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02-6301(con), 02-6131(xap), 02-6151(xap) & 02-6309(xap)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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 E. 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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF ABBREVIATIONS

A	joint appendix
B	appellants' brief
CFMV	current fair market value
Counties	Seneca and Cayuga Counties
DN	docket number
FRV	fair rental value
G	United States' exhibit
ICC	Indian Claims Commission
N	Cayugas' exhibit
Nation	Cayuga Indian Nation of New York
NIA	Nonintercourse Act
p or pp	page or pages of this brief
Rule	Federal Rule of Civil Procedure
S	State's exhibit
SPA	special appendix
State	State of New York
T	transcript
T(D)	transcript of Daubert hearing
Treaties	Treaties of 1795 and 1807
Tribe	Seneca-Cayuga Tribe of Oklahoma

STATEMENT OF ISSUES

This case concerns whether the State of New York ("State"[1]) violated the Nonintercourse Act ("NIA") in purportedly acquiring the Cayuga Reservation in two Treaties in 1795 and 1807 and, if so, what remedy is due to two successor tribes: the Cayuga Indian Nation of New York ("Nation") and the Seneca-Cayuga Tribe of Oklahoma ("Tribe") (collectively "Cayugas"). The issues are:

1. Whether the district court clearly erred in finding that the State acted in bad faith or without good faith.

2. Whether the court properly found the elements of liability, including that (a) the Cayugas are "tribes" under the NIA; (b) the Treaties were within the statute's scope; and (c) Congress did not ratify the Treaties.

3. Whether the court properly rejected the abandonment defense and the equitable defenses of election-of-remedies and laches.

4. Whether the court properly set the parameters for the jury award as the land's current fair market value ("CFMV"), without improvements but with the incidental effect of public infrastructure, plus fair rental value ("FRV") since 1795, for payment by the State as the original tortfeasor.

5. Whether any evidentiary rulings were abuses of discretion that materially swayed the factfinder's judgment.

[1/] We follow appellants' abbreviations and cite their brief as "B[page]."

6. Whether the court abused its discretion in refusing to hold a new trial, including whether (a) the jury verdict was supported by sufficient evidence; (b) it was consistent; and (c) the State waived the right to challenge it.

7. Whether the court abused its discretion in awarding prejudgment interest, including whether (a) interest accrued from 1795; (b) compound interest was appropriate; and (c) the court, which reduced the interest award by 60% based on factors like the length of time since the Treaties, was obliged to reduce it further.

8. Whether the court abused its discretion by including the Cayugas in the judgment rather than having it run exclusively to the United States as trustee.

STATEMENT OF THE CASE

The State purportedly acquired the 64,015-acre Cayuga Reservation in two treaties in 1795 and 1807. In 1974, after the Cayugas had long requested that the State provide further compensation due to the Treaties' unfair terms, the Supreme Court finally made federal jurisdiction available to challenge the Treaties under the NIA. In 1980, the Cayugas sued the State, Seneca and Cayuga Counties ("Counties"), and landowners. The United States intervened as a plaintiff. After finding the defendants liable on summary judgment and rejecting the remedy of ejectment, the district court held two lengthy trials to assess damages for payment by the State as the original tortfeasor: first, a jury trial resulting in a verdict of about $37 million for CFMV and two centuries of FRV; and second, a bench trial resulting in a prejudgment interest award of about $211 million.

A. Statutory Background

In 1790, Congress enacted the first of the Trade and Intercourse Acts that long have embodied the essential features of federal Indian policy. Section 4 constituted the first NIA: "no sale of lands made by any Indians * * * 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 * * * made and duly executed at some public treaty, held under the authority of the United States." B19; SPA636. The 1793 NIA similarly provided: "no purchase or grant of lands" from Indian tribes "shall be of any validity in law or equity" unless "made by a treaty or convention entered into pursuant to the constitution." SPA638. This version also prohibited anyone unauthorized by the United States from even treating with Indians to purchase land. SPA638. An exception allowed state agents to attend treaty negotiations held under the United States' authority and, "in the presence" and "with the approbation" of federal commissioners, to negotiate regarding Indian land. SPA638–39. The NIA remains effective today. 25 U.S.C. 177.

