these disputes, the Tribe's Boundary Claim is neither a duplicative action nor claim splitting.

Laches and the other equitable defenses based on the Supreme Court's ruling in the *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (*Sherrill*) and the Second Circuit's ruling in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (*Cayuga*) are also inapplicable. These defenses are limited to a situation where a tribe is seeking a remedy for its land claim through self help, by purchasing parcels and then unilaterally asserting sovereign immunity for activities on lands located in what are largely non-Indian populated areas. The question presented by this suit is whether Congress altered the Tribe's original reservation boundary and whether the Hogansburg Triangle falls within the parameters of 25 U.S.C. § 233—a classic boundary claim. Laches has never been applied in a boundary claim, which makes sense since a boundary claim concerns current events and seeks to enforce treaty rights against defendants for recent violations of federal law.

This case is also distinguishable from *Sherrill* and *Cayuga* because neither case had before it a federal law delineating the scope of jurisdiction. Here, an Act of Congress sets forth Congress's own determination of the extent and scope of the State's jurisdiction over reservation land. There is no unilateral assertion of sovereign authority or tribal immunity. If there is any

² 25 U.S.C. § 177 (2006).

disruption from this lawsuit, it is a result of an existing treaty-created reservation that has never been diminished by Congress and a federal law that defines New York state jurisdiction. The only action this Court is being asked to take is to resolve the extent to which that law applies to the Hogansburg Triangle. All other issues regarding taxation, regulation, or any other actions that the State wishes to take in that area, need to be resolved on a case-by-case basis by applying § 233 to the specific facts.

Similarly, the Eleventh Amendment is not a defense to this claim because the lawsuit is against the Governor, a state official with unique control over Indian affairs and law enforcement on reservations in the State. The suit is wholly prospective in nature and seeks to enforce the supremacy of federal law in this area by obtaining a clear delineation of the nature of this area and the applicability of § 233 going forward.

I. STATEMENT OF THE CASE

In 1796, Congress ratified a treaty between the Tribe and the State of New York which set aside certain lands as a federal reservation for the Mohawks. Treaty with the Seven Nations of Canada, 7 Stat. 55. The lands so set aside constitute the Tribe's reservation. Cmplt. ¶5. Since that time, Congress has never enacted any law that sought to address the reservation, either through diminishment or disestablishment.³ Cmplt. ¶15. One particular area within the lands set aside in 1796, the Hogansburg Triangle, is a triangular shaped area that the Mohawks have

³ Contrary to the Defendants' assertion on pp. 7, 8 and 19 of their Memorandum, Congress does not "approve" diminishment. Congress enacts a law or treaty that results in a diminishment. See discussion below at 10. Presumably, the Defendants' statement is based on the assumption that the Tribe is claiming that the illegal state transactions were not approved by Congress and therefore could not have diminished the reservation. The Tribe makes no such claim here since, for this claim, these transactions are not federal actions and, therefore, are irrelevant. However, if the State seeks to assert these illegal purchases as a defense and as evidence of diminishment, the Tribe would, of course, argue that the sales do not meet the test established by the Supreme Court for Congressional action to achieve diminishment. But the Tribe's affirmative claim is that there is no Act of Congress whatsoever.

always considered to be part of their existing reservation. The Defendants claims otherwise. For many years it was simply a rural area with houses and farms and disputes between Mohawks and the local governments had always been over property taxes. But in recent years, Mohawks have actively built up the area, not only with housing, but also with various commercial enterprises. The development is driven both by the success of the Tribe's various economic enterprises and by the fact that the population of the Tribe living on and near the reservation has been rapidly increasing. As a result, the Tribe and its members have come into increasing conflict with various state and local agencies regarding all aspects of this kind of development—economic and environmental regulations, licensing, taxation, permitting, and infrastructure and municipal services. Cmplt. ¶13.

The Tribe has concluded that the best way to address this overarching problem is to seek a declaration that the reservation boundary continues to encompass this area and as a consequence it is governed by federal law, 25 U.S.C. § 233, which delineates the extent of State and local jurisdiction over reservation land and tribal members. The Tribe asserts that Congress has never altered the boundary of its treaty-recognized reservation and as a result, under longstanding federal law, the boundary remains in tact. These are the only facts that are material to this cause of action.

II. STANDARD OF REVIEW

The Defendants have moved to dismiss under Fed. R. Civ. P. 12 (b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Under Rule 12(b)(1), the case may be dismissed when the district court lacks the statutory or constitutional power to adjudicate it. "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court ... may refer to evidence outside the pleadings.... A plaintiff asserting

subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Kamen v. American Tel. & Te. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986). But the Court will construe the complaint liberally, drawing all inferences and construing all ambiguities in favor of plaintiff. *Makarova*, 201 F.3d at 113; *Raila v. United States*, 355 F.3d 118, 119 (2d Cir. 2004).

A Rule 12(b)(6) motion subjects the complaint only to a superficial review, testing whether the complaint sets forth, on its face, a plausible claim of entitlement to relief without examining the evidence supporting those allegations. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200 (2007); *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). The Second Circuit has also recognized that,

[t]he purpose of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief *without* resolving a contest regarding its substantive merits. The Rule thus assesses the legal feasibility of the complaint, but does not weigh the evidence that might be offered to support it. See *AmBase Corp. v. City Investing Co. Liquidating Trust*, 326 F.3d 63, 72 (2d Cir. 2003); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2004).

Global Network Communications, Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006)

(emphasis in original).

III. ARGUMENT

A. **The Boundary Claim is Not Duplicative of the Pending Land Claim Because the Essential Facts Needed to Establish the Treaty Boundary Are Not the Same as the Essential Facts of the Land Claim, Which Goes to Title.**

The Defendants maintain that this suit is duplicative of the Tribe's Land Claim or constitutes claim splitting because the Boundary Claim "seeks relief that necessarily is part of the claims that are already before the court in the Land claim." Defs.' Memo. at 14. However, the relief sought is not duplicative and even if it were, relief is not a controlling factor in determining whether a suit is duplicative or constitutes claim splitting. The question this Court must answer is whether the first suit would have a claim preclusive effect on the second because it involves the same transaction or overlapping facts. This suit involves neither.

The Land Claim involves a claim that the State illegally purchased land from the Tribe in transactions that occurred 200 years ago. The transactions at issue in the Boundary Claim are current disputes over jurisdiction that have arisen long after the Land Claim complaint was filed. The Tribe seeks to resolve these disputes, not by claiming title and trespass damages, but by enforcing its reservation boundary under federal law. A similar argument—that a land claim overlaps a jurisdiction claim—was raised by the County in a previous lawsuit and was flatly rejected by the Second Circuit. See Section 4, below.

1. The Determination of Whether Two Actions Are Duplicative or Constitute Claim Splitting Is Made by the Application of Res Judicata Principles.

The Defendants argue that the Tribe's boundary claim is barred under the prior pending claim doctrine. In fact, this so-called doctrine is only a discretionary rule that allows a court to administer its docket by addressing what it deems to be duplicative actions. *Curtis v. Citibank*, 226 F.3d 133 (2d Cir. 2000). The district court may address duplicative claims in any fashion and it does not require dismissal. *Id.* at 138-139. The Supreme Court has stated that when

addressing two claims, "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration are equitable in nature." *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). In exercising this discretion, the Second Circuit cautioned: "A court must be careful, when dismissing a second suit between the same parties as duplicative, not to be swayed by a rough resemblance between the two suits without assuring itself that beyond the resemblance already noted, the claims asserted in both suits are also the same." *Curtis*, 226 F.3d at 136.

The Court in *Curtis* referred to the doctrine of claim preclusion as a basis from which to gauge whether two suits are duplicative. *Id.* at 138, citing *The Haytian Republic*, 154 U.S. 118 (1894).⁴ A court should proceed carefully in determining whether res judicata applies:

"With respect to the determination of whether a second suit is barred by res judicata, the fact that both suits involved essentially the same course of wrongful conduct is not decisive, nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues. A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is "whe[re] the same evidence is needed to support both claims, and whe[re] the facts essential to the second were present in the first."

SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1463-1464 (2d Cir. 1996)(citations omitted);

Cf. *Curtis*, 226 F.3d at 139. Whether or not separate claims encompass the same transaction

⁴ Defendants argue that the Court should find claim splitting because they raise defenses based on *Sherrill/Cayuga* in each case. See Defs.' Memo. at 18, citing to *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005). However, claim splitting is not judged by a defendant's answer or defenses, or even the relief requested by a plaintiff. It is judged by the two complaints and an assessment of whether the second suit is based on the same transaction as the first. Similar defenses may give rise to issue preclusion, but not claim preclusion. Issue preclusion is not the test for determining if claims are duplicative or constitute claim splitting. *Curtis*, 226 F.3d at 139 (claim preclusion is not to be confused with issue preclusion in assessing whether claims are duplicative).

must be judged in a "flexible, common sense construction that recognizes the reality of the situation." *Interoceanica Corp. v. Sound Pilots Inc.*, 107 F.3d 86, 91 (2d Cir. 1997).

