

No. 05-978

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA, PETITIONER

*v.*

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF  
NEW YORK, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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**APPENDIX TO THE  
PETITION FOR A WRIT OF CERTIORARI**

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**VOLUME 2**

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**APPENDIX F**

UNITED STATES DISTRICT COURT  
N.D. NEW YORK.

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Nos. 80-CV-930, 80-CV-960.

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,  
PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR

*v.*

MARIO M. CUOMO, ET AL., DEFENDANTS

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July 1, 1999

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**MEMORANDUM-DECISION & ORDER**

McCURN, Senior J.

*Introduction*

Anticipating the damage phase of this litigation, which is now scheduled to commence on September 8, 1999, the defendants made a number of motions *in limine* seeking to limit the remedies available to plaintiffs, the Cayuga Indian Nation of New York (“the Nation”) and the Seneca Cayuga Tribe of Oklahoma

(“the Tribe”).<sup>1</sup> The court has now resolved nearly every aspect of these extensive motions. The remaining issue, however, easily is the most volatile: whether the remedy of ejectment is available to the Cayugas who have already succeeded in the liability phase of this lawsuit.

After hearing the parties’ legal arguments regarding ejectment, the court decided that that issue could not be resolved in a factual vacuum. Therefore, the court conducted an evidentiary hearing on September 16, 17, and 18, 1998. During the course of that hearing the court heard the testimony of seven witnesses and received into evidence a number of exhibits. Following that hearing, the parties were directed to file post-hearing memoranda, the last of which was filed on January 22, 1999 (although on February 10, 1999, the State did submit a letter bearing on the Eleventh Amendment immunity issue).

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<sup>1</sup> To simplify matters, as it has previously, the court will continue to collectively refer to the Nation, the Tribe, and the United States of America as “the Cayugas,” “except when it is necessary to distinguish between them as separate entities.” *Cayuga Indian Nation of New York v. Pataki*, Nos. 80-CV-930; 80-CV-960, 1999 WL 224615, at \*25 n. 2 (N.D.N.Y. April 15, 1999) (“Cayuga VIII”). Again, “[a]t a few points herein, ‘the Cayugas’ will refer only to the Nation and the Tribe, but that will be obvious from the context.” *Id.* Similarly, unless necessary to distinguish among them, the various State officials and State agencies will be collectively referred to throughout as “the State,” even though the State itself is not named as a defendant in either the Nation’s Complaint (“Nation Co.”) or the Tribe’s Amended Complaint in Intervention (“Tribe Co.”).

In another effort to simplify matters, even though the Nation and the Tribe filed separate complaints, except where it is necessary to refer to those complaints individually, they will be collectively referred to in the singular as the “Cayuga complaint.”

On June 4, 1999, the court orally granted the defense motion seeking to bar ejectment as a remedy, indicating that its reasons for so doing would be forthcoming shortly. Following constitutes the court's decision in this regard.

## Discussion

### I. Scope of Record

The Cayugas object to two separate aspects of the Defendants' Joint Post-Trial Brief ("Def. Memo."). First, they argue that the defendants have impermissibly expanded the scope of the record by referring to the affirmation of Assistant Attorney General David B. Roberts, as well as the affidavit of defendant Miller Brewing Company's ("Miller") expert, Francis G. Hutchins, Ph.D. The Cayugas contend that during the hearing the court excluded such evidence. Based upon that assumption, the Cayugas did not rely upon what they term "excluded testimony," such as the affidavit of their "expert" Elizabeth Tooker. *See* Letter from Raymond J. Heslin to Court of 12/7/98 ("Heslin Ltr") at 2. In light of the foregoing, the Cayugas argue that it would be "manifestly unfair" for the court to now consider the Roberts affirmation and the Hutchins affidavit. *Id.* Therefore, the Cayugas are requesting that the court strike from defendants' post-hearing memorandum all references to these two documents. At a minimum, the Cayugas contend that the court should "ignore" this allegedly improper factual material. *Id.*

In the State's opinion, the court "deferred" ruling on the admissibility of the Roberts affirmation and the Hutchins affidavit "until it had reviewed the material submitted at the hearing." Letter from David B. Roberts to Court of 12/9/98 ("St.Ltr") at 1. Based upon

that understanding, the State notes that it cited to Roberts' affirmation only after renewing its request that the court consider this evidence. In renewing that request, the State stresses that the court should consider the "historical evidence summarized in the Roberts affirmation" because the court allowed into evidence the Cayugas' historical proof. *Id.* Evidently the State is referring to the four exhibits attached to the December 15, 1989, declaration of attorney Glenn M. Feldman. From the court's perspective, those documents from 1795 and 1796 are germane to the issue of what did the State of New York know and when did it know it, in terms of the ramifications of entering into treaties with various Indians within the State without the authority of the United States.

As to the Hutchins affidavit, the State points out that the Cayugas are completely disregarding the context in which it is referring to that document. If, as the State believes, the court reserved decision on the admissibility of the affidavit of the Cayugas' "expert," Tooker, then the State is requesting that the affidavit of Miller's expert, Hutchins, be considered, but only if the court considers the Tooker affidavit.

Defendants Seneca and Cayuga Counties ("the Counties") also object to the Cayugas' "unilateral" attempt to expand the record; but their concern is a November 10, 1998 article from *The Post Standard*, which the Cayugas include in their post-hearing submissions. *See* Letter from William L. Dorr to Court of 12/9/98 at 2. According to the Counties, the court should not consider that newspaper article because it was not part of the record and it is not accurate.

*A. Roberts Affirmation*

To counterbalance the historical proof upon which the Cayugas rely (and hence to give a broader historical backdrop), the court will consider that aspect of the Roberts affirmation addressing the issue of whether the Cayugas delayed in bringing this lawsuit. In all other respects, however, the court will not consider that affirmation.

*B. Hutchins and Tooker Affidavits*

The State is correct that the court reserved decision on the admission of the Tooker and Hutchins affidavits. See Transcript (Sept. 16, 1998) (“Tr.I”) at 186. After reviewing the record as a whole, the court has decided that it will not consider either of these affidavits because the record is sufficiently complete on the matters contained therein. Moreover, because those affidavits basically contradict each other and because the court did not have the opportunity to hear cross-examination of either individual, the opinions contained therein are not particularly helpful.<sup>2</sup>

*C. November 1998 Newspaper Article*

Indisputably, the article from *The Post Standard* was not part of the record. Therefore, the court declines to consider the same, and thus there is no need to determine the accuracy of any statements contained therein.

*II. Scope of Legal Arguments*

In addition to challenging the scope of the record, a dispute has arisen as to the permissible scope of the legal arguments. Both the Cayugas and the Counties

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<sup>2</sup> The court is well aware of the possibility that its own pre-hearing limitation as to the number of witnesses prevented the live testimony of Hutchins and Tooker, as well as perhaps others.

contend that there are certain arguments in the parties' submissions to the court which should be disregarded because those issues have previously been decided. The Cayugas contend that the State has impermissibly expanded the scope of its legal arguments by again addressing the issues of burden of proof and Eleventh Amendment immunity. Thus, as with the allegedly extraneous factual references, the Cayugas are requesting that the court strike or at least "ignore" those two sections of defendants' post-hearing memorandum. Heslin Ltr at 2.

The State, in response, justifies raising the burden of proof issue in the context of ejectment so that it can "expressly address" the Supreme Court's decision in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S. Ct. 2529, 61 L.Ed.2d 153 (1979), "vis-a-vis a State." St. Ltr at 2. The State further asserts that renewal of its Eleventh Amendment argument is warranted because there have been changes in "legal and factual circumstances[,]" requiring the court to revisit this issue. *Id.*

By the same token, the Counties contend that it is the Cayugas who are improperly seeking reconsideration of an issue which has been decided already-the issue of the analytical framework for the ejectment issue. In particular, the Counties point to the fact that in anticipation of the ejectment hearing this court directed the parties to file a stipulation of agreed facts based upon the equitable factors enumerated in *United States v. Imperial Irrigation District*, 799 F.Supp. 1052 (S.D. Cal. 1992). See *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930, 80-CV-960, 1998 WL 460241, at \*1 (N.D.N.Y. Aug. 6, 1998). In light of that explicit order, the Counties object to the Cayugas' renewed argument that the factors set forth in *Imperial Irrigation* should

not be considered in this case. The court will separately address whether it will revisit the burden of proof issue, the State's Eleventh Amendment argument and the propriety of the Imperial Irrigation analysis.

*A. Burden of Proof*

Turning first to the burden of proof, given the court's recent decision wherein it addressed that issue at some length, including the import of the Supreme Court's decision in *Wilson*, there is no need to discuss the burden of proof issue any further. *See Cayuga VIII*, 1999 WL 224615, at \*2-\*5. The court will stand by its prior ruling on that issue. On the other hand, as the court indicated in *Cayuga VIII*, for the reasons set forth below, it will revisit the Eleventh Amendment immunity issue. *Id.* at \*19. Finally, although the court continues to adhere to its prior ruling that it will analyze the availability of ejectment as a remedy employing the factors enumerated in *Imperial Irrigation*, because it has not previously fully stated its reasons for so holding, it will do so below.

*B. Eleventh Amendment Immunity*

*1. Background*

Before deciding whether it is appropriate for the court to reconsider the impact of the Eleventh Amendment on this case, a recitation of the history of that issue in the context of this litigation is warranted. In their complaint the Cayugas name as defendants, among others, various State agencies and individual agency heads, including the Governor, but not the State itself. Although not explicitly stated in their complaint, the Cayugas have made clear that that they are suing the individual State defendants in their "official capacity as agents [of the State]." Transcript (Oct. 15, 1991)

(“Tr.10/15/91”) at 20 and 22. On the theory that those individuals are holding the subject property in violation of the *Nonintercourse Act*, 25 U.S.C. § 177, and the United States Constitution, the Cayugas also have expressly stated that they are seeking ejection as a remedy against the individual State defendants; but the Cayugas are not seeking monetary damages against them. *Id.* at 21. Somewhat surprisingly, the State did not assert Eleventh Amendment immunity in its answers to either the Nation’s complaint or the Tribe’s complaint.

In terms of the State defendants, the United States’ complaint differs somewhat from that of the Cayuga complaint. In the caption of its complaint, the United States specifically names as a defendant Mario M. Cuomo, who was then Governor of the State of New York. Beyond that, in terms of identifying defendants, the United States makes only the broad allegation that “[t]he defendants are all persons, corporations, or governmental entities with a legal or equitable interest in the [subject] property[.]” United States Complaint in Intervention (“U.S.Co.”) at 3, ¶ 5. Presumably this broad language includes the State agencies and individual State officials identified in the Cayuga complaint. Furthermore, also based upon this broad allegation, the court views the United States as asserting claims against the State itself even though the State itself is not expressly named as a defendant in the United States’ complaint.

After a relatively prolonged period of motion practice, on August 13, 1991, this court granted the Cayugas’ motion for partial summary judgment on the issue of liability “as to all defendants except the State of New York.” *Cayuga Indian Nation of New York v.*

*Cuomo*, 771 F. Supp. 19, 24 (N.D.N.Y.1991) (“Cayuga VI”). The State was excepted from that ruling because during oral argument it first raised the possibility of Eleventh Amendment immunity in light of the Supreme Court’s then fairly recent decision in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S. Ct. 2578, 115 L.Ed.2d 686 (1991). Tr. 10/15/91 at 21 n. 2.

The Eleventh Amendment provides that “[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Despite that straightforward language, the Eleventh Amendment “has consistently been interpreted to mean that a state, as a sovereign entity within our constitutional system, may not be sued by an individual whether a citizen of that state, another state or a foreign country—in federal court without its consent.” *U.S. v. State of Vt. Agency of Natural Resources*, 162 F.3d 195, 209 (2d Cir. 1998) (Weinstein, J., dissenting on other grounds) (and cases cited therein), petition for cert. filed, 527 U.S. 1034, 119 S. Ct. 2391, 144 L.Ed.2d 792, 67 U.S.L.W. 3717 (U.S. May 12, 1999) (No. 98-1828). Further extending the foregoing, the Blatchford Court held that the Eleventh Amendment barred an action against a state official by several Alaska native villages challenging the implementation of a state revenue-sharing statute, where the state had not consented to such a suit. The Court further held that 28 U.S.C. § 1362, the general jurisdictional statute pertaining to actions brought by Indians, did not operate to void this Eleventh Amendment immunity.

Given that Blatchford was decided on June 24, 1991, obviously the parties had not had an opportunity to fully consider its impact on the present case when they were before the court a couple of weeks later on July 12, 1991. Therefore, the court expressly “invited the State to bring a formal motion concerning the issue of sovereign immunity[,]” giving all parties an opportunity to address Blatchford. *Cayuga VI*, 771 F. Supp. at 21 n. 2. Responding to that invitation, a few months later the State’s Eleventh Amendment argument, among others, was squarely before the court. Following October, 1991, oral argument the court reserved decision. Approximately two years later, in September, 1993, pending settlement negotiations, the State withdrew its motion to dismiss on Eleventh Amendment grounds. In the meantime, on November 30, 1992, the court granted the United States’ motion to intervene as a plaintiff in this action.

Around this same time, a case arose in Idaho District Court which would eventually have some bearing on the present case. The Couer d’Alene Indian Tribe (“the Tribe”) sued the State of Idaho, as well as several state officials (in their individual and official capacities) and state agencies, alleging ownership of the “beds and banks of all navigable watercourses and waters . . . within the original boundaries of the Couer d’Alene Reservation, as defined by . . . Executive Order[,]” which was ratified by a federal statute. *Idaho v. Couer d’Alene*, 521 U.S. 261, \_\_\_, 117 S. Ct. 2028, 2032, 138 L.Ed.2d 438 (1997) (“*Couer d’Alene III*”). In addition to seeking title to those submerged lands, the Tribe sought declaratory and injunctive relief to, inter alia, “establish its entitlement to the exclusive use and

occupancy and the right to quiet enjoyment of the submerged lands[.]” *Id.*

The Ninth Circuit held “that the Eleventh Amendment bar[red] all claims against the State and the Agencies[.]” but the *Ex parte Young* doctrine<sup>3</sup> applied so that the Tribe could proceed with its claims for declaratory and injunctive relief against the individual State officials. *Couer d’Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244, 1247; and 1250-54 (9 th Cir. 1994) (“*Couer d’Alene II*”). Reasoning that because the Tribe’s action was not one against the State in that the Couer d’Alene Tribe had alleged that the State officials violated a federal statute, the Ninth Circuit held that the Eleventh Amendment did not bar those claims. *Id.* at 1251 (citing *Ex parte Young*, 209 U.S. at 159-60, 28 S. Ct. at 453-54).

After prolonged but eventually fruitless settlement negotiations in the present case, in March, 1996, the State renewed its motion to dismiss the Cayuga complaint for lack of subject matter jurisdiction, asserting Eleventh Amendment immunity. Immediately following the July 10, 1996, argument, the court granted that motion insofar as the State agencies were con-

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<sup>3</sup> “In *Young*, the Court held that a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the State itself is immune from suit under the Eleventh Amendment. The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity.” *Couer d’Alene III*, 521 U.S. at \_\_\_, 117 S. Ct. at 2043 (O’Connor, J.) (Concurring in part and concurring in the judgment) (citing *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L.Ed. 714 (1908)).

cerned, but it denied that motion “as [to] the individual state defendants . . . , primarily for the reasons set forth by the Ninth Circuit in *Couer d’Alene [III]*. . . , cert. granted, 116 S. Ct. 1415 (1996).” Order (July 21, 1996) at 1-2 (citation omitted). In other words, after *Couer d’Alene II*, as to the Cayugas’ claims, the only remaining defendants are the individual State officials, to the extent that the Cayugas are seeking declaratory and injunctive relief against those officials to preclude future violations of federal law. However, because the State’s July, 1996 motion to dismiss pertained only to the Cayugas, the United States’ complaint was not implicated by that motion. Hence, the State, its agencies and the individual State officials are all still defendants in connection with the claims asserted therein.

Almost one year after that July, 1996 order, in a fractured 5-4 decision,<sup>4</sup> the Supreme Court reversed *Couer d’Alene II*. Viewing “the Tribe’s suit [as] the functional equivalent of a quiet title action which implicates special sovereignty interests[,]” in the principal opinion the Court held that the Tribe could not invoke the fiction of *Ex parte Young* to hail the state officials into federal court. *Couer d’Alene III*, 521 U.S. at \_\_\_, 117 S. Ct. at 2043. The Court explained: “[I]f the Tribe were to prevail, Idaho’s sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these *particular and special circumstances*, we find the *Young* exception inapplicable. The dignity and status of its statehood

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<sup>4</sup> Five Justices agreed that the Tribe could not sue the state officials in federal court, but a majority could not agree on the rationale for this holding.

allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.” *Id.* at \_\_\_\_, 117 S. Ct. at 2042 (emphasis added). The end result of these two *Couer d’Alene* decisions was to altogether deny the Tribe itself a federal forum for the vindication of its federal rights.

## 2. *Reconsideration*

Both the State and the Cayugas are asking this court to reconsider its prior rulings with respect to the Eleventh Amendment, but for different reasons. The State contends that *Couer d’Alene III* represents a “change in the controlling law” mandating reconsideration, and indeed, reversal of this court’s July, 1996, order as it pertains to the individual State defendants. Def. Memo. at 68 and 70. The State maintains that the Eleventh Amendment not only bars the Cayugas’ claims against the State agencies, but that after *Couer d’Alene III* that Amendment also bars the Cayugas’ claims against the individual State defendants. Further, argues the State, the fact that the United States is now a plaintiff in this action does not defeat the State’s Eleventh Amendment immunity in any way because (1) the United States intervened in this lawsuit a number of years after its commencement; and (2) the United States did not initiate this lawsuit; the Cayugas did. Moreover, from the State’s perspective, the Cayugas and the United States are asserting very different claims and legal positions—another factor which the State believes militates in favor of a finding of Eleventh Amendment immunity. For these reasons, the State defendants are seeking dismissal in “the entirety” of the Cayugas’ claims against them. *Id.* at 77.

*Couer d'Alene III* does not represent a change in controlling law respond the Cayugas. In fact that case is “wholly irrelevant” to the Eleventh Amendment issue before this court because in contrast to *Couer d'Alene III*, the United States is a plaintiff in this action. Memorandum in Opposition to the Dismissal of Defendant State Officials Based on Eleventh Amendment Immunity (“Pl. Opp’n Memo.”) at 16. Regardless of *Couer d'Alene III*, on the basis of *Arizona v. California*, 460 U.S. 605, 103 S. Ct. 1382, 75 L.Ed.2d 318 (1983), the Cayugas strongly urge this court to reconsider its prior ruling wherein it granted the State agencies’ motion to dismiss based upon the Eleventh Amendment.<sup>5</sup> Succinctly put, based upon *Arizona* the Cayugas argue that the Eleventh Amendment does not defeat its claims against the State agencies because the United States is a plaintiff-intervenor in this action, asserting “the same claims” as the Cayugas; and it matters not whether the Cayugas or the United States initiated this litigation. *Id.* at 9. Therefore, the Cayugas are requesting reconsideration of the court’s earlier decision dismissing their claims against the State agencies, as well as seeking reinstatement of those claims. Finally, notwithstanding *Couer d'Alene III*, wherein the Supreme Court refused to invoke the fiction of *Ex parte Young* to allow the Tribe to pursue its claims for declaratory and injunctive relief against the State officials, the Cayugas contend that the *Young*

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<sup>5</sup> In that ruling, the court generically referred to “the State of New York.” Order (July 21, 1996) at 1. As previously explained, though, the State itself is not named as a defendant in the Cayugas complaint. Therefore, that ruling could only apply to the State agencies which are specifically enumerated in the Nation’s complaint. Allegations as to those agencies are also specifically incorporated by reference in the Tribe’s complaint.

doctrine provides a basis, separate and apart from *Arizona*, for allowing the Cayugas to continue with their claims against the individual State officials.

Before addressing these substantive Eleventh Amendment arguments, there are three prefatory issues upon which the court will at least touch. The first is the timeliness of the State's request for reconsideration; the second is the State's failure to allege Eleventh Amendment immunity, either in its answer to the Nation's complaint or in its answer to the Tribe's complaint. Third, because the parties have raised it, the court will briefly address whether these requests for reconsideration implicate the law of the case doctrine.

*a. Timeliness*

*i. State*

As previously mentioned, the sole basis for the State's request for reconsideration of the Eleventh Amendment issue is *Couer d'Alene III*, which the Supreme Court decided on June 23, 1997. Given that in this case there was no stay in place at that time or thereafter, certainly the State could have renewed this Eleventh Amendment argument much sooner; but it did not. Instead, in conjunction with this motion challenging the availability of ejectment as a remedy, the State waited until November 30, 1998, to renew this argument.

Rule 12(h)(3) states that "[w]henver it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. *Fed. R. Civ. P. 12(h)(3)* (emphasis added). Apparently this Rule is the basis for the State's reconsideration request. Underlying the State's reconsideration request is the

assumption that the Eleventh Amendment relates to subject matter jurisdiction, and as such the court may consider this argument at any time. Assuming, as does the State, that “the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court’s judicial power, and therefore can be raised at any stage of the proceedings,” *Calderon v. Ashmus*, 523 U.S. 740, — n. 2, 118 S. Ct. 1694, 1697 n. 2, 140 L.Ed.2d 970 (1998),<sup>6</sup> the fact that the State did not renew this argument earlier does not preclude the court from considering the same even at this advanced stage of the litigation. *Cf. S. Jackson & Son v. Coffee, Sugar and Cocoa Exchange*, 24 F.3d 427, 430 (2d Cir. 1994) (citation and internal quotation marks omitted) (“It is axiomatic that in our federal system of limited

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<sup>6</sup> There are competing theories as to the nature of the Eleventh Amendment; that is whether it is a limitation on a court’s subject matter jurisdiction under Article III or whether it is a grant of immunity (i.e., a type of defense). See *Parella v. Retirement Board of the Rhode Island Employees’ Retirement System*, 173 F.3d 46, 54 (1 st Cir. 1999) (citing, inter alia, Chemerinsky, *Federal Jurisdiction* § 7.3 (2d ed.1994)). *Cf. Wisconsin Dep’t of Corrections v. Schaet*, 524 U.S. 381, —, 118 S. Ct. 2047, 2054, 141 L.Ed.2d 364 (1998) (noting that whether the Eleventh Amendment is a matter of subject matter jurisdiction is a question not yet decided by the Supreme Court). The Second Circuit has explicitly stated, however, that the Eleventh Amendment “affects . . . subject matter jurisdiction.” *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir.1993) (citations omitted). The Second Circuit has continued to maintain this view. Albeit inferentially, as recently as February 24, 1999, it affirmed a district court’s denial of the State’s motion to dismiss for lack of subject matter jurisdiction based upon the Eleventh Amendment. See *Anderson v. State University of New York*, 169 F.3d 117 (2d Cir.1999), petition for cert. filed (May 17, 1999) (No. 98-1845). Accordingly, in accordance with Second Circuit precedent, for now this court too will treat the Eleventh Amendment as jurisdictional in nature.

jurisdiction any party or the court sua sponte, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction.”).

Moreover, as will soon be evident, there is no prejudice to the Cayugas in treating the Eleventh Amendment as a jurisdictional bar which may be raised at any time. Indeed, although the Cayugas challenge the State’s Eleventh Amendment immunity on several grounds, timeliness is not one of them. What is more, given that the Cayugas based their request for reconsideration upon a 1983 Supreme Court decision, they have been even more lax than the State in terms of the timeliness of their own request for reconsideration. Certainly it would have been preferable for the State to have earlier raised its Eleventh Amendment argument based upon *Couer d’Alene III*. Nonetheless, the court will consider this argument now because: (1) arguably the Eleventh Amendment goes to the core of this court’s subject matter jurisdiction, and as such is an issue which may be raised at any time; and (2) reconsideration of this issue does not prejudice the Cayugas.

*ii. Cayugas*

It is also curious why the Cayugas did not move for reconsideration sooner, given that the basis for their argument is the Supreme Court’s 1983 decision in *Arizona v. California*. What is more curious, though, is why the Cayugas did not even mention Arizona in opposing the State’s 1996 motion to dismiss based upon the Eleventh Amendment. Given the Cayugas’ silence at that time, the court presumed that they had simply taken the tack that the United States could adequately represent their interests, and that the Cayugas were

content to pursue their claims against the individual State officials only.

Unlike the State, the Cayugas do not identify any specific procedural rule which might form the basis for their request for “reinstatement” of their claims against the State. See Pl. Opp’n Memo. at 20. Presumably they are relying upon the court’s plenary power to reconsider at any time prior to final judgment an interlocutory order, such as the court’s July, 1996 order pertaining to Eleventh Amendment immunity. See *Kliszak v. Pyramid Management Group, Inc.*, No. 96-CV-0041E, 1998 WL 268839, at \*1 (W.D.N.Y. April 30, 1998) (citing, inter alia, *Partmar Corp. v. Paramount Corp.*, 347 U.S. 89, 100, 74 S. Ct. 414, 98 L.Ed. 532 (1954)); see also Fed. R. Civ. P. 54(b) (emphasis added) (interlocutory orders are “subject to revision at any time before the entry of judgment. . . .”). “[D]istrict courts have broad discretion to revise interlocutory orders as justice so requires[.]” *Id.* “[T]he major grounds for justifying reconsideration are ‘an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.’” *Virgin Atlantic Airways v. Nat. Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992) (quoting 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 4478). As will be more fully explained below, in light of Arizona and the Second Circuit’s recent affirmance of *Seneca Nation of Indians v. State of N.Y.*, 26 F.Supp.2d 555 (W.D.N.Y.1998) (“Seneca Nation I”), *aff’d*, Nos. 99-6003, 99-6005, 1999 WL 308522 (2d Cir. May 17, 1999) (“Seneca Nation II”), there is a need to “correct a clear error,” making reconsideration appropriate even at this late date. Thus, because a final judgment has not been

entered in this case, the court will reconsider the Cayugas' position with respect to the Eleventh Amendment, even though this argument could easily have been made years ago. See *Maryland Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 621 (2d Cir. 1993) (because challenges to subject matter jurisdiction "may be raised at any time during the course of litigation[,] the Court characterized such a challenge as "unexceptional" even though it was renewed "nearly a decade after the litigation began").

*b. Failure to Plead*

Consistent with the notion that in this case the Eleventh Amendment is a limitation on subject matter jurisdiction, and as such can be raised at any point in the litigation, although the State did not raise the Eleventh Amendment in its answers, its failure to do so does not constitute a waiver. See *Niagara Mohawk Power Corp. v. Jones Chemicals, Inc.*, 95-CV-717, 1998 WL 166875, at \*1 n. 3 (N.D.N.Y. April 3, 1998) (citation omitted) ("[I]n light of the Supreme Court's decision in *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974)[,] which allowed Eleventh Amendment immunity to be raised for the first time on appeal, Defendants are not precluded from asserting such a defense notwithstanding [that] they failed to allege it in their answer."); see also *In re Mitchell*, 222 B.R. 877, 885-886 (B.A.P. 9th Cir.1998) (given that Eleventh Amendment immunity may be raised at any time, the state's failure to expressly assert the same in its answer with respect to count one of the complaint did not constitute a waiver of the Eleventh Amendment where the state raised that issue on appeal, and where it had raised the issue of Eleventh Amendment immunity as to two other counts in the complaint);

*Singleton v. University of California*, No. C-93-3496, 1995 WL 16978, at \*2-\*3 (N.D.Cal. Jan. 6, 1995) (because Eleventh Amendment immunity “is not to be lightly inferred,” and “the test for finding waiver . . . is a stringent one[.]” the state’s failure to raise [such defense] until after the filing of its answer did not amount to a waiver). Here, the State’s renewal of its Eleventh Amendment argument can hardly come as a surprise to the Cayugas; indeed they are not claiming any prejudice in relation thereto. This lack of prejudice bolsters a finding of no waiver.

*c. Law of the Case*

In a rare moment of agreement, both the State and the Cayugas contend that the law of the case doctrine, which posits that “if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case[.]”<sup>7</sup> does not prevent this court from reconsidering its prior Eleventh Amendment rulings in this case. See Def. Memo. at 70; Pl. Opp’n Memo. at 15. These parties are correct: “[T]he law of the case doctrine is, at best, a discretionary doctrine, which does not constitute a limitation on the court’s power but merely expresses a general reluctance, absent good cause, to reopen rulings that the parties have relied upon.” *LNC Investments, Inc. v. First Fidelity Bank, N.A.*, 173 F.3d 454, 467 n. 12 (2d Cir.1999) (citation and internal quotation marks omitted). In other words, “the law of the case is not a commandment etched in stone.” *Mayer v. Cornell University, Inc.*, 909 F. Supp. 81, 83 (N.D.N.Y. 1995) (citations and internal quotation marks

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<sup>7</sup> *Doctor’s Associates, Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir.) (citations and internal quotation marks omitted), cert. denied, \_\_\_ U.S. \_\_\_, 118 S. Ct. 365 (1997).

omitted), aff'd on other grounds unpub'd decision, 107 F.3d 3 (2d Cir.), cert. denied, 522 U.S. 818, 118 S. Ct. 68, 139 L.Ed.2d30 (1997). Thus, as this court has previously explained, "when a court is asked to reconsider its own prior rulings, under the more flexible branch of the law of the case doctrine, it may do so when those previous decisions were substantially erroneous or when reconsideration is necessary to avoid injustice." *Id.* at 83 (citation and internal quotation marks omitted). Another compelling circumstance justifying reconsideration, notwithstanding the law of the case doctrine, is an intervening change in controlling law. *Id.* (citation and internal quotation marks omitted)." Consequently, although a court should be loathe to revisit an earlier decision . . . , and although it should exercise its underlying power to reconsider earlier rulings sparingly, . . . , there are certain circumstances where reconsideration is appropriate." *Id.* (citations and internal quotation marks omitted).

Here, there are "certain circumstances" making reconsideration appropriate, and indeed necessary. Arizona and its recent progeny convince this court that its July, 1996 ruling, wherein it found that the Cayugas' claims against the State agencies were barred by the Eleventh Amendment was in error, thus justifying reconsideration of that ruling. On the other hand, as also will be discussed below, despite the State's protestations to the contrary, *Couer d'Alene III* does not mandate reconsideration of this court's prior ruling denying the individual State defendants' motion to dismiss the Cayugas' claims on Eleventh Amendment grounds. Nonetheless, as will be more fully explained below, the court still must reconsider that ruling given its decision today that ejection is not available as a

remedy. For these reasons, as the parties agree, the law of the case doctrine does not bar reconsideration of the court's prior Eleventh Amendment rulings in this case.

### 3. *Arizona v. California*

Although the State is loathe to admit it, the United States' presence as a plaintiff-intervenor significantly changes the complexion of this case in terms of Eleventh Amendment immunity. In *Arizona v. California*, a number of entities, including a few states and five Indian Tribes ("the Tribes"), sought to determine their respective rights to the waters of the Colorado River. The United States intervened on behalf of the Tribes, among others. Later the Tribes also sought to intervene. In opposing the Tribes' motion to intervene, the States "insist[ed] that, without their consent, the Tribes' participation violat[e]d the Eleventh Amendment." *Arizona*, 460 U.S. at 614, 103 S. Ct. at 1388 (footnote omitted). Swiftly rejecting that argument, the Supreme Court held that allowing the Tribes to intervene did not run afoul of the Eleventh Amendment because "[n]othing in th[at] Amendment 'has ever been seriously supposed to prevent a state's being sued by the United States.'" *Id.* (quoting *United States v. Mississippi*, 380 U.S. 128, 140, 85 S. Ct. 808, 814, 13 L.Ed.2d 717 (1965)) (other citations omitted). In so holding, the Court explained that "[t]he Tribes [were] not seek[ing] to bring new claims or issues against the states, but [were] only ask[ing] leave to participate in an adjudication of their vital water rights that was commenced by the United States." *Id.* Thus the Supreme Court concluded that its "judicial power over the controversy [wa]s not enlarged by granting leave to intervene, and the States' sovereign immunity pro-

tected by the Eleventh Amendment [was] not compromised.” *Id.* (citation omitted).

The states in Arizona also opposed the Tribes’ intervention on the grounds that the United States could adequately represent the Tribes’ interests, and the Tribes could not satisfy the requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a).<sup>8</sup> The Court did not deem the adequate representation argument worthy of comment. As to the intervention as of right argument, however, the Court stated, “it is obvious that the . . . Tribes, at a minimum, satisfy the standards for permissive intervention[.]” *Arizona*, 460 U.S. at 614-15, 103 S. Ct. at 1388. The Court went on to explain that the Tribes’ interests in the Colorado River would be determined in that litigation and the United States, as the Tribes’ “representative,” would bind the Tribes to any judgment therein. *Id.* at 615, 103 S. Ct. at 1388 (citation omitted). The Court also found that because “the Indians [we]re entitled to take their place as independent qualified members of the modern body politic[.]” their “participation in litigation critical to their welfare should not be discouraged.” *Id.* (internal quotations marks, citations and footnote omitted).

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<sup>8</sup> That Rule reads as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a).

Lastly, the Court commented that the States had not made any persuasive showing as to how the Tribes' presence would prejudice the states' interests or unduly delay the litigation. *Id.*

Citing to Arizona, in *Mille Lacs Band of Indians v. State of Minn.*, 853 F.Supp. 1118 (D.Minn.1994) ( "Mille Lacs I" ), the district court dismissed the State of Minnesota's Eleventh Amendment immunity defense where the Chippewa Indians sought to enforce an 1837 treaty which purported to guarantee them certain hunting, fishing and gathering rights. *Id.* at 1129. In Mille Lacs I, as in the present case, the United States was granted leave to intervene as a plaintiff. Adopting the Supreme Court's reasoning in Arizona, the Mille Lac I court declared that because the United States and the Chippewas were "seeking identical relief[,] . . . the State's sovereign immunity was not compromised." *Id.* (citing Arizona, 460 U.S. at 613-14, 103 S. Ct. at 1388-89).

On appeal, the defendants attempted to circumvent Arizona by stressing that the United States did not initiate the Mille Lacs I action;<sup>9</sup> it was appearing only as a trustee-intervenor. *Mille Lacs Band of Chippewa Indians v. Minn.*, 124 F.3d 904, 913 (8 th Cir.1997) ( "Mille Lacs II" ), *aff'd* on other grounds, 526 U.S. 172, 119 S. Ct. 1187, 143 L.Ed.2d 270 (1999). The Eighth Circuit did not find that distinction "controlling[.]" explaining that "[t]he United States ha[d] fully participated in all proceedings on behalf of the [Chippewas][.]"

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<sup>9</sup> The United States did not originally initiate the lawsuit in Arizona. But, as a subsequent intervenor, the United States did initiate the claims on behalf of the Tribes prior to the time they sought intervention.

and, “[a]s an intervenor, it ha[d] the right to continue the suit even without the presence of the [Chippewas].” *Id.* at 913 (citing *Diamond v. Charles*, 476 U.S. 54, 68, 106 S. Ct. 1697, 1706-07, 90 L.Ed.2d 48 (1986)). Thus, the Court held “because the United States has the right to bring these claims in federal court, the State’s sovereign immunity is not compromised and the Eleventh Amendment does not bar these claims.” *Id.* (citing *Arizona*, 460 U.S. at 614, 103 S. Ct. at 1388-89).

Significantly, in a decision recently affirmed by the Second Circuit, Judge Curtin reached the same result. See *Seneca Nation I*, 26 F. Supp.2d at 564. There, as here, a group of New York indians (the Seneca) sought, among other things, a declaration that the State had illegally appropriated certain lands from them in violation of their treaty rights and the Nonintercourse Act. A number of years after the commencement of *Seneca Nation I*, the court granted a motion by the United States to intervene. The parties in *Seneca Nation I* agreed that the Eleventh Amendment did not bar the United States’ claims against the State. Just as in the present case, however, the parties disputed the effect of that Amendment given the presence of the United States as an intervenor. Judge Curtin held that the Eleventh Amendment did not prohibit the Seneca Indians from proceeding with their claims against the State of New York, several State officials and a State agency. *Id.* at 563-565.

Judge Curtin justified this result by first pointing out, as the State conceded there, that “courts have regularly permitted Indian tribes to join or to intervene in cases brought by the United States against States, either as a matter of right under Fed. R. Civ. P. 24(a) or permissibly under Rule 24(b).” *Id.* at 564 (citing

*Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L.Ed.2d 509(1983); *Arizona*, 460 U.S. at 614-15, 103 S. Ct. 1382, 75 L.Ed.2d 318). Next, relying upon *Mille Lacs II*, he explained that even though “[t]he Eleventh Amendment protects a State from being hailed into federal court[,]” because the United States was a plaintiff in that action, “the State [wa]s properly before [that] federal court.” *Id.* Then, as in *Arizona*, Judge Curtin reasoned because “[t]he Senecas’ and the United States’ claims [were] virtually identical[,] [a]llowing the Senecas’ claims to proceed does not further compromise the State’s sovereign immunity.” *Id.* As an additional reason for permitting the Senecas to proceed with their claims in that action, Judge Curtin pointed to reasons of judicial economy. *Id.* at 564-565.