B. Factual Background

1. The Cayugas through the Revolutionary War. — The Cayuga Nation is part of the Six Nations, an alliance of Iroquois-speaking tribes predating Columbus. SPA133–34. Before the Revolutionary War, the Cayugas had about 1700 square miles in territory and a civilized society around Cayuga Lake. SPA134; SPA141–42; SPA598–604; T4840–44.

Early in the war, the Six Nations remained neutral, but their location and British influence ultimately made neutrality impossible. SPA135; T2848–49; T4831–34. Most but not all Cayugas supported the British. SPA135–36. In response, the State joined the fledgling American government in a campaign against British-allied tribes that destroyed the Cayuga economy and way-of-life. SPA139–42. The Six Nations' population fell precipitously, and post-war conditions prevented most surviving Cayugas from reclaiming their destroyed villages. SPA142; T4862–67. They dispersed in three main groups: the Cayuga majority, which settled at Buffalo Creek; the Cayuga minority, which returned to Cayuga Lake; and others who relocated to Canada. SPA144–45.

At war's end, the United States and the State pursued different objectives regarding the Cayugas. SPA145–46. The United States sought peace and political stability. SPA146. The State sought to expel the Cayugas and acquire their territory, which the United States feared could reignite war. SPA146–47; T2877–82; G363:440; G438. To stake its claim, the State designated land encompassing traditional Cayuga territory as a military tract — a land reward for veterans, including many who had fought the Cayugas — without consent from the Cayugas or the United States. T2876–77; T4861–62; G228:266.

The State and the United States pursued separate peace treaties with the Cayugas in 1784. SPA147. Although interested in land cessions, the State procured none. SPA147. The federal treaty recognized the Six Nations' right to

certain lands in return for other cessions. SPA147; SPA629–30. Although invited to participate in the federal negotiations, State Governor George Clinton refused and instead sent representatives informally "to Counteract and frustrate" to further the State's interests. SPA147–48; G425:379.

2. State efforts to obtain Cayuga territory. — The war left the Cayugas destitute. T2885–88. In 1787, a company of land speculators (including various State officials) offered a 999-year lease of land for a $2000 annuity. SPA150–51. The company represented that the State had authorized the "Livingston Lease" and would take the land without compensation otherwise. SPA152. The Cayuga majority agreed given their desperate circumstances. SPA151; T2887. The State viewed the Livingston Lease as competition against its own interests, however, and quashed it. SPA152–54; T2890; T2910–11; T4917–24.

In July 1788, the State ratified the Constitution, which empowers the United States to make treaties and prohibits states from doing so. SPA154. Nevertheless, the State made several treaties later in 1788 and 1789 with constituents of the Six Nations, including the Cayugas. SPA154. It consistently dealt with minority factions of individual tribes, despite Clinton's awareness that Iroquois protocol required consent from authorized representatives of all Six Nations. SPA154; T2898–2913; T4944–52. Suggesting disingenuously to the Cayuga minority that the (already quashed) Livingston Lease would displace them, he persuaded them to sign a treaty in 1789. SPA156; T4940–42. The Cayuga minority ceded 1600

square miles to the State in return for a $500 annuity and an additional lump sum, but retained a 64,015-acre Reservation "for their own use and cultivation but not to be sold, leased or in any other manner aliened or disposed of to others." SPA155; SPA632–33.

The State promised in the 1789 Treaty to protect the Reservation from encroachment by settlers. SPA156; SPA632–33. Nevertheless, on the same day the treaty was signed, the State Legislature reaffirmed the military tract. T2899; T4964–65. The State proceeded to survey Cayuga land despite objections that the State "cheat[ed]" the Cayugas and "stole" their land. T2904; T4967; G298. Frontier violence against Indians was common, yet repeated State promises to stop settler encroachment were broken. SPA164–66; T2922–37; T3410–11. Indeed, Clinton directed that settlers "support[ing] * * * the State" not be removed from the Reservation. T2923–27; T3400; T5000–01; G234:442.

Excluded from the 1789 negotiations, the Cayuga majority vehemently protested that Clinton's "Determination was to effect a Disunion, which would terminate in [their] Ruin." SPA156–60; G234:340–43. Destitute and convinced that the State's appropriation was irreversible, especially given the settlers' presence, the Cayuga majority proposed a sale for $4,000. SPA164–66; T2931–35; T2939; T3320–21. That offer was rejected, and eventually they acknowledged the 1789 Treaty for a share of the annuity and a "benevolence" of $1000. SPA166; T2936.