Significantly, claim preclusion does not bar the filing of a second claim that is based on events that arise after the filing of the first complaint. *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996). Res judicata is determined by the scope of the complaint at the time it is filed. But, "it does not apply to new rights acquired during the action which might have been, but were not, litigated." *Computer Associates Int'l. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997). For example, in *Interoceanica*, a suit involving shipping, the Second Circuit allowed two separate suits based on different voyages, because they were "not related in time space, or origin as to the wrongs." 107 F.3d at 91. The Court of Appeals has also recognized that "a prior action based upon one part of the overlapping facts would not properly act as a bar to a subsequent action based upon another part of the overlapping facts." *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 111 (2d Cir. 2000). In *Waldman*, the Court used trespass as an example. If a suit is brought on a series of trespasses, a second suit cannot address trespasses that occurred *prior* to the filing of the first suit and which could have been included in the first suit. But a suit for trespasses that occurred after the filing of the initial suit is not res judicata since it is based on new transactions and facts. 207 F.3d at 111-113.

Similarly, a complaint alleging discrimination would not necessarily bar a subsequent complaint for retaliatory discharge if that event took place after the first complaint was filed. *Legnani v. Alitalia, Linee Aeree*, 400 F.3d 139 (2d Cir. 2005) (later filed retaliatory discharge claim was not barred by the prior Title VII claim when the "transaction" of discharge took place after the first complaint was filed). *See also Waldman*, 207 F.3d at 114 (a "cumulation of events

occurring after the first suit" and which give rise to a new claim would not be barred by res judicata).

Simply put, a plaintiff has no duty to amend its complaint in a prior filed action to address continuing conduct of the Defendant after the lawsuit is filed. *Computer Associates*, 126 F.3d at 370. "[P]laintiff may simply bring a later suit on those later-arising claims." *Curtis*, 226 F.3d at 139.

This analysis applies to the purported claim splitting argument as well. That is, this court may determine if there is claim splitting by applying res judicata principles. *See e.g., Coleman v. B.G. Sulzle, Inc.*, 402 F.Supp.2d 403, 420 (N.D.N.Y. 2005).

As is shown below, the issue in the instant lawsuit concerns the ongoing enforcement of state and local laws by the Defendants in the Hogansburg Triangle without abiding by § 233 and that have taken place long after the Land Claim complaint was filed. Such disputes will not necessarily be resolved by a claim to title and trespass damages as is alleged in the Land Claim. But they can be resolved independently of the Land Claim, using federal law in the interpretation of treaty boundaries as applied to 25 U.S.C. § 233.

2. A Boundary Claim Requires an Analysis of Legislative Action by Congress, Not the Actions of a State and Not an Analysis of Title.

In order for this Court to adequately determine if the Tribe's Boundary Claim is duplicative of the Tribe's pending Land Claim, it is important to understand the legal framework of such a boundary claim. There are two legal issues to address and both are based on the Federal Government's plenary authority in Indian affairs. *United States v. Lara*, 541 U.S. 193, 200-201 (2004).

The first is question is the extent to which Congress has acted to diminish the boundary. It is settled law that once set aside, only Congress may disestablish or diminish a reservation.

United States v. Celestine, 215 U.S. 278 (1909); *Solem v. Bartlett*, 465 U.S. 463 (1984); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Hagen v. Utah*, 510 U.S. 399 (1994); *Cf. City of Sherrill*, 544 U.S. at 216 n.9. Courts are admonished not to "lightly find diminishment." *Hagen*, 510 U.S. at 411.

Diminishment cases usually arise in current time and address the boundaries of a reservation in relation to a challenge to the application of State or local law to a particular area. All diminishment cases consider Acts of Congress that have opened reservations for settlement. The cases are clear that transfer of title is not the controlling factor and does not lead to diminishment without more. In *Seymour v. Superintendent*, 368 U.S. 351 (1962), the Supreme Court held that a reservation is not diminished by a federal law that merely opened a reservation to non-Indian settlement. It rejected the contention that the actual purchase of lands by non-Indians would lead to a diminishment without other facts to support the conclusion that Congress intended such a drastic result. *Id.* at 357-358. The Court in *Solem*, affirmed this view, citing to the longstanding rule that, "The first and governing principle is 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." 465 U.S. at 470; *Mattz v. Arnett*, 412 U.S. 481 (1973) (holding that the mere fact that a reservation has been opened to settlement does not mean that it has been diminished).⁵

⁵ *Sherrill* did not change this analysis. The *Sherrill* Court actually affirmed the principle that only Congress can diminish a reservation. 544 U.S. at 216, n.9. The *Sherrill* Court relied on the distinction between reservation status and land ownership reflected in the boundary cases, i.e., land ownership does not necessarily decide the reservation status or the sovereignty question but rather depends on the facts.

This threshold—whether Congress has acted—is key to the Tribe's claim. The Tribe argues alleges that Congress has never altered the reservation established by treaty. Cmplt. ¶15. In the absence of Congressional action, the Court need not inquire further into the other factors raised in the diminishment cases. See discussion at 28 and note 14 below.

The second legal issue in a boundary case is the extent to which Congress has granted a state any authority over reservation land. It is settled law that a state has no jurisdiction over a reservation unless Congress makes its intention to authorize such jurisdiction "unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992).

Relying on these two basic principles, the Tribe is asserting that the Congress never disestablished or diminished its reservation and therefore, the boundary remains in tact. Further, Congress made its intention "unmistakably clear" as to the extent of the State's authority over that land when it defined the parameters of State and local jurisdiction under 25 U.S.C. § 233.

3. The Boundary Claim is Not Based on the Same Transaction as Those at Issue in the Land Claim and the Land Claim Will Not Resolve This Case.

The Defendants repeatedly assert that the Land Claim involves title and possession. Defs.' Memo. at 3, 5, 16. The Defendants also admit that the present boundary claim concerns jurisdiction. Defs.' Memo. at 16, 18. Still, Defendants claim that the operative facts in this case include a challenge to the State purchases that occurred in this area hundreds of years ago. Defs.' Memo. at 7. The Defendants are confusing their likely defense—that the illegal State purchases changed the reservation—with the Tribe's affirmative claim. But the Defendants' defense is not relevant here, see note 7 *supra*, and these purchases are not key to the Tribe's affirmative suit. The Defendants also claim that the jurisdictional analysis is "factually and legally intertwined with the issue of title." Defs.' Memo. at 16. To the contrary, illegal State purchases that

occurred long ago purported only to take title to land within the reservation. Even if the State somehow intended more, the loss of title cannot diminish a reservation, see discussion above, and in the absence of an Act of Congress, the reservation has not been diminished. The illegal transactions simply do not meet the threshold test under Supreme Court precedent. They are not Acts of Congress (or even federal treaties) and the Defendants have not alleged otherwise. Thus, they are not operative facts or facts related to a transaction that gives rise to the Tribe's affirmative claim regarding its boundary.

The Tribe further asks this Court to interpret a jurisdictional law enacted in 1950, 25 U.S.C. § 233, with the express intention of defining the extent of the State's jurisdiction over all lands within an Indian reservation in the State of New York. The "transactions" at issue here are the Defendants' persistent failure to abide by this law within the Triangle. This dispute does not arise in the Land Claim.⁶

⁶ The Defendants refer the Court to the briefing in the Land Claim regarding the exclusion of Mr. Wuerschling from property he claims title to in the Hogansburg Triangle. Defs.' Memo. at 12-13. First, the Tribe does not seek to "enjoin" any action by the State in this regard, contrary to the Defendants' assertion. *Id.* at 13. The Complaint does not request an injunction. Second, in its injunction request, the County asserted that the state court had no jurisdiction over the dispute because §233 applied and precluded the state court from acting. Defs.' Exh. R at 11. This is a full admission that § 233 applies to the Triangle. In response, the Tribe did not deny that § 233 applied generally. Rather, the Tribe pointed out that § 233 did not necessarily preclude jurisdiction because of the facts (the parties and the type of claim). See Defs.' Exh. S. at 5. Section 233 prohibits a state court from exercising jurisdiction over "Indian lands or claims," which relate to events that transpired before its effective date. The Wuerschling matter involves individuals that are alleged to be trespassing, a dispute that may or may not fall within the § 233 prohibition. But, as we made clear in our brief, the Defendant had not exhausted state court remedies and until a state court is presented with the question of whether it can or will exercise jurisdiction, the claim that the state court lacked jurisdiction was simply unfounded. *Id.* The Tribe's brief also noted that Franklin County was in other instances, asserting the state court had jurisdiction and that section 233 did not preclude all jurisdiction within the Land Claim area. See Defs.' Exh. S at 6.

Of course, the Defendants' agenda is to have this claim dismissed in favor of the Land Claim because of the procedural posture in that case. The Defendants present a very long discussion of the Land Claim history but the most important fact has been downplayed. That case has been stayed for 20 months, over the objections of the Tribe and other plaintiffs. In addition, the Defendants currently seek to have the Land Claim dismissed on procedural grounds. Given it is the Defendants' position that the land claim cannot be resolved on the facts or on the issue of title, it must follow that Defendants' position is that this Court also cannot or will not resolve the Boundary Claim. This is so because it is the Defendants' goal to never have the Land Claim resolved.⁷

Moreover, even if the Tribe were to succeed in its Land Claim and establish that the State violated federal law when it purchased land from the Tribe, whether or not that holding would resolve the boundary claim is unclear. While the Tribe disagrees that the *Cayuga* ruling precludes the Mohawks from claiming title, it is the current law of this Court that the only possible resolution of a land claim that is not barred by laches is limited money damages. *Oneida Indian Nation v. New York*, 500 F.Supp.2d 128 (N.D.N.Y. 2007).⁸ Under current law and the Defendants' own position in the Land Claim as to the possible relief available, the Land

⁷ The Defendants may respond that under their claim duplication theory, if the Land Claim is dismissed, then the Boundary Claim should be dismissed as well. However, to make this leap, one has to assume that any claim made by an Indian tribe against the Defendants that questions jurisdiction is automatically subject to dismissal. No court has held that *Sherrill/Cayuga* are that sweeping. See below at 22-29. The Defendants should be required to justify the application of its defenses to the Boundary Claim separately.