Recently, in a terse one paragraph opinion, the Second Circuit affirmed for “substantially the reasons stated by Judge Curtin[.]” *Seneca Nation II*, 178 F.3d 95, 1999 WL 308522, at \*1. The Second Circuit was careful to point out, however, “that the State of New York retains its Eleventh Amendment immunity to the extent that the Seneca . . . Indians raise claims or issues that are not identical to those made by the United States.” *Id.* (citing *Arizona*, 460 U.S. at 614) (emphasis added).

Here, the State contends that reinstatement of the Cayugas’ claims against it would expand the court’s judicial power over this controversy, which in turn would compromise the State’s Eleventh Amendment immunity, in direct conflict with *Arizona*. After a hair-splitting comparison of the United States’ complaint and the Cayuga complaint, the State asserts that reinstatement of the Cayugas’ claims against the State agencies would improperly enlarge the court’s power in

three ways. First, such improper enlargement would result because supposedly the United States and the Cayugas are not relying on the same legal theories. The United States is alleging only a Nonintercourse Act violation, whereas the Cayugas are alleging other theories of recovery, such as claims based upon the United States and New York Constitutions. Second, the State contends that the United States and the Cayugas are not seeking the same relief; the relief which the Cayugas are seeking is more specific than that which the United States is seeking. Unlike the United States, the Cayugas are seeking injunctive relief and “various orders and accountings[.]” Def. Memo. at 72 (citations omitted). Third, the State claims that the United States and the Cayugas are advancing different legal arguments with respect to ejectment. The Nation is arguing that ejectment is a legal remedy, and thus equitable factors should not be a factor in awarding such relief. On the other hand, the United States is arguing that equitable factors should be considered, but only after a trial.

There are two additional factors which the State believes show that its Eleventh Amendment immunity is not defeated despite the presence of the United States as a plaintiff-intervenor. First, the United States has “made clear that it ha[s] its own separate interest in the disputed property as well as an interest in protecting any property in which the Cayugas have an interest.” *Id.* at 72. The State also points to that fact that in connection with the United States’ motion to intervene, the United States took the position that the Cayugas could not adequately represent its interests. *Id.*

Taking a broader view, the Cayugas and the United States counter that because the basic nature of the relief which they are seeking is the same (*i.e.*, ejection, trespass damages and costs), even though “there may be a degree of difference in specificity in the relief requested” that fact should not obfuscate that “[a]t bottom, the United States[] . . . seeks to establish the right of possession to the subject lands[,]” and thus its “claim is identical to the [Cayugas’] claims[.]” Response of the Plaintiff-Intervener[sic], United States, to Defendant, State of New York’s Motion to Dismiss (“U.S.Resp.”) at 2. Consequently, the Eleventh Amendment concerns identified in Arizona are not implicated here.

The Supreme Court in Arizona gave no clear guidance as to how to determine whether claims or issues are “new,” so as to give rise to possible Eleventh Amendment concerns. The Arizona Court did hold, however, that where the Tribes sought to intervene in an action by the United States to adjudicate water rights, the states could “no longer . . . assert . . . immunity with respect to the subject matter of th[at] action.” *Arizona*, 460 U.S. at 614, 103 S. Ct. at 1388 (emphasis added). Interestingly, at the same time the Arizona Court stated that “[t]he Tribes [were] not seek[ing] to bring new claims or issues against the state,” it recognized that in the Tribes’ motion to intervene they made “claims for additional water rights to reservation lands.” *Id.* at 612, 103 S. Ct. at 1387 (emphasis added). Thus, as this court reads Arizona, “new claims or issues” may be raised in a situation such as that presented therein, so long as those issues or

claims encompass the same subject matter as the original claims or issues.<sup>10</sup>

In the present case, regardless of whether the focus is on the issues or claims asserted, the relief sought or the subject matter, the court is convinced that for all practical purposes the Cayugas' and the United States' complaints are "virtually identical" so as to defeat the State's Eleventh Amendment immunity. See *Seneca Nation I*, 26 F. Supp.2d at 564. Consistent with Arizona and the Second Circuit's recent comment in *Seneca II*, however, to the extent that there is proof at the upcoming trial that the Cayugas are raising new claims or issues beyond those which the United States alleges, the State's claim of Eleventh Amendment immunity may come into play. The court will cross that bridge if and when it comes to it.<sup>11</sup>

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<sup>10</sup> Neither *Seneca Nation I* nor the *Mille Lacs* cases shed any light on the matter of identity of issues or claims under Arizona. Despite the Arizona Court's specific reference to "claims or issues," in *Seneca Nation I*, with no discussion, the district court declared that the Senecas and the United States were seeking "identical relief[.]" *Seneca Nation I*, 26 F.Supp.2d at 560 (emphasis added). Later in that same opinion, but again with no discussion, the court remarked that "claims" of the Seneca Nation and those of the United States "[we]re virtually identical" and thus the Eleventh Amendment was not a bar to the Senecas' claims. *Id.* at 564 (emphasis added). In *Mille Lacs I* the court commented that the "relief" sought was the "same" and thus the State of Minnesota's sovereign immunity was not compromised, but it did not elaborate. See *Mille Lacs I*, 853 F.Supp. at 1128 (citation omitted). The issue of the identity of the relief sought by the United States and the Band (or, for that matter, the identity of the claims or issues raised) was not before the Eighth Circuit in *Mille Lacs II*.

<sup>11</sup> The court is hard-pressed at this point to see what such "new claims or issues" might be.

In another effort to avoid the clear import of Arizona, the State suggests that the fact the Cayugas, as opposed to the United States, commenced this action, renders Arizona inapplicable. As mentioned earlier, the Eighth Circuit has already rejected that argument, finding that “observation, while true . . . is not controlling[ ]” given that the “United States ha[d] fully participated in all proceedings on behalf of the Bands[.]”<sup>12</sup> and “[a]s an intervenor, it ha[d] the right to continue the suit even without the presence of the Bands.” *Mille Lacs II*, 124 F.3d at 913 (citations omitted). What is more, in *Seneca Nation I*, as in the present case, the United States did not initiate that lawsuit; rather, it intervened on the Senecas’ behalf a number of years after the fact. Obviously the Second Circuit did not find that procedural distinction significant; and neither does this court.

In short, in this court’s opinion Arizona and its progeny leave little doubt that here, where the United States has intervened on behalf of the Cayugas, the State and its agencies are not entitled to invoke the Eleventh Amendment. Indeed, it would border on the absurd if the apparent ultimate wrongdoer in this case, the State, could avoid suit on the basis of the Eleventh Amendment. Moreover, because the Cayugas could join or intervene in the United States’ case against the State and its agencies, the interests of judicial economy would not be served if this court were to stand by its July, 1996, ruling that the Eleventh Amendment bars the Cayugas’ claims against the State agencies. See *Seneca Nation I*, 26 F.Supp.2d at 564-55. Last, but not

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<sup>12</sup> The United States was granted permission to intervene in the *Mille Lacs* case approximately three years after the commencement of that case.

least, because it is difficult to imagine litigation more critical to the Cayugas' welfare than this, the court firmly believes that their participation should not be discouraged. See *Arizona*, 460 U.S. at 615, 103 S. Ct. at 1388.

#### 4. *Pennhurst*

Lastly in an effort to circumvent *Arizona*, relying upon *Pennhurst*, the State bluntly asserts, "The United States Supreme Court has held that a State's Eleventh Amendment immunity from suit by private plaintiffs is not defeated because the United States has intervened in the lawsuit." Def. Memo. at 73. The State vastly misapprehends the Court's holding in *Pennhurst*, however. *Pennhurst* stands for the proposition that the "Eleventh Amendment bars suit alleging violation of state rather than federal law[.]" See *Couer d'Alene III*, 521 U.S. at \_\_\_, 117 S. Ct. at 2046 (O'Connor, J.) (Concurring in part and concurring in judgment) (emphasis added). Indeed, consonant with earlier Supreme Court precedent, the *Pennhurst* Court reiterated that "the Eleventh Amendment does not bar the United States from suing a State in federal court . . . , [but] the United States does not have standing to assert the state-law claims of third parties." *Pennhurst*, 465 U.S. at 103 n. 12, 104 S. Ct. at 909 n. 12 (citation omitted). Here, the court does not read the United States' complaint as pursuing state law claims on behalf of a third-party. Instead, the United States is seeking to enforce the Cayugas' federal rights-statutory and otherwise. Accordingly, the State's Eleventh Amendment immunity does not survive based on *Pennhurst*.

## 5. Individual State Defendants

As mentioned earlier, the State argues that *Couer d'Alene III* mandates dismissal of the Cayugas' claims against the individual State defendants. The court agrees that the individual State defendants are entitled to dismissal of the Cayugas' claims as against them, but the basis for that dismissal is not *Couer d'Alene III*.

A careful review of the voluminous record in this case reveals that earlier in this litigation the Cayugas took the position that they are seeking only ejectment against the individual State defendants.<sup>13</sup> Based upon that prior concession, combined with the fact that the court is not going to allow ejectment as a remedy, *Couer d'Alene III* is not relevant in terms of the individual State defendants. Nevertheless, the court will reconsider its prior Eleventh Amendment ruling with respect to those defendants. As just explained, however, the reason is not *Couer d'Alene III*, but rather the unavailability of ejectment as a remedy. In other words, whether the individual State defendants enjoy Eleventh Amendment immunity from the Cayugas' claims is immaterial given their concession that the only relief they are seeking from those defendants is ejectment-relief which the court refuses to award against them or any defendant in this action.

### *C. Prejudgment Interest*

As the parties are well aware, in *Cayuga VIII* this court addressed the availability generally of prejudgment interest. The State joined in the Counties' arguments opposing such an award-arguments which for the most part the court rejected. See *Cayuga VIII*, 1999

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<sup>13</sup> See discussion *supra* at 8-9.

WL 224615, at \*15-\*25. The State offers an additional reason as to why it should not be held liable for prejudgment interest—a reason which the court deliberately waited until now to address.

According to the State, “the argument against prejudgment interest is even more compelling” where it is concerned because such “interest is not allowable against a sovereign state without express legislative authority or an express contractual agreement,” neither of which are present here. State Defendants’ Memorandum of Law in Support of Motion in Limine (“St.Memo.”) at 4. This is so, asserts the State, “even when the [interest] is owed to the United States.” *Id.* at 5. Thus, positing that the United States cannot recover interest from a state, the State further reasons that the Cayugas, who have a unique trust relationship with the United States, also should not be allowed to recover prejudgment interest against the State. Otherwise, argues the State, the anomalous situation would arise where the Cayugas’ rights to recover prejudgment interest would be greater than those of the United States.

The Tribe, the only party to acknowledge this separate prejudgment interest argument by the State, responds that “[t]he Supreme Court clearly upholds awards of prejudgment interest against states. . . .” Consolidated Response of the Plaintiff-Intervenor Seneca-Cayuga Tribe of Oklahoma to the Motions in Limine Filed by the State of New York and by Cayuga and Seneca Counties and to the Motion to Decertify Defendant Class and on other Pre-trial Issues Filed by the Non-State Defendants at 9. Furthermore, according to the Tribe, the lack of a specific statute or contractual agreement requiring the State to pay

prejudgment interest is not a barrier to the payment of such interest in this case because the Supreme Court has recognized “the states’ federal common-law obligation to pay prejudgment interest on debts owed to the Federal Government.” *Id.* (citing *United States v. Texas*, 507 U.S. 529, 533-39, 113 S. Ct. 1631, 1634-1637, 123 L.Ed.2d 245 (1993)).

Turning first to the State’s arguments opposing an award of prejudgment interest, the only two cases which the State cites in this regard, *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 71 S. Ct. 552, 95 L.Ed. 738 (1951), and *United States v. North Carolina*, 136 U.S. 211, 10 S. Ct. 920, 34 L.Ed. 336 (1890), do not support its argument. In *North Carolina*, the United States sued to recover post-maturity interest on bonds issued by a subsidiary of the State of North Carolina. Admittedly, the Court there did restate the general principle that interest “is not to be a warded [*sic*] against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract[;]” and thus the Court held that North Carolina could not be compelled to pay interest. *North Carolina*, 136 U.S. at 216, 10 S. Ct. at 922 (citations omitted).

The continuing vitality of North Carolina was seriously called into question, however, by *West Virginia v. United States*, 479 U.S. 305, 107 S. Ct. 702, 93 L.Ed.2d 639 (1987). There, the Supreme Court held that “the State of West Virginia [wa]s liable for prejudgment interest on a debt arising from a contractual obligation to reimburse the United States for services rendered by the Army Corps of Engineers.” *Id.* at 306, 107 S. Ct. at 704. Based upon West Virginia law, which exempted it from liability for prejudgment interest

unless it has consented to payment of the same, West Virginia argued that it should also be exempt from paying prejudgment interest to the United States. Flatly rejecting that argument, the Court explained that sovereign immunity was the basis of West Virginia's state law exemption from payment of prejudgment interest. See *id.* (citation omitted). However, "[b]ecause States have no sovereign immunity as against the Federal Government . . . , any rule exempting a sovereign from the payment of prejudgment interest not only does not apply of its own force to the State's obligations to the Federal Government . . . , but also does not represent a policy the federal courts are obliged to further." *Id.* at 311-312, 107 S. Ct. at 707 (citations and footnotes omitted). Put another way, the rule of state immunity from interest applied in North Carolina does not apply where, as here, a state retains no sovereign immunity.

In arguing that it had no obligation to pay prejudgment interest, the State of West Virginia relied upon North Carolina, just as the State does here. But, as the Court in West Virginia did not hasten to add, North Carolina "was decided before *United States v. Texas*, 143 U.S. 621, 12 S. Ct. 488, 36 L.Ed. 285 (1892), in which this Court held dispositively that States retain no sovereign immunity as against the Federal Government." *Id.* at 311 n. 4, 107 S. Ct. at 707 n. 4 (emphasis added); see also Vermont Agency of Natural Resources, 162 F.3d at 201 (citations omitted) ("As against the United States . . . , States have no sovereign immunity."). In this court's opinion, Texas and its progeny seriously undermine, if not completely erode, the State's argument that prejudgment interest is only

recoverable by the United States where there is a statute or contract expressly authorizing the same.

Likewise, *Tillamooks* does not advance the State's argument against prejudgment interest. In sharp contrast to the present case, the tribal plaintiffs in *Tillamooks* were seeking prejudgment interest from the United States. In reversing the Court of Claims' interest award, the *Tillamooks* Court did invoke the "traditional rule" that interest cannot be awarded against a sovereign absent a statutory or contractual obligation to pay the same. See *Tillamooks*, 341 U.S. at 49, 71 S. Ct. at 552. Very different concerns arise, however, when individual plaintiffs are seeking interest from a state, as opposed to when the United States is seeking interest from a state-another sovereign. "Suits by the United States against a state do not denigrate the dignity and respect owed the states in the way that suits by individuals do." *Vt. Agency of Natural Resources*, 162 F.3d at 213 (Weinstein, J. dissenting); see also *United States v. Texas*, 143 U.S. at 646, 12 S. Ct. at 494 ("[T]he suability of one government by another government . . . does no violence to the inherent nature of sovereignty.") In fact, "[t]he possibility of suits by the United States against the states is essential to our federal system." *Id.* It would be incongruous indeed to allow the United States to sue a state, but then not to afford the United States a full measure of relief, including, if otherwise proper, prejudgment interest.

At the end of the day the court agrees with the Tribe that the United States is entitled to recover prejudgment interest from the State; but before moving on the court is compelled to comment upon the Tribe's reliance upon Oneida County, *New York v. Oneida*

*Indian Etc.*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985), ( “Oneida V”<sup>14</sup>) and *United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S. Ct. 2716, 65 L.Ed.2d 844 (1980), in this context. The Tribe overstates the significance of both of those cases in terms of their relevance to the interest issue. The issue in *Sioux Nation* was the federal government’s obligation to pay just compensation, including interest, for its taking of tribal property. *Sioux Nation* did not speak to the issue of a state’s obligation to pay prejudgment interest to the United States.

Likewise, *Oneida V* is readily distinguishable on the interest issue. The State, although it was third-party defendant in that action, was not a defendant. Nor did the United States intervene on behalf of the *Oneida*. In reciting the background, the Court in *Oneida V* accurately stated that in the damage phase of the action, the district court “awarded the Oneidas damages in the amount of \$16,694, plus interest[.]” *Oneida V*, 470 U.S. at 230, 105 S. Ct. at 1249. In that same recitation, the Court further explained that the Second Circuit affirmed the district court’s rulings as to liability and indemnification, but remanded for further proceedings on the amount of damages.<sup>15</sup> The propriety of an interest award was not before either the Second Circuit or the Supreme Court. Consequently, as with *Sioux Nation*, *Oneida V* is not illuminating in terms of

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<sup>14</sup> *Oneida V* originated in this district court and is commonly referred to as the “test case.” As with most Eastern land claim cases, it engendered many written decisions, including this one by the Supreme Court.

<sup>15</sup> Not so coincidentally, that remaining damage issue, which arguably includes the issue of prejudgment interest, is currently pending before this court.

whether the State is obligated to pay prejudgment interest in this particular case. In any event, as the foregoing discussion demonstrates, as with the Eleventh Amendment issue, the United States' presence as a plaintiff-intervenor in this action changes the complexion of the prejudgment interest issue relative to the State.

#### *IV. Imperial Irrigation Analysis*

Before moving on, it is necessary to clarify the issue presently before the court, especially given the Cayugas' fairly recent attempts to cast the ejectment issue in terms of possible leaseholds. The Cayugas boldly state that “[a]t no time in this litigation have [they] expressed in any written or oral submission to the Court that they seek to evict<sup>16</sup> thousands of people from their homes[.]” Pl. Memo. at 30-31 (emphasis added). The Nation's complaint, the Tribe's complaint and the United States' complaint belie this assertion. Those complaints are unequivocal when it comes to ejectment; they uniformly demand a declaration restoring the Cayugas to “immediate possession” of the subject property. Nation Co. at 23, ¶ 3; Tribe Co. at 8, ¶ 3; and U.S. Co. at 6, ¶ 2. In no uncertain terms, the Cayugas also are explicitly seeking to “eject any defendant claiming their chain of title through the 1795 and 1807 New York State ‘treaties[.]’” *Id.* (emphasis added); see also U.S. Co. at 6, ¶ 2 (emphasis added) (seeking a declaration “that defendants are ejected

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<sup>16</sup> To the extent that the Cayugas may be suggesting that there is a distinction between eviction and ejectment, the court is not convinced—at least in this context. See *Pernell v. Southall Realty*, 416 U.S. 363, 375, 94 S. Ct. 1723, 1729, 40 L.Ed.2d 198 (1974) (“ejectment . . . permit[s] the plaintiff to evict one who is wrongfully detaining possession and to regain possession himself[.]”).

from the subject property[ ]”). Not only that, the Cayugas have been aware at least since 1983 that this court viewed their complaint as “present[ing] a possessory claim, basically in ejectment [.]” *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1317 (N.D.N.Y. 1983) (“Cayuga II”) (citation and internal quotation marks omitted) (emphasis added).

Perhaps to assuage the fears of defendants as well as the public at large, during the evidentiary hearing the Cayugas retreated from that hard-line approach, indicating instead a willingness to enter into long-term leases with the current landowners. In their post-hearing memorandum the Cayugas continue to try and divert the court’s and the defendants’ attention away from ejectment, yet they still do not go so far as to affirm that they will never actually seek ejectment of current landowners. See Pl. Memo. at 30-31 (emphasis added) (the Cayugas contemplate[ ] a change in title so that they . . . will be recognized as the rightful owners of the land, but intend to thereafter accommodate the needs of most current possessors[ ]”). In fact, the Cayugas readily admit that they will “seek physical eviction of . . . those few persons who refuse to negotiate on reasonable terms.”<sup>17</sup> *Id.* at 48 (emphasis added). In any event, given their newfound willingness to “enter into arrangements . . . which would allow

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<sup>17</sup> It is self-evident that what may be “reasonable” to one person is not necessarily “reasonable” to another. Thus, without attributing any malevolence to the Cayugas, the court can easily envision a scenario where after offering what to them seems like an eminently reasonable lease, that offer is rejected. Under that version of events, which in the court’s view is all too likely, the Cayugas’ suggestion that only a “few persons” would be evicted seems overly optimistic. See Pl. Memo. at 48.

the[m] to live in harmony with their neighbors[,]” the Cayugas cavalierly suggest that the defendants’ evidence presented at the ejectment hearing was “essentially irrelevant[.]” *Id.* at 27.

The court wholeheartedly disagrees; the defendants’ evidence is highly relevant to the issue currently before the court—the availability of ejectment as a remedy. The court appreciates the Cayugas’ recent conciliatory efforts. The court is not free to ignore the fact, however, that from the outset ejectment is one of several remedies which the Cayugas have been seeking, and their claims also have been framed in terms of ejectment. And, as the Cayugas are fully aware, the availability of ejectment as a remedy was the discrete issue which was the subject of the evidentiary hearing. Therefore, despite the Cayugas’ efforts to broaden the ejectment issue to include the possibility of long-term leases, the court adheres to its view that the only issue with which it is concerned now is whether the Cayugas are entitled to ejectment as a remedy for the loss of their homeland. In short, the court will not permit the issue of ejectment to be obscured by the Cayugas’ fairly recent suggestion that long-term leases may be another means of resolving this litigation.

Having clarified the narrow issue presently before the court, the court will now turn to an examination of Imperial Irrigation and its applicability to the present case. In that case, the United States, on its own behalf and on behalf of the Torres-Martinez band of Mission Indians, sued two water districts for continuing trespass. This alleged trespass occurred over the course of sixty-eight years when irrigation water, which drained from the districts’ agricultural fields, flowed into an inland salt water lake, thus raising the water level of

that lake, which in turn caused flooding to tribal lands. Ultimately finding that the water districts failed to prove that they had consent to trespass on the tribal lands, the court was forced to address the issue of remedies.

The plaintiffs in Imperial Irrigation sought an injunction, but at trial they sought ejectment, arguing that the latter “was an automatic remedy for . . . trespass.” *Imperial Irrigation*, 799 F.Supp. at 1068. The court refused to grant ejectment, first recognizing that “historically” ejectment was “a discrete cause of action[,]” which the plaintiffs there had not “pled, briefed, or proven.” *Id.* (citation omitted). Second, the court distinguished *Oneida Indian Nation of New York v. Oneida County*, 719 F.2d 525 (2d Cir.1983), noting that although the Second Circuit analogized the tribal plaintiffs’ claim therein to common law ejectment, “the court did not hold that ejectment was a remedy for trespass, particularly not the ‘automatic’ remedy plaintiff urges.” 799 F. Supp. at 1068. The Imperial Irrigation court also relied upon “precedent applying equitable factors and thereby limiting relief otherwise available for Indian claims.” *Id.* (citing *Brooks v. Nez Perce County*, 670 F.2d 835 (9th Cir. 1982); and *Oneida V*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169). These reasons, in combination with the court’s belief that “it [wa]s equitable to balance the hardships . . . since the rights of so many farmers would be significantly impacted by ejectment,” resulted in a finding “that an equitable analysis [wa]s appropriate before issuing any final orders other than for monetary damages.” *Id.* Finally, the court observed that “under the general common law, a party injured by a continuing trespass generally recovers damages and a permanent injunction

requiring removal of the encroachment.” *Id.* (citations omitted).

In light of the foregoing, the court treated plaintiffs’ ejection request as a request for a permanent injunction, “and . . . analyze[d] [it] pursuant to the equitable factors suggested by the Restatement of Torts for determining the appropriateness of an injunction against trespass[,]” which are as follows:

- (1) The nature of the interest to be protected;
- (2) The relative adequacy of injunctive and other remedies available to the plaintiff;
- (3) Any unreasonable delay of the plaintiff in initiating the action;
- (4) Any related misconduct on the part of the plaintiff;
- (5) The relative hardship of the parties if the injunction is granted or denied;
- (6) The interests of third persons and the public;
- (7) The practicability of framing and enforcing the injunction.

*Id.* (citing Restatement (Second) of Torts § 936(1)(a)-(g)).

Reviewing those factors in light of the proof adduced at trial, the Imperial Irrigation court found that injunctive relief was not appropriate because the tribal plaintiffs had no historical ties to the land, and they had “unreasonably delayed some 54 years in bringing th[a]t lawsuit.” *Id.* at 1069. There was also misconduct on the part of the United States, though, in that it did not take

any measures to protect the tribal plaintiffs' property rights. What seemed to most heavily influence the Imperial Irrigation, however, was that in balancing the hardships the court found that "[a]n injunction would render useless thousands of acres of cultivated farmland to the detriment of innocent framers who are blameless in this lawsuit and who have worked hard to cultivate desert lands." *Id.* In short, the court relegated "the interest[ ] of the 300 band members to their land . . . to the agricultural industry in . . . [the] counties[.]" *Id.* But, even though the court in Imperial Irrigation refused to grant injunctive relief, it did "award monetary damages equal to the fee value of the property to compensate the band for all future damages based upon trespass." *Id.*

On July 9, 1998, this court held that it would rely upon the Restatement factors enumerated in Imperial Irrigation in determining the availability of ejectment as a remedy in this case. Transcript of Oral Argument (July 9, 1998) at 101. Neither at that time or shortly thereafter did the Cayugas move for reconsideration of that ruling; and in accordance therewith the court conducted an evidentiary hearing. Despite that lapse, in both their pre-hearing and post-hearing submissions the Cayugas argue at some length that because they are seeking the legal remedy of ejectment, as opposed to equitable, injunctive relief, the Restatement factors should not figure into this court's analysis of the ejectment issue. It is tempting to respond, as do the Counties, that it is simply too late in the day for this argument. All parties have been fully aware since July 9, 1998 that the court intended to rely upon the Imperial Irrigation factors in determining the availability of ejectment as a remedy in this case. However,

because this court has not yet delineated its reasons for adopting the Imperial Irrigation approach here, it will do so below.

Given this court's prior rulings that the 1795 and 1807 cessions of land violated the Nonintercourse Act, the Cayugas argue that the court is "required to enter a decree delivering the 'sole and exclusive possession' of such lands to the[m].]" Pl. Memo. at 17 (emphasis added) (quoting *United States v. Brewer*, 184 F. Supp. 377 (D.N.M.1960)). Equitable factors only come into play, according to the Cayugas, in the administration of such an order. So, for example, despite their fervent belief that "all of the land in the subject area should be transferred to the[m,]" as previously discussed, the Cayugas "expect to enter into reasonable long-term leases and easements with most homeowners, farmers, businesses, utilities and the like, perhaps with the assistance and supervision of the Court, or a Master appointed by the Court." Nation Witness and Exhibit List at 2-3.

The Cayugas offer several reasons as to why "equitable factors cannot be used by the Court to deprive the[m] of their possessory right to treaty-recognized reservation lands." Pl. Memo. at 15. First of all, the Cayugas suggest that "[a]nything short of an order restoring the[m] to possession of their lands would be an extinguishment of Indian title without congressional consent." *Id.* at 16. Next, because "Congress determined that the purposes of the Non-Intercourse Act could best be accomplished by rendering 'null and void' all cessions of Indian land lacking federal approval[,]" this court cannot "rewrite that Act or substitute its judgment for that of Congress[]" by refusing to order ejectment on equitable grounds. *Id.*

at 20. Then, after painstakingly distinguishing Imperial Irrigation, the Cayugas conclude that the equitable analysis employed therein has no place in this litigation because of the factual differences between that case and the present one.

On the surface, the Cayugas' arguments opposing an equity based analysis of the ejectment issue are somewhat compelling. Closer examination of those arguments reveals two inherent weaknesses, however. First of all, the legal authority which forms the basis for these arguments is readily distinguishable. Second, by selectively quoting case law, as often occurs in particularly contentious and zealous litigation, the Cayugas have significantly overstated the relevance of the same to the unique situation which this litigation presents.<sup>18</sup>

Relying primarily upon *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L.Ed. 260 (1941); *United States v. Boylan*, 265 F. 165 (2d Cir. 1920); and *United States v. Brewer*, 184 F.Supp. 377 (D.N.M. 1960), the Cayugas make a number of broad assertions in connection with the availability of ejectment as a remedy. For example, they contend that

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<sup>18</sup> The Cayugas are not alone in their, at times, overzealous approach to this litigation. For example, the defendants did not examine in-depth the propriety of employing equitable factors to analyze the ejectment issue herein. Instead they simply declare, "It is well established that equitable factors must be weighed in assessing the propriety of ejectment as a form of relief." Def. Memo. at 31 (emphasis added) (citing *Imperial Irrigation*, 799 F. Supp. at 1069; *Yankton Sioux v. United States*, 272 U.S. 351, 47 S. Ct. 142, 71 L.Ed. 294 (1926)). As should be apparent from the discussion above, the use of equitable factors in this context is anything but "well established." Moreover, neither *Imperial Irrigation* nor *Yankton Sioux* directly support such a broad proposition.

“federal law commands” the “return of land along with damages[.]” Pl. Memo. at 17 and 15. In a similar vein, the Cayugas maintain that “[t]he only manner by which lands wrongfully possessed [by non-Indians] may be returned to their rightful owner is through . . . ejectment[.]” and “[e]jectment is the only proper remedy in these Indian treaty cases.” Pl. Memo. at 15 and 17 (citations omitted) (emphasis added).

The court does not read *Santa Fe*, *Boylan* and *Brewer* (or, for that matter, any of the other cases which the Cayugas cite in this regard) so broadly. First, *Santa Fe* does not speak to the issue of ejectment. Rather, the *Santa Fe* Court focused on the availability to Indians of an accounting for trespass upon their land. See *Oneida V*, 470 U.S. at 235, 105 S. Ct. at 1252 (citation omitted). Furthermore, there are a number of striking differences between *Boylan* and *Brewer* and the present case.

In *Boylan*, the first in a long history of land claim litigation by the Oneida Indians, the United States instituted an action on the Indians’ behalf seeking restoration of thirty-two acres of land, which had formed a part of the original Oneida Indian reservation. In that case, through a series of transactions beginning in 1885, some individual Oneida Indians conveyed a tract of reservation property to a non-Indian. The non-Indian in turn commenced a state court partition proceeding, which purportedly extinguished the Oneida Indians’ interest in the subject property. During that time, the Oneida Indians who had not conveyed any reservation land, remained on that property; but in a partition proceeding, the state court ordered those remaining Oneidas ejected.

Thereafter, on behalf of the Oneidas, the United States instituted a federal court action on the theory that Congressional approval was required before the individual Oneidas could convey any reservations lands. Agreeing with that theory the district court, and ultimately the Second Circuit, found “the partition action and judgment and the sale made thereunder . . . void, so far as they eject the Indians from the possession of the property.” *Boylan*, 265 F. at 174. Thus, in 1920 the Second Circuit “approved . . . the decree restoring the ejected Indians to possession.” *Id.*

It is likewise true that in *Brewer* the court held that non-tribal defendants were not entitled to remain in possession of approximately .485 acres of land located within the Pueblo of San Ildefonso (“the Pueblo”), because those defendants had not acquired title with the approval of the Secretary of the Interior, as statutorily required. *Brewer*, 184 F.Supp. at 380. The defendants were not entitled to remain in possession in *Brewer* even though they had erected \$9,000.00 worth of improvements on the property. However, because the *Brewer* court did not want “to be precipitous in evicting the defendants, who [we]re apparently of high character, and ha[d] not violated any of the Laws of the Pueblo, or of the United States,” it allowed them six months to leave, and it also allowed them “to take so much of the improvements and the building materials with them as they [were] able so to do.” *Id.*

There are three differences which are especially significant between the two cases just discussed and the present case. Neither *Boylan* nor *Brewer* involved land claim litigation, let alone on the scale of this case. Here, ejectment would result in the displacement of countless private and public landowners from approxi-

mately 65,000 acres of land, whereas Boylan involved only thirty-two acres of land and Brewer a mere .485 of an acre. Thus, given the small parcels of land at issue in Boylan and Brewer, ejectment impacted a relatively inconsequential number of people. Moreover, unlike the present case, in both Brewer and Boylan, those who were ejected had not resided on the property for a long period of time. This court will not, as the Cayugas impliedly suggest, ignore these critical distinctions, especially where to do so would result in far reaching consequences well beyond anything contemplated in Boylan and Brewer. Furthermore, the court does recognize the possessory nature of the Cayugas' claims. See *Cayuga Indian Nation II*, 565 F. Supp. 1297, 1317 (N.D.N.Y. 1983) ("The Oneida decision and its concurrence make it clear that the complaint before this Court presents a possessory claim[.]"). But when it comes to the availability of remedies, as opposed to broader issues such as justiciability, as this court stated fairly early on in this litigation, justice requires that "equitable factors . . . be carefully weighed before any relief is granted." *Id.* at 1311 (citation omitted).

Thus, even in the face of the Cayugas' repeated and strenuous insistence to the contrary, the court will not abandon its prior ruling that equitable factors should be considered in conjunction with the issue of ejectment. As just discussed, the court does not find convincing the Cayugas' arguments opposing an equitable based analysis of ejectment. Furthermore, the Cayugas do not offer an alternative way of analyzing the ejectment issue, other than to assert that they are entitled to that remedy. To the best of the court's knowledge, no other Indian land claim case in the country has progressed to

this point. Other similar cases have either settled,<sup>19</sup> or resulted in defeat for the Indians.<sup>20</sup> Thus because the court has very little precedent which is even remotely relevant to guide it on the ejectment issue, despite the differences between the present case and Imperial Irrigation, the latter will provide the analytical framework for the availability of ejectment in this case.

Additionally, after years of acknowledging that equitable factors will play a role in fashioning a remedy in this case, the time has finally come to invoke those equitable principles rather than just paying lip service to the same. Equitable principles are no longer an abstract concept, but a reality which the Cayugas, as well as the defendants must face—a reality which will impact the remedy of ejectment and perhaps the upcoming damage phase of this litigation.

Before separately analyzing each of the Restatement factors repeated in Imperial Irrigation, it should be noted that “a court [should] take[] into account all of th[os]e factors[;]” but “[s]ometimes a single factor, such as the public interest, turns out to be clearly dominant.” Restatement (Second) of Torts § 936 cmt. b (1977) (emphasis added). And although “each of the factors . . . must be separately weighed and appraised[;]” in the end it is a “comparative appraisal of all of the factors in the case, balanced against each other, and

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<sup>19</sup> See, e.g., Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. §§ 1773-1773j (West Supp. 1999); Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741-1749 (West Supp. 1999); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1983 & West Supp. 1999).

<sup>20</sup> See, e.g., *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); *Oneida Indian Nation v. New York*, 649 F. Supp. 420 (N.D.N.Y. 1986), *aff'd*, 860 F.2d 1145 (2d Cir. 1988).

considered together[.]” which determines the appropriateness of an injunction against a tort, such as trespass. *Id.* Keeping this comparative approach firmly in mind, the court will now turn to an examination of the Restatement factors in light of the proof adduced during the September, 1998, evidentiary hearing.

*A. Nature of the Interest*

Obviously the interest to be protected here is property. Because they have sustained great hardships as a result of losing their homeland, and because of the many anticipated positive effects which would inure to their benefit if the land is returned to them, the Cayugas argue that this factor weighs in favor of ejectment. In terms of hardship, the Cayugas assert that the loss of their homeland has had “far reaching negative, cultural, social, religious and economic consequences[.]” Pl. Memo. at 32. One example of this negative impact is that only “roughly . . . 10 percent[.]” of the Cayugas in New York today are able to speak their native language. Tr. I at 46. Furthermore, undoubtedly the loss of the Cayugas’ homeland attributed greatly to their assimilation into white society and concomitant loss of traditional ways of life. See *Id.* at 45-46. By the same token, the Cayugas anticipate that the return of their homeland would “foster aboriginal kinship, political organizations and native religion[.]” as well as “economic development.” Pl. Memo. at 33 and 34.