3. The State dispossesses the Cayugas of the Reservation. — In 1789, the State had pledged to protect the Cayugas' "peaceable possession" of the Reservation. SPA155; SPA203; SPA632–33; G298. Soon thereafter, as the State was aware, Congress adopted the first NIA. SPA167; SPA200; T2957–59; T2966–67. Nevertheless, in 1792, in keeping with his stated desire to promote "disunion" and "impotency" among the Six Nations (G203:167–68), Clinton proposed that the Legislature purchase the Cayuga Reservation.[2] T2953. In 1793, after Congress strengthened the NIA, the State passed a statute authorizing the purchase without regard to the NIA's requirements. SPA172–73. Representatives of the Cayuga majority and minority separately visited Albany in early 1794 to negotiate, without result. SPA174; SPA178–80.

Later in 1794, the United States negotiated the Treaty of Canandaigua with the Six Nations. SPA180. This treaty ratified the State's 1789 purchase of Cayuga lands, "acknowledge[d] the lands reserved" to the Cayugas "to be their property," and guaranteed that the Reservation "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." SPA180–81; SPA677.

In April 1795, the State passed a new act to purchase reservations including the Cayuga Reservation. SPA184–85. Despite purporting to be for the tribes'

[2/] He had quashed another lease in 1791, his evident motive to preserve Cayuga land for the State's own "Speculation." SPA168–72; G362:40–41; G384.

"better Support," the act guaranteed the State a minimum 300% profit by directing that it would pay no more than $0.50 an acre and then auction the land for no less than $2.00 an acre. SPA185; SPA681–82. The State's Council of Revision vetoed the act for promoting the State's interests rather than the Indians', but the Legislature overrode the veto. SPA185–87; T2973–77; T5065; G363:464–65.

Upon learning of the State's intentions, Secretary of War Timothy Pickering sought the opinion of Attorney General William Bradford and received assurance that the NIA forbade treaties held without Congress's authority. SPA191–92; T2979–81; G267. Pickering communicated that opinion to outgoing Governor Clinton and incoming Governor John Jay. SPA192; SPA196; G238; G277. Neither would stop the 1795 treaty, however, with Jay "forbear[ing] officially to consider and decide" his opinion of the NIA's effect. SPA196–97; G238.

Pickering also wrote Israel Chapin, Superintendent to the Six Nations, but the letters arrived after Chapin attended the 1795 negotiations, where he was informed that the State would follow its law over the NIA. SPA192–95; G269; G277. The State rejected the Cayugas' requests that it only lease the Reservation or purchase only half. T2992–97. On July 27, 1795, the State signed a new treaty — this time with the Cayuga majority — purporting to acquire the Reservation, save for a few square miles reserved again to the Cayugas, for an $1,800 annuity. SPA187; SPA688. Chapin witnessed the treaty, but as a private individual, not a federal representative. SPA195; SPA690; G269. Another federal employee,

Jasper Parrish, similarly assisted as interpreter and witness. SPA228; SPA544. President Washington wrote Pickering that "further sentiment * * * on the unconstitutionality of the measure would be [received] too late" if the negotiations were over. SPA193–94; G388:251.

The State next surveyed, subdivided, and auctioned the land in hundreds of lots. SPA211–12; T1147. Some went to the same State commissioners who negotiated the treaty. SPA212. Sale prices averaged $4.50 per acre — 800% more than the Cayugas were paid. SPA216; T1198; T2997–99. A period of rapid development followed, with yet more settlers arriving. T3005–08. Most remaining Cayugas consequently moved away by 1800. SPA225; T3008–09.

In an 1807 treaty, the State purchased the remaining Reservation. SPA224–29. The State had followed NIA procedures in other treaties since 1795, but it failed again with the Cayugas. SPA224–25. Parrish again served as interpreter and witness, but not as a treaty commissioner. SPA544; A2502–03. The State paid $4,800 for land then worth about $15,000. SPA227.