⁸ In the Land Claim, the Mohawks maintain that even if they cannot get title they are entitled to trespass damages because the case is factually distinguishable from *Cayuga*. This is the crux of the Tribe's opposition to the Defendants' motion to dismiss in the Land Claim. That case has been stayed pending an appeal of this *Oneida* ruling to the Second Circuit. But the *Oneida* appeal would in no way set any legal precedent that would impact the Tribe's Boundary Claim.

Claim court would have no opportunity or even reason to address the geographic extent of the treaty boundary in that context.⁹

4. The Second Circuit Held in *Thompson v. Franklin County* There Is No Overlap in a Claim Regarding the Existence of the Reservation Boundary and a Claim of Title Under the Nonintercourse Act.

In 1992, an individual Mohawk filed a claim in this Court against Defendant Franklin County, seeking a declaration that her land was within the territorial boundaries of the St. Regis reservation and as such it was "Indian country" and not subject to local property taxes. Franklin County filed a motion to dismiss the complaint on the ground that ultimately Thompson's claim was based on the Nonintercourse Act and that, as an individual, Thompson lacked standing to assert a claim under that Act. This Court agreed, holding that Thompson's claim regarding the territorial extent of the boundary "turned, in large part, upon whether the series of agreements, beginning in 1816, conveying Indians' interest in the land of New York state violated the Nonintercourse Act." *Thompson v. Franklin County*, No. 92-1258, 1992 WL 554369, at 12 (N.D.N.Y. Nov. 30, 1992). The Court further held that "even though not mentioned in her complaint," the County relied on an 1816 transaction to assert taxing authority and whether this transaction was valid was a "necessary component" of Thompson's claim. *Id.* As such, this Court dismissed Thompson's complaint for lack of standing. The district court's conclusion in *Thompson* mirrors precisely the argument the Defendants are making here.

However, on appeal the Second Circuit reversed, holding that the 1816 conveyance went only to "title to the land located within the boundaries of the St. Regis Reservation." *Thompson*

⁹ That the boundary claim can remain a live issue even after resolution of a land claim is evident from recent rulings. *See e.g., Oneida Indian Nation v. Madison County*, 401 F.Supp.2d 219, 231 (N.D.N.Y. 2005) (appeal pending), (declaration that Oneida reservation not disestablished and qualifies as "reservation" under state tax law); *Cayuga Indian Nation v. Gould*, 884 N.Y.S.2d 510, 66 Ad3d 100 (N.Y.A.D. 2009)(Cayuga reservation has not been disestablished and is "qualified reservation" under state law).

v. Franklin County, 15 F.3d 245, 250 (2d Cir. 1994)(*Thompson I*). The Second Circuit relied on same Supreme Court boundary cases discussed above at 10-11, for the proposition that "the mere conveyance of property to non-Indians does not necessarily disestablish the reservation boundaries for jurisdictional purposes." *Id.*, citing to *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). The Court pointed out that the district court's error was the assumption that the sale of land necessarily altered the boundaries. *Id.* at 251. The Court of Appeals held that this sort of assumption was "at best, premature." *Id.*

In fact, Thompson willingly assumed that the County had validly taken title to the land under the Nonintercourse Act in order for her to have standing. In her view, the Nonintercourse Act was not relevant to her claim that the land remained Indian Country even if the State had previously taken valid title. However, this assumption led the Second Circuit to find that her land was subject to taxation.

In *Thompson v. Franklin County*, 314 F.3d 79 (2002)(*Thompson II*), the Second Circuit considered whether Congress had taken any action to make the land "freely alienable" and therefore subject to property taxes. 314 F.3d at 82, citing to *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998)(land made freely alienable by Congress is subject to taxation even if within the boundaries of a reservation). The Court held that if the conveyance was assumed to be valid, as plaintiff Thompson had stipulated, then the further assumption was that Congress had approved the State's 1816 purchase under the Nonintercourse Act to make them valid. Under these specific facts, her land was subject to taxation even within the reservation boundaries because Congress had made the land freely alienable by approving the title transfer and therefore rendered it taxable. 314 F.3d at 82.

In this ruling, the Second Circuit reaffirmed its holding in *Thompson I* that the question of title and jurisdiction and boundaries are legally distinct. *Id.* at 83. Judge Winter's concurrence made clear that the question of the boundaries was not relevant to the issue of taxation since, once the Court assumed that Congress had made Thompson's title freely alienable, it was taxable regardless of whether the land was within the reservation boundaries. *Id.* at 87. In other words, while Thompson was relying on the boundary to avoid State jurisdiction, this case was ultimately decided based on her assertion that she had valid title under the Nonintercourse Act.¹⁰ As Judge Winter summed up:

Appellant cannot, therefore, win this case. There are only three possible outcomes: (i) there was congressional authorization for, or ratification of, the Conveyances sufficient to transfer title and alter the Reservation boundaries (jurisdiction) in a corresponding fashion; as a result, appellant has title to the land but it is taxable by the County of Franklin; (ii) somehow, Congress authorized the Conveyances to pass title but not shrink the Reservation boundaries; if so, the land is taxable under *Cass County*, 524 U.S. at 110-11, 118 S.Ct. 1904; or (iii) the Conveyances were not authorized by Congress to pass title or alter the Reservation boundaries, and, as noted in *Thompson I*, only the Tribe has standing to challenge the property tax. *Thompson I*, 15 F.3d at 249. The judgment must, therefore, on any theory, be affirmed.

314 F.3d at 87. Therefore, the Court did not need to and did not resolve the title question, nor did the Court decide the boundary question. The Court recognized that only Congress had the power to subject the land to state or local jurisdiction and the power to tax. Congress had to either change the boundaries, approve transfer of title, or both. *Id.* at 86. Either could make the land subject to taxation. The Court ruled based on an assumption that the boundary did exist and further on an assumption that Thompson had valid title because Congress approved the 1816 transaction under the Nonintercourse Act. *See also Id.* at 83. The Second Circuit used the

¹⁰ Contrary to the Defendants' assertion, Defs.' Memo. at 26, Thompson never asserted a claim or cause of action under 25 U.S.C. § 233. Her claim was based entirely on the argument that her land was Indian country under 18 U.S.C. § 1151.

Nonintercourse Act to answer a question about the power to tax and it did so based on an assumption that the State took valid title, an assumption that is currently at issue in the Land Claim. In the end, the boundary simply did not make a difference to Thompson's specific claim. Conversely then, it is also true that the validity of title does not answer the boundary and diminishment question. In fact, it cannot under controlling Supreme Court precedent.

The Defendants also claim a relationship between the Land Claim and the Boundary Claim based on statements made by the Tribe during its efforts to have this court to enjoin Franklin County from foreclosing on certain properties in the Land Claim area. Defs.' Memo. at 12. Specifically, the Defendants quote an answer filed by the Tribe in a related state court proceeding. In that answer, the Tribe argued that the state court should refrain from exercising its jurisdiction pending the resolution of the Tribe's All Writ's Act motion or because the court should defer to the federal court to resolve title questions. The Defendants specifically quote paragraph 7. *Id.* The Defendants, however, failed to provide the full answer in that paragraph which included a citation to the *Thompson* case. The Tribe stated, "Whether or not the land is subject to the County's taxing authority is a question that will be answered by the resolution of the land claim. **See *Thompson v. Franklin County*, 314 F.3d 79 (2d Cir. 2002).**" See Def. Exh. P, ¶7 (emphasis added).

As is described above, the Second Circuit ruled in *Thompson II* that land was subject to local property taxation if the state purchases were valid under the Nonintercourse Act. Thus, this statement was not an acknowledgement that the Land Claim would resolve the boundary question.¹¹ *Thompson* made clear the existence of a boundary and title are two separate issues

¹¹ The Defendants also quote ¶ 13, in which the Tribe argues that the Land Claim will resolve whether the lands were removed from the reservation. Defs.' Memo. at 14. This statement goes to the issue of the validity of title as well.

and whether or not the State or local governments can impose property taxes may flow from either. The Supreme Court in *Sherrill* confirmed this analysis when it acknowledged the reservation boundary precedents but concluded it could decide the immunity question presented by the Oneida without addressing the diminishment question. *Sherrill*, 544 U.S. at 216, n.9.

So too, here, the Land Claim is poised to resolve the narrow question of title and the Nonintercourse Act claim. But it is not poised to resolve the larger question of whether the boundary has ever been diminished by Congress. Since that is the precise claim being made, unlike *Thompson* and *Sherrill*, the Court cannot decline to decide the question here.

