UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS,
Plaintiff,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK, et al.,
Defendants.

Civil Action Nos.
82-CV-783
82-CV-1114
89-CV-829 (NPM)

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

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK, *et al*.,
Defendants.

SUPPLEMENTAL MEMORANDUM OF MOHAWK COUNCIL OF AKWESASNE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

In October 2008, the Court stayed this case pending a decision from the United States Court of Appeals for the Second Circuit in a separate case filed by the Oneida Indian Nation. The Mohawk plaintiffs opposed the defendants' request for a stay, because the factual circumstances at Akwesasne are so different from the facts in the Oneida case that we saw no reason to wait. A Second Circuit panel has now issued its decision in the Oneida case, and the *en banc* court has denied rehearing. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) ("*Oneida 2010*"), *reh'g denied* (Dec. 16, 2010). The ruling in *Oneida 2010* does not change any fact or issue here. The Mohawk claims are based on very different circumstances of fact and law than the claims in *Oneida 2010* – or in the *Cayuga* case[1] before it – and should go forward and not be dismissed.

The Mohawk Council of Akwesasne (MCA) fully supports the brief filed concurrently by the St. Regis Mohawk Tribe (SRMT) and the Mohawk Nation Council of Chiefs (MNCC). This brief focuses on the Island claims; their brief focuses on the mainland claims.

ARGUMENT

I. DEFENDANTS' CONTENTION THAT DISRUPTIVE CONSEQUENCES WILL OCCUR IF THE MOHAWK CLAIMS ARE RECOGNIZED IS BASED UPON ALLEGED FACTS WHICH SIMPLY DO NOT EXIST.

The State in its Memorandum of Law in Support of its Motion for Judgment on the Pleadings, dated November 6, 2006, concluded by stating:

> It is clear that the same factors barring the Sherrill and Cayuga claims preclude the plaintiffs' claims here. Asking the Court to uproot thousands of New York citizens, potentially destroying businesses and long settled expectations, prohibiting the State from operating one of its largest and most important energy generation facilities, despite more than a century of non-Indian control and ownership, simply asks too much.

[1] *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

Id. at 23 (emphasis added). This statement of supposed outcomes is entirely untrue as to the whole Mohawk claim, and it is glaringly so as to the Island claim in particular.

A. <u>There is no "uprooting" of any New York Citizen or "destruction" of any private business as a consequence of the Mohawk Island claim.</u>

The Mohawk Island claim will not uproot "thousands of New York Citizens," or "destroy[] businesses and long-settled expectations" – indeed, if this Court recognizes Mohawk ownership of the Islands, rather than awarding damages, not a single person will be moved, nor a single business destroyed. The Island claim, 82-CV-1114, encompasses three islands (one of them a set of small islands): Barnhart Island, Baxter Island (also known as Croil Island) and the Long Sault Islands. The Mohawks have owned these and numerous other islands in the St. Lawrence River since before there was a United States. Part of the current homeland of the Mohawk Council of Akwesasne is Cornwall Island, a Canadian island in the St. Lawrence next to the islands at issue here. When the 1796 Treaty was negotiated between the Seven Nations of Canada and the State of New York to reserve certain lands in the State of New York, all the parties understood that Barnhart Island, Baxter Island, and the Long Sault Islands, like Cornwall Island, were Mohawk lands in Canada. Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55. The Mohawks had undisturbed possession of and exercised ownership over these islands from the time of first European settlement until after the War of 1812, when the islands for the first time were determined to be part of the United States. *See* Decl. of Peter Michael Whiteley, Ph.D. (June 4, 2007) (hereinafter "Whiteley") at 8, 9 (resp. to Questions 19, 20).