The defendants acknowledge that traditionally “the law regards [property] as unique[.]” See *Imperial Irrigation*, 799 F.Supp. at 1069. The Cayugas’ purported interest in the subject land should “not weigh heavily” in the court’s decision regarding ejectment, however, because the Cayugas have failed to show that

they had “a specific or unique relationship with the land” before they left that area. Def. Memo. at 33. Furthermore, many “unique” qualities of the subject property are, in the defendants’ view, directly attributable to them because they “have created and nurtured” this land, “mold[ing] [it] into the thriving communities that exist today.” *Id.* at 36. Therefore, because “the land at issue reflects the character of defendants, [and] not plaintiffs[,]” the defendants are adamant that this factor, too, militates against the granting of injunctive relief in the form of ejectment. See *Id.*

Defendants also maintain that the land itself should not factor heavily in analyzing the ejectment issue because currently there are only “roughly 464 Cayuga citizens[,]” with approximately two-thirds of them living in New York. *Id.* at 73. The court fails to see, however, how this statistic undermines the importance of the subject land to the Cayugas. This is a common weakness in the defendants’ analysis of the nature of the interest at stake. The defendants have done nothing more than cobble together bits and pieces of evidence which they claim shows how this first Restatement factor “weighs in [their] favor [.]” Def. Memo. at 33. As with the population statistic, however, the defendants do not explain how much of this evidence supports that conclusion.

Nonetheless, the court concludes that the subject land is not so “absolutely fundamental and paramount” to the Cayugas so as to justify ejectment of the current landowners. See Pl. Memo. at 32. The proof adduced during the hearing convinces the court that the loss of their homeland has had an immeasurable impact upon the Cayuga culture and Cayuga society as a whole, and,

to be sure, “[r]eturn of th[at] homeland w[ould] provide a vindication that the Cayugas [believe they] have been entitled to for generations.” Pl. Memo. at 36. That vindication cannot come at the expense of the current landowners-landowners who, for the most part, are blameless and who, especially recently, have been treated as pawns by both the State and federal governments. Indeed, in the court’s opinion, the laudable goals which the Cayugas hope to achieve through reclaiming their homeland could be accomplished without ejection. As the court envisions it, eventually the Cayugas will have the financial means to purchase land within the claim area from willing sellers. When that is done the Cayugas will once again have a homeland where their culture can thrive, limited only by their ingenuity.

*B. Relative Adequacy of Injunctive and Other Remedies*

The second Restatement factor which the court must consider is “the relative adequacy of injunctive and other remedies available” to the Cayugas. Restatement§ 936(1)(b). This factor is “important” but as previously explained, as with each of these Restatement factors, the adequacy of remedies “is not the sole factor.” *Id.* § 933, cmt. a (citation omitted). Ultimately, in determining the relative adequacy of various remedies, the question “is a practical one: whether the employment of that remedy would produce results found by the court to be as satisfactory to the plaintiffs as those he could properly derive from an injunction.” *Id.*, Div. 13, Chap. 48, Topic 2. When that question is posed in this case, the answer is a resounding “Yes.” As will be more fully explained below, monetary damages will produce results which are as satisfactory

to the Cayugas as those which they could properly derive from ejectment.

Reiterating their earlier argument that “the only remedy available in Indian Treaty cases” is ejectment, the Cayugas add that monetary damages alone are an insufficient remedy because of the cultural significance at least two portions of the claim area have to them. Pl. Memo. at 37 (emphasis in original). Those two areas are the Great Gulley, which one witness described as the equivalent of the Cayugas’ “Eden,” and the Cayuga Castle, which another witness described as akin to a capital. See Tr. I at 61 and 159. Then, in an attempt to mitigate what can only be described as the harsh remedy of ejectment, the Cayugas suggest that rather than immediate and outright ejectment of the current landowners, the court could order that title be restored to the Cayugas, or held in trust for them by the United States, with the court also ordering the current landowners to enter into long-term leases with the Cayugas.

Once again the defendants are taking the position that because the Cayugas do not have a “special relationship to the specific land at issue[,]” it is immaterial where a land base is situated and how it is acquired (i.e. ejectment, lease, purchase). Def. Memo. at 42. So long as the Cayugas have some land base, however acquired, the “same positive impacts” will result, such as economic development and restoration of a cohesive Cayuga society. *Id.* Hence the defendants strongly believe that there are adequate means available to compensate the Cayugas, apart from the drastic remedy of ejectment.

The long-term leases which the Cayugas are now suggesting as an alternative to ejectment do not alter

the defendants' position that ejectment is not an appropriate remedy. Long-term leases do not somehow make the concept of "ejectment" more palatable because even if the court does not order ejectment, and there is an attempt to negotiate such leases, the defendants hypothesize that the Cayugas would have the majority if not all of the bargaining power. The irony of this scenario is not lost on this court.

Insofar as the relative adequacies of various remedies are concerned, the defendants easily have the stronger argument. The Cayugas still have not managed to convince this court that ejectment is the only available relief in this case. Apart from the relatively few acres which comprise the Great Gully and Cayuga Castle, the Cayugas have not shown how the subject property is so unique such that the objectives which they hope to attain, such as economic, political and cultural development, cannot be reached without ejecting thousands upon thousands of landowners. It is certainly true, as Justice Black observed in his dissent in *Federal Power Com'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142, 80 S. Ct. 543, 567, 4 L.Ed.2d 584 (1960), that "some things are worth more than money[.]"<sup>21</sup> The fact remains, however, that in this particular case ejectment is not an adequate remedy relative to other available remedies, most notably monetary damages. See Restatement § 937, cmt. b ("For property rights . . . , a damage award may often provide adequate substitutional relief."). By using monetary damages to purchase property from willing sellers, the Cayugas should have no difficulty accomplishing the same goals

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<sup>21</sup> Justice Black made this comment in response to the majority's holding that the New York Power Authority was entitled to flood certain lands owned by the Tuscarora Indians.

which they hope to accomplish through ejectment. In sum, because monetary damages are “as efficient [if not more so] to the ends of justice” than ejectment, comparatively speaking, ejectment is not an adequate remedy here. See Restatement § 933, cmt. a.

*C. Unreasonable Delay*

The third Restatement factor which the court must consider is laches, “the two essential elements of [which] are unreasonable delay committed by the plaintiff and prejudicial consequences suffered by the defendant.” Restatement § 939, cmt. a (emphasis added).” The reasonableness of the delay is tested by asking what should have been expected of one in the plaintiff’s position as the menace to his interests from the defendant’s conduct developed.” *Id.* § 939, cmt. b. Although “prompt action following reasonably explained delay may be especially necessary[,] . . . protests, complaints and negotiations looking toward a settlement of the controversy, go far to explain the reasonableness of the delay.” *Id.*

At first glance a finding that the Cayugas unreasonably delayed in bringing this action seems inevitable. The disputed treaties were entered into in 1795 and 1807 and the Cayugas did not commence this lawsuit until nearly two hundred years later, in 1980; and the United States did not intervene on the Cayugas’ behalf until 1982. This delay is not completely unreasonable, however, when the court takes into account the efforts to reclaim their homeland which the Cayugas have made over the years. In some ways, as the record reflects, the Cayugas’ efforts to pursue this land claim earlier were, as with the initial treaty process, severely hampered by two factors: (1) their relative lack of sophistication in dealing with

governments and a legal system which were alien to them; and (2) the fact that the very systems which theoretically should have assisted the Cayugas seemingly thwarted their efforts.

By way of illustration, one reason for the Cayugas' delay, as this court has previously recognized, is that they could not pursue these claims through other vehicles such as the Indian Claims Commission ("ICC"). See *Cayuga Indian Nation of New York v. Cuomo*, 667 F.Supp. 938, 946 (N.D.N.Y. 1987). Furthermore arguably the Cayugas' land claims were not cognizable "until the Passamaquoddy Tribe filed a lawsuit against the State of Maine in 1972, and the theory was sustained by the First Circuit." Pl. Memo. at 41 (citations omitted). Shortly thereafter the Cayugas attempted to settle this matter, but they were unable to obtain Congressional approval, thus resorting to this federal litigation in 1980. In addition to attempting to pursue their land claims through various means over the years, the Cayugas stress that they are not to blame for any unreasonable delay; the blame for such delay lies largely with the State of New York. See Pl. Memo., and exhs. 9 and 10 thereto.

Regardless of whether the focus is on the timing of this lawsuit generally or the timing of the specific request for ejectment, the defendants strenuously argue that the delay factor augurs against ejectment. Although not couched in precisely these terms, the defendants appear to be making the overly simplistic argument that because at the time both the Cayugas and the United States were aware of the 1795 and 1807 treaties, the fact that they both waited almost two hundred years to commence this lawsuit is inexcusable.

Then, as do the Cayugas, the defendants rely upon selected snippets of historical evidence which they believe conclusively demonstrate that this lawsuit could easily have been commenced long before 1980. For example, defendants assert that in 1790 then President George Washington told the Senecas that they should bring their complaints regarding treaties to the federal courts. Def. Memo. at 44 (citation omitted). Even assuming that the court agrees (which it does not) with defendants' interpretation of the cited passage from Helen M. Upton's book, *The Everett Report in Historical Perspective*, it does not agree with the further contention that "[i]t is reasonable to believe that Washington's advice would have been communicated to . . . the Cayugas." *Id.* In making this statement, the defendants appear to have forgotten that the world in 1790 was a far different place than it is today, including in terms of modes of communication. In the court's opinion just the opposite seems more likely; it is reasonable to believe that Washington's "advice" was not communicated to the Cayugas.

Regardless of when the Cayugas should have or could have commenced this lawsuit, the court cannot overlook the prejudicial consequences which the defendants would sustain if the court were to order ejectment. Understandably, over the past two hundred years or so many of these defendants have improved the subject property in countless ways. The Cayugas do not address this prejudice factor—a factor which is far too important to ignore. The record is replete with instances where defendants (and their forebears) have vastly improved the subject property. Today the claim area contains all of the necessities of modern-day life—sewer, water and transportation systems, to name a

few. It is safe to say that the subject property today bears almost no resemblance to the undeveloped state of that property in the 1790's. It is also safe to say that this complete transformation is directly attributable to these defendants and their forebears. Thus, even though some delay on the part of the Cayugas is explainable, in the context of determining whether ejectment is an appropriate remedy, given this prejudice, the delay factor tips decidedly in favor of the defendants.

*D. Related Misconduct*

In examining whether the Cayugas engaged in “related misconduct” which might warrant denial of injunctive relief in the form of ejectment, the court must look to their “misconduct prior to or pending suit[.]” Restatement § 940, cmt. b. “[I]f the misconduct relates directly to the controversy immediately involved in the . . . suit and is of a character that renders the plaintiff’s interests undeserving of injunctive protection[.]” then such relief may be denied. *Id.* However, “[c]ollateral misdeeds, no matter how indicative of general unworthiness, are not . . . material.” *Id.*, cmt. c.

The thrust of the Cayugas’ argument on this point is that they have not engaged in any misconduct which might preclude ejectment, whereas the defendants (aside from the State of New York), “have unclean hands” because, as evidenced in part by the testimony of the President and CEO of the National Bank of Geneva (“the Bank”), Thomas Kime, these defendants have ignored the *lis pendens* which was filed in conjunction with this lawsuit. Pl. Memo. at 42. The Cayugas highlight the admission by Mr. Kime that even after the filing of this lawsuit, the Bank continues to

make loans with respect to the subject property, fully aware of the pendency of this action. See Transcript (Sept. 18, 1998) at 544-48.

\*27 New York also has unclean hands, argue the Cayugas, because it was aware as early as June 16, 1795, that the Cayugas' interest in land reserved to them could not be extinguished except by treaty entered into under the authority of the United States and consistent with the laws of Congress. See Pl. exh. 3 at 1 (June 16, 1795 Opinion, Attorney General Wm. Bradford's with Letter of Transmittal to Secretary of War). The Cayugas strenuously contend that the "Everett Report," which in essence outlines the history of New York's Indian "problem," reveals more recent evidence of New York's "unclean hands." See Pl. exh. 9 at xi and 10.

The defendants respond by again stressing the supposed delay on the part of the Cayugas in commencing this action. Further, the defendants suggest that the Cayugas's acceptance of \$70,000.00<sup>22</sup> "for the sale of the claim area" from the federal government in the late 1970's constitutes a "waive[r][of] their right to continue their claims." Def. Memo. at 50. However, according to the defendants, the United States is responsible for the "most egregious" misconduct because it "did not-though it could have on many occasions-alter the parties' collision course, which resulted in this lawsuit." *Id.* at 48.

Examining the record as a whole leaves the court with the distinct impression that aside from the previously addressed issue of delay, any "related miscon-

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<sup>22</sup> Incredibly, the defendants assert that this \$70,000.00 constitutes "substantial compensation." See Def. Memo. at 50.

duct” worthy of consideration here is that which is attributable to the State and federal governments. Clearly those two entities, at various times and to varying degrees, hindered the Cayugas’ ability to reclaim their homeland. Thus, as the foregoing demonstrates, there is no “related misconduct” on the part of the Cayugas which would “render[] the[ir] . . . interests undeserving of injunctive protection[]” in the form of an ejectment order. See Restatement § 940. cmt. b.

*E. Relative Hardship*

Even “[w]hen a plaintiff proves that a tort has been committed or is threatened and shows that other remedies will not make him whole, an injunction is not to be issued as a matter of course. Restatement § 941, cmt. a. “Elementary justice requires consideration of the hardship the defendant would be caused by an injunction as compared with the hardship of the plaintiff would suffer if the injunction should be refused.” *Id.* Relative hardship to the parties cannot, however, be viewed in isolation; it extends to other factors “such as the character of the conduct (including the respective motives) of the defendant and the plaintiff that produced the situation and created the attendant hardships.” *Id.* In terms of the parties’ respective motives, “[t]he defendants’ good or bad faith is often important in an appraisal of his responsibility.” *Id.* cmt. b. Likewise, “[t]he interests of third parties and of the public in general are also relevant here.” *Id.* cmt. a (citation omitted).

Indisputably great hardships have befallen the Cayugas as a result of the 1795 and 1807 cessions; and the Cayugas will continue to sustain some hardships if the court refuses to order ejectment. The court must

balance those competing hardships, however, against those which would result from ejectment. Balancing the relative hardships in the present case, the court finds that ejectment would potentially displace literally thousands of private landowners and several public landowners, including those who provide such essential services as electricity and transportation systems.<sup>23</sup> Moreover, an order of ejectment would prove all too vividly the old axiom: “Two wrongs don’t make a right.” In sum, although the court is painfully aware of past hardships to the Cayugas, concentrating, as the court must, upon future hardships to the defendants which would result from ejectment, the court finds that this factor too unquestionably tips in defendants’ favor.

*F. Interests of Third Persons and the Public*

In accordance with the Restatement, “public interest of the local community and the interests of the public in various social policies, must often be balanced against other factors” in determining “the appropriateness of injunction against tort.” Restatement § 942, cmt. a. The nature of these interests are many, and “[t]he weight to be assigned to any one of the[m] . . . in a given situation depends upon its own individual significance, upon the extent to which it probably will be affected and upon its alignment with the other factors in the case.” *Id.*

The Cayugas collapse the last two Restatement factors—the interest of third persons and the public and the practicability of framing and enforcing the

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<sup>23</sup> The Court does not doubt the sincerity of the Cayugas in wanting to enter into long-term leases with current landowners, but as the court has made clear, the issue at this juncture is ejectment-not leases.

injunction-into one. Again operating under the mistaken assumption that long-term leases would be a natural offshoot of an ejectment order, the Cayugas rely solely upon the testimony of Assistant Secretary of the Department of the Interior for Indian Affairs, Kevin Gover, to establish that such leases would be workable. Based upon a number of factors, such as the Cayugas' stated desire to enter into such leases; the Bureau of Indian Affairs' commonplace approval of leases in other contexts; the fact that easements and right-of-ways through reservations are routinely granted with respect to utilities and the like; and his understanding of the leases at issue in *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542 (2d Cir. 1991), Mr. Gover opined that "it is practicable to grant ejectment."<sup>24</sup> Transcript (Sept. 17, 1998) ("Tr.II") at 277. Assistant Secretary Gover's opinion is, in a word, non-responsive. As should be abundantly clear by now, the court and the Cayugas are coming from two entirely different perspectives when it comes to the issue of ejectment. At the risk of sounding repetitive, the court is concerned with the ramifications of ejectment-not of long-term leases.

In terms of how the interests of third persons and the public would be impacted by an ejectment order, it takes little imagination to realize, as the record amply demonstrates, that the impact of ejectment would be

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<sup>24</sup> In addition, the Cayugas claim that Gover testified that an ejectment order along the lines of that ordered in *Salamanca* "is feasible and that his office would administer it on behalf of the Cayugas." Pl. Memo. at 48 (citing Tr.II at 273-274). The court and the Cayugas must be looking at two different transcripts. There is not even a hint of such testimony on the transcript pages to which the Cayugas cite.

widespread and harsh. In reaching this conclusion, the court almost completely discounts the testimony of Mr. Gover-not for lack of veracity;<sup>25</sup> but rather, through no fault of his own, Gover was asked to give an opinion which arguably he was not qualified to give; and, as previously alluded to, was based on facts which were of questionable relevancy.

On the other hand, the defendants' evidence on this factor is directly germane. Cayuga County's Director of Planning, Robert Brower, testified fairly extensively about the effect which ejection would have on the area's transportation systems. He testified to the disruption which ejection would cause to those systems, with resultant negative consequences for the economy. Bank President Kime echoed the negative economic impact of ejection. The local banking industry would, in his opinion, be especially hard-hit in terms of the mortgage defaults which are bound to occur if this court orders ejection. Given the extraordinarily unique circumstances of this litigation, and the public interest and social policy concerns which would be implicated if ejection is ordered, the interests of third persons and the public heavily favor the defendants.

*G. Practicability of Framing and Enforcing the Injunction*

“If drafting and enforcing [of injunctive relief] are found to be impracticable, the injunction should not be granted.” Restatement § 943, cmt. a. Not only must the court “delineate with reasonable precision the action that is to be prohibited or required, [but it] must

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<sup>25</sup> Indeed, the court found Mr. Gover, along with all of the other witnesses who testified during the evidentiary hearing, to be both candid and sincere.

envisage the practicability of enforcement measures if the defendant should refuse to comply.” *Id.* The court should also be cognizant of the fact that “[a]n ineffective order or judgment may impair the prestige of the court, may render futile the relief that the order or judgment purports to award . . . and may give rise to vexatious disputes in contempt proceedings.” *Id.* “This is not to say, however, that the difficulties of drafting and of administration thus presented are sufficient in themselves to outweigh the plaintiff’s needs.” *Id.* Injunctive relief should be withheld “only when the court’s best efforts, in the light of the circumstances of the case in hand[ ] would probably result in impracticability[.]” *Id.*

This court has no difficulty in finding that it would be impractical if not completely impossible to frame and enforce an ejectment order here. That is so even if long-term leases were a component of such an order. There is a very real possibility that if ejectment is ordered, many if not all of the defendants would refuse to comply with such an order. The court is not suggesting in any way that under ordinary circumstances these defendants are not law-abiding citizens. An ejectment order would, however, strike at the very heart of what many in this country (including no doubt the individual landowner defendants), strive for years to achieve-ownership of real property.

No matter how hard it tries, the court simply cannot envisage a practical method of enforcing an ejectment order if, as the court strongly suspects, many defendants would refuse to comply with the same. The possibility of such en masse non-compliance could render futile an ejectment order and chaos could prevail. Furthermore, there is also a very real likelihood of vexatious disputes in the form of satellite contempt

proceedings-proceedings which could easily clog the federal courts well into the next century.

The court stresses that it is not denying ejection on the basis of possible non-compliance with such an order. The basis for denial is a comparative analysis of the seven Restatement factors, which mandates the conclusion that ejection, to put it mildly, is not an appropriate remedy in this case. Only one of those seven factors-related misconduct-favors the Cayugas. More importantly, however, is the overwhelming evidence showing that the cumulative effect of the Restatement factors would be devastating if this court were to order ejection. Ejecting all or nearly all of the current landowners would result in widespread disruption not only to the Counties and those residing therein, but to the State of New York as a whole. That is so because, as the record shows, ejection would mean that transportation systems, such as the New York State Thruway, would have to be rerouted at great expense. Putting aside costs, rerouting the Thruway would have almost unthinkable consequences in terms of intrastate and interstate commerce.

Similarly, ejection would cause great upheaval in terms of requiring removal of existing power and sewer infrastructures. Not only that, conceivably ejection would render homeless thousands upon thousands of innocent landowners. Ejection would also destroy many revenue sources, such as tourism and agribusiness. While the court is sympathetic to the Cayugas' desire to reclaim their homeland and revitalize their culture, the court cannot turn back the clock. Surely the Cayugas are entitled to relief for the past two centuries during which they have been

deprived of their homeland; but ejectment is not the answer.

*Conclusion*

To summarize, the court finds that the State of New York's Eleventh Amendment immunity is not compromised given the presence of the United States as a plaintiff-intervenor in this action. Therefore, the court hereby denies the State's motion to dismiss the Cayugas' claims as against the State agencies. By the same token, as set forth herein, to the extent that there is proof at the upcoming trial on damages that the Cayugas are raising new claims or issues, the Eleventh Amendment may be implicated.

The court grants the defendants' motion in limine seeking to preclude ejectment as a remedy. In light of this holding, because that is the only relief which the Cayugas are seeking against the individual State defendants, the court hereby dismisses the Cayugas' and the United States' claims against those particular defendants.

IT IS SO ORDERED.

**APPENDIX G**

UNITED STATES DISTRICT COURT  
NORTHER DISTRICT OF NEW YORK.

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Nos. 80-CV-930, 80-CV-960

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THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,  
PLAINTIFFS  
AND  
THE SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR

*v.*

MARIO M. CUOMO, ET AL., DEFENDANTS

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Aug. 13, 1991

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MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

**BACKGROUND**

This action was commenced in November, 1980 by the Cayuga Indian Nation of New York. On November 9, 1981, this court granted the motion brought by the Seneca-Cayuga Tribe of Oklahoma to intervene in this action. The plaintiffs (or the "Cayugas") seek a declaration from this court concerning their current ownership of and right to possess a tract of land in central New York State containing approximately 64,000 acres ("the subject land"), an award of fair rental value for the

almost two hundred years during which they have been out of possession of the subject land, and other monetary and protective relief. This court already has issued several decisions concerning the present action. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 565 F. Supp. 1297 (N.D.N.Y. 1983) (“*Cayuga I*”), this court denied the defendants’ motion to dismiss plaintiffs’ complaint, and held that the plaintiffs can present evidence in support of their claims. *Cayuga I*, 565 F. Supp. at 1330. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 667 F. Supp. 938 (N.D.N.Y. 1987) (“*Cayuga II*”), this court denied both parties’ motions for summary judgment on plaintiffs’ claims. *Cayuga II*, 667 F. Supp. at 949. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 730 F. Supp. 485 (N.D.N.Y. 1990) (“*Cayuga III*”), the court granted the plaintiffs’ motion for partial summary judgment, and held that agreements entered into in the years 1795 and 1807 between the plaintiffs and New York State, wherein the plaintiffs purportedly conveyed to the State of New York the plaintiffs’ interest in the subject land, were invalid. *Cayuga III*, 730 F. Supp. at 493. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 758 F. Supp. 107 (N.D.N.Y.1991) (“*Cayuga IV*”), this court determined that the Cayugas obtained recognized title in the subject land by way of the 1794 Treaty of Canandaigua, and that therefore the defendants’ defense of abandonment was legally insufficient to defeat plaintiffs’ claims. *Cayuga IV*, 758 F. Supp. at 118. Most recently, the court, in *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 762 F. Supp. 30 (N.D.N.Y.1991) (“*Cayuga V*”), granted the motion to dismiss plaintiffs’ complaint brought by defendant

Consolidated Rail Corporation (“Conrail”) as against that defendant.<sup>1</sup>

By the present motion, the plaintiffs seek an order from this court declaring that the defendants are liable to the plaintiffs, and that any and all defenses of the defendants, including their affirmative defense of laches, are insufficient as a matter of law to avoid liability on plaintiffs’ claims. The defendants argue that the present action is barred by the equitable doctrine of laches.

#### DISCUSSION

In support of their contention that the plaintiffs’ action is barred by laches, the defendants initially argue that no federal statute specifically provides a time limitation concerning the Cayugas’ claims. They allege that proof of the plaintiffs’ attempts to enforce the “treaties” entered into between the Cayugas and the State of New York in 1795 and 1807 lends additional support to their position that this action is time-barred. They further argue that the education of the Cayugas, coupled with their proven ability to enforce their legal rights, demonstrates that the plaintiffs should no longer be afforded a protected status by the government. Finally, they claim that it would be inequitable to find in favor of the plaintiffs in light of the generations of

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<sup>1</sup> The court held that the Regional Rail Reorganization Act, 45 U.S.C. § § 701-797, established a Special Court which had original, exclusive and sole jurisdiction to hear and determine the claims brought by the plaintiffs which challenged Conrail’s legal title to certain rail lines transferred to Conrail pursuant to the Rail Act and which were the subject of the present dispute. Accordingly, this court was without jurisdiction to hear plaintiffs’ claims against Conrail. *Cayuga V*, 762 F. Supp. at 35-36.

individuals who have lived on the subject land since the purported conveyance of such land to the State of New York.<sup>2</sup>

The Cayugas claim that “this case was timely filed within the express statutory and regulatory framework established by Congress in 1982 to govern Indian land claims. See 2[8] U.S.C. § 2415; 48 Fed. Reg. 13698, 13920 (March 31, 1983).”<sup>3</sup> They argue that the language of 28 U.S.C. § 2415, the holding of the Supreme Court in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), *reh’g denied* 471 U.S. 1062, 105 S. Ct. 2173, 85 L.Ed.2d 491 (1985) (“*County of Oneida*”), as well as the second circuit’s decision in *Oneida Indian Nation of New York v. Oneida County*, 719 F.2d 525 (2d Cir. 1983) (“*Oneida Indian Nation of New York IP*”) all support

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<sup>2</sup> At oral argument, Assistant Attorney General David B. Roberts raised, for the first time, the State’s argument that it was immune from plaintiffs’ action under the eleventh amendment of the United States Constitution. The State argued that the Supreme Court’s recent decision in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686, (1991) stands for the proposition that the State of New York, as sovereign, is immune from the instant action. Because the *Blatchford* decision was so recent, at the time oral argument was heard concerning the present motions, none of the parties had had the opportunity to submit any briefs to this court regarding the applicability, or lack thereof, of the *Blatchford* decision with respect to the present action. By letter dated July 23, 1991, the court invited the State to bring a formal motion concerning the issue of sovereign immunity before this court, thereby affording the parties the opportunity to fully present their respective arguments concerning the import of the *Blatchford* decision to this action.

<sup>3</sup> Plaintiffs’ memorandum in support of their motion for summary judgment (“Pl.Mem.”) at 3.

their contention that the defense of laches is unavailable in Indian land claim cases.<sup>4</sup> Additionally, they contend that Justice Stevens' dissent in *County of Oneida*, as well as Judge Newman's statement in *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2d Cir.1988) ("*Oneida Indian Nation of New York III*"), lend further credence to their argument that laches is not a legally sufficient defense to their claims. Accordingly, a review of 28 U.S.C. § 2415, its legislative history, and the various decisions relied upon by both parties in support of their respective positions is in order.

28 U.S.C. § 2415(c) provides that there is no time limitation on claims which seek "to establish the title to, or right of possession of, real or personal property." Sections 2415(a) and (b) of this Title provide that actions brought by the United States on behalf of an Indian tribe which sounded in contract or tort, sought money damages, and accrued prior to July, 1966 were timely so long as such actions were commenced prior to December 31, 1982. *See, e.g., Oneida Indian Nation of New York II*, 719 F.2d at 538. The 1982 amendments to this statute also imposed a specific statute of limitations concerning certain tort and contract claims brought by Indian tribes themselves. *County of Oneida*, 470 U.S. at 242-43, 105 S. Ct. at 1256, 84 L.Ed.2d 169.

In *Oneida Indian Nation of New York II*, the second circuit was confronted by a land claim brought by the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band Council (collectively referred to as the "Oneidas"). There, as here, the court was confronted by the argu-

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<sup>4</sup> Plaintiffs' Reply Memorandum ("Pl.Reply") at 3-4, 7-10.

ment that the claims of the Indian tribes were time-barred because the Oneidas' lawsuit was filed some 175 years after their cause of action had accrued. In finding this argument to be without merit, the court, in discussing the *minimum* amount of time which Indian tribes are to be afforded in the filing of land claims, concluded that:

“[A]t the very least, suits by tribes should be held timely if such suits would have been timely if brought by the United States.” (quoting *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1084 (2d Cir.1982) (“*Oneida Indian Nation of New York I*”).

*Oneida Indian Nation of New York II*, 719 F.2d at 538. Since the Oneidas' action would have been timely had the same been brought by the United States on the plaintiffs' behalf pursuant to 28 U.S.C. § 2415, the court concluded that the Oneidas' action was timely. *Id.* While the Oneidas were apparently both impoverished and illiterate, *see Oneida Indian Nation of New York v. County of Cayuga*, 434 F. Supp. 527, 535-37 (N.D.N.Y. 1977), the second circuit did not limit its holding to like Indian tribes. Nor did it claim, as the defendants would have this court hold, that its ruling was only applicable to non-litigious tribes, or tribes that did not seek to enforce their perceived right to compensation under their “treaties” with the State. In fact, to view the second circuit's ruling in *Oneida Indian Nation of New York II* to stand for this proposition would be, in this court's opinion, clearly erroneous. Under 28 U.S.C. § 2415, the United States was entitled to bring an action seeking money damages on behalf of any Indian tribe until December 31, 1982, notwithstanding such tribe's education, literacy or litigiousness. *Id.* As the

second circuit noted, “[i]t would be anomalous to allow the trustee to sue under more favorable conditions tha[n] those afforded the tribes themselves.” *Oneida Indian Nation of New York II*, 719 F.2d at 538 (quoting *Oneida Indian Nation of New York I*, 691 F.2d at 1083-84).

This court holds that the second circuit’s decision in *Oneida Indian Nation of New York II* stands for the proposition that claims brought by Indian tribes in general, including the plaintiffs herein, should be held by courts to be timely, and therefore not barred by laches, if, at the very least, such a suit would have been timely if the same had been brought by the United States.<sup>5</sup>

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<sup>5</sup> The court notes that the mere fact that the Cayugas may have attempted to obtain additional compensation under the 1795 and 1807 “treaties” between these two parties did not, by itself, make these agreements legally enforceable treaties. As this court has already held, the United States, and the United States alone, has the legal power to consent to the alienation of tribal land. *See Cayuga III*, 730 F. Supp. at 488 (citing 25 U.S.C. § 177). The federal government never consented to the Cayugas’ attempt to convey the subject land to New York in 1795 and 1807. *Id.* at 493. Any actions of the Cayugas to secure additional compensation pursuant to these invalid agreements did not magically transmogrify such invalid agreements into valid treaties which ceded rights in the subject land to the State of New York.

With respect to the defendants’ contention that the Cayugas should not be afforded any protected status by this court, this court has already held that there exists an especial trust relationship between the plaintiffs herein and the federal government. *Cayuga II*, 667 F. Supp. at 943. Thus, the defendants’ argument that the Cayugas are somehow not to be afforded any protected status at the present time is contrary to the law of this case and clearly lacks substance.

The Supreme Court, in affirming in part and reversing in part the second circuit's holding in *Oneida Indian Nation of New York II*, discussed, *inter alia*, the legislative history surrounding 28 U.S.C. § 2415. In *County of Oneida*, the Supreme Court held that:

The legislative history of the 1972, 1977, and 1980 amendments [to 28 U.S.C. § 2415] demonstrates that Congress did not intend § 2415 to apply to suits brought by the Indians themselves, and that it assumed that the Indians' right to sue was not otherwise subject to any statute of limitations. . . .

With the enactment of the 1982 amendments, Congress for the first time imposed a statute of limitations on certain tort and contract claims for damages brought by Indian tribes. These amendments, enacted as the Indian Claims Limitation Act of 1982, Pub.L. 97-394, 96 Stat. 1976, note following 28 U.S.C. § 2415, established a system for the final resolution of pre-1966 claims cognizable under §§ 2415(a) and (b). The Act directed the Secretary of the Interior to compile and publish in the Federal Register a list of all Indian claims to which the statute of limitations provided in 28 U.S.C. § 2415 applied. The Act also directed that the Secretary notify those Indians who may have an interest in such claims. The Indians were then given an opportunity to submit additional claims; these were to be compiled and published on a second list. . . . If at any time the Secretary decides not to pursue a claim on one of the lists, "*any* right of action shall be barred unless the complaint is filed within one year after the date of publication [of the notice of the Secretary's decision] in the Federal Register."

Pub.L. 97-394, 96 Stat.1978 § 5(c) (emphasis added). Thus, § 5(c) implicitly imposed a 1-year statute of limitations within which the Indians must bring contract and tort claims that are covered by §§ 2415(a) and (b) and not listed by the Secretary. *So long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live.*

*County of Oneida* at 242-43, 105 S. Ct. at 1255-56, 84 L.Ed.2d 169 (footnote omitted) (emphasis added).<sup>6</sup>

While the Supreme Court found that the time limits provided in §§ 2415(a) and (b) apply only to actions brought by the United States, and not to those lawsuits commenced by Indian tribes themselves, *see id.* at 242, 105 S. Ct. at 1255-56, 84 L.Ed.2d 169, the second circuit's determination that the time limitation provided by this statute is the *minimum* amount of time which must be afforded to Indian tribes which bring land claim actions on their own behalf is still the law in this circuit. A fair reading of *Oneida Indian Nation of New York II* reveals that actions brought by Indian tribes may well be timely even *after* the time period available to the United States to bring such claims has passed pursuant to Section 2415; for that court's holding provides that, *at the very least*, suits brought by tribes are to be held timely if such suits would have been timely if such actions were brought by the United States. *Oneida Indian Nation of New York II*, 719 F.2d at 538.

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<sup>6</sup> At oral argument, both parties conceded that the Secretary of the Interior listed the Cayuga land claim as a § 2415 claim. *See* 48 Fed.Reg. 13698, 13920 (March 31, 1983). The Secretary of the Interior has taken no further action regarding this claim subsequent his listing of the same in the Federal Register. Therefore, under *County of Oneida*, this claim remained live. *County of Oneida*, 470 U.S. at 243, 105 S. Ct. at 1256, 84 L.Ed.2d 169.

In fact, the vitality of this ruling was noted by Justice Stevens in his dissent in *County of Oneida*. Justice Stevens, joined by Chief Justice Berger, and Justices White and Rehnquist, recognized that “[t]he Court of Appeals’ rejection of delay-based defenses, [discussed in] 719 F.2d [at 538] will remain the law of the Circuit until it is reversed by this court, and will no doubt apply to the numerous Indian claims pending in the lower courts. . . .” *Id.* at 261-62 n. 10, 105 S. Ct. at 1265-66 n. 10, 84 L.Ed.2d 169 (emphasis added). One such lower court claim is the instant action.

This lawsuit was commenced by the Cayuga Indian Nation of New York on November 19, 1980, with the plaintiff-intervenor Seneca-Cayuga Tribe of Oklahoma joining this action in November, 1981. The instant action would have been timely if it had been brought by the United States by December 31, 1982. *See Oneida Indian Nation of New York II*, 719 F.2d at 538. Thus, it is apparent that this lawsuit was timely when filed by the plaintiffs, and that the defense of laches is unavailable to the defendants herein.<sup>7</sup>

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<sup>7</sup> In *Oneida Indian Nation of New York III*, Judge Newman stated, “[t]he writer accepts the prior panel’s rejection of a laches defense as the law of the case, though would find the issue to be a substantial one if it were open.” *Oneida Indian Nation of New York III*, 860 F.2d at 1149 n. 1. The defendants argue that this comment demonstrates that laches is a viable defense to Indian land claim cases, and that the court’s holding in *Oneida Indian Nation of New York II* is no longer the law in this circuit.

However, this court is unable to interpret Judge Newman’s comment as standing for the proposition that the second circuit’s holding in *Oneida Indian Nation of New York II* is no longer good law. As appealing as this argument might be, in particular consideration of the at least equitable property rights of generations of landholders who have relied upon their apparent good title, it is

The defendants also argue that:

In the last 185 years, private and public landowners have settled, cultivated and developed the Subject Land without any legal challenge to their rights to the land. The Subject Land has substantially increased in value. Entire lifetimes of residence on this land have been invested. There have been literally generations of innocent purchasers of the property and like numbers of people abiding by the laws of the Federal and State governments, paying taxes and building a community on the subject land. If Plaintiff's claims are allowed to proceed, title to real estate in large portions of Cayuga and Seneca counties will be disrupted and landowners, who had no knowledge of the possible defect in their title at the time they purchased, will be irreparably harmed.<sup>8</sup>

However, as the second circuit stated in *Oneida Indian Nation of New York II*, “we know of no principle of law that would relate the availability of judicial relief to the gravity of the wrong sought to be addressed.” *Oneida Indian Nation of New York II*, 719 F.2d at 539.