5. If This Court Decides This Claim is Duplicative, Dismissal is Not Required.

The Tribe has made a strong case that the Land Claim and the Boundary Claim are not duplicative. If, however, this court is inclined to find otherwise, dismissal is not warranted. This Court has discretion on how to address two competing claims. As the Second Circuit summarized in *Curtis*:

"Because of the obvious difficulties of anticipating the claim or issue-preclusion effects of a case that is still pending, a court faced with a duplicative suit will commonly stay the second suit, dismiss it without prejudice, enjoin the parties from proceeding with it, or consolidate the two actions. See *Kerotest Mfg*, 342 U.S. at 186, 72 S.Ct. 219 (stay); *Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121, 129-30 (2d Cir. 1999)(remanding for consideration of consolidation); *First City*, 878 F.2d at 80 (dismissal without prejudice); *National Equip. Rental, Ltd. V. Fowler*, 287 F.2d 43, 45-46 (2d Cir. 1961)(parties enjoined)."

Curtis, 226 F.3d at 138.

The Defendants' theory is that dismissal is appropriate since this issue is subsumed in the Land Claim. As we establish above, even if the case went forward, the Land Claim remedies are limited and may not definitively resolve the boundary question. Thus, dismissal would effectively leave the Boundary Claim unresolved.

Should this Court consider consolidation, it is required to assess the prejudice to the Tribe in consolidation. *Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121, 130 (2d Cir. 1999). In deciding whether consolidation is proper, "the court must balance the interest of judicial convenience against any delay, confusion, or prejudice that might result from such consolidation." *Sheet Metal Contractors Ass'n of Northern New Jersey v. Sheet Metal Workers' Int'l*, 978 F.Supp. 529, 531 (S.D.N.Y.1997); *see also Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990); *Internet Law Library v. Southridge Capital Management, LLC*, 208 F.R.D. 59, 61-62 (S.D.N.Y. 2002). As the Defendants have pointed out, the Land Claim case is stayed indefinitely until the Second Circuit resolves the Oneida Land Claim appeal, which addresses the availability of limited money damages. The implication is that if consolidated, the Boundary Claim should also be stayed. Such a result would be highly inequitable. A ruling by the Second Circuit in that case will have absolutely no impact on resolution of the Boundary Claim.

"Consolidation may properly be denied in instances where the cases are at different stages of preparedness for trial." *Mills v. Beech Aircraft Corporation, Inc.*, 886 F.2d 758, 762 (5th Cir.1989); *St. Bernard General Hospital, Inc. v. Hospital Service Association of New Orleans, Inc.*, 712 F.2d 978, 990 (5th Cir. 1983), *cert. denied*, 466 U.S. 970 (1984). Significant delay due to different stages of litigation has been held to be a reason to decline consolidation. *See Aerotel, Ltd. v. Verizon Communications Inc.*, 234 F.R.D. 64, 67 (S.D.N.Y. 2005); *Transeastern Shipping Corp. v. India Supply Mission*, 53 F.R.D. 204, 206 (S.D.N.Y.1971) ("Although there are common questions of law and fact in the ten cases involved here, their respective calendar positions vary greatly."); *Garfinkle v. Arcata Nat'l Corp.*, No. 72 Civ. 5344, 1974 WL 389, at *2 (S.D.N.Y. Apr.17, 1974) (where discovery in one action is virtually complete while it has just commenced in another, consolidation of both actions deemed inappropriate); *Prudential*

Insurance Company of America v. Marine National Bank, 55 F.R.D. 436 (E.D. Wis. 1972)

(where the court held that because there had already been considerable delay in bringing one of the cases to trial, consolidation was not appropriate because it would further delay the setting of a trial date). This Court should not let efficiency "prevail at the expense of justice." *Devlin*, 175 F.3d at 130.

This court should also take into account that there are many parties in the Land Claim that have no direct interest in the Boundary Claim and the Court would have to assess how these third parties would be impacted by the case and whether the Tribe would be impacted by their participation. Generally, the other parties are not affected by the distinct legal question presented by this case. As the parties are not identical, prejudice could result for the additional parties on both sides depending on the outcome. Consolidation is improper if it would prejudice the rights of the parties. *St. Bernard General Hospital*, 712 F.2d at 989; *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 195-96 (5th Cir.1966), *cert. denied*, 386 U.S. 958 (1967), *cited in Guillermo Sintes Reyes, S.A. v. Opulence Transport, Corp.*, No. 92-2312, 1993 WL 114522 (E.D. La. Apr. 9, 1993); *see also Transeastern Shipping Corp.*, 53 F.R.D. at 204 (The court found that consolidation was not appropriate in actions involving six parties at different stages of litigation).

If the cases remain separate dockets, it would be up to those third parties to determine if they should seek to intervene in the Boundary Claim and the court can make an independent assessment of their interest under intervention standards. By consolidating, the Court would have no opportunity to determine if their participation is justified in the circumstances. In addition, those same parties would have to consider in the extent to which they want to participate in the briefing and prosecution of the case. They may feel compelled to do so to protect some interest even though their participation would not be permitted as intervenors.

Given the differences in the parties, as well as the differences in the procedural status and the potential for case resolution, the Tribe believes that, on balance, the factors counsel against consolidation.

B. The Tribe's Boundary Claim Is Not Barred as a Matter of Law Under the Doctrines of Laches or the Equitable Defenses Set Out in *Sherrill* and *Cayuga*.

Unsurprisingly, the Defendants assert that the holdings in *Sherrill* and *Cayuga* bar the Boundary Claim. Unfortunately for the Defendants, the basic premise upon which it bases this argument is not substantiated by the Complaint. In sum, the Defendants claim that the Tribe is asserting

it is entitled to assert sovereignty over any lands within the Hogansburg Triangle...which are owned in fee by individual members of the Tribe, and non-members as well. This assertion of tribal sovereignty necessarily excludes the State and local governments from the exercise of full governmental authority over the subject lands, and is palpably disruptive

Defs.' Memo. at 20. This is the only factual assertion cited in the Defendants' motion to support its laches argument and it is completely wrong. Nowhere in the Complaint does the Tribe make any assertion as to its blanket sovereign authority over any particular lands within the reservation boundary, and it certainly has not asserted any claim to authority over non-member land in the Complaint. It has been more than clear that the application of state or tribal law within the reservation boundary is to be determined by applicable federal law based on the specific factual circumstances of the dispute. The Defendants' postulation is based on either a complete failure to understand the nature of tribal sovereignty and jurisdiction as it is governed by federal law and § 233 or it is an intentional misstatement of the comprehensive federal law precedents that govern the division of state and tribal jurisdiction. Either way, this assertion cannot be found

anywhere in the Complaint and therefore cannot be the basis to substantiate a claim of disruption that would justify a motion to dismiss.

Nor does the Boundary Claim fit within the four corners of either a traditional laches analysis or the *Sherrill/Cayuga* framework. First, laches does not apply because the filing of the Boundary Claim was not unreasonably delayed. The Defendants could not make such a showing and indeed, they have made no effort to establish delay in their motion. This case challenges a pattern of actions by the Defendants and violations of § 233 that have occurred recently and are ongoing. Nor are the Defendants prejudiced by any delay. The Defendants did not change their position based on anything the Tribe did. The Defendants' position is based on a mistaken conclusion that they need not comply with § 233 in this area.

Second, the *Sherrill/Cayuga* framework does not apply because (1) this case is not an ancient land claim, but a modern day claim seeking to adjudicate the Tribe's current rights under a treaty that has never been repealed, and federal law; (2) the Tribe does not seek title or possession to property, damages, or injunctive relief; (3) the Tribe is not seeking to unilaterally change the jurisdiction of the area but rather seeks to enforce federal law which defines jurisdiction in the area; and (4) any disruption which may occur from an alteration of how this area is treated would be the result of the proper application of federal law, which to date the Defendants have ignored.

In sum, in the context of a boundary claim, the application of the *Sherrill/Cayuga* defenses is unwarranted. *See Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296, 2008 WL 4808823 (E.D. Mich. Oct. 22, 2008) (rejecting application of the equitable defenses applied in *Sherrill* and *Cayuga* to a tribe's boundary claim).

Finally, if this court finds that the Tribe's claim could be subject to laches or other equitable defenses, those defenses should not be ruled upon on in this motion to dismiss. The Complaint states facts sufficient to overcome a motion to dismiss and in any event, laches is a factual defense requiring factual support.

1. *Sherrill* and *Cayuga* Were Decided in the Context of Ancient Indian Claims That Were Determined to Be Disruptive Based on the Facts on the Ground and the Unilateral Actions of the Tribe.