The Mohawks used the Long Sault Islands for hunting and fishing, and archaeological evidence indicates aboriginal importance. Whiteley at 30-32 (resp. to Question 31). Barnhart and Baxter Islands were leased by the Mohawks to non-Indians in the late 18th and early 19th centuries, with fishing and hunting rights retained. *Id.* at 11-15 (resp. to Questions 21-23). The

Mohawks leased what came to be known as Barnhart Island to, not surprisingly, a Mr. Barnhart, for annual payments on a 99-year lease with rights of renewal, as they had done with several other islands. *See id* at 13, 14 (resp. to Questions 22-23). When the new international boundary line was drawn, putting the three islands in New York, the State simply assumed it owned them and illegally patented them to non-Indians in violation of the Treaty of Ghent, which protected Indian ownership. Treaty of Ghent, Dec. 24, 1814, 8 Stat. 218, 222 (Article 9 guaranteeing rights of Indians and Article 8 guaranteeing rights of all landowners). Thirty years later, in 1853, Barnhart complained to the State of New York that he had a valid lease to Barnhart Island from the St. Regis Indians, an interest protected by the Treaty of Ghent. Barnhart argued that New York's transfer of the land to a Mr. Ogden violated Barnhart's leasehold rights. The State Assembly agreed, and paid Barnhart for his leasehold interest. Later the Mohawks complained that if the tenant should be paid, so should the owner. Whiteley at 16-17 (resp. to Question 25). The Assembly report recognized the St. Regis ownership as uncontested, and the Assembly passed legislation in 1856 to pay the St. Regis Indians back rent. *Id.* at 17. There are disputes over whether the money ever was paid, *id.* at 53, and whether the promised payment was intended by the State for back rent or title, *id*. at 17, but in either event the State could not legally acquire the property without the consent of the United States, which it did not obtain. *See* 25 U.S.C. § 177.

In 1953, at the time the New York Power Authority (NYPA) sought a Federal Power Commission license to build the Saint Lawrence Hydro-Electric Project, Barnhart and Baxter Islands were identified as having a small number of land owners and resident non-Indian farmers. The State of New York purchased or appropriated the property of every such individual to use the land in building the Robert Moses Dam, and subsequently transferred its "rights" to

NYPA. *See* Whiteley at 73 (resp. to Question 38). If there was any "disruption" of those private owners' interest and expectations, it was caused by the State of New York, not the Mohawks. But the people truly disrupted were the Mohawks, through flooding of their lands, pollution of the river, and destruction of their fisheries.

At the time the Mohawk Complaints were filed in the 1980s, the three islands here at issue had long been totally out of private "ownership." The Long Sault Islands were (and remain) entirely uninhabited. The Saint Lawrence Hydro-Electric Project uses Barnhart Island and part of Baxter Island as anchors for the Robert Moses Dam and for various NYPA installations. A small state park is located on Barnhart Island entirely within the boundaries of the power project. These two islands are otherwise uninhabited.

There is thus obviously no "uprooting of thousands of New York Citizens" in recognizing the Mohawk claim to the Islands – either in ownership of the islands, or in damages for their illegal taking. New York uprooted its own citizens in creating the power project. Nor would there be any disruption of the operation of the Robert Moses Power Dam and facilities if Mohawk ownership of the Islands were recognized, because of the Federal Power Act and NYPA's renewed license.[2] *See infra* at 5-8. There is nothing like this Island claim in either

[2] NYPA argues that "there are obvious homeland security concerns in transferring ownership of areas adjacent to the United States' border and a major power facility into the hands of private parties." Reply Mem. of Law in Further Supp. of NYPA's Mot. for J. on the Pleadings, at 15 (Dec. 5, 2007) (emphasis added). It is worth reminding the Court and the defendants that a Tribe is a sovereign political entity, not a private party. *See, e.g., United States v. Mazurie*, 419 U.S. 544 (1975); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Moreover, (1) the power facility is not turned over to the Mohawks by recognizing their ownership of the Islands, as we show in the next section, and (2) Mohawk lands already straddle the border between the United States and Canada, as do the lands of many other tribes that have long had reservations on the borders with no security risk. The Blackfeet in Montana, and the Red Lake in Minnesota have reservations on the Canadian border, and the Tohono O'odham and Texas Kickapoo have reservations on the Mexico border. Indeed, the Village of St. Regis since 1817 has been partially in Canada and partially in the United States. The Akwesasne lands have straddled this U.S.-Canada border for over 200 years.

Oneida 2010 or *Cayuga* (or *Onondaga*, *see* Section III *infra*) – and those cases in no way justify dismissal of the Mohawk Island claims.