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for the second circuit or the Supreme Court to so rule, not this district court. As noted in 21 C.J.S. *Courts* § 187 (1940):

In determining a case the court is not concerned with what the law ought to be, but its sole function is to declare what the law, applicable to the facts of the case, is. A fortiori courts will not depart from an established rule of law to meet a particular case of supposed hardship. The rule of stare decisis is peculiarly applicable to a trial court.

*Id.* (footnotes omitted).

<sup>8</sup> Defendants' memorandum in support of their motion for summary judgment at 20.

“Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and ‘disruptive’ remedies.” *Oneida Indian Nation of New York I*, 691 F.2d at 1083. This reasoning applies with equal force to the facts herein. The defendants’ motion cannot be granted even though this court’s ruling may eventually cause disruption in Cayuga and Seneca counties.

#### CONCLUSION

The law enunciated by the second circuit and the Supreme Court regarding the issue presently before this court is clear. The plaintiffs’ action, which was commenced in November, 1980 was timely. *See Oneida Indian Nation of New York II*, 719 F.2d at 538; *County of Oneida*, 470 U.S. at 243, 105 S. Ct. at 1256, 84 L.Ed.2d 169. Thus, the defense of laches is unavailable to any of the defendants in the present action, including the State of New York. No other defense to plaintiffs’ action has been raised by any of the other defendants herein, except the State of New York.<sup>9</sup> Accordingly, the plaintiffs’ motion for partial summary judgment on the issue of liability is granted as to all defendants except the State of New York.

IT IS SO ORDERED.

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<sup>9</sup> As stated *supra* at n. 2, the State of New York now contends that some or all of plaintiffs’ claims against the State are barred by the eleventh amendment. In light of this position, the court has invited the State to make a formal motion relating to this argument to be heard by this court on October 15, 1991 at 11 a.m. in Syracuse, New York.

**APPENDIX H**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT NEW YORK.

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Nos. 80-CV-930, 80-CV-960

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THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,  
PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR

*v.*

MARIO M. CUOMO, ET AL., DEFENDANTS

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March 6, 1991

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MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

The plaintiffs and the defendants have moved for summary judgment concerning the issue of whether defendants' legal defense of abandonment effectively precludes the plaintiffs from maintaining the instant action. The plaintiffs contend that abandonment is not a viable defense to this lawsuit, and that they can succeed in the present action even though they no longer live on the land at issue in this dispute. The defendants argue that the plaintiffs cannot prevail in this action because they allegedly abandoned the land which is the subject of plaintiffs' claims. For the reasons stated

below, this court grants the plaintiffs' motion for partial summary judgment and denies the defendants' motion.

*Background*

This is the fourth memorandum-decision and order issued by this court concerning the present action, and familiarity with the background of this case is presumed. See *Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 565 F. Supp. 1297 (N.D.N.Y.1983) (“*Cayuga I*”) *Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 667 F. Supp. 938 (N.D.N.Y.1987) (“*Cayuga II*”) and *Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 730 F. Supp. 485 (N.D.N.Y.1990) (“*Cayuga III*”). However, a brief review of the facts concerning plaintiffs' claims is in order.

Plaintiff Cayuga Indian Nation of New York and plaintiff-intervenor Seneca-Cayuga Tribe of Oklahoma (collectively referred to as “the plaintiffs” or “the Cayugas”) both seek a declaration from this court concerning their current ownership of and right to possess a tract of land in central New York State containing approximately 64,000 acres (“the subject land”), an award of fair rental value for the almost two hundred years during which they have been out of possession of the subject land, and other monetary and protective relief.<sup>1</sup>

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<sup>1</sup> Plaintiffs maintain that their members are the direct successors in interest to the Cayuga Nation of the Six Nation Iroquois Confederacy which, until the acts complained of in this suit, occupied the land at issue since time immemorial. *Cayuga I*, 565 F. Supp. at 1302. The Six Nations in this Confederacy were comprised of the Oneida, Tuscarora, Mohawk, Onondaga, Cayuga and Seneca Nations. *Id.* at 1303.

This court has previously held that the plaintiffs can present evidence in support of the above claims. *Cayuga I*, 565 F. Supp. at 1330. In *Cayuga II*, this court denied both parties' motions for summary judgment on plaintiffs' claims. *Id.*, 667 F. Supp. at 949. In *Cayuga III*, this court granted the plaintiffs' motion for partial summary judgment and held that agreements entered into in the years 1795 and 1807 between the plaintiffs and New York State, wherein the plaintiffs purportedly conveyed to the State of New York the plaintiffs' interest in the subject land, were invalid. *Id.*, 730 F. Supp. at 493.

By the instant motion, the plaintiffs seek an order from this court holding that the defendants' affirmative defense alleging abandonment is insufficient as a matter of law to preclude recovery on plaintiffs' claims. The defendants contend that this defense bars the plaintiffs from succeeding on their claims against defendants, and have therefore moved for summary judgment on plaintiffs' complaint.

#### *Discussion*

(1) *The Cayugas' title concerning the subject land.*

The first aspect of these motions which this court must consider in arriving at its decision relates to the form or type of title held by the plaintiffs regarding the subject land.

There are two distinct types of title to Indian land; "aboriginal" title and "recognized" or "reserved" title. An Indian tribe obtains aboriginal title in land when it continually uses and occupies said property to the exclusion of other Indian tribes or persons. Conversely, where Congress has, by treaty or statute, conferred upon an Indian tribe, or acknowledged to the Indians,

the right to permanently occupy and use certain land, an Indian tribe is said to possess recognized or reserved title in such land. *Bennett County v. United States*, 394 F.2d 8, 11 (8th Cir. 1968); *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926, 936, 146 Ct. Cl. 421 (1959).

Differentiating between these two forms of title is critical in resolving the issues before this court. Since aboriginal title is dependent upon actual, continuous and exclusive possession of the land, proof of a tribe's voluntary abandonment of such property constitutes a defense to a subsequent claim concerning the land. *See e.g.* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 492 and cases cited therein.<sup>2</sup> However, if an Indian tribe possesses recognized title in certain land, then Congress, and only Congress, may divest the tribe of its title to such land. *Cf. Solem v. Bartlett*, 465 U.S. 463, 470, 104 S. Ct. 1161, 1166, 79 L.Ed.2d 443 (1984), *reh'g denied* 466 U.S. 948, 104 S. Ct. 2148, 80 L.Ed.2d 535 (1984) ("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 plot retains its reservation status until Congress explicitly indicates otherwise") (*citing United States v. Celestine*, 215 U.S. 278, 285, 30 S. Ct. 93, 94-95, 54 L.Ed.2d 195 (1909)); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-88, 97 S. Ct. 1361, 1363-64, 51 L.Ed.2d 660 (1977); *De Coteau v. District County Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 444, 95 S. Ct. 1082, 1092-93, 43

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<sup>2</sup> In fact, the plaintiffs concede that "[b]ecause aboriginal title is based upon continued use and occupancy of the land, aboriginal title can be voluntarily abandoned." *See* plaintiffs' memorandum in opposition to defendants' motion for summary judgment, p. 9.

L.Ed.2d 300 (1975), *reh'g denied* 421 U.S. 939, 95 S. Ct. 1667, 44 L.Ed.2d 95 (1975); *Mattz v. Arnett*, 412 U.S. 481, 504-05, 93 S. Ct. 2245, 2257-58, 37 L.Ed.2d 92 (1973); *see also* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 493.

Central to the plaintiffs' argument that the defense of abandonment is insufficient as a matter of law with respect to their claims is their contention that the 1794 Treaty of Canandaigua ("the Treaty"), entered into between the federal government and the Six Nations, afforded the plaintiffs recognized title to the subject land.

This Treaty contained, *inter alia*, the following provisions:

#### Article I

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

#### Article II

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

## Article III

The land of the Seneka nation is bounded as follows: [Article III continues by describing in detail the boundaries of the Seneka nation's land, and concludes by stating:] Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

## Article IV

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

\* \* \* \* \*

In witness whereof, [Federal Treaty Commissioner] Timothy Pickering, and the sachems and war chiefs of the Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Following this provision, the signatures of approximately 60 individuals and 12 witnesses appear. *See* 7 Stat. 44.

The interpretation of the language contained in this, or any treaty, is a question of law for a court to decide. *See Sioux Tribe v. United States*, 500 F.2d 458, 462, 205 Ct.Cl. 148 (1974) (“[w]e have repeatedly held that the interpretation of an Indian treaty is a question of law, not a matter of fact”) and cases cited therein; *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.1986), *cert. denied* 479 U.S. 1009, 107 S. Ct. 650, 93 L.Ed.2d 705 (1986); *Strong v. United States*, 518 F.2d 556, 563, 207 Ct. Cl. 254 (1975), *cert. denied* 423 U.S. 1015, 96 S. Ct. 448, 46 L.Ed.2d 386 (1975). Therefore, this court must examine these provisions of the Treaty and determine whether it conferred recognized title on the plaintiffs.<sup>3</sup>

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<sup>3</sup> In analyzing the provisions of this Treaty, this court is mindful of the general rule courts must follow in interpreting Indian treaties. This axiom provides that “[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 174, 93 S. Ct. 1257, 1263, 36 L.Ed.2d 129 (1973) (*citing* *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S. Ct. 121, 122, 74 L.Ed. 478 (1930)). *See also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S. Ct. 1328, 1334, 25 L.Ed.2d 615 (1970), *reh’g denied* 398 U.S. 945, 90 S. Ct. 1834, 26 L.Ed.2d 285 (1970) (“treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians’ favor”) (citations omitted); F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 221-22.

- (a) Did the Treaty confer recognized title to the Cayugas?

When determining whether a treaty or statute confers reserved title to an Indian tribe, courts must keep in mind that “formal statements of recognition are not necessary in order that a Treaty be deemed to have recognized title in a particular Tribe.” *United States v. Kiowa, Comanche and Apache Tribes of Indians*, 479 F.2d 1369, 1374, 202 Ct. Cl. 29 (1973), *cert. denied sub nom.* 416 U.S. 936, 94 S. Ct. 1936, 40 L.Ed.2d 287 (1974). Such title “may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.” *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79, 75 S. Ct. 313, 317, 99 L.Ed. 314 (1955).

As the court of claims noted in *Strong*:

Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land.

*Id.*, 518 F.2d at 563 (emphasis in original), *quoting Miami Tribe, supra*, 175 F. Supp. at 936.

The plaintiffs contend that the plain, unambiguous language of the Treaty conferred recognized title upon the Cayugas. They point out that Article II of the Treaty explicitly provides that “[t]he United States *acknowledge the lands reserved to the . . . Cayuga Nations*, in their respective treaties with the state of New York, *and called their reservations*, to be their property.” This Article concludes by noting that “the *said reservations shall remain theirs*, until they choose

to sell the same to the people of the United States, who have the right to purchase.”

Article IV notes that, by this Treaty, the United States “*described and acknowledged what lands belong to the . . . Cayugas*” (emphasis supplied throughout).<sup>4</sup>

Despite the plain language contained in these two Articles, the defendants contend that this Treaty “simply acknowledged whatever aboriginal right of occupancy the Cayuga tribe may have had.”<sup>5</sup> In support of this contention, the defendants rely primarily on *Andrews v. State of New York*, 192 Misc. 429, 79 N.Y.S.2d 479 (Ct. Cl. 1948), *aff’d* 276 A.D. 814, 93 N.Y.S.2d 705 (1949); *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965); *People ex rel. Ray v. Martin*, 294 N.Y. 61, 60 N.E.2d 541 (Ct. App. 1945) and *Williams v. Chicago*, 242 U.S. 434, 37 S. Ct. 142, 61 L.Ed. 414 (1917). However, defendants’ reliance on these cases is misplaced.

In *Andrews*, New York’s court of claims was confronted with a claim by an enrolled member of the Onondaga Indian Nation who, although she did not live on the reservation, argued that the State of New York had abridged certain rights she possessed in communal lands of said Nation. In commenting on the primary

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<sup>4</sup> See 7 Stat. 44. The treaty referred to in Article II concerning the State of New York was the 1789 treaty entered into between the plaintiffs and the State. By this treaty, the Cayugas relinquished approximately 3,000,000 acres in what is now central New York State to the State, reserving for their own use the 64,015 acres that is the subject of the present dispute. *Cayuga I*, 565 F. Supp. at 1303-04.

<sup>5</sup> Defendants’ memorandum in opposition to plaintiffs’ motion for partial summary judgment (“Def. Resp. Memo.”), p. 3.

defect in the claimant's case, the court noted that Ms. Andrews:

[S]ought to disregard completely the organization of which she claims to be a member. She has provided the Court with no statute which recognizes an obligation running from the State to any and every individual Indian belonging to the Indian Nation, nor has the claimant pointed to any treaty or any agreement where such an obligation was recognized or mentioned.

*Id.*, 79 N.Y.S.2d at 488. In light of these facts, the court dismissed plaintiff's claim, concluding that:

[I]n the absence of legislative action bestowing upon individual Indians the right to litigate internal questions relating to their tribal property in the Court of Claims, and conferring jurisdiction to determine such controversies, this Court should not assume jurisdiction.

*Id.* 79 N.Y.S.2d at 489.

However, prior to finding that it had no jurisdiction over plaintiff's claim, the court stated, in what was necessarily dicta, that the 1794 Treaty of Canandaigua "did not create the Onondaga Reservation, but confirmed the Onondaga's aboriginal right of possession." *Id.* 79 N.Y.S.2d at 482.

The defendants claim that this statement in *Andrews* necessarily precludes the plaintiffs from succeeding in the present action. Since the *Andrews* court found that the Treaty merely "confirmed the Onondaga's aboriginal right of possession" to the land, the defendants allege that the Cayugas, whose claim to recognized title is based on the same Article of the Treaty discussed in

*Andrews*, likewise only have an aboriginal right of possession in the subject land.

This is not the case.

The court's reference to the rights allegedly created by the Treaty in *Andrews* was mere dicta, since that court dismissed plaintiff's claim for lack of jurisdiction. A court is free to disregard a prior court's obiter dicta concerning an issue which is squarely in dispute in a subsequent action. *See, e.g., United States v. Crawley*, 837 F.2d 291, 292 (7th Cir.1988). An important factor weighing against a court's relying on dicta in reaching its own determination concerning such an issue is the fact that the prior court may not have considered the issue as fully as it would have had the issue been essential to the outcome of the prior case. *Id.* In matters involving treaties, the *Andrews* court itself recognized that a federal court's interpretation of a treaty is binding on state courts. *See id.*, 79 N.Y.S.2d at 484. This court believes that the *Andrews* court did not fully consider all of the relevant issues regarding the type of title conferred to the Indian tribes by the Treaty in its comments concerning the same, since that issue was neither essential nor relevant to the court's ultimate holding in that case. Therefore, this court is not constrained, nor is it persuaded by that court's interpretation of the Treaty of Canandaigua.

In *Seneca Nation of Indians, supra*, the U.S. Court of Claims stated that:

[T]he purpose of [the Treaty] was to reconfirm peace and friendship between the United States and the Six Nations, to correct an inadvertent error in the boundaries theretofore allotted to the Indians, and to relinquish any rights the United

States may have acquired through this error. There was no purpose to divest New York and Massachusetts of their rights, nor was there any purpose to prevent or supervise sales or transfers of Seneca territory.

*Id.*, 173 Ct. Cl. at 922 n. 5.

However, the crux of the claims in *Seneca Nation of Indians* concerned disputes between the parties over the proper role of the federal government with respect to Indian tribes in light of the newly established fiduciary relationship between the Indians and the federal government created by the passage of the 1790 Trade and Intercourse Act. Prior to the Act's passage, the prevailing standard which courts had utilized in reviewing conveyances of Indian land for possible fraud or deceit had been the "just and honorable dealings" standard provided by the Indian Claims Commission Act. Subsequent to the Act's passage, however, the Court of Claims held that Indians were also protected against improvident, unfair or unconscionable conveyances of their land, *id.* at 925, and that therefore conveyances of Indian land subsequent to the passage of the Act had to be scrutinized in light of this heightened standard. *Id.* at 927.

Since that court's interpretation of the language of the Treaty concerning the Seneca Nation's lands was not necessary for its ultimate holding, its comments were dicta and therefore not binding on this court. Moreover, that case was concerned with the language contained in Article III of the Treaty, which dealt exclusively with the boundaries of the Seneca Nation's land and the rights afforded to the Seneca Nation regarding this land. There are significant differences

between that Article and Article II of the Treaty, which dealt with the Cayugas.

Article II acknowledges the lands “reserved to” the Cayuga Nation and “called their reservations.” It continues by stating that these “reservations” shall remain theirs until they choose to sell the same to the people of the United States. Article III never acknowledges lands “reserved” to the Senecas, nor does it refer to the land of the Seneca Nation as a “reservation”. As the plaintiffs point out, had the United States intended to deal with the Cayuga reservation and the Seneca lands in an identical manner, it would have used identical language and terminology when referring to these tribes in the Treaty. Its use of the words “reserved” and “reservation” with respect to the Cayuga reservation, and the complete absence of these words in \*114 the Treaty’s provisions concerning the Seneca lands, clearly indicates to this court that the United States dealt with these two tribes differently when it treated with them at Canandaigua.

In *Martin, supra*, a prisoner was challenging the validity of his conviction for murder and the life sentence imposed on him because of his crime. Ray alleged that the Supreme Court of the State of New York was without jurisdiction to hear the People’s case against him because his offense was committed on an Indian reservation. After discussing at some length the federal and New York State governments’ respective involvement with Indian tribes, the Court affirmed the conviction and sentencing of Ray. Before reaching this conclusion, the Court stated that the Treaty of Canandaigua “did not create any reservation but confirmed the Senecas’ aboriginal right of possession.” *Id.*, 294 N.Y. at 68, 60 N.E.2d at 544. The Court subsequently

noted that “the doubts and vagueness that becloud the general subject of law on Indian reservations, have nothing whatsoever to do with criminal prosecutions like that of this relator for the killing of Paul Balsiger . . . .” *Id.* at 73, 60 N.E.2d at 547.

As with the *Andrews* and *Seneca Nation of Indians* cases, the Court’s statement in *Martin* regarding the rights created by the Treaty was not necessary for its ultimate finding, and was therefore dicta.<sup>6</sup> Additionally, *Martin* involved a jurisdictional dispute regarding a crime which occurred on the grounds of the Seneca Nation. As discussed *supra*, the Treaty of Canandaigua refers to and treats the Seneca lands in a manner different than that of the Cayuga reservation. While the Treaty may not have conferred recognized title on the Seneca Indians, such a finding would not be dispositive of the issue of whether the Treaty created recognized title for the plaintiffs herein.

Since the Court’s comments in *Martin* regarding the rights conferred to the Seneca Nation by the Treaty were both dicta and based upon Article III, and not Article II, of the Treaty, this court finds *Martin* distinguishable from the present case.

Finally, in *Williams, supra*, several members of the Pokagon Band of Pottawatomie Indians commenced an action against the city of Chicago and numerous corporations occupying lands in Illinois. The complaint alleged that they and the other members of the Pottawatomie Nation of Indians were owners of certain lands in Illinois being occupied by the defendants. The plaintiffs alleged that the Treaty of Greenville, 7 Stat.

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<sup>6</sup> In fact, neither Ray nor his victim were members of the Seneca Nation.

49, had conferred what is now called recognized title to the Pottawatomie Nation, and accordingly sought an injunction ordering the defendants out of the lands, as well as reasonable compensation for their use of the property at issue.

In affirming the dismissal of plaintiffs' claims, the Supreme Court noted that the Treaty of Greenville:

[D]id not convey a fee-simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when it was abandoned, all legal right or interest which both tribe and its members had in the territory came to an end.

*Id.*, 242 U.S. at 437-38, 37 S. Ct. at 144.

The defendants contend that “the facts before the Supreme Court in *Williams* are strikingly similar to those before this Court” in that:

In each treaty, the federal government acknowledged that the signatory tribes had a continued right to use and occupy certain land; neither treaty conveyed fee-simple title to the signatory tribes.<sup>7</sup>

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<sup>7</sup> Defendants' Reply Memorandum, p. 4. The court notes that in his sixth affidavit submitted to this court, Dr. Francis G. Hutchins states that in both the Treaty of Greenville and the Treaty of Canandaigua “the federal government acknowledged that the signatory tribes had a continued right to use and occupy certain land”, and that neither of these treaties “conveyed fee-simple title to the signatory tribes.” Sixth affidavit of Dr. Francis G. Hutchins, 11/14/90 (“6th Hutchins Aff.”), ¶ 6(r). However, this legal argument is not only improper under Rule 10(c) of the local rules for the Northern District of New York, but it is also irrelevant in this court's analysis of the Treaty. As stated *supra*, the interpretation of language contained in a treaty is not a matter

However, *Williams* is readily distinguishable from the present case.

Initially, it must be reiterated that the *Williams* Court was interpreting the Treaty of Greenville, and not the Treaty of Canandaigua, when it determined that the Pottawatomie Nation of Indians did not possess fee simple title concerning the land at issue in that case. The Treaty of Greenville, unlike the Treaty of Canandaigua, does not acknowledge lands “reserved” to the tribe, nor does it refer to the land as a “reservation”. Rather, the Treaty of Greenville provides that the United States relinquished its claims to certain lands referred to in that treaty—there is no acknowledgement of any reservation in that treaty, as there is in the Treaty of Canandaigua. Additionally, subsequent to the *Williams* decision, numerous courts, including the United States Supreme Court, have developed and clarified the distinction between aboriginal and reserved title. See e.g., *Tee-Hit-Ton Indians, supra*, 348 U.S. at 277-85, 75 S. Ct. at 316-20; *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n. 29, 100 S. Ct. 2716, 2740 n. 29, 65 L.Ed.2d 844 (1980); *Lac Courte Oreilles Band etc. v. Voigt*, 700 F.2d 341, 351-52 (7th Cir.1983), *cert. denied & app'l dismissed sub nom.*, 464 U.S. 805, 104 S. Ct. 53, 78 L.Ed.2d 72 (1983); *Strong, supra*, 518 F.2d at 563; *Miami Tribe, supra*, 175 F. Supp. at 936-37 (interpreting the Treaty of Greenville to confer recognized title on the Miami Tribe of Oklahoma to certain lands described therein).

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of fact, but rather a question of law for a court to decide. See *Sioux Tribe, supra*, 500 F.2d at 462; *Ringrose, supra*, 788 F.2d at 643 n. 2; and *Strong, supra*, 518 F.2d at 563.

This court's holding does not stand for the proposition that *whenever* a treaty describes and refers to land claimed by an Indian tribe that such Indian tribe necessarily obtains recognized title in such land. Rather, this court has interpreted the language contained in the Treaty of Canandaigua which refers specifically to the plaintiffs. In this court's opinion, the Treaty's plain language confers reserved title to the Cayugas. The Treaty acknowledges lands "reserved" to the Cayugas, and refers to such land as their "reservation". Since the plaintiffs possess treaty-recognized title in the subject land, only Congress may divest the tribe of its title to this land. The fact that the Cayugas may no longer reside on the subject land is simply not a legally sufficient defense to the plaintiffs' claims, which are based upon federally recognized title. *Cf. Solem, supra*, 465 U.S. at 470, 104 S. Ct. at 1166; *Rosebud Sioux Tribe, supra*, 430 U.S. at 587-88, 97 S. Ct. at 1363-64; *De Coteau, supra*, 420 U.S. at 444, 95 S. Ct. at 1092-93; *Mattz, supra*, 412 U.S. at 504-05, 93 S. Ct. at 2257-58. *See also* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 493.

(b) New York's interest concerning the subject land.

The defendants claim that the Treaty could not have conveyed recognized title to the plaintiffs because such conduct would have purportedly divested New York State of its alleged fee title interest in the land without affording the defendants the due process and just compensation required by the Fifth Amendment of the United States Constitution. They allege that Federal Treaty Commissioner Timothy Pickering believed that New York State owned fee title to the subject land, and that the only means by which title to the land could be altered would be with the consent of the New York

State legislature. They further contend that neither the United States Senate nor the State of New York believed that the Treaty of Canandaigua conferred any rights upon the Cayuga Indian Nation other than those rights the plaintiffs already possessed. Finally, they argue that had the State of New York understood the Treaty of Canandaigua to be interfering with New York's alleged property rights in the subject land, the State would have objected to this Treaty, as it had concerning the 1784 Confederal Treaty of Fort Stanwix and the 1789 Confederal Treaty of Fort Harmar.<sup>8</sup>

It is well settled that a State's affairs with an Indian tribe are subject to the paramount authority of the federal government governing such matters. *Tuscarora Nation of Indians v. Power Authority of New York*, 257 F.2d 885, 891 (2d Cir.1958); *cert. denied* 358 U.S. 841, 79 S. Ct. 66, 3 L.Ed.2d 76 (1958) (“[n]ot only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York, but it has . . . pointed up and reaffirmed its paramount authority over Indian tribal lands); *Mulkins v. Snow et al.*, 232 N.Y. 47, 51, 133 N.E. 123 (Ct. App.1921) (Pound, J.) (“[w]hen the state of New York legislates in relation to [Indian] affairs, its action is subject to the paramount authority of the federal government”).

Contrary to the defendants' assertions, the State of New York did not possess a property interest in the subject land. Their interest in this land was, at most, a right of preemption-the right to purchase the property if and when the plaintiffs' title to the land was extinguished. Such a right of preemption is not a property right, but rather a mere expectancy concerning the

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<sup>8</sup> See generally Def.Resp.Memo., pp. 4-10.

property, with no right vesting in such person until Congress acts to extinguish the Indian interest in the land. See e.g., F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 514 and cases cited therein. Once New York State ratified the United States Constitution, relations with Indian tribes and authority over Indian lands fell under the exclusive province of federal law. *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234, 105 S. Ct. 1245, 1251, 84 L.Ed.2d 169 (1985), *reh'g denied* 471 U.S. 1062, 105 S. Ct. 2173, 85 L.Ed.2d 491 (1985). Thus, the conditions under which New York's right of preemption to the subject property could be exercised by the State are governed solely by federal law. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 670, 94 S. Ct. 772, 779, 39 L.Ed.2d 73 (1974). The Treaty of Canandaigua was simply an assertion by the federal government of its superior authority over matters involving Indian affairs granted to the federal government by the Constitution; it did not divest the State of New York of any property right concerning the subject land.

Defendants' contention that the Treaty cannot be interpreted as conferring reserved title to the Cayugas because of the State's apparent acquiescence concerning the ratification of the Treaty is also without merit. As this court has noted, by its ratification of the Treaty the federal government did not divest the State of New York of any property interest in the subject land. Moreover, as the plaintiffs point out, any actions taken by the State relating to the Treaties of Fort Stanwix and Harmar-treaties which were entered into while this Nation was operating under the Articles of Confederation-are irrelevant in interpreting the rights

conferred by the 1794 Treaty of Canandaigua. While the State retained certain rights with respect to Indian lands within its borders under the Articles of Confederation, such rights were ceded by the State to the federal government by the State's ratification of the Constitution. Any preemptive rights the State had concerning the purchase of the subject land were necessarily subject to the federal government's power regarding the extinguishment of the Cayugas' title to this land; *see e.g., Cayuga I*, 565 F. Supp. at 1312 n. 10; for only Congress may divest an Indian tribe of its recognized title to Indian land. *Cf. Solem, supra*, 465 U.S. at 470, 104 S. Ct. at 1166; *Rosebud Sioux Tribe, supra*, 430 U.S. at 587-88, 97 S. Ct. at 1363-64; *De Coteau, supra*, 420 U.S. at 444, 95 S. Ct. at 1092-93; *Mattz, supra*, 412 U.S. at 504-05, 93 S. Ct. at 2257-58. The State of New York's actions-or inactions-regarding the ratification of the Treaty of Canandaigua did not somehow exempt the State from the normal operation of federal law concerning the diminishment of an Indian reservation.

Simply put, the plain language of the Treaty of Canandaigua indicates to this court that this Treaty conferred recognized title to the Cayugas concerning the subject property. The State of New York did not have a compensable property interest in this land at the time this Treaty was ratified. New York's failure to object to the federal government's ratification of the Treaty of Canandaigua is not a ground for this court to conclude that this Treaty did not confer recognized title to the plaintiffs concerning the subject land. Accordingly, the plaintiffs' motion for partial summary judgment must be granted, as the affirmative defense of

abandonment is legally insufficient to defeat the plaintiffs' claim to the subject land.

(2) *Plaintiffs' physical abandonment of the land.*

The defendants contend that proof of the plaintiffs' physical abandonment of this land precludes the Cayugas from prevailing on the claims asserted in the present action.<sup>9</sup>

Relying on several affidavits of Dr. Francis G. Hutchins and numerous exhibits submitted therewith, the defendants contend that there is no evidence that the Cayuga tribe ever occupied the subject land after 1794.<sup>10</sup> They claim that in that year, the Cayugas, led by an Indian named Fish Carrier, (whom the defendants allege was the Cayugas' "supreme leader" from 1775 to 1796) left Buffalo Creek and relocated to Grand River in Canada.<sup>11</sup> They further allege that the Indians who remained in the subject lands after 1794 were not members of the Cayuga tribe.<sup>12</sup>

The plaintiffs dispute these contentions. They claim that Fish Carrier was never a League Chief of the Cayugas, and that there was no one supreme leader of the Cayugas.<sup>13</sup> The plaintiffs also disagree with the

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<sup>9</sup> It appears as though this argument in support of their motion for summary judgment is based on the defendants' erroneous assumption that the plaintiffs only possessed aboriginal title to the subject land. Nevertheless, a brief review of this argument is warranted.

<sup>10</sup> See *e.g.*, fifth affidavit of Dr. Francis G. Hutchins, 9/28/90, ¶ 5(1); fourth affidavit of Dr. Francis G. Hutchins, 8/29/90 ("4th Hutchins Aff."), ¶ 5(nn).

<sup>11</sup> 4th Hutchins Aff., ¶ 5(a)-(d); 6th Hutchins Aff., ¶ 6(f)-(h).

<sup>12</sup> 4th Hutchins Aff., ¶ 5(ii)-(jj).

<sup>13</sup> Affidavit of Dr. Elizabeth Tooker, 9/26/90, ¶ 6.

defendants' assertions concerning the time of the exodus of the Cayugas from the subject land to Grand River. While they concede that some members of the tribe lived at Buffalo Creek from 1780 to 1794,<sup>14</sup> they claim that:

[T]he historical record is clear that other members of the Cayuga Nation, under the leadership of other Cayuga chiefs, continued to live on and occupy the Reservation at Cayuga Lake well after the treaties with the State of New York in 1789 and 1795 and probably into the early years of the nineteenth century.<sup>15</sup>

The plaintiffs proffered several exhibits to the court which supported their position that some members of the Cayuga tribe resided on the subject land some time after 1794.

It is clear that there are questions of fact concerning whether Fish Carrier was a supreme leader of the Cayugas who led all members of the Cayuga tribe out of the subject land in 1794. Both parties have proffered evidence to this court which supports their respective positions. However, even if the defendants are correct in their assertions concerning the Cayugas' physical abandonment of the land at issue, the plaintiffs are nevertheless entitled to partial summary judgment. As stated earlier by this court, proof of a tribe's physical abandonment of land is only a defense to a claim which is based upon aboriginal title to such land. This court has found that the plaintiffs obtained recognized title to the subject land by the Treaty of Canandaigua, and

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<sup>14</sup> See *id.* ¶¶ 8-9.

<sup>15</sup> *Id.*, ¶ 9.

therefore only Congress can divest the plaintiffs of their title to this land. Thus, evidence of the plaintiffs' physical abandonment of the subject land is both irrelevant and immaterial to the present action, which is based upon reserved title to such land.

*Conclusion*

The 1794 Treaty of Canandaigua conferred recognized title to the Cayugas concerning the land at issue in this proceeding. This Treaty did not deprive the State of New York of any property interest in such land, because the State only possessed, at most, a right of preemption regarding the subject land, i.e., the right to purchase the property if and when the Cayugas' title to the land was extinguished by the federal government. New York's acquiescence concerning federal ratification of the Treaty of Canandaigua did not prevent the plaintiffs from obtaining recognized title to the subject property. Finally, proof of the plaintiffs' physical abandonment of the property at issue is irrelevant in a claim for land based upon reserved title to Indian land, for such title can only be extinguished by an act of Congress.

Accordingly, plaintiffs' motion for partial summary judgment is granted, and defendants' motion for summary judgment is denied.

IT IS SO ORDERED.

**APPENDIX I**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK.

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Nos. 80-CV-930, 80-CV-960

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THE CAYUGA INDIAN NATION OF NEW YORK,  
ET AL., PLAINTIFFS  
AND  
THE SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR

*v.*

MARIO M. CUOMO, ET AL., DEFENDANTS

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Feb. 15, 1990

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MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

By this motion, the plaintiff Cayuga Indian Nation and the plaintiff-intervenor Seneca-Cayuga Tribe of Oklahoma (collectively referred to as “the plaintiffs” or “the Cayugas”) seek a declaration that two conveyances of land, one occurring in 1795, and the other occurring in 1807, are invalid under the Nonintercourse Act (or “Act”), 25 U.S.C. § 177. The defendants oppose said motion, claiming that questions of fact exist concerning the circumstances surrounding these conveyances. For the reasons stated below, this court grants the plaintiffs’ motion for partial summary judgment, and de-

clares that the conveyances at issue were never properly ratified by the federal government as required by the Nonintercourse Act.

#### BACKGROUND

This is the third memorandum-decision written by this court concerning the instant action, and familiarity with this case is presumed. *See Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 565 F. Supp. 1297 (N.D.N.Y. 1983) (“*Cayuga I*”), *Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 667 F. Supp. 938 (N.D.N.Y. 1987) (“*Cayuga II*”). Nevertheless, a brief review of the facts surrounding this lawsuit is in order.

The plaintiffs’ complaint seeks a declaration of their current ownership of and right to possess a tract of land in central New York State containing approximately 64,000 acres, an award of fair rental value for the almost two hundred years during which they have been out of possession of said land, and other monetary and protective relief.

This court has previously held that the plaintiffs can present evidence in support of the above claim, *see Cayuga I*, 565 F. Supp. at 1330, and in *Cayuga II* both parties’ motions for summary judgment were denied. *Id.*, 667 F. Supp. at 949.

#### DISCUSSION

The most recent pronouncement of the Nonintercourse Act, which has been in effect in various versions for nearly two hundred years, provides as follows:

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177.

As stated in *Cayuga II*, to establish a violation of the Nonintercourse Act, a plaintiff must prove that: (1) it is or represents an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States and the tribe has never been terminated.<sup>1</sup> *Cayuga II*, 667 F. Supp. at 941 and cases cited therein.

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<sup>1</sup> The Cayuga Indian Nation's members maintain that they are the direct successors in interest to the Cayuga Nation of the Six Nation Iroquois Confederacy which, until the acts complained of in

This court has found that the plaintiffs have, as a matter of law: (1) established for purposes of the Nonintercourse Act that they represent an Indian tribe within the meaning of the Act; (2) proven that the land in question is covered by the Act as tribal land, and (3) demonstrated that the requisite trust relationship concerning the fourth requirement of a Nonintercourse Act suit exists between the plaintiffs and the federal government. *Id.*, 667 F. Supp. at 943.

In that decision, it was noted that the factual record concerning the circumstances surrounding the 1795 and 1807 land conveyances was, at the time, incomplete. *Id.* at 945. Consequently, this court could not determine whether the United States had ever consented to the conveyances at issue, and both parties' motions for summary judgment were denied. *Id.* at 949.

Since that order, the parties have been afforded more than two years of additional discovery. Thus, this court is confident that the parties have had ample time to discover any and all relevant documents concerning these conveyances, and will now consider the merits of plaintiffs' contention that the United States never consented to either of these land conveyances.<sup>2</sup>

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this suit, occupied the land at issue since time immemorial. *Cayuga I*, 565 F.Supp. at 1302. The Six Nations in this Confederacy were comprised of the Oneida, Tuscarora, Mohawk, Onondaga, Cayuga and Seneca Nations. *Id.* at 1303.

<sup>2</sup> The procedural posture of this case is readily distinguishable from the procedural history found in *Oneida Indian Nation of N.Y. v. State of New York*, 520 F.Supp. 1278 (N.D.N.Y.1981), *aff'd in part, rev'd in part* 691 F.2d 1070 (2d Cir. 1982), *cert. denied* 474 U.S. 823, 106 S. Ct. 78, 88 L.Ed.2d 64 (1985).

The district court in that case had taken judicial notice of correspondence, notes, and other historical evidence proffered by the

For a treaty to be valid under the Nonintercourse Act, it must be (1) made in the presence of a federal treaty commissioner, and (2) entered into pursuant to the Constitution. See 25 U.S.C. § 177.

The plaintiffs assert that no federal treaty commissioners were present at either the 1795 or the 1807 land conveyances. Additionally, they claim that neither of these New York treaties were approved by the President with the advice and consent of the United States Senate, and therefore neither conveyance was entered into pursuant to the Constitution.