Neither *Sherrill* nor *Cayuga* provides a basis for this Court to simply assume that the Tribe's Boundary Claim, which seeks to enforce existing law, is disruptive or presumptively barred by laches.¹²

In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Supreme Court was asked to rule on the extent to which the City of Sherrill could tax land owned by the Oneida Indian Nation. Knowing, based on court rulings, that ejectment was not going to be a possible

¹² In their brief, Defendants purport to incorporate memoranda of law that they submitted in the Land Claim. Defs.' Memo. at 19, Defs. Exhs. F, G, and K. In attempting to incorporate those memoranda, totaling some 75 pages, Defendants have run afoul of the applicable page limitations. By Order dated Oct. 28, 2009, Magistrate Judge Lowe granted Defendants' motion to file a brief of no more than 40 pages. The Court should not consider the supposedly incorporated arguments. *See Gilday v. Callahan*, 59 F.3d 257, 273, n. 23 (1st Cir. 1995) (appellate courts need not consider arguments incorporated into appellate briefs by reference). "A party may not articulate a legal argument simply by 'incorporating by reference' the argument presented in another document. Such a practice violates the Local Rule on page limitations." *Topliff v. Wal-Mart Stores East LP*, No. 04-0297, 2007 WL 911891 at *9, n. 65 (N.D.N.Y. Mar. 22, 2007) (Lowe, M.J.); *see also Swanson v. U.S. Forest Service*, 87 F.3d 339, 343, 345 (9th Cir. 1996) (affirming ruling that plaintiff could not incorporate by reference additional pages of legal argument, and noting that district court had sanctioned plaintiff's counsel for such incorporation). Not only is this a violation of the applicable page limit set by Court order, it is confusing and unhelpful to the Court, given the many differences between this case and the Land Claim, as to the claims involved, the different parties, and the different procedural statuses of the two cases, including the extensive factual materials filed by the parties in the Land Claim. *See Prudential Ins. Co. of Am. v. Sipula*, 776 F.2d 157, 161 (7th Cir. 1985) (incorporation by reference "unnecessarily confuses and diffuses the issues presented"). This Opposition Memorandum addresses only the arguments set out in Defendants' Memorandum of Law, and not the 75 pages of arguments Defendants purport to have incorporated therein.

remedy in the land claim, the Oneida purchased land in their land claim area in an effort at self-help, as an alternative land claim remedy. The Nation took the position that upon purchase the Tribe had renewed sovereign authority over the land, and it therefore was not subject to state or local jurisdiction. 544 U.S. at 211-13, 219. The Oneida did not rely on 25 U.S.C. § 233.

The Court considered the specific question of "whether 'equitable considerations' should limit the relief available to the Oneida [for its land claim]." *Id.* at 213-214. The Court held that the Oneidas' self-created remedy, a reassertion of sovereign authority over land it had purchased in fee, was barred under equitable considerations. The Court called upon three equitable principles—laches, impossibility and acquiescence—as examples of legal doctrines that draw upon specific facts to preclude relief. *Id.* at 213-221.

First, the Court reasoned that the passage of time often justifies precluding relief based on "one side's inaction and the other's legitimate reliance..." citing laches. *Id.* at 217. The Court further found that the belated assertion of sovereignty and settled expectations as to jurisdiction can lead to the preclusion of relief under the doctrine of acquiescence. *Id.* at 218. The Court looked to impossibility to preclude a remedy that would uproot citizens and create a checkerboard of jurisdiction, citing to the diminishment cases. *Id.* at 219-220. It summed up its conclusion that, "[t]he long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude the OIN from gaining the disruptive remedy it now seeks." *Id.* at 216- 217.

When the Second Circuit applied the *Sherrill* decision to the land claim of the Cayuga Indian Nation in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), the court considered the context of a land claim where the Tribe sought "possession of a large swath of

central New York State and the ejectment of tens of thousands of landowners." 413 F.3d at 275. The Court reasoned that under *Sherrill*, equitable doctrines such as laches could "in appropriate circumstances, be applied to *Indian land claims*." 413 F.3d at 273 (emphasis added). The Court relied on three factors to apply laches: (1) the possibility of a disruption in governance of the land if the tribe was awarded possession, (2) the lapse of time during which no relief was sought by the Tribe and (3) because of the delay in seeking relief, the dramatic change in the character of the land after the illegal purchase. These factors required a finding that the claims for possession were "disruptive." *Id.* at 274. As such, they were "subject to the equitable considerations discussed in *Sherrill*." *Id.* at 275.

In sum, both *Sherrill* and *Cayuga* concerned ancient Indian land claims. *Sherrill* concerned an assertion of tribal immunity from taxation on the basis of renewed sovereignty. *Cayuga* addressed the extent to which a tribe's claim to title and possession of non-Indian land would impact non-Indians. Both addressed a situation where the tribe sought possession and title with the result that jurisdiction would be impacted, not by an Act of Congress which delineates jurisdiction, but by a court ruling on a land claim remedy. All of these distinctions are key in addressing the Tribe's Boundary Claim. None of these concerns arise from the Tribe's present claim.

2. *Sherrill* and *Cayuga* Do Not Apply When Claims Are Based on Current Events and Seek to Enforce the Congressional Delineation of Jurisdiction.

In *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296, 2008 WL 4808823 (E.D. Mich. Oct. 22, 2008), the district court rejected the application of the *Sherrill* and *Cayuga* defenses to a tribe's boundary claim. The Saginaw Chippewa Tribe brought an action against state officials seeking prospective declaratory and injunctive relief, to require state and local officials to recognize the tribe's historical reservation and to prohibit the enforcement of

state law against the tribe and its members within the reservation. *Id.* at *2. The United States intervened as a plaintiff, seeking a declaratory judgment that the lands set aside for the tribe in a treaty with the United States constituted Indian country within the meaning of 18 U.S.C. § 1151(a). *Id.* at *4. The United States did not seek injunctive relief of any kind. *Id.* The county and a municipality intervened as party defendants. *Id.* at *5. The defendants amended their answers to assert the equitable defenses of laches, estoppel, and impossibility, and sought to introduce evidence to support those defenses. The United States moved for summary judgment and to limit evidence as to these defenses. The tribe moved to strike the affirmative defenses. The court granted both motions. *Id.* at *24.

The Court gave several reasons for its ruling. First, the court noted that the defendants' assertion of governmental control over the lands was incremental, and post-dated the treaties, and so did not pose the "the same sort of distinct ancient wrong arising from the early days of the Republic that was at issue in either *Sherrill* or *Cayuga*." *Id.* at *22. Second, and of "greater significance," the court noted that *Sherrill* or *Cayuga* arose from violations of the Nonintercourse Act, and the task of fashioning a remedy for violations of the same. *Id.* The court noted that any remedy in the boundary claim would necessarily involve less judicial discretion and be less disruptive:

While a decision on the merits in favor of the Saginaw Chippewa and the United States in this case may require some exercise of discretion, the remedy will be closely tied to the treaties and later congressional action. The undertaking will be a decidedly different task than fashioning a remedy for a two century old violation of law out of whole cloth.

Id.

Third, the court found that there was a "dramatic difference" between the character of the tribe's boundary claim and the claims involved in *Sherrill* and *Cayuga*. *Id.* Whereas plaintiffs in

Sherrill and *Cayuga* "sought resurrection of an ancient claim to the land," the Saginaw boundary claim did not assert an entitlement to land or damages for loss of land (as in *Cayuga*), or affirmative relief from property taxes (as in *Sherrill*). *Id.* at *22. The tribe's claims, by comparison, were grounded on issues resolved by the treaties and later congressional action. *Id.* The court noted defendants' argument that the relief sought may be disruptive, but rejected the argument for two reasons: first, because of the different character of the claims and the remedies sought and second, because any disruption would not result from the task of fashioning a judicial relief from an ancient wrong, but from treaties and law. *Id.* at *23.¹³ The *Saginaw* court further noted:

The analytical framework outlined in *Rosebud Sioux*, with its focus on congressional intent as expressed in the treaties and later legislation provides the appropriate analytical framework for the resolution of this case. Extending *Sherrill*'s holding to defeat the interpretation of Treaties approved by Congress would fundamentally conflict with the provisions of the United States Constitution that allocate those responsibilities to Congress and the executive branch of the United States government.

*Id.*¹⁴

¹³ The court noted in dictum that evidence as to the potential future impact of a decision in the tribe's favor on the disestablishment issue "may become relevant" if the tribe and the United States prevailed on the merits, if the court were then called upon to fashion a remedy. *Saginaw Chippewa*, 2008 WL 4808823 at *24 ("a distinct difference between the substantive question and any potential remedy exists").

¹⁴ *Rosebud Sioux Tribe* and the other diminishment cases set forth an analysis as applied to an Act of Congress. *See e.g., Rosebud Sioux*, 430 U.S. at 604-05. Here, the Tribe alleges that, "the State and County have wrongfully treated parts of this reservation as removed from the exterior boundaries . . . even though there has been no act of Congress to permit this treatment." Cmplt ¶ 9. In their brief in support of their motion to dismiss, Defendants' do not assert that Congress has enacted any law diminishing the reservation boundaries. While the diminishment cases are relevant for this court to address the status of the Tribe's boundary, unless the court finds as a threshold matter that there is an Act of Congress, it would be unnecessary for the Court to address the rest of the *Rosebud* analysis as to Congressional intention and surrounding circumstances. *Cf. Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296, 2009 WL 1285846, at *13 (E.D.Mich. April 29, 2009). ("in the absence of an Act of Congress... modern jurisdictional facts are irrelevant to the analysis of the treaties.").

The instant case is on all fours with the *Saginaw Chippewa* case. Under the applicable motion to dismiss standard, the Defendants have failed to meet even the threshold since it cannot show that the Tribe's Complaint, on its face, requests a disruptive court ordered remedy in relation to an ancient land claim. The Tribe's Boundary Claim does not present "the same sort of distinct ancient wrong arising from the early days of the Republic that was at issue in either *Sherrill* or *Cayuga*." *Id.* at *22. The Tribe alleges that "Hogansburg Triangle has remained largely within Indian ownership, use and occupation. The Triangle is bounded on three sides by the original reservation and has a distinct Indian character. Many members of the tribe work and live in the area today and have done so since the 1796 reservation was set aside." Cmplt ¶ 10. Moreover, the Tribe alleges that, "*In the past few years, the State and County have sought to more vigorously enforce their civil laws against the Tribe and its members who live and work in the Hogansburg Triangle.*" Cmplt. ¶ 3 (emphasis added).