B. Under the Federal Power Act, and NYPA's renewed license, recognizing the Mohawk claim to the Islands either through ownership or damages in no way "prohibit[s] the State from operating one of its largest and most important energy generation facilities."

The Federal Power Act, originally enacted as the Federal Water Power Act, Act of June 10, 1920, 41 Stat. 1063 (codified as amended at 16 U.S.C. §§ 791a *et seq*.), regulates, *inter alia*, the use of navigable waters by States and private utilities for the production of electrical power. The Act makes Tribal lands as well as federal lands available for such projects, thus greatly enhancing the ability of States or utilities to construct power dams. Under the Act, as amended, the Federal Energy Regulatory Commission (FERC) grants licenses subject to the conditions set out in the Act. Section 10(e) of the Act requires that the United States collect an annual charge for the use of "tribal lands embraced within Indian reservations" used in such projects, with the amount of the charge based on the contribution of Tribal lands to hydropower production. 16 U.S.C. § 803(e). Section 4(e) provides certain environmental protections for reservations. 16 U.S.C. § 797(e). Except where the use is incompatible with the purpose of the reservation – a situation almost never found, and not applicable here – the Act limits the relief available to Indian tribes to these remedies. The Tribe cannot interfere with the operation of the facility, but is paid for the use of its land. *See, e.g., Montana Power Co. v. Federal Power Comm'n*, 298 F.2d 335, 340 (D.C. Cir. 1962) (affirming annual payment to the Confederated Salish and Kootenai Tribes from the Kerr project on the Flathead Reservation). The Act thus sets up an equitable situation between Tribes and power producers.

There are many power dams located wholly or partially on Indian lands and licensed by FERC, as the Robert Moses Dam is. To name just three examples: Montana General Electric

operates Kerr Dam on the Flathead Reservation in Montana; Portland Power Company operates two dams on the Warm Springs Reservation in Oregon; and the Douglas County PUD operates a dam on the Colville Reservation on the Columbia River in the State of Washington. *See* Fed. Energy Regulatory Comm'n, Complete List of Issued Licenses, *available at* http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls (last visited Jan. 18, 2011). Another example, and a dam much larger than Robert Moses Dam, is the Grand Coulee Dam on the Columbia River, which as a federal project under a special act of Congress uses part of the Colville Reservation and makes annual payments to the Colville Tribes. *See* Act of August 30, 1935, § 2, 49 Stat. 1028, 1039-1040 (1935); Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, Pub. L. No. 103-436, 108 Stat. 4577, 4579 (1994). These power projects have run for decades without any problems related to tribal ownership of the underlying land. This is ordinary statutory procedure for electrical production in the United States, nothing unusual or "disruptive."

The original license for the Robert Moses Dam was issued on July 15, 1953. *See In re Power Authority of New York*, 12 F.P.C. 172 (1953). It did not mention the use of Indian land or provide for annual payments. That license expired in 2003. By that time, this land claim suit had been filed and was well under way. The United States supported the Mohawks both in their land claim and in the relicensing procedure. The United States explained in a letter to FERC that it is the position of the United States that the Island lands are Indian Reservation Lands and that Sections 4(e) and 10(e) of the Federal Power Act apply to them:

> Most importantly, because the disputed land transactions were not ratified by an act of Congress, it is the position of the United States that the lands in question have been and remain *Mohawk reservation lands.* If the Mohawk land claim is resolved in accordance with the United States' position, Barnhart, Croil and Long Sault Islands would likely qualify as reservations for purposes of sections 4(e) and 10(e) of the FPA. The Supreme Court of the United States has determined that

> the term "reservations," as defined in FPA section 3(2), is restricted to lands "'owned by the United States' . . . or in which it owns a proprietary interest" and does not apply to lands owned in fee simple by Indian tribes. Under the United States' asserted position in the Mohawk land claim, the disputed islands meet the FPA definition of "reservation." As a result of certain boundary determinations in the 1783 Treaty of Paris [8 Stat. 80 (Sept. 3, 1783)] and the 1812 Treaty of Ghent, it is the United States' position that title to Barnhart, Baxter and Long Sault Islands passed directly from the British Crown to the United States in 1822, subject to the use and occupancy of the Indians of the Village of St. Regis.