4. The Cayugas after the Treaties. — After the 1795 and 1807 Treaties, the Cayugas had no homeland in the State. SPA227. A diaspora followed, with some moving to Seneca reservations in the State, others to Ohio and then Indian Territory (in modern Oklahoma and Kansas), and others to Canada. T3010–16. Efforts to create a new reservation failed, stymied by lingering prejudice. T3023–31; G369:87–88. Their limited resources were also taxed in protecting

their meager annuities — their only visible means of support — from claims by the Canadian Cayugas. T3031–37; G445:ex.15:249–50; G600:6–8.

The following years were marked by the Cayugas' attempts to obtain fair compensation. SPA230–32. In 1853, a Grand Sachem of the Six Nations presented the State Legislature with a "memorial" seeking justice: "The Cayugas are poor * * * . They now come to their powerful friend, the State of New-York, and ask to be heard. They have no other source to which to look." SPA230; G459. He submitted a similar memorial in 1861: "[The Cayugas] are exiles, even in the very State that gave them origin; they possess not an acre of ground wherein to bury their dead!" SPA230; G460. In response, the State Senate's Committee on Indian Affairs recognized the State's "large profit" and recommended that the Cayugas be further compensated, but the Legislature rejected the resulting bill and then similar bills in 1890, 1891, and 1895. SPA230; T3039–41; G445:ex.5; G464.

After the Cayugas submitted another memorial in 1906, the State's Attorney General concluded that their claim "surviv[ed] any lapse of time" but that "no court had jurisdiction." SPA231; G445:ex.22; G463; S635:2; S639; S641:365. An investigation commissioned by the State Land Board concluded that the State had a "moral obligation" to provide further compensation and that its "large profits" were "made possible by * * * [its] superior knowledge, ability and position * * * in its negotiations with [the Cayugas] in consequence of the[ir] ignorance, helplessness and dependence." SPA230; T3045–47; G374:77–78. With the

Legislature's approval, the Land Board negotiated a settlement based on the State's inequitable profits, but the Governor, viewing it as a "charitable gift without basis as a legal claim," denied approval. SPA231–32; T3047–51; G375:27–32; G445:ex.5; G600:13–14.

In 1913, after the Land Board rebuffed further settlement overtures, the Cayugas won (after two appeals) a writ ordering negotiation. SPA232; G445:ex.35. The State then agreed to pay additional annuities, but those payments ceased in 1918 based again on the Governor's disapproval. SPA232; G600:18–20. The Cayugas persevered through various avenues in the State bureaucracy, and in 1958 the State finally passed a law authorizing further compensation for the Cayugas living in the State — that is, the Nation. SPA232; G600:20–22.

In the west, the Tribe did not receive such additional payment, but it sought further compensation in a 1951 suit against the United States before the Indian Claims Commission ("ICC"). SPA557; G600:22–23. The suit alleged that the Treaties resulted from the United States' breach of fiduciary responsibility. A2267–75. The United States defended itself vigorously but eventually paid $70,000 in settlement. A2286–2302.

Throughout this period, the Cayugas had no effective recourse against the State in federal or state court. SPA232. That changed in 1974 with the Supreme Court's landmark holding in Oneida Indian Nation v. County of Oneida ("Oneida II"), 414 U.S. 661 (1974), that tribes present federal questions within federal

jurisdiction when asserting "possessory rights * * * to their aboriginal lands, particularly when confirmed by treaty." Id. at 667. After this decision, the Cayugas again attempted to settle with the State and filed this suit only when Congress disapproved the resulting agreement. SPA480; T4432–34; T4491–92.

C. Procedural Background

In 1980, the Nation sued State officers and agencies, the Counties, and private landowners. A204–29. Asserting the Treaties' invalidity under the NIA, the Nation sought relief including ejectment and FRV. A218–29. The court certified a defendant class and the Tribe intervened as a plaintiff. A335–49.

Over the following years, the court denied motions to dismiss and granted the Cayugas summary judgment on various liability issues. SPA527–90. In 1992, the United States intervened as a plaintiff. A2581–89. In 1996, after unsuccessful settlement discussions, the court found that all liability issues had been resolved. SPA519–20; see SPA340; SPA530. Further mediation failed. DN411.

The court next determined the parameters for a trial on remedies. In April 1999, it ruled on various issues regarding damages. SPA487–517. In June 1999, after a three-day hearing on ejectment, it rejected that remedy. SPA453–86. In October 1999, it found that the State could be held responsible for all damages as the original tortfeasor and decided to start with a trial against the State alone. SPA353–62. In December 1999, it ruled on various evidentiary issues. SPA337–52. In January 2000, after a seven-day hearing under Daubert v. Merrell

Dow Pharmaceuticals, 509 U.S. 579 (1993), it accepted the State's and the United States' land appraisal experts but not the Cayugas' expert. SPA282–90.