Second, of "great[] significance," *Saginaw Chippewa*, 2008 WL 4808823 at 22, this action does not present the task of fashioning a remedy for violations of the Nonintercourse Act in answer for an ancient wrong. The Tribe is seeking only declaratory relief as to the meaning of the 1796 Treaty, the boundaries of the reservation thereunder, and 25 U.S.C. § 233. This is a legal claim and the remedy sought does not require the exercise of equitable discretion on the part of the Court.

Despite the Defendants' claim to the contrary, the Tribe is not unilaterally asserting sovereignty. Nowhere does the Complaint ask the Court to declare exclusive tribal jurisdiction over fee lands or non-members, as the Defendants claim. Defs.' Memo. at 20. Rather the question of tribal versus state sovereignty and jurisdiction will be answered by § 233 on a case-by-case basis. The division of jurisdiction will follow from an Act of Congress and the

application of federal law once the boundary issue is decided.¹⁵ To the extent there is any disruption, it will follow from the 1796 Treaty itself and enforcement of an existing federal law, and not from the fashioning of a judicial remedy for a land claim.

3. The Defendants Have the Burden of Proof in the Assertion of Any Laches Defense and Since the Defendants Have Failed to Establish Undue Delay, the Burden Has Not Been Met.

"Laches is an equitable defense based on the ... maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those who sleep on their rights)." *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997). Laches "bars a plaintiff's equitable claim where he is 'guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.'" *Id.* (quoting *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979)). The elements of laches are that "(1) the plaintiff knew of the defendant's alleged misconduct, (2) plaintiff inexcusably delayed in taking action, and (3) the defendants have been materially prejudiced as a result of the delay. *Watson v. Mayo*, No. 07-54, 2008 WL 538442, at *4 (S.D.N.Y. Feb. 26, 2008). It is well settled that laches depends on "the circumstances peculiar to each case." *Stone v. Williams*, 873 F.2d 620, 623-624 (2d Cir. 1989), *cert denied*, 493 U.S. 959 (1989). There is no one size fits all rule. The burden of proof rests

¹⁵ What such a declaration would mean in terms of the Tribe's sovereignty (as opposed to the application of the Defendants' sovereignty) depends on many factual circumstances and the Tribe does not seek to litigate these issues in this case. For example, the Supreme Court has held that the Tribe's authority to apply its laws to non-members is restricted and based on specific circumstances. *See Montana v. Blackfeet Tribe*, 450 U.S. 544 (1981). Similarly, the application of state taxes on-reservation and under § 233 is based on an analysis of specific factors. *See e.g.*, New York State Attorney General's Opinion holding that state income tax does not apply on reservation generally and because of the language of § 233. 1977 N.Y.Op. Atty. Gen. 76, 1977 WL 28972 (N.Y.A.G.). Thus, the resolution of any particular issue in regard to how sovereignty and jurisdiction would parse out will have to be addressed after the issue of the geographic placement of the boundary is made clear.

with the defendant and both parts of the test must be satisfied. *Costello v. United States*, 365 U.S. 265, 282 (1961).

Initially, the Defendants must prove an unreasonable delay since it is a threshold factor in the application of laches. Absent an unreasonable delay in filing a claim, laches cannot be established. *Southside Fair Housing Comm. v. City of New York*, 928 F.2d 1336, 1354 (2d Cir. 1991); *Ortiz v. Suffolk County Police Dept.*, 210 F.Supp.2d 143, 145 (E.D.N.Y. 2002)(defendant must satisfy two part test). Both *Sherrill* and *Cayuga* relied on an unreasonable delay as the underlying basis for the application of laches. *Sherrill*, 544 U.S. at 222; *Cayuga*, 413 F.3d at 277.

Here, the Tribe is claiming a current and continuing pattern of acts by the Defendants. Therefore, the Tribe has not inexcusably delayed and the Defendants have made no effort to meet the burden of proof to show that there has been such a delay. In fact, their motion is devoid of any discussion of delay. Since delay is a threshold for laches, the court should not reach the prejudice factor.

Even if the Court reaches prejudice, the Defendant's showing is equally lacking. To establish prejudice through disruption, the Defendants rely on two cases that are wholly distinguishable from the case at bar: *Cayuga Indian Nation v. Village of Union Springs*, 390 F.Supp. 2d 203 (N.D.N.Y. 2005) and *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, 233 F.R.D. 278 (N.D.N.Y. 2006). Defs.' Memo. at 21-22. Both involved attempts by the plaintiff tribes in the Cayuga land claim to assert tribal sovereignty to newly-acquired lands purchased by the two tribes within their land claim area. In each case, the tribe sought injunctive relief from local land use or tax laws on the newly-acquired land. *Village of Union Springs*, 390 F.Supp. 2d at 205 (zoning and land use laws); *Town of Aurelius*, 233 F.R.D. at 280 (zoning and

real estate taxation). In both cases the tribe asserted immunity based on title and land ownership. Neither resembles the Tribe's claim here since neither sought a declaration of a boundary and neither sought to resolve the question through the prism of § 233.

Osage Nation v. Oklahoma ex rel Oklahoma Tax Commission, 597 F.Supp.2d. 1250 (N.D. Ok. 2009), *appeal filed*, (10th Cir. Sep. 14, 2009)(No. 09-5050), also relied upon by Defendants (Defs.' Memo. at 22), does not support dismissal here. In that case, the Osage Nation sued for a declaratory judgment that "all 2,296 square miles of Osage County comprise a reservation," 597 F.Supp.2d. at 1254, and injunctive relief from taxation of tribal members working and living in the county, notwithstanding that two federal laws addressed the reservation: the 1906 Osage Allotment Act had removed all restrictions on alienability of tribal lands within Osage County, *id.* at 1257, and the contemporaneous Oklahoma Enabling Act, which specified that the lands within the Osage reservation should constitute a separate county and would be governed as provided by the Oklahoma constitutional convention. *Id.* at 1260. On these facts, the court ruled that the Osage Reservation had been disestablished. *Id.* at 1257-61. The Court did not need to go further but in *dicta* it referred to *Sherrill* as a separate basis for not acting because it was resisting a request for unilateral court action in the face of a Congressional action of diminishment.¹⁶ "If this Court were to now establish Osage County as a reservation more than a century after Congress was understood to have dissolved that status...[s]uch a ruling would affect the State's Sovereign rights." 597 F.Supp.2d at 1265 (emphasis added). The court was only stating a truism—only Congress can disestablish a reservation and once Congress acts, a court cannot reinstate it.

¹⁶ The holding is *dicta* because it was not necessary to the Court's resolution of the case. See *Cotto v. Herbert*, 331 F.3d 217, 250 n. 20 (2d. Cir. 2003) (prior statements described as *dicta* if not necessary to the holding).

4. Even if the Claim May be Subject to Laches, Dismissal is Inappropriate Since Sufficient Facts Are Alleged in the Complaint to Survive a Motion to Dismiss.

The *Sherrill* and *Cayuga* decisions were based not just on the passage of time, but also on the particular facts on the ground: the non-Indian character of the area, *Sherrill*, 544 U.S. at 202, 219, the history of non-Indian governmental control over the area, *id.* at 215-216, and the extent of non-Indian population and ownership, *Cayuga*, 423 F.3d at 275, 277, and the development of the area and the possibility of impacting local governance. *Id.* at 277.

In *Osage Nation*, the court had before it the following facts developed on motion for summary judgment: (1) Oklahoma had governed Osage County as a county for over 100 years; (2) the county is predominately non-Indian, with only 5.4% of the population Osage Indians; (3) the Osage had not challenged the reservation boundary or state taxation until recently; and (4) recognizing the county as a reservation and ousting the state of taxation of tribal members within would have significant consequences for state civil, criminal, and regulatory jurisdiction. 597 F.Supp.2d at 1266.

These types of facts are the key to the application of the *Sherrill* and *Cayuga* and, in its Complaint, the Tribe has alleged specific relevant facts that address the laches/disruption standard. Those allegations, which must be taken as true, are sufficient to survive a motion to dismiss, and serve to distinguish this case from *Sherrill* and *Cayuga*.

For example, the Tribe has alleged that the Hogansburg Triangle "has remained largely within Indian ownership" and "has a distinct Indian character," that many tribal members live and work within it, that a majority of its population is Indian, Cmplt. ¶ 10, and that the Tribe provides various services within the area, including road construction, water and sewer, trash collection, business licensing, and police and fire protection. *Id.* ¶ 11. All of these facts are

pertinent to assessing disruption.¹⁷ Yet, the Defendants do not dispute these facts. They do not even address them despite their importance to the conclusions in both *Sherrill* and *Cayuga*. From the Defendants' perspective, the only relevant fact to bar this claim is that their longstanding, but wrongful, assertion of jurisdiction could potentially be undone by this lawsuit. Yet, neither the Supreme Court nor the Second Circuit approved such a broad defense nor did they state that any and every challenge to governmental jurisdiction is presumptively barred by laches. If such a presumption held true, then the State would have carte blanche to exercise jurisdiction without question. The law allows no such sweeping authority. Necessarily, there has to be a delay and there has to be a finding of prejudice which, in this case, would be disruption. Since the Defendants cannot sustain these factors given the allegations in the Complaint, dismissal at this juncture is improper.