Comments, Recommendations, Terms, Conditions and Prescriptions of the Dep't of the Interior on Application for New License and Preliminary Draft Envtl. Impact Statement, Project No. 2000, at 21 (Feb. 10, 2003) (citations omitted, emphasis in original).[3] FERC did not itself decide whether the Mohawks owned the islands, but in renewing NYPA's license expressly provided that if the Mohawks establish that they own the land and that it is part of a federal reservation, the provisions of the Federal Power Act protecting the environment (Section 4(e)) and requiring annual payments (Section 10(e)) would apply, just as they apply to other Indian reservation lands used for power projects throughout the nation. The exact language of the renewed license states:

> Article 418. *Unified Mohawk Land Claim*. Authority is reserved to the Commission to require the Licensee to implement such conditions for the protection and utilization of the St. Regis Mohawk Tribe Reservation as may be provided by the Secretary of the Interior pursuant to Section 4(e) of the Federal Power Act. Authority is also reserved to establish a reasonable annual charge for the use of federal reservation lands pursuant to Section 10(e) of the Federal Power Act. Exercise of these authorities is contingent on resolution of the Mohawk land claim litigation pending on the issuance date of this license in the United States District Court for the Northern District of New York, Civil Action Nos. 82-CV-829, 82-CV-1114, and 82-CV-783, in a such a manner sufficient as to cause the lands and waters subject to the referenced claims to become Federal reservations for purposes of the Federal Power Act.

Mass. Mun. Wholesale Elec. Co. v. Power Authority of New York, 105 F.E.R.C. P 61102, at *61604 (Oct. 23, 2003).

[3] The relevant excerpt from the United States' Comments is enclosed here as Exhibit 1. Additionally, the United States in its Amended Complaint seeks return of Mohawk land illegally held by New York or NYPA. Amended Complaint, at 3, 14 (Aug. 3, 2001).

The existence of the Federal Power Act and its attendant administrative procedures for licensing and protecting power producers and for compensating Tribes and protecting Tribal interests – provisions applied throughout the United States – show that if the Mohawks establish title to Barnhart Island and the other Islands, that in no way can result in "prohibiting the State from operating one of its largest and most important energy generation facilities." Mem. of Law in Supp. of State Def.'s Mot. for J. on the Pleadings, at 23 (Nov. 6, 2006). The Robert Moses Dam will run without impediment, as do the dams under similar licenses in the rest of the United States and the federal Grand Coulee Dam. Moreover, the provision in the FERC-issued 2003 license expressly contemplating possible Mohawk ownership of the Islands makes clear that recognizing that ownership will not frustrate any "long-settled expectations."

To further demonstrate that no "disruption" would occur with respect to the dam and power plant, the Court might take note that Ontario Power Generation (OPG) – which runs the R.H. Saunders Generating Station and related facilities that make up the Canadian side of the Robert Moses Dam – recently settled a Mohawk Council of Akwesasne claim against OPG for underpayment for use of the Tribe's disputed Canadian Tribal lands. The major terms of the settlement were payments totaling $45,963,520 (in Canadian dollars), recognition of land titles, and transfer of four islands to the Mohawks. The R.H. Saunders Dam continues to operate unfettered. There is no "disruption." *See* Ontario Power Generation, Press Release, "Mohawk Council of Akwesasne Finalizes Settlement Agreement with Ontario Power Generation" (Oct. 2, 2008), *available at* http://www.opg.com/news/releases/NewsOct02_08.pdf (last visited Jan. 25, 2011); MCA Press Release, "Eligible Voters 'Unofficially' Approve Ontario Power Generation Proposed Settlement Agreement" (June 17, 2008), *available at* http://www.akwesasne.ca/news/PR061708.html (last visited Jan. 27, 2011).