Defendants claim that federal treaty commissioners were present at the time of both land conveyances, and that the federal government ratified both of these treaties in a manner consistent with the Nonintercourse Act.

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parties as an aid in interpreting the Articles of Confederation, the Proclamation of 1783, and the 1784 Fort Stanwix Treaty. See generally *Oneida Indian Nation of N.Y. v. State of New York* 520 F. Supp. at 1308-28.

In finding the exercise of judicial notice inappropriate under the circumstances, the Second Circuit noted that “when facts or opinions found in historical materials or secondary sources are disputed, it is error to accept the data (however authentic) as evidence.” *Oneida Indian Nation*, 691 F.2d at 1086. The Second Circuit held that the opposing party in such situations should be afforded an opportunity to present information which might challenge the facts or propriety of disputed historical data. *Id.*

In the instant case, this court has utilized affidavits of historians provided by both parties in interpreting various documents relevant to the present action. Thus, unlike in *Oneida Indian Nation*, the parties here have presented information they believe supports their interpretation of disputed historical data, and therefore this court may properly reach the merits of the plaintiffs’ arguments.

(1) The presence of federal treaty commissioners.

For a conveyance to be valid under the Nonintercourse Act, the sale must be made “in the presence and with the approbation of the commissioner of the United States to hold [treaties].” 25 U.S.C. § 177. Thus, the New York treaties could only be valid if they were made in the presence of a federal treaty commissioner.

The plaintiffs contend that there is no evidence that any such commissioner was present at the time of either of the two conveyances. The defendants argue that both Jasper Parrish and Israel Chapin Jr. were present at the time the agreements at issue were made, and that these individuals were official representatives of the United States.

In light of the differing views held by the parties concerning the role these men played with respect to these conveyances, this court, with the assistance of testimony from historians provided by both parties, has examined the actions taken by both Jasper Parrish and Israel Chapin, Jr., in order to determine whether either of these individuals, or both, were federal treaty commissioners at the time of the 1795 and 1807 conveyances.

(a) *Jasper Parish.*

At the time New York entered into the 1795 and 1807 treaties with the Cayugas, Jasper Parrish was an interpreter employed by the federal government. He was present at treaty negotiations in both 1795 and 1807, and signed the 1795 treaty between New York

and the plaintiffs as a witness and as an interpreter in the federal service.<sup>3</sup>

On February 15, 1803, Parrish was appointed to the position of Indian sub-agent to the Six Nations.<sup>4</sup> On February 26, 1807, Parrish travelled with Cayuga representatives to a negotiation session in Albany, New York wherein New York agreed to purchase any remaining land-use rights the plaintiffs still possessed.<sup>5</sup> Parrish signed and witnessed the final 1807 agreement between the Cayugas and the defendants. Additionally, Parrish transmitted the consideration paid by New York State for the acquisition of the Cayuga land under the 1807 treaty.<sup>6</sup>

(b) *Israel Chapin Jr.*

General Israel Chapin, Sr. was an appointed U.S. agent to the Six Nations and was specifically authorized by both the President and Secretary of War Timothy Pickering to facilitate negotiations between the Cayugas and New York State for the sale of the land at Cayuga Lake.<sup>7</sup> After Chapin Sr.'s death, Pickering appointed Israel Chapin Jr. to succeed his father as a U.S. Agent.<sup>8</sup>

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<sup>3</sup> Affidavit of Francis G. Hutchins, 11/17/89, "Hutchins Affidavit", ¶ 4(r), 4(s).

<sup>4</sup> *Id.*, ¶ 4(t).

<sup>5</sup> *Id.*, ¶ 4(cc).

<sup>6</sup> *Id.*, ¶ 4(ee). While the defendants do not explicitly state that Parrish was a federal treaty commissioner, they do argue that, as a federal official, he was competent to treat with the Indians concerning the land conveyances at issue.

<sup>7</sup> *Id.*, ¶ 4(j).

<sup>8</sup> *Id.*, ¶ 4(k). The letter wherein Pickering appointed Chapin Jr. to this position stated: "[t]he public instruction formerly given

In claiming that Chapin, Jr. had no authority to treat with the Indians on behalf of the federal government, the plaintiffs submit a letter written by Pickering to General Israel Chapin, Sr., which stated that “unless a commissioner of the U. States holds the [Buffalo Creek] treaty neither you nor Mr. Parish are to give any countenance to it.”<sup>9</sup> The plaintiffs contend that this proves that Chapin Sr. was himself not a federal treaty commissioner.

As further support for this contention, the plaintiffs cite a letter Israel Chapin Jr. wrote to Pickering about the New York treaties. This letter stated that Chapin, Jr. had “supposed the Commissioners [present at the 1795 treaty] were fully authorized by the Government of the United States as well as that of their own with full powers to transact the business.”<sup>10</sup>

While the plaintiffs contend that this is proof that Israel Chapin Jr. did not believe himself to be a federal treaty commissioner, the defendants proffer this letter as proof that Chapin Jr. assumed he was so authorized, and this letter was sent merely to confirm his beliefs.

Additionally, the defendants have proffered testimony which indicates that Israel Chapin Jr. was in attendance with the Cayugas at Cayuga lake as an official representative of the United States when the

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to your father and which you will find among his papers, you will at present take for the general rule of your conduct.” *Id.*, ¶ 4(l).

<sup>9</sup> This letter is reproduced in plaintiffs’ Reply Memorandum in support of their motion for partial summary judgment, “Plaintiffs’ Reply Memorandum”, at exhibit 1(c).

<sup>10</sup> This letter is reproduced in plaintiffs’ Reply Memorandum in support of their motion for partial summary judgment, “Plaintiffs’ Reply Memorandum”, at exhibit 1(c).

1795 New York treaty was signed.<sup>11</sup> Further, Chapin's signature appears on the 1795 conveyance as the first among ten witnesses.<sup>12</sup>

Since there is conflicting testimony concerning whether Jasper Parrish or Israel Chapin, Jr. were officials representing the federal government at the time of the conveyances at issue, it would be inappropriate for the court, on a motion for summary judgment, to resolve this dispute in favor of the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

Accordingly, for purposes of this motion, this court will assume that federal treaty commissioners were present at the time of the 1795 and 1807 conveyances.

(2) Federal ratification of the 1795 and 1807 conveyances.

The mere presence of federal treaty commissioners at treaty negotiations, or signatures of such individuals as witnesses to conveyances of land between New York State and the Cayugas, does not amount to federal ratification of treaties under the Nonintercourse Act. Rather, the United States must consent to the alienation of tribal land by way of a "treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

The parties in this action have widely differing interpretations of this portion of the Act. The plaintiffs maintain that the language "pursuant to the constitution" requires all Indian land conveyances be entered into in accordance with the treaty \*489 making powers

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<sup>11</sup> See *id.*, ¶ 4(r).

<sup>12</sup> *Id.*, ¶ 4(s).

of the federal government as set forth in Article II, Section 2 of the Constitution. The defendants argue that the words in this statute are vague, and that the federal government may ratify an Indian treaty in any manner which demonstrates the federal government's clear and unambiguous consent to the conveyance.

In *Mashpee Tribe v. Watt*, 542 F. Supp. 797 (D. Mass. 1982), *aff'd* 707 F.2d 23 (1st Cir. 1983), *cert. denied* 464 U.S. 1020, 104 S. Ct. 555, 78 L.Ed.2d 728 (1983), the court, in discussing the requirements of the Nonintercourse Act, held that:

[u]nder the Nonintercourse Acts, the restraint on alienation could be released only by treaty or convention. Treaties and conventions are made by the President with the advice and consent of the Senate.

*Id.* 542 F. Supp. at 805.

This interpretation of 25 U.S.C. § 177 was confirmed by the United States Supreme Court in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985). In this case, the Supreme Court discussed, *inter alia*, the requirements of federal ratification of treaties under the Indian Trade and Intercourse Act.<sup>13</sup> The Court noted that all conveyances of Indian land under this Act were prohibited “except where such conveyances were entered into pursuant to the treaty power of the United States.” *Id.* at 231-32, 105 S. Ct. at 1250.

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<sup>13</sup> As the Supreme Court has noted, the Nonintercourse Act is “a stronger, more detailed version of the [Indian Trade and Intercourse] Act.” *County of Oneida*, 470 U.S. at 232, 105 S. Ct. at 1250. Additionally, the non-alienability clauses found in both the Indian Trade and Intercourse Act and the Nonintercourse Act are substantially similar. *Cayuga I*, 565 F. Supp. at 1304.

Additionally, since this court's decision in *Cayuga II*, the plaintiffs have proffered evidence which demonstrates that Timothy Pickering, whom the defendants concede was "the senior federal official, under the President, in charge of Indian affairs"<sup>14</sup> unequivocally believed that ratification under the Nonintercourse Act required a treaty signed by the President with the advice and consent of the Senate.<sup>15</sup>

Therefore, at the present time, it is clear that the 1795 and 1807 land conveyances could only be valid if they were entered into pursuant to the treaty power of the United States. This power, found in Article II, Section 2 of the U.S. Constitution, provides that "[the President] shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. Const., Art. II, Sec. 2.

In discussing whether the defendants have provided this court with any evidence of such an express federal treaty, this court has already noted that:

[a]lthough the parties are in vehement disagreement on the issue of whether ratification of the 1795 and 1807 conveyances occurred, they do not appear to disagree on the issue of whether the conveyances were accomplished by treaties made by the President with the consent of the Senate. Stated simply, the record is completely void of any indication that the president made the 1795 and 1807 treaties with the consent of the Senate. Thus, if it is

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<sup>14</sup> Supplemental Affidavit of Francis G. Hutchins, 4/25/85, ¶ 4(d).

<sup>15</sup> See letter from Timothy Pickering to John Jay, ¶ 2, reproduced in Plaintiffs' Reply Memorandum at exhibit 1(d).

ultimately decided that such requirements must be met before a valid conveyance of Indian land must be made, then the plaintiffs have established a prima facie case of a violation of the Nonintercourse Act.

*Cayuga II*, 667 F. Supp. at 944-45.

Two years later, the defendants have still failed to proffer any evidence of the federal government's express ratification of the 1795 and 1807 land conveyances.

Since there is no proof that the conveyances of 1795 and 1807 were ever ratified by the federal government in accordance with Article II, Section 2 of the U.S. Constitution, the plaintiffs are entitled to partial summary judgment on this theory alone. However, since the plaintiffs' motion could be granted under the defendants' interpretation of the Nonintercourse Act as well, this court will analyze their contention that the federal government plainly, unambiguously, and explicitly ratified the 1795 and 1807 New York treaties.

This court has previously held that, at a minimum, federal government ratification of a conveyance of Indian land must be plain, unambiguous, and explicit. *Cayuga II*, 667 F. Supp. at 944. In support of their claim that they have amply demonstrated federal ratification of the 1795 and 1807 conveyances, the defendants point to the correspondence of various figures from this country's past, including letters from former President George Washington, former Chief Justice of the U.S. Supreme Court John Jay, and former Secretary of War Timothy Pickering. The defendants also claim that the findings of the British-American Arbitral Tribunal demonstrates clear and unambiguous ratification of the

1795 and 1807 conveyances. Finally, the defendants argue that the 1838 Buffalo Creek Treaty ratified the 1795 and 1807 conveyances. These contentions will now be addressed *seriatim*.

(a) *Historical Correspondence.*

The defendants contend that federal ratification of the 1795 land conveyance is demonstrated in part by the fact that George Washington did not submit the 1795 document pertaining to this agreement to the United States Senate for ratification. In support of this theory, they proffer a letter sent by Washington to Timothy Pickering, wherein Washington states:

If the meeting of the Commissioners, appointed to treat with the . . . Cayugas . . . took place . . . any further sentiment now on the unconstitutionality of the measure would be received too late. If it did not take place, according to expectation it is my desire that you would obtain the best advice you can on the case and do what prudence, with a due regard to the constitution and laws, shall dictate.<sup>16</sup>

As this letter indicates, Washington believed that he had either been contacted too late concerning his opinion about the constitutionality of the 1795 treaty, or that the parties involved should act with prudence and due regard to the U.S. Constitution and laws when arriving at an agreement.

President Washington believed that treaties entered into under what is now the Nonintercourse Act required “‘a public treaty, held under the authority of the United States.’” *Seneca Nation of Indians v. United*

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<sup>16</sup> Hutchins Affidavit, ¶ 4(v).

*States*, 173 Ct. Cl. 917, 923 (1965). Additionally, both sides agree that George Washington “adhered steadfastly to treaty formalities” when dealing with Indian nations.<sup>17</sup>

In light of these facts, this court is not persuaded that either the aforementioned letter, or Washington’s refusal to submit the 1795 treaty to the Senate, is proof of plain, unambiguous, and explicit federal ratification of the 1795 conveyance.<sup>18</sup>

Defendants also contend that a letter from John Jay to Timothy Pickering is evidence of federal ratification of the agreements at issue. Jay, then Governor of New York, and Pickering had been debating the validity of the 1795 conveyance in light of the Indian Trade and Intercourse Act. In this letter, Jay states:

[w]hether the Constitution of the United States warrants the [Trade and Intercourse] act of Congress of the 1 March 1793, and whether the act of this State [i.e. New York] respecting the business now negotiating with the Onondaga and other tribes of Indians, is consistent with both or either of them, are questions which on this occasion I think I should forbear officially to consider and decide.<sup>19</sup>

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<sup>17</sup> Defendants’ memorandum in opposition to plaintiffs’ motion for partial summary judgment, “Defendants’ Memorandum”, p. 4, Plaintiffs’ Reply Memorandum, p. 8.

<sup>18</sup> As the plaintiffs point out, the fact that Washington never submitted the document for Senate approval or formally proclaimed the treaty may be probative of the fact that Washington viewed the document as invalid and unworthy of further consideration. *See* Plaintiffs’ Reply Memorandum, pp. 8-9, n. 4.

<sup>19</sup> Hutchins Affidavit, ¶ 4(b).

The fact that Jay, who was not a federal official at the time he wrote the letter at issue, refused to officially consider whether the proposed treaty was consistent with the U.S. Constitution is clearly not proof of plain, unambiguous, and explicit federal ratification of the 1795 conveyance.

The defendants allege that federal consent to the 1795 conveyance is further evidenced by a letter sent by Timothy Pickering in his capacity as Secretary of War to George Clinton, then Governor of New York, on January 30, 1795. This letter, which was sent “[b]y the direction of the President of the United States”, transmitted the Cayuga chiefs’ request that New York State purchase the tribe’s land-use rights.<sup>20</sup> The letter outlined the steps the chief believed should be taken by the State in acquiring the Cayuga’s land.<sup>21</sup>

The defendants claim that since Pickering’s letter did not qualify the procedure the Cayuga chief had outlined for the acquisition of the Cayuga land, Pickering, and therefore the federal government, had “[i]ntentionally or not . . . given endorsement to the procedure outlined in the chiefs’ request.”<sup>22</sup> This position is untenable.

Clearly, an unintentional act on the part of Pickering would not be a plain, unambiguous, and explicit federal ratification of the 1795 conveyance. Additionally, numerous letters written by Pickering demonstrate that he believed that any treaty with the Cayugas would have to be formally ratified by Congress before a conveyance

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<sup>20</sup> *Id.*, ¶ 4(i).

<sup>21</sup> *Id.*, ¶¶ 4(i), 4(j).

<sup>22</sup> Defendants’ Memorandum, p. 9.

of tribal land would be valid under the Indian Trade and Intercourse Act.

For example, on June 29, 1795, Pickering wrote to Israel Chapin Sr., an agent to the Six Nations. In this letter, Pickering stated that the proposed treaty between New York State and certain tribes, including the Cayugas, would be “repugnant to the law of the United States.”<sup>23</sup> Later that same year Pickering, on September 1, 1795, wrote a letter to then Governor John Jay. In describing what he believed to be the ratification requirements under the Indian Trade and Intercourse Act, Pickering stated:

[Although] the cession of Indian land will be to the State, . . . the instrument of cession is to be in the form of a treaty or convention, to be entered into “pursuant to the constitution;” of course to be ratified by the President with the advice and consent of the Senate. The State Commissioners negotiate only for the price (emphasis added).<sup>24</sup>

Thus, it is clear that Pickering believed that the proper procedure for federal ratification of an Indian treaty was an express treaty between the United States and the Indian tribe, ratified by the President with the advice and consent of the Senate. Defendants’ contentions that Pickering believed otherwise are disproven by Pickering’s own letters.

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<sup>23</sup> See letter from Timothy Pickering to Israel Chapin, Sr., reproduced in Plaintiffs’ Reply Memorandum at exhibit 1(a).

<sup>24</sup> This letter is reproduced in Plaintiffs’ Reply Memorandum at exhibit 1(d).

(b) *The British-American Arbitral Tribunal.*

The defendants also allege that findings of the British-American Arbitral Tribunal demonstrate federal ratification of the 1795 land conveyance.

On August 18, 1910, the United States and Great Britain, in an attempt to resolve certain claims which existed between the two governments, entered into an agreement which established an Arbitral Tribunal (“Tribunal”).<sup>25</sup> Among the claims to be resolved by the Tribunal was a claim by Great Britain on behalf of the Cayuga Indians of Canada.

On January 22, 1926, the Tribunal published an award which required the government of the United States to pay Great Britain \$100,000 as trustee for the Canadian Cayuga Indian tribe.<sup>26</sup> Later that year, President Coolidge, with the approval of both houses of Congress, included in the federal government’s budget the funds required to pay Great Britain this award. The defendants argue that the payment of this award demonstrates the federal government’s consent to the 1795 conveyance. However, any payments the federal government made pursuant to an arbitration award published more than one hundred and thirty years after the 1795 agreement at most constitutes an implicit ratification of the conveyance, and therefore is not evidence of a plain, unambiguous, and explicit ratification of the 1795 agreement.

The defendants also claim that “[t]he Arbitral Tribunal found unanimously that the 1795 Treaty was valid under pertinent federal law and that the federal

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<sup>25</sup> Hutchins Affidavit, ¶ 4(mm).

<sup>26</sup> *Id.*, ¶ 4(pp).

government had knowledge of and responsibility to enforce the treaty's terms."<sup>27</sup> The Arbitral Tribunal cited by the defendants found that:

[n]either in form nor in substance was the Treaty of 1795 a Federal Treaty; it was a contract of New York with respect to a matter as to which New York was fully competent to contract. In form it is exclusively a New York contract. The negotiators derived their authority from the State legislature and purported to represent the State only. The United States does not appear anywhere in the negotiations nor in the treaty. The United States Indian agent, who was present at the request of the Indians because they had confidence in him, appears as a witness in his personal, not his official, capacity.<sup>28</sup>

Since the Tribunal explicitly found that the treaty of 1795 was not a federal treaty in either form or substance, the defendants' contention that it found the conveyance valid under pertinent federal law is without merit.

(c) *The Buffalo Creek Treaty of 1832.*

The defendants' final argument in opposition to the plaintiffs' motion for partial summary judgment is that the federal government ratified the 1795 and 1807 New York treaties through its ratification of the Buffalo Creek treaty in 1832. In this treaty, which was ratified by the Senate and signed by the President, several

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<sup>27</sup> Defendants' Memorandum, p. 16.

<sup>28</sup> Nielsen, *American and British Claims Arbitration*, p. 326 (G.P.O.1926), reproduced in Plaintiffs' Reply Memorandum at exhibit "E".

New York tribes, including the Cayugas, relinquished their rights to portions of land they had owned in Green Bay, Wisconsin.

Defendants point to two aspects concerning this treaty in support of their proposition that it retroactively ratified the 1795 and 1807 conveyances at issue. First, the defendants note that R.H. Gillett, a federal treaty commissioner, in describing the Cayuga Indian tribe to then Commissioner of Indian Affairs C.A. Harris, stated that the Cayugas were a tribe consisting of 130 individuals, and that “[m]any years since this tribe sold out all their lands, and gave the Senecas \$800, for the privilege of residing on their reservations.”<sup>29</sup> Additionally, the defendants note that Article 10 of the Buffalo Creek Treaty states that the Cayuga Indian tribe “agree[s] to remove from the State of New York to their new homes within five years and to continue to reside there.”<sup>30</sup> The defendants contend that “in ratifying the Buffalo Creek Treaty, the President and the Senate explicitly approved the removal of the plaintiffs from New York State”, and therefore, by analogy, the 1795 and 1807 treaties.

However, as with their arguments concerning the British-American Arbitral Tribunal, the events discussed by the defendants concerning the Buffalo Creek treaty at best demonstrate an implicit, rather than an explicit, approval of the 1795 and 1807 conveyances.

Since this court has previously held that congressional ratification under the Nonintercourse Act must be explicit, and not implicit, *see Cayuga II*, 667 F. Supp. at 944, 945, the defendants’ contention that the 1795 and

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<sup>29</sup> Hutchins Affidavit, ¶ 4(jj).

<sup>30</sup> Defendants’ Memorandum, pp. 19-20.

1807 conveyances were ratified by the subsequent ratification of the Buffalo Creek treaty is without merit.

In sum, none of the correspondence proffered by the defendants as proof of the federal government's alleged ratification of the 1795 and 1807 land conveyances demonstrates that the United States consented to these purported treaties in plain, unambiguous, and explicit terms. Additionally, evidence proffered by the defendants concerning the findings of the British-American Arbitral Tribunal, and the effect of the Buffalo Creek Treaty of 1832 is, at most, proof of an implicit ratification of the 1795 and 1807 agreements, and therefore insufficient to demonstrate explicit ratification of the conveyances, as would be required by the defendant's interpretation of the Nonintercourse Act.

#### CONCLUSION

The defendants have been unable to establish a genuine issue of material fact concerning alleged ratification by the federal government of the 1795 and 1807 land conveyances at issue. There is no evidence before this court that the President, with the advice and consent of the Senate, ever ratified these conveyances by an express federal treaty. Additionally, the defendants have not proven that the circumstances surrounding the conveyances demonstrated a plain, unambiguous, and explicit ratification of the New York treaties by the United States government. For both of these reasons, this court grants the plaintiffs' motion for partial summary judgment.

IT IS SO ORDERED.

**APPENDIX J**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK.

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Nos. 80-CV-930, 80-CV-960

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THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,  
PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR

*v.*

MARIO M. CUOMO, ET AL., DEFENDANTS

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Aug. 21, 1987

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MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

In this action, one of a number with which the court has dealt involving Indian land claims, the court is being asked by the plaintiff, the Cayuga Nation of New York, and the plaintiff-intervenor, the Seneca-Cayuga Tribe of Oklahoma (the plaintiffs),<sup>1</sup> to determine that two conveyances of land, one occurring in 1795, and the other occurring in 1807, violated the Nonintercourse Act (or the Act), 25 U.S.C. § 177. The court has already

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<sup>1</sup> The court need not resolve any dispute at this time between the plaintiff and the plaintiff-intervenor as to who has the actual right to claim interest in the land in question.

written one lengthy opinion in this action denying the defendants' motions to dismiss, and in that opinion, with which familiarity will be presumed, the court set forth in detail the basic factual background of this action. *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297 (N.D.N.Y. 1983) (McCurn, J.). Currently pending before the court are a motion by the plaintiffs for partial summary judgment and motions by the defendants for summary judgment made pursuant to Fed. R. Civ. P. 56.

Before addressing the merits of the motions, the court should make clear its role at this stage of the proceedings. In a recent trilogy of cases, the Supreme Court has illuminated the responsibility of the district court and the burdens on the parties when dealing with summary judgment motions. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

In *Anderson*, the Court stated:

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.

ment; the requirement is that there be no genuine issue of material fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

106 S. Ct. at 2510. The Court went on to state:

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes* [v. *S.H. Kress & Co.*, 398 U.S. 144 [90 S. Ct. 1598, 26 L.Ed.2d 142] (1970)],

*supra*, and [*First National Bank of Arizona v. Cities Service* [Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L.Ed.2d 569 (1968) ], *supra*, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service*, 391 U.S., at 288-289, 88 S. Ct., at 1592. If the evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 82, 87 S. Ct. 1425, 18 L.Ed.2d 577 (1967) ( per curiam ), or is not significantly probative, *Cities Service, supra*, [391 U.S.] at 290, 88 S. Ct. at 1592, summary judgment may be granted.

*Id.* at 2511. In *Celotex*, the Court discussed the burden on a party opposing a motion for summary judgment:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson v. Liberty Lobby, Inc.*, [477] U.S.

[242], [—], 106 S. Ct. [2505], [—], 90 [91] L.Ed.2d [202] (1986).

106 S. Ct. at 2552-53. With the procedural fundamentals of summary judgment motions firmly in hand, the court will proceed to address the merits of the pending motions.

### I.

The most recent pronouncement of the Nonintercourse Act, which has been in effect in various versions for almost two hundred years, is as follows:

#### § 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177.

The plaintiffs contend that the 1795 and 1807 conveyances of land, made pursuant to treaties with the State of New York, were invalid under the Act because the requisite federal government ratification was never received.

To establish a violation of the Nonintercourse Act, a plaintiff must show that: (1) it is or represents an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States and the tribe has never been terminated or abandoned. *Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527, 537-38 (N.D.N.Y. 1977), *aff'd and rem'd*, 719 F.2d 525 (2d Cir.1983), *aff'd in part and rev'd in part*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902 (D. Mass. 1977).

The defendants, asking for no quarter and giving none, are battling the plaintiffs right from the start by arguing that the plaintiffs have yet to prove their tribal existence. The plaintiffs argue, among other things, that they are recognized as Indian tribes by the federal government and that the federal government has had a continuous relationship with them for a great number of years.

Based on affidavits by federal government officials that have been submitted to the court, there is no doubt that the federal government officially recognizes the Cayuga Nation of New York and the Seneca-Cayuga Tribe of Oklahoma as Indian tribes. The government acknowledges the Cayuga Nation of New York as the same tribe with whom it entered into the 1794 Treaty of

Canandaigua,<sup>2</sup> and it recognizes the Seneca-Cayuga Tribe of Oklahoma as a successor tribe to the tribe with whom it treated in 1794. *See* Rainbolt Affidavit attached to Plaintiffs' Memorandum of Law in Support of Partial Summary Judgment and Krenzke Affidavits attached to Plaintiffs' Amended and Supplemental Motion for Summary Judgment and Memorandum of Plaintiff-Intervenor Seneca-Cayuga Tribe of Oklahoma in Response to Plaintiffs' Motion for Partial Summary Judgment.

The defendants maintain, however, that federal recognition is insufficient to establish tribal status for the purposes of a Nonintercourse Act claim and that the plaintiffs must prove that they have had a continuous tribal existence since the time of the challenged conveyances to the present time. In support of their position, the defendants rely primarily on *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

That case, though, does not stand for the proposition that federal recognition is irrelevant to a determination of tribal status. The Mashpees are not recognized as a tribe by the federal government. Consequently, the court was constrained to look for other evidence of tribal status and applied several different factors in

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<sup>2</sup> As set forth in the court's earlier opinion in this case:

[The Treaty of Canandaigua] acknowledged the Original Reservation retained by the Cayugas through their treaty of 1789 with New York State, and contained a promise by the United States that the land would remain theirs until the Cayugas "chose to sell the same to the people of the United States who have the right to purchase."

*Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1304-05 (N.D.N.Y. 1983).

making its ultimate determination. In recognizing the importance of federal recognition, the court did state:

Because most groups of Indians involved in litigation in the federal courts have been federally recognized Indians on western reservations, the courts have been able to accept tribal status as a given on the basis of the doctrine going back at least to *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57, 18 L.Ed. 667 (1867), that the courts will accord substantial weight to federal recognition of a tribe. See, e.g., *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975).

*Id.* at 582.

In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), referred to above, the court was also confronted with a Nonintercourse Act claim where the plaintiff tribe lacked federal government recognition. The court proceeded to determine that the plaintiff was nonetheless still a “tribe” for purposes of a suit under the Act but did note that federal recognition would conceivably be of “great significance” in determining tribal status. *Id.* at 377.

The plaintiffs contend that the question of tribal status is a non-justiciable political question and that recognition of the tribes by the federal government is binding on the court. There is case authority in support of the plaintiffs’ position. See *United States v. State of Washington*, 384 F. Supp. 312, 401 (W.D. Wa. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975); *United States v. Aam*, 670 F. Supp. 306 (W.D. Wa. 1986). In *Aam*, the court stated that “The Court must extend great deference to the political departments in determining whether Indians are recognized as a tribe. This

determination closely resembles a political question, which should not be resolved by the courts. *Baker v. Carr*, 369 U.S. 186, 215 [82 S. Ct. 691, 709, 7 L.Ed.2d 663] (1962).” At —.

This court has itself recognized the importance of federal government determinations of tribal status. “The question of whether the plaintiffs are the proper parties is an issue which, as previously explained, is to be resolved whenever possible through executive determinations of tribal status.” *Oneida Indian Nation of New York v. State of New York*, 520 F.Supp. 1278, 1301 (N.D.N.Y. 1981) (McCurn, J.), *aff’d in part and rev’d in part*, 691 F.2d 1070 (2d Cir. 1982). Moreover, in a recent First Circuit decision involving the Mashpees, that court could not have made much clearer the great deference that it gives federal government recognition of tribal status. *Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480 (1st Cir. 1987). The court initially discussed the history of the litigation and that a jury had found, as a matter of fact, that the Mashpees are not a tribe. The court went on, though, to refer to the “difficulty” in the Mashpees’ case that resulted from the lack of federal executive or legislative branch recognition. *Id.* at 484. The court cited with approval the standard for federal recognition set forth by Professor Cohen,<sup>3</sup> and going even further, looked to a recently

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<sup>3</sup> Normally a group will be treated as a [tribe or a] “recognized” tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has had some continuing political relationship with the group.

*Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 484 (1st Cir. 1987) [citing F. Cohen, Handbook of Federal Indian Law at 6

published federal government list of recognized Indian tribes as evidence of tribal status. *Id.* While the Mashpees and four other “tribes” involved in that litigation are not on the list, the Cayuga Nation of New York and the Seneca-Cayuga Tribe of Oklahoma are listed. 51 Fed. Reg. 25115 (July 10, 1986).

Future court decisions may lead to a clear rule that the issue of tribal status is a political determination that binds the courts. As noted, there is some authority for that proposition at this time. However, even if a court is not bound by federal government recognition of a tribe, such recognition should be given great weight in any determination of tribal status. Notwithstanding the defendants’ protests and presentation to the court of “questions of material fact” on the issue of tribal status, the court has little hesitation in holding that there is no genuine issue of material fact regarding the tribal status of either of the plaintiffs. The court concludes that, for the purposes of a Nonintercourse Act suit, tribal status of the Cayuga Nation of New York and the Seneca-Cayuga Tribe of Oklahoma has been established as a matter of law.

The second requirement in an action based on an alleged Nonintercourse Act violation is that the land in question must be covered by the Act as tribal land. There appears to be no dispute that the land under consideration in this case, that conveyed in 1795 and 1807, is covered by the Act as tribal land, and the court so concludes as a matter of law.

Similarly, advancing to the fourth requirement for a Nonintercourse Act suit, there is no argument re-

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(1982)]. The plaintiffs in the instant action meet the above-quoted test.

garding the existence of a trust relationship between the federal government and the plaintiff tribes. Obviously, the defendants have implicitly challenged any relationship with the tribes by challenging the existence of the tribes themselves. However, they have not addressed themselves specifically to the issue of a trust relationship. The affidavits by federal government officials mentioned earlier leave no doubt that the requisite trust relationship does exist, and the court concludes that this requirement has been met.

The third, and at this point, crucial requirement that the plaintiffs must meet is to establish that the federal government did not consent to the 1795 and 1807 conveyances. As stated in the Act itself, no conveyance is valid unless made by a treaty or convention entered into pursuant to the Constitution. 25 U.S.C. § 177. Not surprisingly, the plaintiffs and the defendants maintain quite different positions on just how literally the language of the statute should be read.

The defendants contend that federal government consent to the alienation of tribal land, by ratification of a land conveyance, need not be in the form of an express federal treaty or convention made by the President with the consent of the Senate. Further, the defendants contend that ratification need not be explicit.

Addressing the second point first, the Supreme Court has unequivocally held that congressional intent to terminate title to Indian land must be plainly and unambiguously expressed. *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247-48, 105 S. Ct. 1245, 1258-59, 84 L.Ed.2d 169 (1985). It is difficult, if not impossible, for the court to envision instances where implicit federal government ratifica-

tion will be plain and unambiguous. As held in *Oneida Indian Nation of New York v. County of Oneida*,” Termination of Congressional responsibility under the Nonintercourse Act must be explicit.” 434 F. Supp. at 538. Further, Justice Brennan has stated, “[I]nterests in Indian lands can be conveyed only pursuant to explicit congressional authorization.” (footnote omitted). *Mountain States Telephone & Telegraph Company v. Pueblo of Santa Ana*, 472 U.S. 237, 257-58, 105 S. Ct. 2587, 2599, 86 L.Ed.2d 168 (1985) (Brennan, J., joined by Marshall, J. and Blackmun, J., dissenting). The court is unwilling to accept the defendants’ argument that implicit congressional ratification will satisfy the requirements of the Act.

As for the defendants’ first point on this issue, stating that federal government ratification of a conveyance of Indian land must be plain and unambiguous, as well as explicit, does not necessarily answer the question of whether such ratification must be by express federal treaty. At least one court has held that any conveyance of Indian land must be by an express treaty or convention made by the President with the consent of the Senate. *Mashpee Tribe v. Watt*, 542 F. Supp. 797, 805 (D. Mass. 1982), *aff’d*, 707 F.2d 23 (1st Cir. 1983).

Further, the Supreme Court itself has touched upon this question. In *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, the Court addressed the issue of ratification of conveyances of Indian land. Confronted with the argument that there was language in two different treaties, one entered into in 1798 and the other in 1802, that served to ratify conveyances that occurred in 1795, the Court held that neither treaty evidenced an intent by either the Senate or the Pre-

sident to ratify the conveyances. 470 U.S. at 248, 105 S. Ct. at 1259. The Court stated that the language in the treaties that purportedly served to ratify the conveyances was neither plain nor unambiguous. *Id.* Although it could have, however, the Court did not set down an unequivocal rule that any conveyance of Indian land must be by express federal treaty in order to comply with the Nonintercourse Act. Thus, the question of the form that ratification must take is, at least in this court's view, not completely settled.<sup>4</sup>

Arriving at the uncertain answer that a conveyance of Indian land may require a treaty made by the President with the consent of the Senate is not of tremendous assistance in resolving the issues before the court at this time. Although the parties are in vehement disagreement on the issue of whether ratification of the 1795 and 1807 conveyances occurred, they do not appear to disagree on the issue of whether the conveyances were accomplished by treaties made by the President with the consent of the Senate. Stated simply, the record is completely void of any indication that the President made the 1795 and 1807 treaties with the consent of the Senate.

Thus, if it is ultimately decided that such requirements must be met before a valid conveyance of Indian

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<sup>4</sup> The plaintiffs argue that ratification cannot occur subsequent to the conveyances. However, that the Supreme Court, in *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985), was examining language in 1798 and 1802 treaties to determine if there was any ratification of conveyances that occurred in 1795 lends strong support to the defendants' position that ratification need not occur contemporaneously with the conveyances. *See id.* at 246-48, 105 S. Ct. at 1258-59.

land can be made, then the plaintiffs have established a prima facie case of a violation of the Nonintercourse Act.

However, because the court, at least at the present time, is not completely convinced that there must always be an express federal treaty in order to validly convey Indian land, it deems it wise to determine if there were any acts or circumstances surrounding the conveyances that could lead to a finding of plain and unambiguous ratification.

Having said that, the court is constrained to note that the evidence that it has examined in this regard does not favor the defendants. The defendants point to the involvement of federal officers Israel Chapin and Jasper Parrish with the 1795 treaty and Jasper Parrish with the 1807 treaty. Further, the defendants argue that the 1838 Treaty of Buffalo Creek served to ratify the 1795 and 1807 conveyances. The plaintiffs make several cogent arguments as to why none of the circumstances surrounding the conveyances evidence ratification on the part of the federal government, and in *Oneida Indian Nation of New York v. County of Oneida*, the court discussed the specious nature of the argument regarding the Buffalo Creek Treaty. 434 F. Supp. at 538-40. What must be remembered at all times, and is worth repeating, is that ratification must be plain and unambiguous, as well as explicit.

The court is quite cognizant, though, that at this stage of the proceedings, its role is not to weigh the evidence, but to determine whether there are any genuine issues of material fact. The court concludes that the defendants have demonstrated the existence of open questions of material fact that should be resolved before a final determination in this action is reached.

Particularly in a case with the wide-ranging ramifications of this one, the development of a complete factual record regarding the circumstances of the conveyances will serve to facilitate a more accurate, and thus, more just, resolution.