The Defendants further argue that *Sherrill* and *Cayuga* require that the Tribe's claim be dismissed as barred by laches without a hearing or any evidentiary review. This position cannot be sustained. The fundamental law of laches remains unaltered by *Cayuga*, even where the court finds old Indian land claims are "subject to" the defense. 413 F.3d at 275. Not only have the Defendants not established unreasonable delay, they have not established legally cognizable prejudice and cannot do so given the facts state in the Complaint. If further factual development is required, it must be done through a hearing

¹⁷ The Defendants cite to evidence submitted by the Tribe in the Land Claim regarding the Hogansburg Triangle. Defs.' Memo. at 6, n.5. The Land Claim briefing goes to the Defendants' motion to dismiss based on laches and the submitted evidence is intended to overcome the defense. It is the Tribe's position that the facts on the ground are highly relevant to the equitable laches defense outlined by *Sherrill* and *Cayuga*. Since the Defendants are posing the same laches defense here, it is very likely those same facts, which are relevant to overcoming the defense, would be presented by the Tribe. The difference here is that a summary of those facts are presented in the Complaint and the Court cannot simply disregard those facts under the motion to dismiss standard. Since the Complaint is sufficient on its face, at minimum, the Tribe is entitled to prove those facts and show why they are relevant to overcoming the defense.

In *Cayuga*, a hearing produced evidence regarding prejudice. The Court of Appeals' application of laches to bar the claims was based on the "findings of the District Court" decided on a full factual record. 413 F.3d at 268. In the *Oneida* land claim, the court's holding was based on "undisputed facts as developed by the parties" in both the District Court and in *Sherrill*. *Oneida Indian Nation of New York, et al v. State of New York*, 500 F.Supp.2d 128, 136-137 (N.D.N.Y. 2007) (reviewing factual considerations drawn from *Sherrill* and *Cayuga* to determine whether the defense barred the claims, and holding "the undisputed facts as developed by the parties and in Second Circuit and Supreme Court precedent require the Court to grant the Defendants' Motion for summary judgment and dismiss the Plaintiffs' possessory land claims").

In contrast, in the case at bar, the Defendants either assume prejudice or rely on the consequences of losing the lawsuit as the basis for prejudice. It is well settled that "the mere prospect that a defendant might lose a case does not suffice to warrant the imposition of laches as a barrier to a plaintiff's action." *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1412 (9th Cir. 1993).¹⁸

The Defendants confuse the result in *Sherrill* and *Cayuga* – that laches barred the claims in those cases under those facts – with the holding that disruptive Indian land claims are subject to laches. "Subject to" in this context means that the defense is available. *Cayuga* did not create an "automatic dismissal" rule applicable to all Indian claims of any sort. Indeed, the court could not have held that laches bars all Indian claims as a matter of law because it is well settled that laches depends on "the circumstances peculiar to each case." *Stone*, 873 F.2d at 623-624. In order for this Court to find that the Tribe's claim is disruptive within the meaning of *Sherrill* and

¹⁸ Other cases also had significant factual development. Both *Union Springs* and *Aurelius* were based on the facts as to the Cayugas that had been fully developed in those cases and the Cayuga land claim. See e.g., *Village of Union Springs*, 390 F.Supp. 2d at 204 (decided on motion for summary judgment, following remand after previous decision on summary judgment).

Cayuga, it must determine whether the Defendants have met their burden of showing that the required elements of laches have been proven with findings of fact adduced through declarations or at an evidentiary hearing.

C. The Tribe's Boundary Claim is Not Barred by the Eleventh Amendment.

1. The Eleventh Amendment Does Not Bar The Tribe's Claim Since it Meets the Straightforward Inquiry Test—The Complaint Alleges an On-going Violation of Federal Law and Seeks Prospective Relief.

The Eleventh Amendment generally protects States from suit. But the immunity conferred by the Eleventh Amendment is not all-encompassing. *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir.1990). The Supreme Court long ago recognized in *Ex Parte Young*, 209 U.S. 123 (1908), that while the Eleventh Amendment generally gives a state, and state officials acting in their official capacities, protection against suits by citizens for money damages for past wrongs, it does not protect against suits for prospective injunctive relief to remedy continuing wrongs. *See also Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977).

To determine whether the state official is appropriately named and that the suit is not one where the state is the real party in interest, this court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002), quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *CSX Transportation Inc., v. New York State Office of Real Property Services*, 306 F.3d 87, 98 (2d Cir. 2002)(same).

The State avoids the straightforward inquiry and argues that this case is barred because it is really one that goes to "attributes of state sovereignty" that would bar the claim. Defs.' Memo.

at 31-32 citing to *Coeur d'Alene, supra*, and *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004). The Supreme Court in *Coeur d'Alene* expressly held that the tribe's claim for a declaration of interference with possession effectively amounted to a quiet title action. 521 U.S. at 281. In *Western Mohegan*, the tribe sought enforcement of the Nonintercourse Act by seeking a declaration of title and restoration of possession. 395 F.3d at 20. Both would have unilaterally used a judicial ruling to divest a state of jurisdiction. Both involved claims for title, control, possession and ownership. *Coeur D'Alene*, 521 U.S. at 287.

The State cannot find solace in these cases because the Supreme Court has significantly limited the scope of *Coeur d'Alene* in *Verizon Maryland, supra*. By instructing that a court need only conduct a straightforward inquiry, the Supreme Court essentially did away with the separate inquiry as to whether sovereignty will be impacted. *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2000)(courts "need not (and should not) linger over the question of whether ... sovereign interests are at stake"); *Tarrant Regional Water District v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008).

Even the Second Circuit has been clear that claiming an impact on state sovereign interests does not necessarily control and simply because a case addresses state property interests does not mean that *Coeur d'Alene* is always implicated. *In re Deposit Insurance Agency*, 482 F.3d 612, 619-620 (2d Cir. 2007)(claim of sovereign interest in possession not enough); *CSX Transportation, Inc.*, 306 F.3d at 98-99. Since *Verizon Maryland* was decided, most courts, including the Second Circuit have limited *Coeur d'Alene's* application to a direct challenge or claim to title. In *Western Mohegan*, the Second Circuit reasoned that it need not decide the limits of *Coeur d'Alene* because the Tribe's claim was one for title. 395 F.3d at 23. Similarly, in *Deposit Insurance*, the Circuit court distinguished a claim for possession from a claim for title,

finding that the former did not fall within the *Coeur d'Alene* analysis. 482 F.3d at 619-620 (Eleventh amendment has "never prevented a federal court from providing relief from government officials taking illegal possession of property in violation of federal law" and distinguishing between "*possession of property and title to property.*")(emphasis in original). See also *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 260 Fed. Appx. 13 (10th Cir. 2007)(tribe's claim to enjoin tax collection and to assert sovereign rights over a territory not barred by Eleventh Amendment because actual title not in dispute); *Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009)(right of state to impose easement not a title issue and "particular and special circumstances of *Coeur d'Alene*" not implicated).

In *Elephant Butte Irrigation District v. Dept. of Interior*, 160 F.3d 602 (10th Cir. 1998), irrigation district brought suit for contract reformation of land leases and a share of lease profits entered into with the Department of the Interior. The State argued that the contract claim went to state property interests and was barred under *Coeur d'Alene*. The Tenth Circuit held that *Coeur d'Alene* does not extend to every situation where a state property interest is at issue. 160 F.3d at 612. It found that *Coeur d'Alene* "reflects the extreme and unusual case" in which the suit affects "special sovereignty interest and cause[s] offense to the state's sovereign authority." 160 F.3d at 612 (internal citations and quotes omitted).

In *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000), the tribe sought a declaratory judgment that the State's sales and use tax did not apply to non-Indians at a hotel operated on reservation. The Court distinguished *Coeur d'Alene* explaining that more than state sovereignty must be at stake. Rather,

"In *Coeur d'Alene*, it was the unique divestiture of the state's broad range of controls over its own lands that made the *Young* exception to sovereign immunity inapplicable. Thus, in the case on appeal here, characterizing the state's interest in taxation as a core sovereignty area does not address the

question posed by *Coeur d'Alene*. Indeed, the question posed by *Coeur d'Alene* is not whether a suit implicates a core area of sovereignty, but rather where the relief requested would be so much of a *divestiture* of the state's sovereignty as to render the suit as one *against the state itself*."

223 F.3d at 1048 (emphasis in original).¹⁹

The *Agua Caliente* Court also found significant that "there is a long tradition of federal courts exercising jurisdiction over tribal challenges to state taxation." *Id.* at 1049. On that basis, the court found that the suit did not rise to the level of interference with state sovereignty that existed in *Coeur d'Alene*. *Id.* Moreover, the case concerned a competing tribal interest in the exercise of jurisdiction under federal law.