II. THE HOLDINGS IN *CAYUGA* AND *ONEIDA* SHOULD NOT BE EXTENDED TO THE MOHAWK CLAIM.

The Supreme Court in *Sherrill* rejected the claim of the New York Oneidas of a right to regulate and be free of county or city regulation or taxes in any land they might choose to purchase in the 300,000 acres of their former reservation, whether held in trust or not. That is all the Supreme Court did, and this judgment is neither surprising nor extreme. The Court held that to allow the Oneidas, most of whom had left New York and had not occupied this land since the early 1800s, to exercise that kind of regulatory authority over land in an area predominantly occupied by non-Indians would be too "disruptive." To reacquire jurisdiction, the Supreme Court said, the Oneida should go through the process of putting land into trust as provided in 25 U.S.C. § 465. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220-21 (2005). *Sherrill* was not a case for damages or return of land.

In *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) ("*Oneida II*"), the Supreme Court had expressly held that the Oneida, or any Tribe, may bring suit for violation of its possessory rights protected by federal law. 470 U.S. at 236. The Court found that "[f]rom the first Indian claims presented," the '"unquestioned right'" of Indians to their lands "has been reaffirmed consistently," *id.* at 234-35 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)), and that the Court's decisions spanning two centuries had recognized that "Indians have a federal common-law right to sue to enforce their aboriginal land rights." *Id.* at 235. Based on these "well-established principles," the Court concluded that "the Oneidas can maintain this action for violation of their possessory rights based on federal common law." *Id.* at 236.

In so holding, the Court expressly acknowledged that it had considered whether the passage of 175 years defeated the Oneidas' right, stating that:

> One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.

Id. at 253. This is the United States Supreme Court speaking. The Court left open only the question of "whether equitable considerations should limit the relief available to the present day Oneida Indians." *Id*. at 253 n.27 (emphasis added). A normal reading of this language would be that a court in granting relief might or might not allow a return of land, depending on the circumstances, but could substitute a money judgment against the wrongdoer, the State.

In *Sherrill*, far from narrowing the earlier *Oneida* precedents, the Supreme Court explicitly did not alter its prior ruling in *Oneida II*, that Indian tribes have a substantive right to bring an action "to be compensated 'for violation of their possessory rights based on federal common law.'" *Sherrill*, 544 U.S. at 209 (quoting *Oneida II*, 470 U.S. at 236). *See also id.* at 221 ("[T]he question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*."). Thus the Supreme Court has clearly ruled that a Tribe has a right to bring suit to enforce its possessory rights, but that a court might, depending on the circumstances, limit the remedy to damages or fashion some other appropriate relief, as this Court did in its original *Cayuga* decision. *See Cayuga Indian Nation of N.Y. v. Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001). Moreover, the conclusion is inescapable that the Supreme Court in *Sherrill*, expressly stating that it did not change its holding in *Oneida II*, did not thereby intend to extinguish all New York Indian land claims.[4]

[4] Congress also has expressly provided that the United States on behalf of an Indian Tribe may bring suit to enforce its possessory rights (or recover damages for them) if the suit is brought within six years of the enactment of the statute of limitations or its extension. Indian Claims Limitations Act of 1982 ("ICLA"), Pub. L. No. 97-394, 96 Stat. 1966, 1976 (codified as amended at 28 U.S.C. § 2415). The New York Land claims were among those Congress preserved. *Oneida II*, 470 U.S. at 243-44; 123 Cong. Rec. 22,165 (daily ed. July 11, 1977)

It is no accident that three trial judges, used to determining appropriate remedies, considered this issue and determined that these land claims are not barred by laches or any similar doctrine, but that the remedy may be fashioned so as not to dispossess innocent purchasers of land. Judge McCurn, for example, in the district court decision in *Cayuga* fashioned an equitable remedy allowing a monetary award, without dispossessing innocent land holders. 165 F. Supp. 2d at 366. The same was true of District Judge Hall's dissent in the Second Circuit's *Cayuga* decision and District Judge Gershon's dissent in *Oneida*. *See Cayuga*, 413 F.3d at 280-91 (Hall, J., dissenting); *Oneida 2010*, 617 F.3d at 140-48 (Gershon, J., dissenting).