Additionally, although it perhaps does not directly rebut the establishment of a prima facie case of a Nonintercourse Act violation, the defendants have presented some support for an argument that the plaintiffs abandoned the land in question before the conveyances took place. *See Williams v. City of Chicago*, 242 U.S. 434, 37 S. Ct. 142, 61 L.Ed. 414 (1917); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354, 62 S. Ct. 248, 255, 86 L.Ed. 260 (1941). The plaintiffs' only response to this argument is that they did not raise this point in their motion for summary judgment and that it is inappropriately addressed at this time. Since both sides are moving for summary judgment, the court cannot imagine just what the appropriate time to address this defense might be. What the court can conclude at this time is that the defendants have sufficiently raised issues of material fact regarding alleged abandonment by the plaintiffs and that this issue cannot be resolved by summary judgment.

As for the plaintiffs' motion for partial summary judgment, then, the court reiterates its holding that the plaintiffs have met the first, second, and fourth requirements for the establishment of a prima facie case of a Nonintercourse Act violation. The court concludes, however, that further factual development is needed on the issues of ratification of the conveyances and the alleged abandonment by the plaintiffs of the land in question.

## II.

The defendants' motions for summary judgment are premised on several grounds, which the court will attempt to address in order.

The defendants' initial point is that the plaintiffs are barred, by the doctrine of election of remedies, from pursuing their Nonintercourse Act action in this court. In 1906, the Cayuga Nation of New York petitioned the State of New York, in the form of what is known as a memorial, for additional consideration for the land conveyed in 1795 and 1807. In 1913, a settlement was reached for approximately \$247,600, and a trust was established by the State on behalf of the Cayuga Nation. According to the defendants, that trust had a principal of over \$433,000 in 1972.

Further, in 1951, the Seneca-Cayuga Tribe of Oklahoma petitioned the Indian Claims Commission of the federal government (ICC or the Commission) for additional consideration for the 1795 and 1807 conveyances. In 1974, there was a trial on the liability issue which occurred after a lengthy litigation process that included an earlier trial and a remand by the United States Court of Claims. The ICC found in favor of the Seneca-Cayugas, and in 1975, a settlement was reached between that tribe and the federal government for just over \$70,000. In 1977, the settlement was approved; in 1978, there was a final judgment incorporating the settlement; and in 1983, a fund distribution plan was approved by Congress. The defendants assert that each tribe has elected its remedy, and the plaintiffs

cannot now come before this court for the proverbial “second bite of the apple.”<sup>5</sup>

The doctrine of election of remedies is given little, if any, validity in federal practice; see *Carbone v. Gulf Oil Corp.*, 812 F.2d 1416, 1421 (T.E.C.A. 1987); and under any circumstances is considered a harsh doctrine that is not favored. *Quinn v. DiGiulian*, 739 F.2d 637, 644 (D.C. Cir. 1984). In order to apply the doctrine, there must be: (1) the existence of two or more remedies; (2) the inconsistency of such remedies; and (3) a choice of one of them. *Davis v. Rockwell International Corp.*, 596 F. Supp. 780, 787 (N.D. Oh. 1984).

What must not be lost sight of in this discussion is that any conveyance of land in contravention of the dictates of the Nonintercourse Act is invalid, as if it did not occur at all. Because either plaintiff tribe sought additional consideration for the land, or even received such consideration, does not place an imprimatur of validity on the conveyances. The receipt of additional monies is of no bearing on the issue of whether there was compliance with the Act.

Therefore, even if the doctrine of election of remedies were generally accepted in federal practice, which it is not, the court concludes that it is inapplicable here. Neither plaintiff was afforded a true choice of remedies, as the receipt of additional consideration is no remedy at all for an invalid conveyance of land.<sup>6</sup> The court thus

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<sup>5</sup> This election of remedies argument, on which one group of defendants in particular devotes a great deal of energy, differs little from an argument based on *res judicata*.

<sup>6</sup> The defendants do contend that the Indian Claims Commission was in a position to rule on the validity of the conveyances and

finds no merit to the defendants' argument based on the doctrine of election of remedies.<sup>7</sup>

The defendants' next argument is that the court lacks subject matter jurisdiction over this action, because the Indian Claims Commission provided the exclusive forum to resolve disputes regarding the validity of the conveyances. The ICC, which is no longer in existence, was created by Congress to resolve Indian claims against the United States. 25 U.S.C. § 70a *et seq.* There is no mention in the statute of the Commission having any jurisdiction to hear claims against non-federal parties.

In support of their argument, the defendants rely on three cases: *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir.1983); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir.1981); and *Navajo Tribe of Indians v. State of New Mexico*, No. 82-1148-JB, slip op. (D.N.M. Jan. 23, 1984), *aff'd*, 809 F.2d 1455 (10th Cir. 1987). These cases differ from the instant one in several respects. Most notable, though, is that the defendants in all three cases were the United States and other parties that derived their title to the land in question directly from the United States. Those facts prompted the courts to hold that the ICC was the exclusive forum for the resolution of the disputes and, in *Navajo Tribe of Indians v. State of New Mexico*, that the United States was an indispensable party. Slip op. at 6.

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in fact did so, at least as to the 1807 conveyance. As will be discussed presently, this contention is not well taken.

<sup>7</sup> Should the plaintiffs ultimately prevail on the issue of liability, that they received additional consideration for the land in question may become pertinent to the issue of damages.

There is no question that, in the case sub judice, the defendants did not derive title to the disputed land directly from the United States, and there is no basis upon which to hold that the United States is an indispensable party.<sup>8</sup> See *Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. at 544-45. The court in that case also stated that:

A more important question, whether the Indian Claims Commission was created to provide an exclusive remedy for redress of wrongs to the Indian nations, was not raised by the defendants but deserves comment. . . . The legislative history makes clear that the Commission was to consider only claims against the United States; no intent to supplant Indian claims against other parties, governmental or private, is evidenced.

434 F. Supp. at 531 n. 9.<sup>9</sup> The court therefore concludes that it does not lack subject matter jurisdiction over the instant action.

The defendants further assert in support of their motions for summary judgment that the proceedings before the Indian Claims Commission served to create a preclusive bar to the action in this court. There are two main doctrines of preclusion, *res judicata* and *collateral estoppel*.<sup>10</sup> *Res judicata* has been defined as follows:

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<sup>8</sup> The United States has filed an amicus brief in this action on the issue of tribal status of the plaintiffs.

<sup>9</sup> The defendants maintain that the court's statement regarding the congressional purposes in creating the Indian Claims Commission was "merely" dicta. Dicta or not, this court agrees with the statement.

<sup>10</sup> The defendants at times indiscriminately mix the doctrines of *res judicata* and *collateral estoppel*.

The principle of *res judicata* bars a subsequent suit between the same parties or their privies where a prior action has resulted in a judgment on the merits of the same cause of action. *Res judicata* prevents the subsequent litigation of any defense or ground for recovery that was available to the parties in the original action, whether or not it was actually litigated or determined.

*Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981); see also *National Association of Pharmaceutical Manufacturers v. Department of Health and Human Services*, 586 F. Supp. 740 (S.D.N.Y. 1984). Clearly, none of the defendants in this district court action, nor their privies, were defendants in the ICC action.<sup>11</sup> Moreover, as the court has already concluded that the ICC was created to resolve claims against the United States, the plaintiffs could not have proceeded against non-federal defendants, at least not against those who did not derive title directly from the United States, in that forum. Therefore, *res judicata* does not serve as a bar to this federal court action.<sup>12</sup>

While *res judicata* involves claim preclusion, collateral estoppel involves issue preclusion:

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<sup>11</sup> The Cayuga Nation of New York also argues that it was not in privity with the Seneca-Cayuga Tribe of Oklahoma in the Indian Claims Commission proceeding. The court concludes that there are open questions of fact in that regard, but that issue is irrelevant to the court's determination at this time.

<sup>12</sup> The court also notes the existence of a statutory *res judicata* bar to Indian Claims Commission decisions. 25 U.S.C. § 70u(b); *United States v. Dann*, 706 F.2d 919, 923-25 (9th Cir.1983), *rev'd on other grounds*, 470 U.S. 39, 105 S. Ct. 1058, 84 L.Ed.2d 28 (1985). However, as that bar applies only to claims against the United States, it has no bearing in the instant case.

The doctrine of collateral estoppel . . . normally will bar the relitigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties, if the determination was essential to the judgment, regardless of whether or not the two proceedings are based on the same claim.

*N.L.R.B. v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir.1983). Additionally, similarity between the issues is not sufficient; the issues must be identical. *Shapley v. Nevada Board of State Prison Commissioners*, 766 F.2d 404, 408 (9th Cir. 1985).

The defendants maintain that because the ICC made some findings regarding the federal government's "involvement" with the 1795 and 1807 conveyances, the issue of federal ratification has already been decided. Regarding the 1795 treaty, the Commission merely found that the federal government had knowledge of New York State's intention to purchase land from the Cayugas and that the Cayugas complained to the federal government about the fairness of the treaty. The *Cayuga Nation of Indians v. United States*, Docket No. 343, 36 Ind. Cl. Comm. 75, 79 (1975). As for the 1807 treaty, the Commission found again that the federal government had knowledge of the treaty, and the Commission also found that a government representative was involved in the treaty negotiations and was present at the signing. *Id.* at 80.

The court has already held that the development of a full factual record regarding the circumstances of the conveyances is in order. The findings of the ICC may eventually have some pertinence in that regard. Those findings, however, standing alone, do not support the conclusion that there was plain, unambiguous, and

explicit ratification of either the 1795 or 1807 conveyance. The issue of federal government ratification was not before the ICC. It was not raised; it was not litigated; and it was not essential to the ICC's decision. Thus, collateral estoppel does not bar this court's determination of the issue of federal government ratification of the conveyances.

Consequently, the court refuses to leapfrog to the next conclusion that the defendants would have it reach. The conclusion is that, because the 1807 treaty between the Cayugas and the State of New York has already been found "valid," then the 1795 treaty must be considered "valid" as well. The 1807 treaty has certainly not been found valid, and even if it were, the court is not convinced at this point in time that its validity would serve to automatically ratify the 1795 treaty.

The defendants' final contention in support of their motions is that, because the Indian Claims Commission was created by Congress, and because it resolved the claim of the Seneca-Cayuga Tribe of Oklahoma for additional consideration, it ratified the 1795 and 1807 land conveyances. The defendants have again lost sight of the fact that federal ratification must be plain, unambiguous, and explicit. An award by the Commission need not be based on a finding of validity of the conveyances themselves.<sup>13</sup> See *United States v. Oneida Nation of New York*, 576 F.2d 870, 882 n. 26 (Ct. Cl. 1978). Even if such a presumption of validity could be

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<sup>13</sup> As noted, the additional consideration received by the Seneca-Cayuga Tribe of Oklahoma was not so much by award as by settlement.

made, the ratification by the Commission would be implicit, not explicit.

Further, that the Commission was created by Congress did not give it inherent ratification power. Such a contention was presented to the court in *Oneida Indian Nation of New York v. County of Oneida*, No. 79-7685 (N.D.N.Y. May 17, 1979). In refuting the contention, the court held that, had Congress wanted to provide the ICC with ratification power, it could have done so, but it did not.<sup>14</sup> Transcript at 74-97. The court agrees with that holding and finds no merit to the defendants' argument regarding the ratification power of the Indian Claims Commission.

Accordingly, for the reasons adduced in this opinion, the plaintiffs' motion for partial summary judgment and the defendants' motions for summary judgment are denied. Further proceedings will be limited to the issues of federal government ratification and alleged abandonment by the plaintiff tribes as discussed herein.

IT IS SO ORDERED.

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<sup>14</sup> The Supreme Court has made clear that it will examine congressional intent quite carefully when interpreting statutes that allow for the alienation of Indian land. In *Mountain States Telephone & Telegraph v. Pueblo of Santa Ana*, 472 U.S. 237, 105 S. Ct. 2587, 86 L.Ed.2d 168 (1985), the Court had occasion to examine a statute that allowed for the alienation of Pueblo Indian land. That statute provides for approval by the Secretary of Interior. Notwithstanding that the remaining language in the statute is almost identical to that contained in the Nonintercourse Act, the Court noted that the difference between approval by the Secretary of Interior and ratification by Congress is "significant." *Id.* at 250-51, 105 S. Ct. at 2595-96.

**APPENDIX K**

UNITED STATES COURT OF APPEALS  
FOR THE NORTHERN DISTRICT OF NEW YORK

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Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, BY ITS  
CHIEFS, FRANKLIN PATTERSON, JAMES LEAFFE,  
VERNON ISAAC, KENNETH JOHN, AND FRANK  
BONAMIE, INDIVIDUALLY AND AS MEMBERS OF THE  
CAYUGA INDIAN NATION OF NEW YORK, PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR

*v.*

MARIO M. CUOMO,\* AS GOVERNOR OF THE STATE OF  
NEW YORK; THE STATE OF NEW YORK; MILLER  
BREWING COMPANY; THE COUNTY OF CAYUGA, NEW  
YORK; CONSOLIDATED RAIL CORPORATION; DAVID L.  
KOCH; GEORGE G. SOUHAN; THE COUNTY OF SENECA,  
NEW YORK; AND NEW YORK STATE ELECTRIC AND GAS  
CORPORATION, INDIVIDUALLY AND AS  
REPRESENTATIVES OF ALL OTHERS SIMILARLY  
SITUATED, DEFENDANTS

THE CAYUGA INDIAN NATION OF NEW YORK, BY ITS  
CHIEFS, FRANKLIN PATTERSON, JAMES LEAFFE,  
VERNON ISAAC, KENNETH JOHN, AND FRANK  
BONAMIE, INDIVIDUALLY AND AS MEMBERS OF THE  
CAYUGA INDIAN NATION OF NEW YORK, PLAINTIFFS

AND

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\* Pursuant to Rule 25(d)(1) Mario M. Cuomo is substituted for  
Hugh L. Carey as defendant in this action.

THE SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR

*v.*

WILLIAM J. KIRK, GAIL KIRK, HENRY W. KOCH,  
BARBARA F. KOCH, ROBERT MAIER,  
CHARLES HITCHCOCK, PHILO BACON, WILMA  
ANTHONY, DANIEL A. DEPASQUALE,  
ALICE M. DEPASQUALE, RICHARD HILL, AND  
VIRGINIA HILL, DEFENDANTS

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May 26, 1983  
As Amended Sept. 19, 1983

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**MEMORANDUM-DECISION AND ORDER**

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McCURN, District Judge.

The Cayuga Indian Nation and five chiefs of that tribe seek a declaration of their current ownership of and right to possess a 64,015 acre tract of land in central New York State, an award of fair rental value for the almost 200 years during which they have been out of possession, and other monetary and protective relief. The Cayugas allege that this tract is reserved for their tribe by treaties with both the United States and the State of New York, and has been subject to a restraint against alienation under the Nonintercourse Act, now codified at 25 U.S.C. § 177. Though the tract was conveyed to the State through transactions in 1795 and 1807, and thereafter conveyed, in large part, to private purchasers, the Cayugas claim that under federal law their right to possession has never been extinguished.

This suit is one of a recent series of land claims brought by eastern Indian tribes in the federal courts.<sup>1</sup> Such claims have imposed upon the courts the painful task of determining whether, and how, federal commitments to tribes are to be enforced against states, against municipalities, and against innocent non-Indians who have for generations considered the land their own. Most of the claims, like this one, challenge the validity of conveyances by the tribes which occurred after the adoption of the Constitution, and after the enactment of the first Nonintercourse Act. Although as of this date only one such claim has reached a final judgment for the plaintiffs, *Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35 (N.D.N.Y. Oct. 5, 1981) (Port, J.), *appeals docketed*, (2d Cir. June 11, 1982; June 24, 1982), others have withstood a variety of challenges to the jurisdiction of the court and the legal sufficiency of the complaint.

For example, it has been established that a claim asserting a possessory right conferred by treaty and protected by the Nonintercourse Act is within the subject matter jurisdiction of the federal court, *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974); that the claim may be maintained by any bona fide Indian tribe, *Joint Tribal Council of the Passamaquoddy Tribe v.*

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<sup>1</sup> It is likely that this recent surge of tribal land claims was prompted, in large part, by the enactment of 28 U.S.C. § 2415 which, as amended, set a deadline of December 31, 1982 for the filing of certain claims. For a discussion of other factors in the revival of these long-dormant claims, see Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 *Me. L. Rev.* 17, 47-49 (1979-80).

*Morton*, 528 F.2d 370, 377 (1st Cir. 1975); *Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp.*, 418 F. Supp. 798, 808 (D.R.I. 1976); and may be maintained without joinder of the federal government, *Narragansett Tribe of Indians v. So. R.I. Land Dev. Corp.*, *supra*, 418 F. Supp. at 810-813; that defenses based upon state law such as adverse possession, statutes of limitation, laches, or estoppel by sale are unavailable to the defendants, *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 615 n.3 (2d Cir. 1980); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 541-44 (N.D.N.Y. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780, 783-85 (D. Conn. 1976); *Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp.*, *supra*, 418 F. Supp. at 803-06; that the Nonintercourse Act was meant to apply throughout the United States and not only to land in “Indian Country”, *Mohegan Tribe v. State of Connecticut*, *supra*, 638 F.2d 612; and is not geographically limited by the “surrounded by settlements” exception in the Trade and Intercourse Acts. *Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp.*, *supra*, 418 F. Supp. at 808-809.

Further instruction on the maintainability of tribal land claims has recently appeared in a Second Circuit decision reviewing the dismissal of one such action by this Court. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070 (2d Cir. 1982), *aff’g in part and rev’g in part Oneida Indian Nation of New York v. State of New York*, 520 F. Supp. 1278 (NDNY 1981). Although *Oneida* largely concerned a pre-constitutional claim (it was alleged that conveyances in 1785 and 1788 were invalid under Article IX, clause 4 of the Articles of Confederation), the Court’s discussion of the availability of particular defenses is largely applicable to any

tribal claim which asserts the nonalienability of Indian land under federal law. Thus it is pertinent here that the Second Circuit rejected in *Oneida* defenses based on the Eleventh Amendment immunity of states, *id.* at 1079-80, the nonjusticiability doctrine, *id.* at 1080-1083, state time-bars, *id.* at 1083-84, and federal time-bars, *id.* at 1084.

Presently before the Court are further challenges to jurisdiction and the legal sufficiency of a tribal land claim. These challenges are raised by means of (1) a joint motion by the Counties of Cayuga and Seneca, Miller Brewing Company, Consolidated Rail Corporation, and New York State Electric and Gas Corporation (hereinafter “the non-state defendants”), who appear individually and as representatives of the defendant class, to dismiss the complaint pursuant to Rules 12(b)(1) and (6), Fed. R. Civ. P., and (2) a motion by the State of New York and Governor Carey (hereinafter “the state defendants”), also individually and as representatives of the defendant class, to dismiss the complaint pursuant to Rules 12(b)(1), (2) and (6), Fed. R. Civ. P.

The arguments raised by the defendants in support of their motions are, to a large extent, variants of arguments presented to this and other courts in previous tribal land claim litigation. *E.g.*, sovereign immunity, nonjusticiability, statutes of limitations, geographic nonapplicability of the Nonintercourse Act, equitable defenses. These have invariably been rejected in such cases and must be rejected in this case as well. The defendants have advanced other arguments herein which lead the Court into less well-charted territory. *E.g.*, unavailability of an implied right-of-action under the Nonintercourse Act or of a federal common law

remedy, abatement of statutory claims. However, for the reasons stated below, these relatively new contentions do not warrant dismissal of the complaint.

I. THE PARTIES

A. The Plaintiffs

The plaintiff Cayuga Indian Nation of New York asserts that it is an Indian Nation or Tribe recognized by the United States and principally situated in New York State, though without a reservation. Its members maintain that they are the “direct successors in interest” to the Cayuga Nation of the Six Nation Iroquois Confederacy which, until the acts complained of in this suit, had occupied the subject land in New York State since time immemorial. They state that tribal relations have been continuously maintained to the present time.

By *Memorandum-Decision and Order* of November 9, 1981, the Court granted a motion by the Seneca-Cayuga Tribe of Oklahoma to intervene as a plaintiff in this suit, pursuant to Rule 24, Fed. R. Civ. P. The Seneca-Cayuga Tribe had established sufficient interest in the action for the purpose of intervention by their allegations that, at the time of the challenged transactions, it had been “incorporated within and was a part of the Cayuga Nation of Indians.” According to the Intervenor, the Cayugas split into two branches after they lost their Original Reservation to New York State. One branch settled in Western New York State, and is, apparently, the branch represented by the Cayuga Indian Nation of New York. The Intervenor Seneca-Cayuga Tribe purports to represent the other, larger branch of the Cayugas, which had moved first to Ohio, then to “Indian Territory” (now Oklahoma). The Order permitting intervention does not impair the right of the

plaintiff Cayuga Indian Nation of New York or the defendants to challenge the Intervenor's entitlement to a share of the recovery from this lawsuit, if any is ultimately awarded.<sup>2</sup>

#### B. The Defendants

The initial complaint in this action, filed November 19, 1980, named numerous defendants sued individually and as representatives of a proposed class of "all other persons who assert an interest in any portion of the Original Reservation lands. . . ." *Complaint* ¶ 25. Those named included the Governor of New York, numerous administrative agencies, authorities and officials, the Counties of Cayuga and Seneca, various local governmental entities and officials, and various commercial and individual landowners. Plaintiffs have estimated the number of persons asserting an interest in the land as exceeding 7,000 individuals and entities.

On December 1, 1980, the plaintiffs commenced a second action, *Cayuga Indian Nation v. William J. Kirk, et al*, 80-CV-960, asserting the same legal claim against twelve individual owners of land in the contested area. By *Memorandum-Decision and Order* of March 25, 1981, 89 F.R.D. 627, this Court ordered the consolidation of the two actions brought by the Cayugas, pursuant to Rule 42(a), Fed. R. Civ. P.

By that same *Memorandum-Decision and Order*, as amended, this Court certified a defendant class,

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<sup>2</sup> Although plaintiff Cayuga Indian Nation of New York and the plaintiff-intervenor Seneca-Cayuga Tribe have submitted separate briefs in opposition to the motions to dismiss, the briefs are similar enough to permit the Court to treat them collectively in this opinion, by referring to the allegations or arguments of "the plaintiffs" or "the Cayugas".

pursuant to Rule 23(b)(1)(B), Fed. R. Civ. P., for the purpose of litigating certain specified but key issues in this lawsuit. After notice to the class and a hearing, at which several individuals and a corporation lodged objections to the certification, all objections were overruled and a motion to decertify the class was denied. *Order* of March 31, 1982. A list of those named defendants who have been designated as representatives of the class for the purpose of this motion appears in the title of this decision.

## II. FACTUAL ALLEGATIONS

Plaintiffs allege that from time immemorial until the late eighteenth century the Cayuga Nation owned and occupied over 3,000,000 acres in what is now central New York State. They produce as an exhibit to their complaint in 80-CV-930 a map indicating a strip of land, about 50 miles wide, running from Lake Ontario to the Pennsylvania border; the strip is labeled “Cayuga Aboriginal Land Area”. The present suit is not an assertion of possessory rights to the entire Aboriginal Land Area, but to a portion thereof which was purportedly reserved for the Cayugas, then lost, in the course of the events alleged below.

During the colonial period in our history, the British Crown pursued a policy of protecting Indian tribes in the peaceful protection of their land. In furtherance of this policy, a treaty was concluded in 1768 at Fort Stanwix, establishing a boundary between the American colonies and the Six Nations—an Indian confederation comprised of the Oneida, Tuscarora, Mohawk, Onondaga, Cayuga and Seneca Nations. Plaintiffs state that a portion of this boundary corresponded to a portion of the eastern boundary of the Cayuga aboriginal territory.

At the conclusion of the American Revolution, Congress assumed authority over relations with Indians, pursuant to Article IX, clause 4 of the Articles of Confederation.<sup>3</sup> In exercise of its new authority, and allegedly to promote peaceful relations with the Indian tribes, Congress issued a Proclamation in 1783 which reiterated its “sole and exclusive”, but qualified, right to regulate trade and manage affairs with Indians. In addition, it prohibited the purchase of or settlement on certain Indians’ lands without the express authority and direction of the federal government.

The following year, federal commissioners met with the Six Nations and concluded the Treaty of Fort Stanwix, 7 Stat. 15 (1784). Article II of the Treaty delineated the boundaries of the Six Nations, including the boundary of the Cayuga Nation.

Notwithstanding the federal restrictions under the Articles of Confederation, the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix, the State of New York concluded a treaty with the Cayuga Indian Nation on February 25, 1784 in Albany; the Cayugas thereby relinquished all of their lands to New York, reserving for their own tribal use the 64,015 acres that is the subject of this action. This remaining area, referred to

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<sup>3</sup> The Articles of Confederation, Art. 9 cls. 1, 4, provides in pertinent part:

The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war . . . entering into treaties and alliances . . . .

The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.

by the Cayugas as the “Original Reservation”, is depicted on the map attached to the complaint as two swaths of land on the eastern and western shores at the northern end of Cayuga Lake.

Less than a week later, on March 2, 1784, the United States Government under the Constitution commenced. *See, Oneida Indian Nation of New York v. State of New York*, 520 F. Supp. 1278, 1323 (NDNY 1981).

In 1790, Congress enacted the first in a series of Trade and Intercourse Acts, *Act of July 22, 1790*, ch. 33, 1 Stat. 137, pursuant to Congress’ authority under Article I, § 8, clause 3 of the Constitution. Section four of that Act constituted the first Nonintercourse Act. It provided:

. . . That no sale of lands made by any Indians or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made or duly executed at some public treaty, held under the authority of the United States.

The Trade and Intercourse Act of 1790, which included the above-quoted Nonintercourse Act, was a temporary measure, and expired in 1793. It was replaced by the Trade and Intercourse Act of 1793, *Act of March 1, 1793*, ch. 19, 1 Stat. 329, which in Section 8, contained a revised Nonintercourse Act:

. . . That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution. . . .

The Act went on to establish penalties for its violation, and to carve certain exceptions to its coverage. The “non-alienability clause” set forth above has remained substantially the same through successive re-enactments of the Act, and is now codified at 25 U.S.C. § 177.

The Cayugas next state that on November 11, 1794, the Six Nations concluded another treaty with the United States at Canandaigua. This treaty, 7 Stat. 44, acknowledged the Original Reservation retained by the Cayugas through their treaty of 1789 with New York State, and contained a promise by the United States that the land would remain theirs until the Cayugas “chose to sell the same to the people of the United States who have the right to purchase.”

We are then told that on June 16, 1795, William Bradford, then Attorney General of the United States, issued an opinion on the question of whether the State of New York had a right to purchase land from the Six Nations or from any of the individual tribes without the participation of the federal government. The Attorney General concluded that, under the Nonintercourse Act of 1793, no sale of land by an Indian tribe was valid, nor could the claims of the New York Indians be extinguished, except by a treaty entered into by the federal government.

On July 27 of that same year, however, while the Nonintercourse Act of 1793 was still in effect, a treaty was entered into at Cayuga Ferry, New York, by which New York State acquired the entire Cayuga reservation except for a three mile parcel on the eastern shore of Cayuga Lake. As consideration, the state agreed to pay the Cayuga Nation \$1,800 annually in perpetuity.

Plaintiffs allege that the treaty negotiations were conducted by state officials without the consent and approbation of the federal government. A federal official, Israel Chapin, was among those who signed the treaty on July 27 as a witness, but he purportedly informed the Secretary of War Pickering shortly thereafter that he had attended the treaty signing as a private individual and not as a commissioner representing the United States.<sup>4</sup>

The Nonintercourse Act was re-enacted in 1796, *Act of May 19, 1796*, ch. 30, 1 Stat. 469, § 12; in 1799, *Act of March 3, 1799*, ch. 46, 1 Stat. 743 § 12; and in 1802, *Act of March 30, 1802*, ch. 13, 2 Stat. 139 § 12. In 1807, during the effective period of the 1802 Act, New York State purchased the remaining three mile parcel held by the Cayugas for \$4,800. Plaintiffs allege that this conveyance, too, was without the consent and approbation of the federal government.

### III. PLAINTIFFS' CLAIM

Plaintiffs have styled their suit “a defendant class action to declare plaintiffs’ current ownership of and right to possess certain lands in the State of New York . . . the right to which is conferred by federal law and

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<sup>4</sup> In ¶ 47 of their Complaint, plaintiffs allege that Chapin wrote again to Secretary Pickering, to inform him of a grievance expressed to him by a party of Cayugas from the reservation. The Cayugas allegedly explained that the land was sold out from under them; that those who signed on behalf of the Cayugas were Canadian Indians and not residents of the reservation; that the remaining three mile parcel was too small for their usage. Since plaintiffs’ claim is based on the nonalienability of the parcel, and not on the unfairness of the transaction, this particular allegation is surplusage.

which is subject to restrictions against alienation.”<sup>5</sup> *Complaint* ¶ 1. Their claim for relief assertedly arises under Article IX of the Articles of Confederation; the Proclamation of 1783; the Treaty of Fort Stanwix (1784); the Treaty of Canandaigua (1794); Article I, Section 8 of the United States Constitution (the Commerce Clause); 25 U.S.C. § 177 and its predecessor, the 1790 Nonintercourse Act, Article 37 of the 1777 New York Constitution, and the common law. Elsewhere in the Complaint, plaintiffs add that their title is protected by the Fifth and Fourteenth Amendments to the United States Constitution. *Complaint* ¶ 49.<sup>6</sup> With respect to the common law bases for their claim, references are made in plaintiffs’ papers to “ejectment”, “trespass”, “waste” and “conversion”, either as analogous forms of action or as indices of damages.

The Seneca-Cayugas, in their *Amended Complaint in Intervention*, at 2, invoke 42 U.S.C. § 1983 as a further statutory basis for the action.

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<sup>5</sup> Because of the peculiar nature of tribal land tenure, the Cayugas do not claim to hold fee title to the land, such title having been appropriated by the European sovereign upon “discovery”. See, *Oneida Indian Nation of New York v. State of New York*, 691 F.2d at 1074-75. Plaintiffs’ claim is to the “Indian title” or “right of occupancy”, long recognized to be “good against all but the sovereign”. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. at 667, 94 S. Ct. at 777 (1976). See, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823). See also, note 10, *supra*.

<sup>6</sup> At one point in their papers, the Cayuga Indian Nation of New York refers to the action as one for “a declaratory judgment and ancillary relief.” *Plaintiff’s Memorandum of Law* at 7. However, the applicability of 28 U.S.C. § 2201, which authorizes that remedy, is nowhere discussed by the parties.

As is apparent, the plaintiffs are not specifying a single source for their substantive possessory right, or a single source for their right of action. However, it may be noted here that the particular theory of plaintiffs' case which has been the focus of argument and is the focus of this decision is that plaintiffs' substantive right to the subject land has been confirmed by federal and state treaties, and has been subject to the restraint against alienation in the Nonintercourse Act; that the right to maintain this action is derived from the Nonintercourse Act itself or from federal common law.

The relief sought by plaintiffs is (1) a declaration of their current ownership and right to possess the land in question; (2) an order restoring the plaintiffs to possession of the land and ejecting the defendants; (3) an accounting of all taxes paid on the land from 1795 to the present; (4) trespass damages in the amount of the fair rental value of the land since plaintiffs' dispossession; (5) establishment of a fund, comprised of all proceeds of any sales of the land in issue, for the satisfaction of trespass damages; (6) establishment of a fund, comprised of all tax proceeds collected by defendant counties for the land, for the satisfaction of trespass damages; (7) restitution for the value of all timber, oil, gas, coal, or other matter of value which has been extracted or removed from the land; and (8) establishment of a fund comprised of all future proceeds from the extraction or removal of the above natural resources.

#### IV. SUBJECT-MATTER JURISDICTION

The initial complaint invokes federal jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1362. Plaintiff-Intervenors add § 1343(3) as the jurisdictional basis for their claim of deprivation of Constitutional and statutory rights. Having determined that the suit presents a

federal controversy brought by an Indian tribe, the Court concludes that it has jurisdiction over the subject matter of this claim pursuant to § 1331 and § 1362.

In *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) (hereinafter “*Oneida v. County of Oneida*”), the Supreme Court considered a tribal claim conceptually identical to the claim now asserted by the Cayugas. The Oneidas alleged aboriginal ownership of a vast area of what is now New York State and further alleged that their right to possess a more modest area was confirmed by treaties with the federal government, including the Treaty of Fort Stanwix (1784) and the Treaty of Canandaigua (1794). Notwithstanding these treaties, and despite the restraint on alienability in the Non-intercourse Act of 1793, a portion of the land reserved to that tribe was ceded to New York State in 1795.

The Court viewed the complaint in *Oneida v. County of Oneida* as asserting “a current right to possession conferred by federal law”, *id.* at 666, 94 S. Ct. at 776, and concluded:

Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362.

*Id.* at 667, 94 S. Ct. at 777.

Neither of the movant-defendants attempt to distinguish *Oneida v. County of Oneida* from the case at bar, or otherwise contend that its holding is inapplicable here. Instead, the defendant New York State seeks to exclude itself from the jurisdiction of this Court by

asserting sovereign immunity under the Tenth and Eleventh Amendments. That defense is addressed below, but it is noted here that the immunity of the State would at most deprive the Court of jurisdiction over the State, and not over the subject matter.

Although the non-state defendants have also moved to dismiss for lack of subject matter jurisdiction, the defenses they assert either challenge the timeliness or legal sufficiency of the complaint (statutes of limitations, equitable defenses, geographic non-applicability of the Nonintercourse Act, no right of action, abatement of statutory claims) or the justiciability of the claim, which is a *sui generis* ground for dismissal, not a jurisdictional defect. *See, Powell v. McCormack*, 395 U.S. 486, 512, 89 S. Ct. 1944, 1959, 23 L. Ed. 2d 491 (“there is a significant difference between determining whether a federal court has ‘jurisdiction over the subject matter’ and determining whether a cause over which a court has subject matter jurisdiction is justiciable”).

Thus, none of the contentions advanced by the movants upsets our initial conclusion that the Court has jurisdiction over the subject matter of this action.

#### V. SOVEREIGN IMMUNITY

Defendant New York State seeks dismissal of the claim against it by reason of its sovereign immunity preserved by the Tenth Amendment or created by the Eleventh Amendment. In effect, the State requests this Court to reconsider its recent determination, in *Oneida Indian Nation of New York v. New York State*, 520 F. Supp. 1278, 1301-08 (N.D.N.Y. 1981) (hereinafter “*Oneida v. New York*”), that Congress, in enacting 28

U.S.C. § 1362, abrogated the state's Eleventh Amendment immunity from tribal suits.<sup>7</sup>

In the interim between the submission of papers on this motion and the issuance of this decision, that particular holding of *Oneida v. New York* was affirmed by the Second Circuit. In *Oneida v. New York*, 691 F.2d 1070 (2d Cir. 1982), the Court of Appeals stated as its premise that,

When the states granted to Congress the power “[t]o regulate commerce . . . with the Indian tribes,” U.S. Constitution, Art. I, § 8, cl. 3, they necessarily “surrendered a portion of their sovereignty,” *Parde v. Terminal Railway*, 377 U.S. 184, 191 [84 S. Ct. 1207, 1212, 12 L. Ed. 2d 233] (1964), and thereby granted Congress the power to abrogate the state's immunity from suits upon claims arising out of such regulation.

*Id.* at 1079-80.

The Court then noted that the purpose of 28 U.S.C. § 1362, as discerned in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) was “to open the federal courts to the kind of claims that could have been brought by the United States as a trustee, but for whatever reason were not so brought.” *Id.* at 1080, citing *Moe, supra*, 425 U.S. at 472, 96 S. Ct. at 1636. Satisfied that the Eleventh Amendment would not bar a suit brought by the federal government on behalf of an Indian tribe, the Court

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<sup>7</sup> 28 U.S.C. § 1362. *Indian tribes* The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

concluded that Congress, in enacting § 1362, “indicate[d] an intent to remove the state’s 11th Amendment immunity in suits brought by tribes.” *Id.* at 1080. In closing the Court specified that states are subject to monetary damages as well as declaratory and injunctive orders under § 1362.

There was no assertion of Tenth Amendment immunity in *Oneida v. New York*, as there is by the State here; however, that precise defense was recently considered, and unequivocally rejected, in *Mohegan v. Connecticut*, 528 F. Supp. 1359, 1367-69. This Court is in full agreement: there is no support for the view that the Tenth Amendment preserves any preconstitutional attributes of sovereign immunity which have not been abrogated by Congress and which would bar this type of claim. On the contrary, the rationale of the *Oneida v. New York* holding clearly applies—perhaps in even greater force—to the defense of Tenth Amendment immunity: the States implicitly granted Congress the power to abrogate their immunity with respect to Indian affairs within the scope of Congressional power under Article I; Congress exercised that power when it enacted § 1362. The explicit reservation of immunity in the Eleventh Amendment therefore cannot bar this action; *a fortiori*, any vestige of immunity under the more general Tenth Amendment would also be ineffectual.