On the face of the Tribe's Complaint, which must be taken as true for the purposes of this analysis, the Tribe makes no claim for title or possession. The Tribe maintains that whether or not the State holds title to property (even though the Tribe believes it does not) is not relevant to a boundary claim analysis. The Tribe does not seek to change traditional state sovereignty on the basis of title. The Tribe seeks to enforce its treaty rights and the statutory protection of those rights under federal law. The Eleventh Amendment has never been successfully asserted in a boundary case largely because a boundary claim does not "rise to the level of a functional equivalent of a quiet title action implicating special sovereignty interests." *Arnett v. Myers*, 281 F.3d 552, 567 (6th Cir. 2002). Like taxation cases, there is a tradition of federal courts exercising jurisdiction over boundary claims, which more often than not address the division of

¹⁹ In *Western Mohegan*, the Second Circuit decline to follow this narrow reading of *Coeur d'Alene*. See 395 F.3d at 23, n. 4. But it did so because it found the *Western Mohegan* claim for quiet title and the "unique divestiture" of state control over the lands to be on all fours with the facts in *Coeur d'Alene*. For example, the *Western Mohegan* court noted that the tribe in that case sought to challenge the State's exercise of fee title over the contested area and that therefore those lands are not within the regulatory jurisdiction of the State. 395 F.3d at 23. In this lawsuit, the Tribe does not contest fee title and the extent of the State's jurisdiction is determined not by this lawsuit but by federal law and Congressional action.

jurisdiction, not a divestiture. This distinction is significant since *Coeur d'Alene* dealt with a unique situation where the lawsuit and change in title would accomplish a complete divestiture of state sovereignty. Here the Tribe only seeks to have the state exercise its authority properly, as defined by Congress.

In addition, *Coeur d'Alene* is not implicated since the suit would not divest the State of a traditionally exercised authority since states do not have traditional jurisdictional authority over Indian lands. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1206 (10th Cir. 2002). Nor does it mean that the State would be completely divested of regulatory authority. It would simply have to exercise its authority under the aegis of the applicable federal statute. At least two courts have held that when the suit is merely to require the State to abide by its own laws, or with federal law, the Eleventh Amendment is not implicated. *Agua Caliente*, 223 F.3d at 1049; *Arnett*, 281 F.3d at 568 (land will not be placed beyond sovereign control of State but rather will be regulated according to applicable law).

Coeur d'Alene has also been found to be inapplicable to cases involving treaty rights. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997). The Tenth Circuit concluded that since a State has no inherent right to regulate hunting and fishing on reservation lands, a suit against a state official could not impinge on a traditional state sovereign right. *Timpanogos*, 286 F.3d at 1206. *Cf. Ottawa Tribe of Oklahoma v. Speck*, 447 F.Supp.2d 835 (N.D. Ohio 2006), (a declaratory judgment action seeking a declaration of hunting and fishing rights did not violate *Coeur d'Alene* because the tribe did not seek exclusive hunting and fishing rights and the State would not lose entirely its ability to regulate land or waterways).

So too, in the Tribe's case here, it seeks to enforce the Tribe's treaty right—the geographic boundary of its reservation—and to clarify the extent of State jurisdiction over the area in question as defined by Congress under federal law.

Given that the Tribe's claim cannot in any way be read to claim title and possession, but rather is a treaty enforcement action, the *Coeur d'Alene* exception does not apply.

2. Under Ex Parte Young, the Governor is the Appropriately Named Official

Under the straightforward inquiry test, the Tribe's claim falls under the *Ex Parte Young* exception since it clearly contains an allegation of an ongoing violation of federal law, §233, by the Governor as head of various state agencies and the executive branch. This is sufficient for the purposes of an Eleventh Amendment analysis. *Verizon*, 535 U.S. at 645; *Coeur d'Alene*, 521 U.S. at 281. *Ex Parte Young* does not require a specific connection between the official and the act but simply that the state official has the duty to enforce the laws in question. 209 U.S. at 157; *Prairie Band Potawatomi Nation v. Wagon*, 402 F.3d 1015 (10th Cir. 2005), *rev'd on other grounds*, *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 1072 (2005).

Under the State Constitution, the power vested in the Governor is broad. *Rapp v. Carey*, 44 N.Y.2d at 162. The Governor is charged with the duty to "take care that the laws are faithfully executed." N.Y. Constitution, art. IV, §3; Executive Law, arts. 2, 3. The Governor has the authority over departments of the Executive branch. N.Y. Executive Law § 31 (McKinney 2010). The Governor appoints the heads of many departments including the Dept of Environmental Conservation, which controls environmental regulation, N.Y. Environmental Conservation Law §3-0103 (McKinney 2010), the Department of State, which oversees licensing, N.Y. Executive Law, §90 (McKinney 2010), and the Department of Taxation and Finance, which administers taxes. N.Y. Tax Law §170(1) (McKinney 2010). See also Affidavit

of Marsha K. Schmidt, Exh. 1. The Governor has the full power to oversee the administration of these entities. *Rapp*, 44 N.Y.2d at 162; *Matter of DiBrizzi*, 303 N.Y.2d 206, 100 N.E.2d 464 (N.Y. 1961). The Governor has also been accorded the flexibility to determine the "proper method" of enforcing state law and seeing to the execution of laws within the State. *Bourquin v. Cuomo*, 85 N.Y.2d 781, 790-791, 625 N.E.2d 171, 177 (N.Y. 1995); *Rapp*, 44 N.Y.2d at 163.

Here, the Governor is the proper party in this case. There is no disputing that the Governor is at the forefront of Indian relations and policy in the State. For example, the Governor's Office stands as the lead negotiator and diplomat on a number of issues involving state relations with Indians—gaming, taxation, and land claims. The Governor sets the policy as to whether and how an agency will proceed with respect to Indian lands.²⁰

In addition, this suit asks this Court to declare an area subject to a federal jurisdictional statute and that the State and its many agencies abide by that declaration, which is to say, that this federal law be "faithfully executed" by the executive and state agencies. Given the Governor's power over execution of the laws by the executive agencies, he has the authority to effectively carry out such a declaration. These powers are sufficient to establish the Governor as the official appropriately named in this suit. *Association of American Medical Colleges v. Carey*, 482 F.Supp. 1358, 1363 (N.D.N.Y. 1980). This case differs from a situation where a state

²⁰ Perhaps the best example of the Governor's authority to decide if and when to enforce laws against tribes can be found in the area of cigarette taxes. The 2009 testimony of the Deputy Commissioner of the Office of Tax Enforcement details decades of actions by several Governors to address the application of state cigarette tax laws to tribes. The Governor has adopted a policy of forbearance in the enforcement of these laws directly precluding application of the law, which the State agencies abide by. The Governor instead seeks to negotiate agreements with the tribes and he has directed the Department of Taxation and Finance to carry out this policy. See Affidavit of Marsha K. Schmidt, Exh. 2.

The Defendant County has also historically relied upon the Governor to address Indian affairs and have sought his direct intervention. For example, they recently sought the Governor's assistance with the ongoing land occupation. See Affidavit of Marsha K. Schmidt, Exh. 3.

statute is being directly challenged. *See e.g., Warden v. Pataki*, 35 F.Supp.2d 354, 359 (S.D.N.Y. 1999). In *Warden*, the Court declined to follow *Association of American Medical Colleges* because the Court found that the Governor did not have a direct role in enforcing the statute being challenged. 35 F.Supp.2d at 359. But here no particular state statute is being challenged. Rather, it is the overall policy of state law enforcement in the Triangle that is in question.

Moreover, the suit seeks a declaration on the supremacy of federal law, which governs the area, and it concerns the enforcement of a federal law in the face of continued violations by the State and its agencies. This, too, takes this suit out of the protection of Eleventh Amendment immunity. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)(The "supremacy of federal law must be accommodated to the constitutional immunity of the States."); *Doe v. Pfrommer*, 148 F.3d 78, 80-81(2d Cir.1998) (exception used when there is a conflict between a state practice and a federal mandate); *Burritt v. New York State Dept. of Transportation*, No. 08-605, 2008 WL 5377752, *5 (N.D.N.Y. Dec. 18, 2008). Indeed, unconstitutional action cannot "impart" immunity from the laws of the United States. *Green v. Mansour*, 474 U.S. 64, 68 (1985). "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring supremacy of that law." *Id.*; *Ward v. Thomas*, 207 F.3d 114, 119 (2d Cir. 2000); *Dyno v. Binghamton*, No. 09-313, 2009 WL 1663990, *5 (N.D.N.Y. Jun. 15, 2009). The Eleventh Amendment seeks a balance between the state's immunity and the supremacy of federal law. *New York City Health & Hospitals Corp. v. Perales*, 50 F.3d 129, 135 (2nd Cir. 1995). The Supreme Court observed, the "implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S.

159, 166, n. 14 (1985); *see also Jungels v. State University College of New York*, 922 F.Supp. 779, 783-84 (W.D.N.Y.1996), *aff'd*, 112 F.3d 504 (2d Cir.1997)("a state official acting in his official capacity may be sued in federal court to enjoin conduct that violates the federal constitution"); *Barnes v. Anderson*, No. 97-1491, 1997 WL 482165, *3 (S.D.N.Y. Aug. 20, 1997)(suits seeking prospective relief to remedy continuing wrongs are permissible).

In sum, under the *Ex Parte Young* doctrine, the Governor is the appropriate official to name in this action.

CONCLUSION

The Defendants have failed to establish a basis for dismissing this case and the motion should be denied.

Respectfully submitted,

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