The Second Circuit in both *Cayuga* and *Oneida*, however, went far beyond the decisions of the Supreme Court in *Sherrill* and *Oneida II*. Consistent with these Supreme Court cases, the Second Circuit held that to require the return to Indian ownership of hundreds of thousands of acres of land long held almost exclusively by large populations of non-Indians would, like the change of jurisdiction upon purchase rejected in *Sherrill*, be too "disruptive." But the Second Circuit went much further and held that not only would the land not be returned, but the Tribes would receive no monetary compensation from the State of New York at all. The Court justified its decisions by holding that because the claim was for return of land, and that would be

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(particularly mentioning the Oneida Claim). A court has the duty to construe the law so as to avoid holding that Congress engaged in a fruitless act where a reasonable alternative is available. *See Oneida II*, 470 U.S. at 244 n.16.

The Supreme Court's failure to grant a writ of certiorari in *Cayuga* is no legal precedent. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). *See also Barber v. Tennessee*, 513 U.S. 1184 (1995). In denying a writ of certiorari in *Barber*, Justice Stevens took the occasion "to restate the settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits." *Id*. at 1184.

"disruptive," payment of damages would also be "disruptive." We submit that no law supports this conclusion, and it is contrary to the clear holding of the Supreme Court.

This Court, of course, must follow the rulings of the Second Circuit, but it should not extend those rulings beyond the facts relied upon by that Court to justify them. Both *Cayuga* and *Oneida 2010* concern Tribes that had very large reservations, but sold all or most of their land in New York almost 200 years ago. The land filled with non-Indian citizens, and the bulk of the population of each Tribe left the State of New York altogether. Indeed, Justice Ginsburg begins her *Sherrill* opinion with the statement that the lands in question "once contained within the Oneidas' 300,000-acre reservation, were last possessed by the Oneida as a tribal entity in 1805." 544 U.S. at 202. As both Justice Ginsberg in *Sherrill, id.* at 205, and Judge Livingston in the recent Second Circuit *Oneida 2010* opinion emphasized, federal agents "took an active role . . . in encouraging the removal of the Oneidas . . . to the west." 617 F.3d at 119 (quoting *Oneida Nation of N.Y. v. United States*, 43 Ind. Cl. Comm'n 373, 390 (1978)). The bulk of the Oneidas long ago moved to a large reservation provided for them in Wisconsin. Department of the Interior figures show that in 1887 there were 1,732 enrolled Oneidas in Wisconsin, while in the same general time period (1892) there were only 215 Oneidas in New York. *See The Oneida Indian Journey: From New York to Wisconsin, 1784-1860*, at 71 (Lawrence M. Hauptman and L. Gordon McLester III eds., University of Wisc. Press, 1999); Whiteley, Ex. 42: Report of the Agent in New York, Ann. Rep. of the Comm'r of Indian Affairs to the Sec'y of the Interior (1892). In 1972 there were 6,684 enrolled Oneida in Wisconsin, compared to 524 in New York in the same decade (1978). *See* Jack Campisi, *Oneida, in* 15 *Handbook of North American Indians* 481, 487 (William C. Sturtevant ed., Smithsonian, 1978); Whiteley, Ex. 49: American

Indians in New York State, Table of Indian Nations/Tribes of New York, N.Y. Dep't of Social Services Bureau of Data Management and Analysis (1978).

The Second Circuit's *Cayuga* opinion similarly states that the Cayuga in 1789 had a reservation of 64,015 acres, but by 1807 had sold every single acre to the State of New York. 413 F.3d at 268-69. Both the Oneida and Cayuga thereafter lived on reservations of other Tribes, or had small individual holdings, or left the State entirely. The *Annual Reports of the Department of the Interior, 1900* stated as to the New York Cayuga and Oneida:

> The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties . . . . What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation. The Cayuga mostly reside on the Cattaraugus Reservation.

Id. at 298.