There are, of course, some attributes of state sovereignty which are specifically protected by the Tenth Amendment from the exercise of Congressional power under the Commerce Clause. See *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976). But the scope of such immunity is narrow, applying only where the state can show that (1) the challenged statute regulates the “States as

States,” (2) the statute addresses matters that are indisputable attributes of state sovereignty; (3) compliance would impair the state’s ability “to structure integral operations in areas of traditional governmental functions.” *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 1060-61, 75 L. Ed. 2d 18 (1983), citing *Hodel v. Virginia Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 286-288, 101 S. Ct. 2352, 2364, 69 L. Ed. 2d 1 (1981). It can hardly be contended, and New York does not contend, that the enforcement of the Nonintercourse Act can be avoided on immunity grounds under the *Usury* doctrine.

## VI. JUSTICIABILITY

The non-state defendants have also asked this Court to renounce an aspect of its decision in *Oneida v. New York*, and hold that plaintiffs’ claim is not justiciable. The argument is twofold: (A) the relief requested cannot be judicially molded, and (B) the action presents solely political questions.

### A. Availability of Relief

Defendants have cited this Court’s recognition, in *Oneida v. New York*, that “serious, if not insurmountable problems . . . would arise out of granting the plaintiffs the relief they seek,” 520 F. Supp. at 1296, and that “an award of possession . . . would create utter chaos and disaster to many, socially, economically, and politically.” *Id.* at 1295. They build upon these concerns by describing in their brief the more dramatic potential consequences of an award of possession: *e.g.*, the loss of homes, businesses, and municipal facilities; the transfer of sovereignty over the land and its unwilling inhabitants to the Cayuga Indian Nation and its tribal government.

The dire warnings of the defendants are not unheard by this Court, and should plaintiffs ultimately prevail the utmost circumspection and restraint will be employed in fashioning an appropriate remedy. But the fact that a particular remedy sought may be unavailable or impractical as too disruptive or unfair does not render a lawsuit unjusticiable, so long as there is some form of relief that the Court could fashion. *Cf. Powell v. McCormack*, 395 U.S. 486, 498-99, 89 S. Ct. 1944, 1951, 23 L. Ed. 2d 491 . By way of example and not prediction, it may be noted that in the one recent tribal claim to reach final judgment, plaintiffs were awarded historically adjusted monetary damages as compensation for the illegal alienation of their land. *Oneida v. County of Oneida*, *supra*, 70-CV-35 (May 5, 1982), *appeals docketed* (by plaintiffs, June 11, 1982; by defendant, June 24, 1982).

In *Oneida v. New York*, where the tribal plaintiffs sought some five million acres of New York land, this Court concluded that there were standards by which to formulate some relief should the plaintiffs establish their claim, 520 F. Supp. at 1297, and the claim was therefore justiciable. The Second Circuit upheld this Court on that point, observing that “Indian land claims have traditionally been asserted in the courts of this country for resolution.” 691 F.2d at 1081. *See also, Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 664 (D. Me.), *aff’d*, 528 F.2d 370 (1st Cir. 1975). In the Second Circuit’s view, plaintiffs’ request for a declaration of its possessory rights renders the claim justiciable, even if no other relief can be devised. *Id.* at 1082, *citing Powell v. McCormack*, *supra*, 395 U.S. at 517, 89 S. Ct. at 1961. But it refused to concede that a compensatory remedy could not be

fashioned, or that “fair rental value” was an indeterminate basis for damages. Moreover, in response to an argument that the scale of the claim rendered it unjusticiable, the Court wrote, “we know of no principle of law that would relate the availability of judicial relief to the gravity of the wrong sought to be redressed.” *Id.* at 1083.

Defendants assert that great disruption has already been caused by the mere filing of this suit, and will worsen over the course of what promises to be lengthy litigation. The Court is aware of this and joins with other courts and commentators in regretting that too few of the eastern tribal land claims have been resolved by legislation or negotiated settlement. *See, e.g., Oneida v. New York*, 691 F.2d at 1081-82; *Oneida v. County of Oneida*, 434 F. Supp. at 531; *Comments: Indian Land Claims Under the Nonintercourse Act*, 44 *Albany L. Rev.* 110, 134-37; Clinton and Hotopp, *supra*, 31 *Me. L. Rev.* at 89. But in the absence of such preferable solutions, access to the courts is and must be available, and the hardship inflicted upon parties *pendente lite* does not render the suit nonjusticiable.

#### B. *Political Question*

Defendants next contend that this action poses solely political questions and is thus nonjusticiable under *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1961). They maintain that the issues raised have been constitutionally committed to either the President or Congress, and that adjudication by the Court creates a “potential for embarrassment resulting from multifarious pronouncements by various branches of the federal government.” *Baker v. Carr*, *supra*, 369 U.S. at 217, 82 S. Ct. at 710.

The identical arguments were raised by the defendants in *Oneida v. New York* and rejected, both in this Court and on appeal. In so doing, the Second Circuit observed that the political question doctrine is “‘essentially a function of separation of powers’,” citing *Baker v. Carr*, *supra* at 217, 82 S. Ct. at 710, and it concluded that:

adjudication of Indian land claims such as the instant action is wholly consistent with the prevailing conceptions of the relationship among the three branches of government concerning the appropriate means to redress the historical wrongs committed against the Native American.

691 F.2d at 1081. The Court then added that the executive and legislative branches of the federal government have acknowledged the justiciability of such claims, and that, to its knowledge, no Indian land claim had ever been dismissed as nonjusticiable. *Id.* at 1081-82.

In light of the Second Circuit decision in *Oneida v. New York*, it can no longer be seriously maintained that tribal land claims are nonjusticiable due to the difficulty of molding relief or due to the possible strain on our political concept of the separation of governmental powers.

#### VII. STATUTE OF LIMITATIONS

The two transactions which are challenged in this lawsuit occurred over 1 3/4 centuries ago. One might expect that the term of some applicable statute of limitations would have long ago elapsed, shielding the defendants from the disruption and prejudice inherent in defending an aged claim. Nevertheless, the Second Circuit decision in *Oneida v. State of New York* makes it clear that this claim is not time-barred.

At the outset of its discussion, the Court rejected the view that a state statute of limitations could bar the action *ex proprio vigore*. The Court’s reasoning was that “the United States as a trustee on behalf of an Indian tribe would not be subject to state delay-based defenses,” and therefore, “[i]t would be anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves.” 691 F.2d at 1083-84.

However, the defendants do not contend here that the state statute governs of its own force and effect. Instead, they—to be precise, the state defendants—argue that there is no federal statute of limitations which is applicable to plaintiff’s claim, and that under such circumstances the most analogous state statute of limitations should be “borrowed” and applied as federal law. *See, Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 462, 95 S. Ct. 1716, 1721, 44 L. Ed. 2d 295 (1975). This Court is thus invited to reject the view taken in *Capitan Grande Bank of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 471 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S. Ct. 143, 46 L. Ed. 2d 106 (1975), and by Judge Port in *Oneida v. County of Oneida*, *supra*, 434 F. Supp. at 542, that 28 U.S.C. § 2415 governs the timeliness of actions brought by tribes on their own behalf, as well as those brought by the United States as trustee.<sup>8</sup>

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<sup>8</sup> 28 U.S.C. § 2415. *Time for Commencing actions brought by the United States*

(a) . . . an action for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the

The state defendants' argument for a restrictive reading of 28 U.S.C. § 2415 (and for a correspondingly restrictive reading of *Capitan Grande* and *County of Oneida*) is weighty, but now academic. The Second Circuit has answered "the question whether a delay based defense founded on federal law may be asserted," holding that "at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States." *Oneida v. New York*, 691 F.2d at 1084. That holding is dispositive as to the timeliness of this action. The Cayuga's cause of action accrued prior to 1966 and was filed prior to December 31, 1982. The United States could have brought this action on behalf of the tribe. 28 U.S.C. § 2415(a), (c), (g). It is at least as timely though brought by the Cayugas themselves.

#### VIII. EQUITABLE DEFENSES

The non-state defendants also advance a delay-based defense, invoking certain common law principles of equity. Relying upon *Felix v. Patrick*, 145 U.S. 317, 12 S. Ct. 862, 36 L. Ed. 719 (1892) and *Yankton Sioux*

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right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) . . . shall not be barred unless the complaint is filed after December 31, 1982. . . .

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

. . .

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

*Tribe of Indians v. United States*, 272 U.S. 351, 47 S. Ct. 142, 71 L. Ed. 294 (1926), they contend that the equitable remedies of rescission and restitution are no longer available where the use and value of the land claimed has changed drastically, and where it is held by innocent purchasers.

In the Court's view, this argument may still be pertinent to the appropriateness of particular remedies, but can no longer refute the timeliness or maintainability of the action. As discussed in the preceding section, Congress has determined such claims to be timely when brought by the United States, 28 U.S.C. § 2415; and the Second Circuit has made it clear that tribal claims brought within that statutory period are also timely. *Oneida v. New York*, *supra*, 691 F.2d at 1084. An equitable argument that the action is untimely due to changed circumstances cannot override federal legislation. *See, Oneida v. New York*, *supra*; *Oneida v. County of Oneida*, *supra*, 434 F. Supp. at 542.

This is not to say that the equitable considerations noted in *Felix v. Patrick* and in *Yankton Sioux Tribe* will play no role in this lawsuit. Should plaintiffs ultimately prevail, equitable factors will be carefully weighed before any relief is granted. *See, Oneida v. New York*, *supra*, 520 F. Supp. at 1296. And, as stated previously in the discussion of justiciability, any such relief will be fashioned with the utmost restraint. However, those equitable factors do not render this action unmaintainable.

As a further equitable defense, the non-state defendants argue that a claim for rescission cannot be asserted against parties not in privity with the plaintiff unless fraud is alleged. Their support for this proposition is *Gordon v. Burr*, 506 F.2d 1080 (2d Cir. 1974), in

which a purchaser of stock was allowed the remedy of rescission against a salesman where there was fraud, despite a lack of privity. Defendants' argument is faulty for several reasons. First, the Cayugas are not seeking rescission, or equitable cancellation of the conveying instruments—a remedy generally available only where the party lacks a plain, adequate, and complete remedy at law. 12A *C.J.S.* Cancellation of Instruments §§ 10, 11 (1980). Instead, they seek the appropriate legal remedy for one out of possession who claims a paramount right to possession: recovery of possession and damages through an action in ejectment. 28 *C.J.S.* Ejectment § 1-2, 25b (1941). Such an action may be maintained against a defendant in possession of the property, without regard for privity of estate or contract. 28 *C.J.S.* Ejectment §§ 25(2), 32.

Moreover, the holding in *Gordon v. Burr*, *supra*, is simply not instructive as to the availability of rescission with respect to the case at bar. In *Gordon*, the Court acknowledged that privity is ordinarily required “where an action for rescission is based on a contract theory—mistake or breach of contract . . . see, generally 3 Corbin Contracts § 613 (1960); 5 *id.* § 1104.” 506 F.2d at 1083. It then declared the inapplicability of that privity requirement where “a suit is predicated on fraud.” The Cayugas' claim, however, is not predicated on mistake, breach of contract, or fraud; it is predicated on the inalienability of tribal land under federal law. Nothing in *Gordon v. Burr* or any other case to the Court's knowledge limits the availability of rescission, in this type of claim, to plaintiffs in privity of contract with the defendant.<sup>9</sup>

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<sup>9</sup> In the course of arguing this point, the parties devoted considerable attention to issues which are more pertinent to a

Thus, neither of the equitable defenses asserted herein warrant either dismissal of the claim or the preclusion of any particular remedy against the non-state defendants.

#### IX. LEGAL SUFFICIENCY OF THE CLAIMS

In determining whether the plaintiffs have stated a claim upon which relief can be granted, we accept as true all material factual allegations in the complaint, and construe the complaint in favor of the complaining party. *Scheur v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Oneida v. New York*, 691 F.2d at 1074 (2d Cir. 1982). Dismissal under Rule 12(b)(6), Fed. R. Civ. P., is not

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conceptually similar defense: that the Cayugas may not recover against subsequent bona-fide purchasers of parcels in the claim area. Thus, the parties debated whether the conveyances should be deemed void *ab initio*, or merely voidable, and whether the statutory restraints against alienation are fully and equally enforceable against all current occupiers of the claimed land.

The defense of the bona-fide purchaser is a serious question which is not squarely before the Court on these motions, because it involves cognizance of matters outside the pleadings. The Court has not been briefed on the question, and it appears not to have been explicitly decided in prior decisions. *But see, Oneida v. County of Oneida*, 434 F. Supp. at 530 (“Although the present owners of the 100,000 acres may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act.”) *See also*, Comments, *supra*, 44 Albany L. Rev. 110, 131. The Court therefore declines to address issues of crucial importance to a defense not yet raised, where it is unnecessary for evaluating the defense that has been raised. It is sufficient, then, to hold that the absence of privity of contract does not bar plaintiffs from asserting their right of possession against current occupiers of the land.

warranted unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, *supra*, 355 U.S. at 45-46, 78 S. Ct. at 101-02; *Oneida v. New York*, 520 F. Supp. at 1308. It is with these principles in mind that the Court turns to the following challenges to the legal sufficiency of the Cayuga’s claim: the inapplicability of the Nonintercourse Act to preemption States; the unavailability of a private right of action under the Nonintercourse Act, or of a federal common law remedy; the abatement of plaintiff’s statutory claims.

#### X. APPLICABILITY OF THE NONINTERCOURSE ACT TO PREEMPTION STATES

It is the contention of the State defendants that the 1793 version of the Nonintercourse Act contained a change in language from its 1790 predecessor that reveals a Congressional intent to exclude New York State and other states with “preemptive rights” from its coverage.<sup>10</sup> The language of the 1790 Act, with the pertinent clause underscored, is as follows:

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<sup>10</sup> An explanation of what is meant by “pre-emptive rights” appears in *Mohegan Tribe v. State of Connecticut*, *supra*, 638 F.2d at 616-17:

In accordance with the “right of discovery” of the European settlers, native Indians found in this country were granted the “right of occupancy” to their lands. That is, the natives were allowed to remain upon their lands, but their freedom to alienate those lands was restricted. The land could be sold only to the European settlers or the governmental authority representing those settlers . . . Thus, while the Indians retained the “right of occupancy,” the settlers retained the “fee interest” in the land and retained a “pre-emptive right” to purchase the land from the Indians. After the Revolution, this “pre-emptive right” lay in the individual states—at least in the

. . . no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

*Act of July 22, 1790*, ch. 33, 1 Stat. 137 § 4.

The 1793 version, which was operative at the time of the challenged 1795 conveyance, omits the underscored clause and reads as follows:

. . . no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution. . . .

*Act of March 1, 1793*, ch. 19, 1 Stat. 329 § 8. The same language appears in the 1802 version, which was in effect at the time of the challenged 1807 conveyance.

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already settled part of the country. And when the states joined the Union, unless they ceded the lands, they retained their “pre-emptive rights.” Nevertheless, the right to purchase Indian lands was not inconsistent with federal control over the extinguishment of Indian occupancy. Thus, the first Nonintercourse statute provided that even where the states retained “pre-emptive” rights to purchase the land, the federal government was responsible for overseeing any transfer of land from the Indians to the states.

*See also, Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823); *Oneida v. County of Oneida*, 414 U.S. 661, 666, 94 S. Ct. 772, 776, 39 L. Ed. 2d 73; *Oneida v. New York*, 520 F. Supp. at 1311.

Conceding that the 1790 statute applied uniformly throughout the United States, defendants argue that the deletion of the preemptive rights clause in the 1793 version was a deliberate measure to permit the original states to acquire Indian lands without federal supervision. Support for this proposition is derived from *Seneca Nation of Indians v. Christie*, 126 N.Y. 122, 145, 27 N.E. 275 (1891) in which the New York Court of Appeals concluded that the omission “place[d] purchases of Indian lands within the states upon a different footing than other purchases,” and from *United States v. Franklin*, 50 F. Supp. 152 (N.D.N.Y. 1943) in which the district court found that “the omission is significant when viewed in the light of the practical construction given to the Act by both the State of New York and the United States.” Defendants emphasize this last point, that contemporaneous and longterm construction confirms the non-applicability of the act to the original states, and they insist that it has not only been the state and federal governments, but the Cayugas themselves that have up to now proceeded on the assumption that the transactions were valid.

In determining the scope of a statute, the Court must first examine its language. *North Dakota v. United States*, 460 U.S. 300, 103 S. Ct. 1095, 1102-03, 75 L. Ed. 2d 77 (1983); see, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 246, 62 L. Ed. 2d 146 (1979). “Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). The language of the 1793 and 1802 Nonintercourse Acts reveals no ambiguity whatsoever as to their geographic scope. By

their express terms both are applicable to land transactions “within the bounds of the United States,” and area that has always included the State of New York. It is difficult to conceive why Congress would have employed this unequivocally inclusive language if it sought to exclude from coverage most of the territory formerly within the scope of the statute. If such was its intent, one would expect Congress to have simply changed the previous clause, “any state, whether having the right of pre-emption or not,” to some variant of “any state, except those having the right of pre-emption.” Instead, Congress omitted all reference to preemption states, apparently deeming any reference superfluous, and made the statute applicable “within the bounds of the United States.” In our view, that change of language evidences, if anything, a legislative intent to remove all doubt as to the uniformly-inclusive nature of the nonalienability clause.

In *Mohegan Tribe v. State of Connecticut, supra*, 638 F.2d 612, the Second Circuit closely examined the geographical scope of the Nonintercourse Act, and concluded that “the statute was meant to apply to Indian Land throughout the United States.” *Id.* at 620. The defendants in that case had argued that the statute did not apply to eastern states because of the “surrounded by settlements” exception which appeared in each of the Trade and Intercourse Acts from 1793 to 1834. That provision stated that:

nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of the individual states.

In determining whether this provision limited the geographical scope of the Nonintercourse Act, the court first noted, as we have, that the plain language of the act admits of no intra-national geographical limitations, and that the presence of geographical limitations in other sections of the Act “suggest[s] that Congress was careful to distinguish between regulations applicable only to Indian country and those applicable to all Indian tribes and their lands.” *Id.* at 620.

Next, the Court examined the legislative and jurisdictional history of the Trade and Intercourse Acts, and found it consistent with “reading the Nonintercourse Statute, as its language suggests, to include encroachment upon Indian lands throughout the United States.” *Id.* at 622. In reaching that conclusion the Court encountered the same argument advanced by the defendants here, that longstanding contemporaneous interpretation is indicative of the non-applicability of the statute to eastern states. It rejected that argument, stating:

We believe that, although considerable evidence amassed by the State supports the proposition that the federal government did not avail itself of the provisions of the Nonintercourse statute and appeared to leave management of the affairs of the eastern tribes to the individual states, it does not follow that the federal government had no obligation to do so, or that the states had the authority—unimpeded by the Acts—to buy land from the eastern tribes without federal approval.

*Id.* at 623.

The Court then surveyed the case law with respect to the geographic scope of the Nonintercourse Act, and concluded:

. . . the case law does not support the State's contention that we should ignore the plain language of the statute and limit the Nonintercourse statute's applicability. Moreover, while no case is controlling on the issue, *Oneida [v. County of Oneida]* does make clear that the extinguishment of all Indian title was meant to be a matter of federal concern. Since we have found no evidence that Congress intended to treat Indian lands in a different manner it would seem reasonable to believe that Congress intended a unified federal policy toward land acquisition from the Indians. In any event, we find nothing in the case law which dissuades us from our conclusion that Congress intended the Nonintercourse statute to apply throughout the United States.

*Id.*, 626. In a final section of the *Mohegan* decision, the “surrounded by settlements” exception was construed to apply only to those provisions of the Trade and Intercourse Act which regulated trade and intercourse, and not to the Nonintercourse Act, which governs conveyances of land.

The State defendants contend that *Mohegan* may be read only for its ultimate holding—that the “surrounded by settlements” exception does not limit the Nonintercourse Act—and thus does not preclude them from asserting other theories for excluding eastern states from coverage of the Act. In our view, however, it is improper to fixate on the ultimate holding in *Mohegan* and ignore almost the entire basis for that

holding: the Court's finding that the statutory language, the legislative and jurisdictional history, and the case law all indicate that the Nonintercourse Act was meant to apply to land transactions throughout the United States.

Even if *Mohegan* were deemed distinguishable for not having addressed the specific geographic limitation asserted here, it may be noted that the district court which entertained the case upon remand did reach this precise question, and found no implied exclusion for preemption states. *Mohegan v. State of Connecticut*, 528 F. Supp. 1359, 1364 (D. Conn. 1982). In so doing, Judge Blumenfeld observed that the 1793 revisers also deleted those words in the 1790 Act which had made it applicable "to any person or persons"; he noted that, under defendant's logic, the omission would be indicative of a Congressional intent to exclude "any person or persons" from the Act's restrictions—a patent absurdity. Instead, the Judge viewed the change of language as creating "a stronger prohibition, not a weaker one, because Congress omitted the earlier limitation on the class of prohibited grantees." *Id.* at 1364.

The cases relied upon by the state do not warrant a pronouncement that the Nonintercourse Act is inapplicable to preemption states. In *Seneca v. Christie*, *supra*, 126 N.Y. 122, 27 N.E. 275, (1891), the Court of Appeals did not hold the Nonintercourse Act inapplicable to New York State. It cited the change in language in support for its holding that a lesser degree of formalities would constitute federal approval of purchases in preemption states than elsewhere. After finding indicia of federal approval of the challenged treaty, including the presence of a United States Commissioner at its conclusion, the Court affirmed a directed

verdict which had been issued below. Thus, even were this Court to adopt the construction employed in *Seneca* (which has arguably been undermined by the holding in *Mohegan*), it would not warrant dismissal of the complaint: plaintiffs have specifically alleged an absence of federal approval of the transactions now under scrutiny.

*United States v. Franklin County*, 50 F. Supp. 152 (N.D.N.Y. 1943), however, is not distinguishable. The district court therein expressly concluded that the change of language “is indicative of an intent to exempt a state ‘having the right of pre-emption’ from the provisions thereof.” *Id.* at 155. One basis for its conclusion was the longstanding contemporaneous construction argument: that the sheer number of treaties concluded by the State without federal interference proves that the statute did not apply to New York State. But, as stated previously, the Second Circuit has not been impressed with that argument, *Mohegan*, 638 F.2d at 638, and neither is this Court. This is not a situation in which a statute has been consistently applied in a particular manner so as to suggest that the statute is properly construed in harmony with that application. Rather, the statute in question has evidently been largely disregarded by state and federal authorities for indeterminate reasons. As the district court in *Mohegan* aptly notes, the disregard of federal restraints on alienation “can[not] be said to have established the meaning of 25 U.S.C. § 177 and its predecessors.” *Mohegan, supra*, 483 F. Supp. at 604.

The *Franklin* Court also based its decision on an overly broad reading of *Seneca v. Christie*, which, as discussed above, treated the Nonintercourse Act as applicable to pre-emption states. Finally, there is an

incorrect intimation in *Franklin* that the federal government lacks authority to regulate the extinguishment of Indian title within the states; that in such matters, “the State has an exclusive right to deal.” *Id.* at 156. That view is contrary to now clear principles of federal sovereignty over and responsibility for tribal lands, which were expressed by Justice White in *Oneida v. County of Oneida*, *supra*:

The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, [(10 U.S.)] 6 Cranch 87, 3 L. Ed. 162 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

414 U.S. at 670, 94 S. Ct. at 778.

Thus the decision in *United States v. Franklin County*, though in point, does not adequately substantiate its restrictive view of the geographic scope of the Nonintercourse act to commend its adoption here. In this regard, the Court joins company with *Mohegan, supra*, and with *Oneida v. County of Oneida*, 434 F. Supp. at 540, both of which rejected the holding of *Franklin* for substantially similar reasons.

Defendants have thus failed to convince the Court that the language in the Nonintercourse act making it

applicable “within the bounds of the United States” was employed with intent to exclude the State of New York from its geographic scope.

#### XI. PLAINTIFFS’ RIGHT OF ACTION

In support of their motion to dismiss, the non-state defendants advance the novel argument that the Non-intercourse Act does not afford a private right of action. The argument begins with the proposition that none of the versions of the Nonintercourse Act have expressly provided that an Indian tribe or any other private party could sue to enforce its provisions or recover for statutory violations. It is therefore contended that, in order for the Cayugas to establish a right to sue to recover for injuries sustained as a result of an alleged violation of the Act, they must first show that the action meets the criteria set forth in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) for determining whether a private remedy is implicit in a statute not expressly providing one. The criteria are as follows:

First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted,” . . .  
 Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

*Id.* at 78, 95 S. Ct. at 2088 (emphasis in original).

Defendants correctly consider the intent of the enacting Congress to be the key inquiry in such analysis,

*Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S. Ct. 242, 245, 62 L. Ed. 2d 146 (1979). They contend that there is no indication in the language of the successive acts, or in the legislative history of those acts, of a legislative intent to create a private right of action. They find evidence of a contrary intent in the fact that Congress provided various enforcement provisions and penalties in the 1793 Act and subsequent Acts, other than a private right of action for possession or damages; it thereby revealed that, “when Congress wished to provide a . . . remedy, it knew how to do so and did so expressly.” *Touche Rose & Co. v. Redington*, 442 U.S. 560, 572, 99 S. Ct. 2479, 2487, 61 L. Ed. 2d 82.

Particular significance is attached to provisions in the 1793 Act which empowered the President to remove persons settling on Indian lands, and which made the purchase of Indian lands in violation of the non-alienability provisions a misdemeanor punishable by a fine not exceeding \$1,000 and up to twelve month’s imprisonment. This, in defendant’s view, evidences a legislative intent not to create other remedies, such as a private right of action.

Defendants add that it is particularly unlikely for the enactors to have intended that a right of action be available to an Indian tribe, since until the late eighteenth century it was doubtful that Indian tribes could sue in federal court, absent special legislation.

Finally, a variety of excerpts from historical and legal sources are produced by the defendants in an effort to establish that the Nonintercourse Act was not enacted for the purpose of protecting Indians, but rather to maintain peace and order on the frontier. In this view, Congress was concerned with the alienation of Indian

land only insofar as it engendered a risk of Indian wars or other retaliatory acts against non-Indians. Since the act was meant to benefit the public at large, and since the enforcement provisions and penalties set forth in the Act were ample to effectuate such purpose, defendants conclude that the implication of a private remedy would be inappropriate.

The defendants' argument is elaborate and well-researched, but unpersuasive for a number of reasons.

A. *The Complaint Asserts a Current Right to Possession Conferred by Federal Law Without Reliance on an Implied Right of Action Under the Nonintercourse Act*

1. *The Characterization of the Claim in Oneida v. County of Oneida.*

The Supreme Court decision in *Oneida v. County of Oneida*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) did not address the implied right of action question now before this Court, but its analysis of the jurisdictional basis of a similar claim establishes that such claims are not strictly “based on,” “arising under,” or “implied from” the Nonintercourse Act. As noted in the previous discussion on jurisdiction, the claim in *Oneida* was virtually identical to the claim at bar, save the size and location of the disputed tract. Like the Cayugas, the Oneida tribe alleged that their right of possession had been confirmed by federal treaty, and was subject to the restraint against alienation in the Nonintercourse Act. They also alleged dispossession through conveyances to the State of New York.

The district court and the Court of Appeals read the complaint in *Oneida* as stating a claim, under state law, to establish a right to the possession of real property,

*Oneida v. County of Oneida*, (N.D.N.Y. Nov. 9, 1971), *aff'd*, 464 F.2d 916 (2d Cir. 1972) (Friendly, C.J.); the higher court specifying that the suit constituted an action in ejectment. 464 F.2d at 920. Both courts reached the conclusion that there was no federal question jurisdiction under 28 U.S.C. § 1331 or § 1362 since (1) the mere allegation of a federal source of title does not convert an ordinary action for possession into a federal case; and (2) the allegation that the conveyance to the state violated the Nonintercourse Act is not a necessary element of a well-pleaded complaint in a possessory action, because it is alleged in anticipation of and to avoid a defense of a valid conveyance.

The Supreme Court accepted the premise shared below that “the case was essentially a possessory action,” *id.* at 666, but rejected the conclusion that the action presented no federal question. Federal jurisdiction was implicated in that “the right to possession itself is claimed to arise under federal law in the first instance.” *Id.* at 676. The Court distinguished other suits for possession claiming title under a federal statute, patent, or treaty which were found devoid of the requisite federal question, *e.g.*, *Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L. Ed. 1218 (1914), on the grounds that such suits were by individuals; tribal suits were deemed on a different footing. But the crucial point here is that the Court considered the Indian’s claim as a traditional possessory claim which could be maintained in federal court because of the “nature and source” of tribal rights in land:

Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the

Constitution, laws, or treaties within the meaning of both § 1331 and § 1362.

*Id.* at 667.

This is not to say that the allegation that plaintiff's title had been extinguished in violation of the Nonintercourse Act was irrelevant for the purpose of determining jurisdiction. Indeed, the Court emphasized that:

the assertion of a federal controversy does not rest *solely* on the claim of a right to possession derived from a federal grant of title . . . Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands . . . .

*Id.* at 782 (emphasis added).

At one point, the Court even acknowledged that the Oneida's complaint, in part, "asserts a claim under the Non-Intercourse Acts." *Id.* at 678. But the thrust of that same paragraph, as well as of the opinion as a whole, is that the Oneidas were asserting a possessory right based primarily on the unique source and nature of their tribal property interest. The alleged violation of the Nonintercourse Act, though an inevitable and key issue in *Oneida*, and here as well, is not necessarily regarded as the source or basis of the claim.

The concurring opinion of Justice Rehnquist, joined by Justice Powell, confirms this reading of the *Oneida* decision. Near the outset of his opinion, Justice Rehnquist acknowledges and approves the majority's characterization of the action:

As the majority seems willing to accept, the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as stated in *Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L. Ed. 1218 (1914). Thus the complaint must be judged according to the rules applicable to such cases.

*Id.* at 683.

Justice Rehnquist then reasoned, much as the majority did, that the peculiar source of the Indians' interest, coupled with the federal government's "continuing solicitude for the rights of Indians in their land," *id.* at 683, created federal court jurisdiction over what might otherwise be a state law suit in ejectment.

The *Oneida* decision and its concurrence make it clear that the complaint before this Court presents a possessory claim, "basically in ejectment," with federal jurisdiction based on the source, nature, and continuing federal interest in the contested possessory right. *See also, Mohegan Tribe v. State of Connecticut*, 638 F.2d at 625. Viewed as such, there is simply no need to determine whether a parallel claim for the same relief might be asserted on the theory that a private right of action is implicitly afforded by the Nonintercourse Act.<sup>11</sup>

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<sup>11</sup> Plaintiffs inform the Court that during the district court proceedings in *Oneida v. County of Oneida* upon remand, Judge Port offered the following comment from the bench:

The principle thrust of the [defendants'] argument is a reassertion of the non-justiciability and the lack of an implied cause-

## 2. *Availability of a Common Law Cause of Action*

Defendants dispute the Cayuga's right to assert a possessory claim without statutory authorization for the cause of action. They rely largely upon *Milwaukee v. Illinois*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981) for the general proposition that federal common law remedies are disfavored, and for the view that any such remedies previously available have been preempted by the Trade and Intercourse Acts.

Turning first to the more general limitations on federal common law remedies, defendants cite the following familiar principle:

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of-action arguments. These were made earlier. I have ruled adversely to the defendants. Those arguments did not, in my opinion, support a dismissal for failure to state a claim after a trial. They do not support a denial of damages. I think what's been missed here, when you talk about implied causes of action under the Non-Intercourse Act, is that it is not necessary to seek out an implied cause of action. The old common law action of trespass will do very well. Why be inventive? You're going to invent the wheel all over again.

*Transcript* at 19 (October 5, 1981).

Defendants vigorously argue that the above-quoted comments were unsolicited and unwarranted; that the implied right-of-action argument had been tangentially raised by the *Oneida* defendants in a memo prior to trial on the liability issue, but had then been dismissed by the Court as outside the scope of its pre-trial order. Consequently, when the remarks were made after trial, the issue was no longer present in the case.

Accepting defendants' account of the *Oneida* proceeding, it would indeed be improper to accord *stare decisis* status to Judge Port's conclusion. However, this Court has reached a similar conclusion after independently considering the question. The quote is reproduced here merely as a concise and intuitive statement close to our own view of the issue.

Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision . . . The enactment of a federal rule in an area of national concern . . . is generally made not by the federal judiciary, purposely insulated from democratic pressures, but by the people through their elected representatives in Congress.

*Id.* at 312-13, 101 S. Ct. at 1790 (citations omitted).

The question presented in *Milwaukee* was whether the respondent states of Illinois and Michigan could invoke federal common law principles of nuisance to require stricter effluent limitations than those imposed by the Water Pollution Control Act Amendments of 1972. Starting from the assumption that “it is for Congress, not the federal courts to articulate the appropriate standards to be applied as a matter of federal law,” *id.* at 317, 101 S. Ct. at 1792, the Court held that the federal judiciary lacked authority to enforce more stringent limitations than those provided by Congress.

Nothing in *Milwaukee* inhibits this Court from permitting the Cayugas to sue to establish a right to possess property. The plaintiffs are not asking the Court to create substantive law of the type which concerned the Court in *Milwaukee*. Instead, plaintiffs point to specific treaties which define the scope of their substantive right to possession, and the construction of those sources—not federal common law—will determine the validity of their claim. Federal common law is invoked at this point only as a source for the right of action, only for the proposition that an Indian possessory action may be asserted in a court of proper juris-

diction without express statutory authorization. That principle is well-established.

“Indian lands claims have traditionally been asserted in the courts of this country for resolution.” *Oneida v. New York*, 691 F.2d at 1081. In *Oneida v. Oneida County*, the Supreme Court remarked upon the “almost countless cases” in which the possessory rights of Indian tribes have been adjudicated, and listed many of them. 414 U.S. at 669 n.5, 94 S. Ct. at 778 n.5. During the long history of adjudications involving the conveyability of Indian land, rarely have courts noted their reliance upon any statutory basis for the cause of action. See, e.g., *Meigs v. McClung’s Lessee*, 13 U.S. (9 Cranch) 11, 3 L. Ed. 639 (1815); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 542, 5 L. Ed. 681 (1823); *Patterson v. Jenks*, 27 U.S. (2 Pet.) 216, 7 L. Ed. 402 (1829). It appears to have been simply assumed that title to land necessarily included the ability to assert ownership rights in a court of proper jurisdiction, for “[h]ow can it be said to be any title at all which cannot be asserted in a court of justice by the owner to defend or obtain possession?” *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 11, 5 L. Ed. 547 (1823) (Story, J.). See also, *id.* at 32 (Washington, J.) (at common law, “right to land . . . includes the right . . . to recover the possession by suit”). Accordingly, the Supreme Court could confidently state in *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232, 12 L. Ed. 1056 (1850), “[t]hat an action of ejectment could be maintained on an Indian right of occupancy and use, is not open to question.” See also, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 523 (“The right to protection of tribal possession through actions of ejectment, trespass, or other similar possessory suits was affirmed early in the nation’s history”).

To be sure, there is an unfortunate lack of specificity in early federal court cases involving Indian possessory rights as to the governing sphere—state or federal—which provided the right of action. *See generally*, A. Hill, The Law Making Power of the Federal Courts: Constitutional Preemption, 67 *Colum.L.Rev.* 1024, 1028, 1069 (noting that such lack of specificity was endemic in the pre-Erie era). Nevertheless, it has long been clear that “Indian title is a matter of federal law,” *Oneida v. Oneida County*, 414 U.S. at 670, 94 S. Ct. at 778; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 62 S. Ct. 248, 251, 86 L. Ed. 260 (1941), and, properly viewed, it is federal common law that has implicitly supplied the right of action in federal possessory actions. *C.f.*, *Oneida v. Oneida County*, 414 U.S. at 674, 94 S. Ct. at 780 (“absent federal statutory guidance, the governing rule of decision [for a tribal ejectment action] would be fashioned by the federal court in the mode of the common law.”). *See also*, *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied, sub. nom. City of Salamanca v. United States*, 316 U.S. 694, 62 S. Ct. 1293, 86 L. Ed. 1764 (1942).

The Supreme Court decision in *Milwaukee v. Illinois*, *supra*, does not purport to disable federal courts from continuing their traditional reliance upon federal common law for such interstitial purposes, 451 U.S. at 324-25 n.18, 101 S. Ct. at 1796 n.18, and it certainly does not address itself to the unique exigencies of tribal land claims. The Court, therefore, declines defendants’ invitation to place a new impediment in the way of such claims, by requiring a statutory basis for a cause of action heretofore freely available.

### 3. *Preemption of the Common Law Right of Action*

Nor does the Court accept defendants' contention that Congress preempted any common law right of action to enforce tribal possessory rights by enacting the Trade and Intercourse Acts. The question of whether a federal statute preempts an existing federal common law remedy is distinct from the question of whether a statute implies a private right of action, but Congressional intent and the comprehensiveness of the statute are key elements in either determination. *See, Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981) (Federal Water Pollution Control Act and Marine Protection & Sanctuaries Act do not provide an implied right of action, and preempt the federal common law of nuisance). The case primarily relied upon the defendants, *Milwaukee, supra*, established that the enactment of a comprehensive statute which has "addressed the problem" or "occupies the field" indicates a congressional intent to supplant parallel common law remedies. As mentioned previously, *Milwaukee* involved construction of the Federal Water Pollution Control Act, "a comprehensive regulatory program supervised by an expert administrative agency." *Id.* 451 U.S. at 317, 101 S. Ct. at 1792. The Court discerned from that statute a Congressional intent to preclude the judicial imposition of more stringent effluent limitations through the application of federal common-law principles.

The Trade and Intercourse Act neither created a "comprehensive regulatory program" with respect to tribal possessory rights, nor "addressed the problem" in the sense that the FWPCA did in the water pollution

field. As described in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 616 (2d Cir. 1980), “the majority of sections of the original Act established a system of licensing fur trade with the Indians and imposed federal authority over crimes committed on Indian property.” Though the Act became more elaborate in subsequent re-enactments, the pattern remained the same: trade and intercourse were the focus of most sections; possessory rights were substantially confined to the single Nonintercourse Act section. That section, too, became more elaborate, setting forth penalties and punishments for violators. The 1793 version, for example, made violation a misdemeanor punishable by up to \$1,000 fine and twelve month’s imprisonment. The addition of this penal clause, however, does not transform the Trade and Intercourse Acts into the type of comprehensive legislation which has been found to displace pre-existing common law remedies. *See, e.g., National Sea Clammers, supra* (FWPCA and Marine Protection and Sanctuaries Act preempt common law nuisance remedies); *Amoco Oil Co. v. Local 99, Int’l Bro. of Elec. Wkrs.*, 536 F. Supp. 1203 (D.R.I. 1982) (NLRA preempts common law remedies for tortious interference with a labor contract); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (Clean Air Act preempts common law nuisance remedies); *United States v. Price*, 523 F. Supp. 1055 (D.R.I. 1981) (Resource Conservation and Recovery Act and Comprehensive Environmental Response, Compensation, and Liability Act preempt federal common law nuisance remedies).

The more crucial question, however, is whether Congress has “addressed the problem” for which the plaintiffs are invoking a common law remedy. In this

instance it has not. Nothing in the Trade and Intercourse Acts touches upon the traditional mechanisms for the enforcement of possessory rights. While it is true that matters beyond those specifically addressed by a comprehensive statute may be displaced by implication, *Illinois v. Outboard Motor Corp.*, 680 F.2d 473 (7th Cir. 1982) there must be an ample basis for discerning such an expansive preemptive effect. In this instance, the Court finds no basis for the notion that a statute which explicitly invalidates title held by some, implicitly preempts the right of others to assert their own possessory rights. The Nonintercourse Act has never been deemed to emit such preemptive emanations; we decline to announce their discovery here.<sup>12</sup>

*B. The Right of Action of the United States may be invoked by a Tribal Trust-Beneficiary*

As discussed above, the Court has concluded that the Cayugas may, as a matter of federal common law, assert a claim to recover possession of tribal lands. In this section, the Court notes an alternative basis for the tribal right of action, which still does not necessitate the inference of a private right of action under the Nonintercourse Act.

It is well established that the United States may, as trustee on behalf of an Indian tribe, bring suit to enforce tribal possessory rights protected by the

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<sup>12</sup> Although the question of whether a federal statute preempts a state statute involves somewhat different considerations than those raised by a question of preemption of federal common law, *Milwaukee, supra*, 451 U.S. at 316, 101 S. Ct. at 1792, it is instructive to note that the Nonintercourse Act was found not to have preempted additional remedies provided in a parallel state restraint against alienation of Indian lands. *New York ex rel. Cutter v. Dibble*, 62 U.S. (21 How.) 366, 16 L. Ed. 149 (1859).

Nonintercourse Act and other federal laws. *See, e.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941); *United States v. Candelaria*, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023 (1926); *Cramer v. United States*, 261 U.S. 219, 43 S. Ct. 342, 67 L. Ed. 622 (1923); *Heckman v. United States*, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820 (1911); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *United States v. Boylan*, 256 F. 165 (2d Cir.1920); *United States v. Franklin County*, 50 F. Supp. 152 (N.D.N.Y. 1943).<sup>13</sup> And, as noted previously, it is also established that the purpose and effect of 28 U.S.C. § 1362 was “to open the federal courts to the kinds of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought.” *Moe v. Consolidated Salish & Kootenai Tribes*, 425 U.S. 463, 472, 96 S.Ct 1634, 1641, 48 L. Ed. 2d 96 (1976). *See, Oneida v. New York, supra*, 691 F.2d at 1080, 1084. The measure was meant to assure the tribes “of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys.” H.R. Rep. No. 2040, 89th Cong., 2d Sess., 2-3, *reprinted in* 1966 U.S.Code Cong. & Ad. News 3145, 3147. *See, Oneida v. New York, supra*, 691 F.2d at 1080; *Narrangansett Tribe of Indians v. So. R.I. Land Devel. Corp., supra*, 418 F. Supp. 798, 806 (D.R.I. 1976).

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<sup>13</sup> Indeed, the failure of the United States to bring such action may, in certain circumstances, constitute an actionable breach of fiduciary duty. *United States v. Oneida Nation of New York*, 201 Ct. Cl. 546, 477 F.2d 939 (1973).

The United States could have brought this suit, but has, according to the parties, declined to do so. The Cayugas are therefore to be afforded an opportunity to do so on their own behalf. In short, the right of action owned by the United States to enforce the Nonintercourse Act may, due to 28 U.S.C. § 1362, be invoked by the affected Indian tribe. The Cayugas are exercising that derivative right of action in bringing this lawsuit.

*C. A Private Right of Action is Implicit in the Nonintercourse Act*

Assuming plaintiffs could not raise their claims except by a private right of action implicit in the Nonintercourse Act, there is sufficient basis for finding that such implied right of action exists.

In *Merrill Lynch Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982), the most recent Supreme Court decision on the implication of private remedies, the Court offered an historical overview of the changing judicial approaches to that recurrent problem. Speaking through Justice Stevens, the Court explained:

Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has changed. When federal statutes were less comprehensive the Court applied a relatively simple test to determine the availability of a private remedy. If the statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 36 S. Ct. 482, 60 L. Ed. 874 (1916).

*Id.*, 456 U.S. at 374, 102 S. Ct. at 1837.

The principle of *Rigsby*, that a statutory violation gives rise to a cause of action for damages “to one of the class for whose especial benefit the statute was enacted,” 241 U.S. at 39, was the prevailing approach throughout most of our history. *Merrill Lynch, supra* at 374, 102 S. Ct. at 1837. The approach was considered to be “but an application of the maxim, *Ubi jus ibi remedium* “, where there is a right, there is a remedy. *Rigsby, supra*, 241 U.S. at 39, 36 S. Ct. at 484. *See also, Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a remedy by suit, or action at law, whenever that right is invaded.”), quoting, 3 W. Blackstone, *Commentaries* 23); *Merrill Lynch, supra* at 375 n.54, 102 S. Ct. at 1837 n.54. The Court in *Merrill Lynch* further noted that, “while the *Rigsby* approach prevailed . . . congressional silence or ambiguity was an insufficient reason for the denial of a remedy”, *id.* at 377, 102 S. Ct. at 1838, and that federal courts traditionally “regarded the denial of a remedy as the exception rather than the rule.” *Id.* at 375, 102 S. Ct. at 1838.

In the 1975 decision, *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26, the Court announced a more exacting set of criteria for determining whether a private right of action is implicit in a statute not expressly providing one. Although *Cort v. Ash* lists four factors to consider in making the determination, reproduced *infra*, it has become clear that the central inquiry under the new approach is “whether Congress intended to create the private remedy asserted.” *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S. Ct. 242, 245, 62 L. Ed. 2d 146 (1979); *Middlesex Cty. Sewage Auth. v. Nat. Sea Clammers Ass’n.*, 453 U.S. 1,

13, 101 S. Ct. 2615, 2622, 69 L. Ed. 2d 435 (1981). In *Merrill Lynch, supra*, 456 U.S. at 377, 102 S. Ct. at 1839, the Court attributed its new restrictive attitude to “the increased complexity of federal legislation and the increased volume of federal litigation. . . .”

Despite the fact that the new restrictive approach to inferring private rights of action was devised in response to problems inherent in modern legislation, defendants assume that such approach must be employed in the analysis of a statute which has remained substantially the same since 1793. In light of *Merrill Lynch*, however, that assumption must be discarded. As the Court stated:

In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its own terms is silent on the issue, the initial focus must be on the state of the law at the time the legislation was enacted.

456 U.S. at 378, 102 S. Ct. at 1838. *See also, Cannon v. University of Chicago*, 441 U.S. 677, 698-99, 99 S. Ct. 1946, 1958, 60 L. Ed. 2d 560; *Mohegan v. State of Connecticut, supra*, 638 F.2d 612, 621 (Indian legislation “cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them,” quoting, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 98 S. Ct. 1011, 1019, 55 L. Ed. 2d 209 (1978)).

As noted above, the Nonintercourse Act was enacted during a period in which federal courts, “following the common law tradition,” regularly inferred private rights of action from statutes not expressly providing them. *Merrill Lynch, supra* 456 U.S. at 375, 102 S. Ct. at 1838. *See also*, T. Frankel, Implied Rights of Action,

67 *Va. L. Rev.* 553, 555. It must be presumed that Congress was aware of this judicial proclivity when it acted. *Cf.*, *Merrill Lynch, supra* at 382 n.66, 102 S. Ct. at 1841 n.66 (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute. . . .”). Accordingly, it is anachronistic to regard the absence of an express right of action in this 18th Century legislation as indicative of a lack of legislative intent to allow such an action. Indeed, to require the Court to locate an affirmative expression of congressional intent before permitting a private action under a statute of this era would be more likely to defeat actual Congressional intent than to effectuate it.

This is, of course, not to say that *Merrill Lynch* requires federal courts to infer private rights of action freely from statutes enacted before *Cort v. Ash* and sparingly from those enacted thereafter. *Cort v. Ash* itself involved the construction of a measure which had been enacted in 1907: 18 U.S.C. § 610, which prohibited campaign contributions or expenditures by national banks, corporations, and labor organizations. But that measure was nevertheless part of a modern and comprehensive statutory scheme, for which the criteria employed by the Court in its decision were well-suited. In subsequent cases in which the implied right of action issue was considered, the legislation was of a similar nature. *See, e.g.*, *Merrill Lynch, supra* (Commodity Exchange Act amendments of 1973); *Middlesex Cty. Sewage Auth. v. Nat. Sea Clammers Ass’n., supra* (Federal Water Pollution Control Act of 1972); *Touche Ross & Co. v. Reddington, supra* (Securities Exchange Act of 1934); *Cannon v. University of Chicago, supra* (Title IX of Education Amendments of 1972). The problem with applying the *Cort v. Ash* criteria to the

Nonintercourse Act is not, therefore, that the statute predates the decision. It is, rather, that the criteria were devised as a means to ascertain congressional intent with respect to complex legislation enacted in a modern jurisprudential context. If those criteria are formalistically applied to the antique measure now under scrutiny, it is most doubtful that an accurate portrayal of congressional intent will emerge.

Accordingly, the determination of whether a private right of action exists under the Nonintercourse Act will be made by applying the implication principles accepted by Congress and the Courts of the enactment era: the *Rigsby* approach. The Cayugas, then, may infer a private right of action under the Act provided their tribe is “one of the class for whose especial benefit the statute was enacted. . . .” *Rigsby, supra* at 39, 36 S. Ct. at 484.

There can no longer be any doubt but that Indian tribes are especial beneficiaries of the Nonintercourse Act. In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton, supra*, 388 F. Supp. 649 (D. Me. 1975), Judge Gignoux thoroughly examined the extensive case law on the purpose of the Act, and was able to conclude that:

[e]very court . . . which has considered the purpose of the [Nonintercourse] Act has agreed that the intent of Congress was to protect the lands of the Indian tribes in order to prevent fraud and unfairness.

*Id.* at 656. Most notable among the many cases cited therein is *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960), in which the Supreme Court declared:

The obvious purpose of that [Nonintercourse Act] is to prevent the unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties . . . .

*Id.* at 119, 80 S. Ct. at 555. Judge Gignoux' further research on the subject is worth reproducing, as it indicates the extent of the judicial consensus on the statutory purpose:

The decided cases are replete with similar statements of the Act's purpose. *E.g.*, *United States v. Candelaria*, 271 U.S. 432, 441-42 [46 S. Ct. 561, 562-63, 70 L. Ed. 1023] . . . (1926) (the intent of Congress was "to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges," . . . ; *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 888 (2d Cir. 1958) . . . (the statute was enacted "to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain"); *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957) . . . (the purpose of such legislation is to protect the Indians "against the loss of their lands by improvident disposition or through overreaching by members of other races"); *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 923 (1965) ("From the beginning, this legislation has been interpreted as giving the Federal Government a supervisory role over conveyances by Indians to others, in order to forestall fraud and unfairness.")

*Id.*, 388 F. Supp. at 656-57.

Cases since the district court decision in *Passamaquoddy* have adhered to the rather self-evident proposition that the Nonintercourse Act was intended

to protect Indians. *E.g.*, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975) (“to prevent to unfair, improvident, or improper disposition of Indian lands”); *Oneida v. County of Oneida*, 434 F. Supp. 527, 538 (“to protect the Oneida nation”); *Schaghticoke Tribe of Indians v. Kent School Corp., Inc.*, 423 F. Supp. 780, 784 (D. Conn. 1976) (“to protect the Indians from their own improvidence and to prevent the unfair or improper disposition of Indian lands”); *Narragansett Tribe v. So. R.I. Land Devel. Corp.*, 418 F. Supp. 798, 803 (D.R.I. 1976) (“to prevent the government’s Indian wards from improvidently disposing of their lands and becoming homeless public charges”).<sup>14</sup>

Notwithstanding this judicial consensus, defendants urge this Court to re-examine the historical background of the Nonintercourse Act and declare that its purpose was to promote peace on the frontier for the benefit of the public at large, and that it was not meant to benefit any special class in particular. A major source of support for their thesis is an address made in 1791 by President George Washington, in which he discussed the objectives of the statute:

Among the most important of these [objectives] is the defense and security of the western frontiers. To accomplish it on the most humane principles was a primary wish.

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<sup>14</sup> To be sure, the purpose of the Nonintercourse Act as stated in the cited cases may today be criticized for its paternalistic assumptions. *See*, F. Cohen, *supra* at 509 (noting this, but describing less paternalistic functions the Act continues to serve). However, the Court’s duty here is to identify the Act’s purpose, not to critique it.

Accordingly . . . effectual measures have been adopted to make those of a hostile description sensible . . .

It is sincerely to be desired that all need of coercion in the future may cease; and that an intimate intercourse may succeed . . .

In order to do this, it seems necessary . . . [t]hat the mode of alienating their lands, the main source of discontent and war, should be defined and regulated as to obviate imposition.

American State Papers: *Foreign Relations* 16.

The thesis advanced by the defendants does, at least in part, explain the purpose for granting protection to the Indians. Indeed, the Second Circuit has recognized as much in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612 (1981). The defendants in that case had argued that, since the purpose of the Nonintercourse Act was to promote peace on the frontier and not to protect Indian tribes, the Act should be construed to cover only land in “Indian Country”, and not the Connecticut lands in issue. After considering many of the same primary and secondary sources that have been cited by the defendants here, the Court acknowledged,

Of course, Washington and Knox and their countrymen were concerned not only with protecting the Indians, but with preventing the onset of overt hostilities. Moreover, it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act’s land provisions.

*Id.* at 622. However, the Court ultimately rejected the proposed geographic limitation on the scope of the Act, due to its conclusion that,

there is no evidence demonstrating that peace on the frontier and enforcement of treaty obligations were the *sole* purposes of the various Acts.

*Id.* at 622 (emphasis in original).

The important point for consideration here is that the *Mohegan* decision does not in any way contest the longstanding view that the Nonintercourse Act was enacted for the protection of Indians. It limited itself to discussing “the State’s argument . . . on the motivation for granting federal protection for Indians,” *id.*, at 621, and found that a governmental concern for peace on the frontier was a factor in the determination to protect Indians.

There is no inconsistency in finding that a statute was enacted for the benefit of a special class, and that it serves a broader public interest as well. In *Merrill Lynch, supra*, for example, the Supreme Court found that the Commodities Exchange Act, 7 U.S.C. § 4b, was enacted for the especial benefit of investors in futures contracts, and could be invoked by such persons in private actions for damages. In so holding, the Court explained:

The legislative history quite clearly indicates that Congress intended to protect all futures traders from price manipulation and other fraudulent conduct violative of the statute. It is assumed, of course, that federal regulation of futures trading benefits the entire economy; a sound futures market tends to reduce retail prices of the underlying commodities . . . Although the speculator has never

been the favorite of Congress, Congress recognized his crucial role in an effective and orderly futures market and intended him to be protected as much as the hedger.

*Id.*, 456 U.S. at 390, 102 S. Ct. at 1845. The Nonintercourse Act was similar in conception, and the ability of the defendants to identify a governmental policy of promoting peace on the frontier does not negate the longstanding consensus that the instrument of that policy was a statute for the benefit of Indians in particular.

The defendants also argue that the original policy of the federal government was not to protect Indian possessory rights, but was rather to promote Indian withdrawal and the advancement of white settlement. In this view, the function of the Nonintercourse Act was to afford federal control over dispossession, in order that “this process should be as free of disorder and injustice as possible.” F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1832* 186 (1962). The defendants thus regard it as historically inaccurate to characterize the Nonintercourse Act as a measure for the special protection of Indians, and they insist that a private right of action would disserve the Act’s true function.

The defendants’ thesis may well be accurate as history, *see, e.g., Mohegan, supra* at 622 (“ . . . the evidence rather convincingly demonstrates that the nation’s early leaders were perhaps not so charitable toward the Indian as we have come to view them”), but it must not be a basis for discerning law. Whether or not the federal government anticipated or even desired the alienation of Indian lands, it nevertheless

committed itself to a system of treaties, agreements, and statutes which gave rise to a trust relationship between the government and the tribes. *See, Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831); *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886). The United States has thereby “charged itself with moral obligations of the highest responsibility and trust” with respect to its management of Indian affairs. *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480 (1942). The Nonintercourse Act in particular is firmly understood to have “impose[d] upon the federal government a fiduciary role with respect to protection of the lands of a tribe covered by the Act . . . .” *Passamaquoddy, supra*, 528 F.2d at 379. *See also, United States v. Oneida Nation of New York*, 201 Ct. Cl. 546, 477 F.2d 939 (1973); *Seneca Indians v. United States*, 173 Ct. Cl. 917, 923 (1963); *United States v. Sante Fe R. Co.*, 314 U.S. 339, 348, 62 S. Ct. 248, 252, 86 L. Ed. 260 (1941).

In effect, the defendants are asking the Court to look beyond the face of unequivocal legal commitments made to Indian tribes, and give effect to ulterior policy considerations which may have induced, in part, those commitments. The Court is loathe to take that path. No matter how thoroughly a *de facto* policy of Indian removal may be established, the *de jure* policy of this government from its very beginning has been to respect and protect Indian possessory rights. *Cramer v. United States, supra*, 261 U.S. at 227, 43 S. Ct. at 344; *see, Worcester v. Georgia, supra*. It is that *de jure* policy which the Court must consider in determining the issues raised by this lawsuit.

In a related argument, defendants maintain that the Nonintercourse Act was enacted in an era when Indian tribes generally lacked capacity to bring suit in federal court; that Congress therefore could not have intended that Act to bestow upon tribes a private right of action.

The historical accuracy of defendant's premise is debatable. Certainly during the nation's early history lawsuits by tribes were rare, but as scholars of the subject have explained:

Except for the Cherokee, who had experienced some intermarriage and infusion of Anglo-American legal concepts, the tribes were ignorant of American legal processes and were still politically organized in traditional fashions, making resort to American courts virtually impossible.

Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 *Me. L. Rev.* 17, 46 (1978). It is also likely that the Supreme Court's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), which held that the Cherokee tribe was not a foreign state for the purpose of invoking the original jurisdiction of the Supreme Court, "had a chilling effect that discouraged tribes from bringing suit." Clinton & Hotopp, *supra* at 46. The Court did not, however, unequivocally declare a general tribal incapacity to sue. It is simply not clear, then, whether the scarcity of tribal suits in the 18th and early 19th centuries should be attributed to legal barriers, or rather to restraints that were political and cultural in nature.

In either case, the present right of the Cayugas to invoke the Nonintercourse Act does not turn on whether their ancestors had or lacked access to the

federal courts. The crucial aspect of our inquiry under *Rigsby* is firmly established: the Act was enacted for the especial benefit of Indians. Whatever impediments may have prevented plaintiffs' ancestors from bringing suit were extraneous to the purpose of the Nonintercourse Act, and have long since disappeared. Indians are now "entitled 'to take their place as independent qualified members of the modern body politic'", and their "participation in litigation crucial to their welfare should not be discouraged." *Arizona v. California*, 460 U.S. 605, —, 103 S. Ct. 1382, 1389, 75 L. Ed. 2d 318 (1983), quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369, 88 S. Ct. 982, 984, 19 L. Ed. 2d 1238 (1968), in turn quoting *Bd. of Cty. Comm'rs. v. Seber*, 318 U.S. 705, 715, 63 S. Ct. 920, 925, 87 L. Ed. 1094 (1943). More pointedly, there is no longer any doubt as to a tribe's capacity to sue in federal court. 28 U.S.C. § 1362. Defendants fail to suggest any persuasive reason as to why anachronistic notions of tribal capacity should now restrain the Cayugas from invoking a statute enacted for their benefit.

Moreover, it is a cardinal rule of construction that a statute framed in general terms embraces conditions arising in the future not known at the time of enactment. *Delima v. Bidwell*, 182 U.S. 1, 197, 21 S. Ct. 743, 753, 45 L. Ed. 1041 (1900); *United States v. Browder*, 113 F.2d 97, 99 (2d Cir. 1940). Without this principle, there would be continual doubt as to the right of married women, blacks, Indians, and others to invoke statutes enacted in periods when their predecessors had lacked capacity to sue. The principle is not in derogation of legislative intent, but rather extrapolates legislative intent to post-enactment circumstances. See, R. Dickerson, *The Interpretation and Application of*

*Statutes*, 127-29 (1975). By extension, then, a statute enacted for the benefit of Indians contemplates a tribal right of action once extraneous barriers to that right of action have ceased to exist.

For the reasons set forth above, the Court finds that the Cayugas' right to maintain this possessory action is derived from federal common law, from the right of the United States to maintain the action as trustee, and from the Nonintercourse Act itself, under the *Rigsby* analysis.

## XII. ABATEMENT

Finally, the defendants contend that plaintiffs' right to sue under the 1793 and 1802 Nonintercourse Acts has "abated" due to the repeal of those statutes. The common law doctrine upon which they rely was stated by Chief Justice Marshall in *The General Pinkney*, 9 U.S. (5 Cranch) 281, 283, 3 L. Ed. 101 (1809):

[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for the purpose by statute.

Chief Justice Taney later stated the rule with even greater brevity: "The repeal of a law imposing a penalty is itself a remission." *Maryland v. The Baltimore & Ohio R.R. Co.*, 44 U.S. (3 How.) 534, 552, 11 L. Ed. 714 (1845).

Accepting defendants' premise that the 1793 and 1802 Nonintercourse Acts have either expired or have

been repealed,<sup>15</sup> the defense of abatement is nonetheless inapplicable for several reasons. First, the defense

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<sup>15</sup> The Trade and Intercourse Acts of 1790, 1793, 1796, and 1799 were all acts of limited duration; the first three were made operative “for the term of two years, and from thence to the end of the next session of Congress, and no longer”, *Act of 1790* § 7; *Act of 1793* § 15; *Act of 1796* § 22. The last was made operative for three years. *Act of 1799* § 21.

The 1793 Act was expressly repealed by section 21 of the 1796 Act. It is arguable, however, that a right of action under the 1793 Act was preserved by a limited savings clause in section 21 which provided that:

all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

Whatever effect this savings clause had, it terminated when the savings clause itself expired in 1802. The Trade and Intercourse Act of that year, which was the first such Act of unlimited duration, contained no such savings provision.

Thus defendants are correct in their statement that the Nonintercourse Act of 1793, which was in effect at the time of the challenged land transaction of 1795, has expired or has been repealed, and has not been preserved continuously by any savings clause.

The Act of 1802 was in effect at the time of the second challenged land transaction in 1807, and it remained in effect until superseded by the Next Trade and Intercourse Act of 1834. The new Act expressly continued the effectiveness of the prior Act with respect to Indian tribes residing east of the Mississippi. *Act of 1834* § 29.

The 1834 Act continued in effect until Congress enacted the Revised Statutes in 1874. Defendants contend that a possessory action based on the pre-1874 Nonintercourse Act was made unavailable by the general repealer in the Revised Statutes, -§ 5596, and was not preserved by the general savings clause in the

is dependant upon a characterization of plaintiffs' claim as a private action to enforce the Nonintercourse Act. As discussed previously, however, plaintiffs' claim is also properly characterized as an action in ejectment asserting possessory rights confirmed by federal treaty. So viewed, the repeal of any particular Nonintercourse statute would not disable plaintiffs from asserting their claim.

But even if the action were deemed one arising under the Nonintercourse Act, the Court cannot accept the view that the pertinent clause in the Nonintercourse Act which plaintiffs seek to enforce imposes a "penalty" or "punishment" which would be subject to abatement. The relevant clause declares that certain transactions in land are of no validity in law or equity. The purpose of this restraint against alienation, as discussed at length above, was to protect Indian possessory rights. Under the rule of *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), such provision is not penal:

This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder v. Bull* [3 U.S.], 3 Dall. 386, 1 L. Ed. 648 . . . In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it

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Revised Statutes, found in § 13 (now at 1 U.S.C. § 109). Because the Court has determined, for reasons set forth, *infra*, that this possessory action has not been abated irrespective of whether the Nonintercourse Statute of 1834 survived the enactment of the Revised Statutes of 1874, it is not necessary to address the intricate question of what rights were terminated by the repealer and what rights were preserved by the savings clause.

has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

*Id.* at 95-96, 78 S. Ct. at 595.

It is clear that every Nonintercourse Act since 1793 has contained some penal provision within it which, arguably, is subject to abatement. For example, it may well be that the provision in the 1793 statute which imposed upon violators a “fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months” became unenforceable once that statute was repealed (or at least once the savings clause expired). This application would appear consistent with Chief Justice Marshall and Chief Justice Taney’s statement of the rule. Indeed, the cases cited by the defendants in which the abatement doctrine was employed involved precisely such type of penal provisions. *See, e.g., United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L. Ed. 49 (1801) (vessel condemnation); *The General Pinkney, supra*, 9 U.S. (5 Cranch) 281, 3 L. Ed. 101 (vessel condemnation); *Norris v. Crocker*, 54 U.S. (13 How.) 429, 14 L. Ed. 210 (1851) (\$500 penalty); *United States v. Tynan*, 78 U.S. (11 Wall.) 88, 20 L. Ed. 153 (1870) (fine or imprisonment); *United States v. Chambers*, 291 U.S. 217, 54 S. Ct. 434, 78 L. Ed. 763 (1934) (fine or imprisonment); *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964) (fine or imprisonment).<sup>16</sup>

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<sup>16</sup> One remaining case cited by the defendants does involve a non-penal remedy, but does not involve abatement. In *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 32 S. Ct. 542, 56 L. Ed. 860 (1911) the question was whether an award of attorneys

The clause in the Nonintercourse Act which invalidates certain conveyances is wholly unlike the penal provisions held abated in the cases above. Though enforcement could work great hardship upon those who claim title through a transaction which is invalid under the Act, it is nevertheless manifest that the statutory disability was established not to punish, but to accomplish “some other legitimate governmental purpose.” *Trop v. Dulles, supra*, 356 U.S. at 96, 78 S. Ct. at 595. Thus, plaintiffs’ claim based upon the statutory disability did not abate upon the repeal of the specific version that was in effect at the time of the challenged transaction.

Moreover, the rationale of the abatement doctrine counsels against its application here. The cases in which the doctrine has been invoked typically involve situations wherein conduct that was punishable when committed became legal at some point before final judgment in the case had been rendered. For example, in *United States v. Chambers, supra*, defendant’s conviction for conspiracy to violate the National Prohibition Act was vacated because, while his appeal was pending, the 21st Amendment was adopted, repealing Prohibition. Similarly, in *Hamm v. City of Rock Hill*,

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fees to a prevailing plaintiff under a state statute should be affirmed even though, while the appeal was pending, the state court declared the attorneys fees statute unconstitutional. In the course of holding that the intervening declaration of invalidity must be recognized on appeal, the Court referred to the abatement doctrine by analogy. It extrapolated from the abatement cases a general principle that a court on appeal must “recognize the changed situation, and either apply the intervening law or decision, or set aside the judgment and remand.” Thus, *Dennis* hardly stands for the proposition that a right of action exists only so long as the original statute creating the right exists.

*supra*, the Court dismissed trespassing charges against civil rights “sit-in” participants because, though such conduct was illegal when committed, the intervening enactment of the Civil Rights Act of 1964 legalized the conduct and abated further prosecutions. *See also, United States v. The Schooner Peggy, supra* (vacating the condemnation of a vessel which was hostile when seized, because a United States-French treaty ended hostilities before the condemnation became final); *The General Pinkney, supra* (vacating the condemnation of a vessel which had illegally traded at St. Domingo, because during appeal such trade became legal).

The circumstances here stand in stark contrast to those in the abovementioned cases. The very first Nonintercourse Act provided that conveyances of land, absent federal consent, were invalid. That provision has been continually re-enacted in substance, and “has remained the policy of the United States to this day.” *Oneida v. County of Oneida, supra*, 414 U.S. at 668, 94 S. Ct. at 777. *See*, 25 U.S.C. § 177. Where, as here, identical or substantially similar statutory provisions have continually been in force, the subsequent legislation is to be construed as a continuation of the previous legislation, despite formal repeal. *Bear Lake Irrigation Co. v. Garland*, 164 U.S. 1, 11-12, 17 S. Ct. 7, 9, 41 L. Ed. 327 (1876); *Steamship v. Joliffe*, 69 U.S. (2 Wall.) 450, 456, 17 L. Ed. 805 (1864).

Defendants argue that *Norris v. Crocker, supra*, holds otherwise and is controlling. In *Norris*, the owner of a fugitive slave brought an action to recover a statutory penalty against a person who allegedly violated the Fugitive Slave Act of 1793. While the action was pending, Congress replaced the 1793 Act with the Fugitive Slave Act of 1850. Although the Acts

shared a common purpose, to penalize those who assist fugitive slaves, the Court held that the claim arising under the earlier statute had abated, and was no longer enforceable.

*Norris* is reconcilable with *Bear Lake*, *supra*. In *Norris*, Justice Catron emphasized that the relevant provision in the new Act was “new and inconsistent with the 4th section of the act of 1793” with respect to the nature of remedies available to slaveowners. 54 U.S. (14 How.) at 472. Since the specific remedy that the plaintiff sought was no longer available under the new Act, the Court found it proper to dismiss the action. In short, the two statutes in *Norris* did not exhibit the continuity which enables an action to avoid abatement under the rule of *Bear Lake* and *Joliffe*.

Quite clearly, that requisite continuity of statutory policy is present in the case at bar. Plaintiffs’ first claim arose under the 1793 Act, which provided in pertinent part:

That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution.

The 1796, 1799, and 1802 versions of the Act exhibit only the minor change underscored below:

That no purchase, *grant, lease, or other conveyance* of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be

made by treaty or convention entered into pursuant to the Constitution.

The 1834 version applies only to “any Indian nation or tribe of Indians”, but is otherwise identical to its predecessor, as is the current version, 25 U.S.C. § 177.

In view of the nonpenal nature of the nonalienability clause in the 1793 and 1802 Acts, and in view of the continuous effectiveness of the statutory protection of Indian lands, the Court finds that plaintiffs cause of action has not abated.

### XIII. CONCLUSION

Tribal land claim litigation attracts considerable attention and apprehension among non-Indians, and not merely among those in the claim areas. This is understandable given the size and location of the claimed lands and the drastic nature of the remedy sought. Indeed, the prospect of the most drastic conceivable remedies is extremely disturbing, and has tended to pervade and disrupt the impartial determination of the issues raised on this motion to dismiss. That it must not do. It is the duty of the Court, at this juncture, to ascertain whether it has jurisdiction over the subject-matter and the parties, whether the claim is justiciable and timely, and whether the complaint states a violation of Indian possessory rights. Those questions we must answer affirmatively. The Cayugas are therefore entitled to present evidence in support of their claim.

Defendants’ motions under Rules 12(b)(1), (2), and (6) are denied. It is so ordered.

**APPENDIX L**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
THURGOOD MARSHALL U.S. COURT HOUSE  
40 FOLEY SQUARE  
NEW YORK 10007

[Filed: Sept. 8, 2005]

Roseann B. MacKechnie  
CLERK

Date: 9/8/05  
Docket Number: 02-6111-cv  
Short Title: Cayuga Indian Nation v. Pataki  
DC Docket Number: 80-cv-930  
DC: NDNY (SYRACUSE)  
DC Judge: Honorable Neal McCurn

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 8th day of September two thousand five.

CAYUGA INDIAN NATION OF NEW YORK,  
PLAINTIFF-APPELLEE-CROSS-APPELLANT,  
SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR-APPELLEE-CROSS-APPELLANT  
UNITED STATES OF AMERICA,  
PLAINTIFF-INTERVENOR-APPELLEE

*v.*

GEORGE PATAKI, AS GOVERNOR OF THE STATE OF NEW  
YORK, ET AL., CAYUGA COUNTY AND SENECA COUNTY,  
MILLER BREWING COMPANY, ET AL.,  
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Cayuga Indian Nation of New York and Seneca-Cayuga Tribe of Oklahoma. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: ARTHUR HELLER  
ARTHUR HELLER  
Motion Staff Attorney

**APPENDIX M**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
THURGOOD MARSHALL U.S. COURT HOUSE  
40 FOLEY SQUARE  
NEW YORK 10007

[Filed: Sept. 8, 2005]

Roseann B. MacKechnie  
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CAYUGA INDIAN NATION OF NEW YORK,  
PLAINTIFF-APPELLEE-CROSS-APPELLANT,  
SENECA-CAYUGA TRIBE OF OKLAHOMA,  
PLAINTIFF-INTERVENOR-APPELLEE-CROSS-APPELLANT  
UNITED STATES OF AMERICA,  
PLAINTIFF-INTERVENOR-APPELLEE

*v.*

GEORGE PATAKI, AS GOVERNOR OF THE STATE OF NEW  
YORK, ET AL., CAYUGA COUNTY AND SENECA COUNTY,  
MILLER BREWING COMPANY, ET AL.,  
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee United States. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,  
Roseann B. MacKechnie, Clerk

By: ARTHUR HELLER  
ARTHUR HELLER  
Motion Staff Attorney

**APPENDIX N****STATUTORY PROVISIONS**

1. Since 1790, see ch. 33, § 4, 1 Stat. 138, various forms of the Trade and Intercourse Act, also known as the Nonintercourse Act, have made the approval of the federal government a prerequisite to the lawful sale of land belonging to any Indian Tribe. The Trade and Intercourse Act in its current form provides as follows:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. 177.

2. Section 2415 of Title 28, United States Code, provides in pertinent part as follows:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims

Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an

individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

\* \* \* \* \*

28 U.S.C. 2415.

3. Section 5(b) of Public Law No. 97-394 provides that, under specified circumstances, the Secretary of the Interior shall provide a report concerning tribal land claims that the Secretary has “decide[d] to reject for litigation.” 96 Stat. 1978. Section 5(c) of the same law then provides:

The Secretary, as soon as possible after providing the report required by subsection (b) of this section, shall publish a notice in the Federal Register identifying the claims covered in such report. With respect to any claim covered by such report, any right of action shall be barred unless the complaint is filed within one year after the date of publication in the Federal Register.

96 Stat. 1978.