This is obviously in stark contrast to the Mohawks. The original New York Mohawk Reservation, defined in the 1796 Treaty, is a six-mile square at the Northern extremity of New York State on the St. Lawrence River including the Village of St. Regis, plus two one-mile squares where the Mohawks had mills, and also pasturage along the Grasse river – for a total of about 24,900 acres. The greater part of the reservation, some 14,500 acres, still remains intact today. The Village of St. Regis, as a result of a change in the national border, is now partially in Canada, and partially in the United States. St. Regis property in Canada, much of which is *south* of the St. Lawrence River, or on Cornwall Island, is totally occupied by Mohawks, adding greatly to the total Mohawk population in the area. The Mohawk territory on both sides of the border is known as Akwesasne, and its Mohawk population, with about equal numbers in the

United States and Canada, is close to 23,000.[5] The Mohawk population is also great in the areas that were purportedly "sold" to New York under duress in the mainland claims area. In the Hogansburg Triangle, a 2,000-acre triangular-shaped tract in the claims area, surrounded on two sides by the Mohawk Reservation, the population is overwhelmingly Mohawk. The Mohawks supply municipal services to Indians and non-Indians alike in that claims area. *See* St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs Mem. in Opp'n, at 32-42 and attached affidavits (July 13, 2007) (especially affidavit of James Ransom describing services provided by the Tribe in the Claims area). Moreover, the Island claim is unique to the Mohawk case.

Thus, unlike the Oneida and Cayuga Tribes, the Mohawks are a large population, never re-located, who still own most of the lands on their historic reservation, and have a growing community with growing needs. They are the neighbors of the local non-Indian community, not strangers, and supply services to them. Their situation is not at all like that discussed in either *Oneida 2010* or *Cayuga*. The return of the Islands to the Mohawks, an issue unique to this case, as explained above, does not in any way interrupt the Islands' current use for the production of power and is foreseen in the renewed FERC license under which NYPA runs its plant. *See supra* at 5-8. Nor is the land in the Hogansburg and Ft. Covington mainland tracts, where Mohawks

[5] The New York portion of the Mohawk Tribe listed its enrollment as 12,217 as of 2007. St. Regis Mohawk Tribe and the Mohawk Nation Council of Chiefs Mem. in Opp'n, at 33 (July 13, 2007). The last official count made by Indian and Northern Affairs Canada – Canada's equivalent of the BIA – shows the total population of the Mohawk Council of Akwesasne in December 2009 as 8,893 living on the Reservation and 2,136 living off the Reservation for a total population of 11,029. This makes the total New York and MCA Mohawk population combined 23,246, before any reduction for double-counting or additions for increase population in the last several years.

are a majority and the Tribe provides essential services to all residents, at all similar to the lands at issue in *Oneida 2010* or *Cayuga*.[6]

In addition, the Mohawks have a long and well-documented history of attempting to right the wrongful land transactions with New York, going back to at least 1856. *See, e.g.*, Whiteley at 15-17 (Mohawks sought and received recognition by the State in 1856 of title to Islands); *id.* at 51-53 (Mohawk representatives testified in 1888 before the State's "Whipple Committee" that the lands were Tribal); *id.* at 65-67 (Mohawk representatives in 1922 protested before the State's Everett Commission against the State's possession of Tribal lands); *Deere v. New York*, 22 F.2d 851 (N.D.N.Y. 1927) (ejectment action against New York and the St. Lawrence Power Co.); Whiteley at 68-71 (Six Nations petitioned Congress in 1930 and New York in 1935 for redress of all illegally transferred lands, including the Islands); *United States v. Franklin County*, 50 F. Supp. 152 (N.D.N.Y. 1943) (suit by United States challenging county's right to tax tribal members in the Hogansburg Triangle portion of the claim area); *St. Regis Mohawk Tribe v. New*

[6] The Mohawk Parties and the State and Counties, with the support of the United States, had negotiated and signed a settlement of their land claims and were in the process of obtaining the necessary legislative approvals before the Second Circuit reversed this Court's decision in *Cayuga*. After the ruling, the Counties withdrew. The settlement provisions were necessarily made public and were hailed by Governor Pataki in a press release of June 9, 2005:

> The Mohawk land claim settlement would effectively end decades of litigation in a fair and comprehensive manner that protects the interests of local governments, landowners, and taxpayers in Franklin and St. Lawrence Counties.

Press Release, State of New York, "Governor Announces New Legislation to Implement the Historic Settlement of the Akwesasne Land Claim" (June 9, 2005). The settlement required monetary payments to the Mohawks by the State and by NYPA for a period of years. It also required the return of certain lands to the Mohawks, provided an area in which lands purchased by the Mohawks from willing sellers would return to reservation status, and provided compensation to the counties. The Court may take judicial notice of this settlement agreement, which was publicly described in the press release and in news accounts. *See, e.g.*, Fed. R. Evid. 201. The Press Release is enclosed here as Exhibit 2.

York, 5 N.Y. 2d 24 (N.Y. 1958) (suit by SRMT in State court for illegal appropriation of power plant lands). Considering this history, any statements that the Mohawks sat on their rights for over 100 years or are now acting contrary to well-settled expectations are plainly untrue.

III. THIS COURT'S RECENT DECISION IN *ONONDAGA* SHOULD NOT BE CONTROLLING HERE.

The *Onondaga* case did not provide a good opportunity for this Court to draw a line under *Cayuga* and *Oneida*. *Onondaga Nation v. New York*, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010). The Court should certainly draw such a line with the Mohawk land claims. As we have shown, none of the issues presented by the Island claim are discussed or decided in either of those cases. Nor do the prior cases present the factual situation of the Mohawk land claim – facts almost the opposite of those discussed by the Second Circuit in *Cayuga* and *Oneida*. The factual situation of *Onondaga* is even more extreme.

The original Onondaga Reservation, established in 1788, was 100 square miles, 64,000 acres. *See* Harold Blau et. al., *Onondaga, in* 15 *Handbook of North American Indians* 491, 496 (William C. Sturtevant, ed., Smithsonian, 1978). By treaties signed in 1793 and 1795 the Onondagas disposed of over three fourths of the Reservation. *Id.* An 1892 report of the Federal Indian Agent in New York stated that the Onondaga retained a reservation of 6,100 acres and had 488 members living in New York.[7] *See* Whiteley, Ex. 42: Report of Agent in New York, at 338, 341. This means that the Onondaga, if limiting their claim to the area of their 1788 reservation, had a claims area of 57,900 acres surrounding a reservation of about 6,000 acres.

But Onondaga did not limit their claim to their earlier reservation. As their first amended complaint shows, "The land which is the subject of this action is the aboriginal

[7] A 1978 State of New York report shows a reservation of 7,300 acres and 1,430 members. Whiteley, Ex. 49.

property of the Onondaga Nation," a strip which runs "from the St. Lawrence River along the east side of Lake Ontario and south as far as the Pennsylvania border. The strip varies in width from about 10 miles to more than 40 miles." First Am. Compl. for Declaratory J. at ¶¶ 17-18, *Onondaga Nation v. New York*, No. 05-cv-314 (LEK/DRH), 2005 WL 4136413 (N.D.N.Y. 2010).[8] In this area is all or most of the City of Syracuse, which was named as a defendant. *Id.* ¶ 12. As of the 2000 census, the Syracuse metropolitan area had a population of 650,154. *See* U.S. Census Bureau, Annual Estimates of the Population of Metropolitan and Micropolitan Statistical Areas: April 1, 2000 to July 1, 2009, http://www.census.gov/popest/metro/tables/2009/CBSA-EST2009-01.csv (last visited Jan. 26, 2011). Therefore, this is a claim to aboriginal land that the Onondaga have not occupied since before the United States was created, containing more land than the *Oneida* and *Cayuga* claims combined. This is totally unlike the Mohawk claim, which is limited to three Islands with a unique legal history and portions of the Mohawk's treaty reservation in a predominantly Indian area. This Court's decision in *Onondaga* should have no bearing on the decision here.

CONCLUSION

The laws of the United States protecting Indians are part of the obligation of the United States to its first inhabitants, and should be obeyed. This includes both the Indian Non-Intercourse Act and ICLA setting the statute of limitations for Indian claims. The decisions of the Supreme Court in *Oneida II* and *Sherrill* recognize these laws. The Second Circuit decisions in *Cayuga* or *Oneida 2010* do not justify this Court extending those cases beyond their extreme circumstances. The defendants' motions for judgment on the pleadings should be denied.

[8] The relevant excerpt of the Onondaga complaint is enclosed here as Exhibit 3.

Dated this 7th day of February, 2011.

Respectfully submitted,

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