A nineteen-day jury trial ensued in January and February 2000. The United States' witness Arvel Hale testified that CFMV was $264,710,039 and that FRV since 1795 was $70,492,456. T293–94. The State's witness John Dorchester testified that CFMV was between $25 and $40 million, and FRV between $6.7 and $11 million. T1855–57.

In a special verdict, the jury found CFMV of $35,000,000. A4767. It found FRV of $17,156.86 per full year, with smaller amounts for partial years, for a total of $3,510,007.61. A4758–67. After subtracting $1,598,334.99 for the State's past payments, the jury found $1,911,672.62 in FRV minus setoffs. A4767.

A twenty-three-day bench trial followed in July and August 2000 for remaining issues. The Cayugas' and the United States' witnesses Peter Temin and Mark Berkman testified that prejudgment interest on FRV damages totaled, respectively, $1,749,963,279 and $527,500,817. T5780; T5928. The State's witness Richard Grossman presented an analysis resulting in the Cayugas' owing the State about $7.6 million. T6451–53.

On October 2, 2001, the court issued a decision awarding prejudgment interest. SPA68–255. The court declined the State's invitation to "adjust" the jury verdict and suggested that the State likely waived its right to challenge the verdict. SPA80–96. The court then found an award of prejudgment interest appropriate

based on factors including the State's lack of good faith. SPA96–237. It denied that the Cayugas were responsible for any delay in bringing this action. SPA235–36. The court adopted the analysis of the United States' economist, who compounded interest from 1795 at the lowest risk-free rate, but reduced his result by 60% for reasons including "the passage of 204 years" and the United States' failure to protect the Cayugas. SPA238–55. The court thus awarded interest of $211,000,326.80, for a total judgment of $247,911,999.42. SPA67.

In March 2002, the court denied motions to hold a new trial or alter the judgment, save for technical revisions; granted the United States' motion to dismiss non-State defendants, which announced the policy not to seek relief from those who acquired land from the State or later landowners in good faith (A5316); and certified the judgment as final under Federal Rule of Civil Procedure ("Rule") 54(b). SPA9–66. Both the non-State defendants and the Cayugas received leave to appeal certain issues under 28 U.S.C. 1292(b). SPA1–8; A5428–30.

STANDARD OF REVIEW

Findings of fact are reviewed for clear error and overturned only on "the definite and firm conviction that a mistake has been committed." Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

Summary judgment rulings are reviewed de novo except that rulings on equitable defenses are reviewed for abuse of discretion even on summary judgment. Tri-Star Pictures v. Leisure Time, 17 F.3d 38, 43–44 (2d Cir. 1994).

Rulings regarding expert testimony are reviewed for abuse of discretion and reversed only if "manifestly erroneous." Amorgianos v. National R.R. Passenger, 303 F.3d 256, 264–65 (2d Cir. 2002). Furthermore, such rulings warrant reversal only if affecting substantial rights, and thus not unless they likely swayed factfinders materially. Constantino v. Herzog, 203 F.3d 164, 174 (2d Cir. 2000).

A court should not grant a new trial unless "the jury has reached a seriously erroneous result or * * * the verdict is a miscarriage of justice," with decisions regarding new trials reviewed for abuse of discretion. Smith v. Carpenter, 316 F.3d 178, 183 (2d Cir. 2003). This Court "upset[s] a jury verdict only if * * * 'such a complete absence of evidence support[s] the verdict that the jury's findings could only have been the result of sheer surmise and conjecture.'" Norton v. Sam's Club, 145 F.3d 114, 118 (2d Cir. 1998). Similarly, it will "adopt a view of the case, if there is one, that resolves any seeming [verdict] inconsistency." Turley v. Police Dep't, 167 F.3d 757, 760 (2d Cir. 1999).

The decisions whether to award prejudgment interest and how to calculate it are reviewed for abuse of discretion. SEC v. First Jersey Sec., 101 F.3d 1450, 1476 (2d Cir. 1996).

SUMMARY OF ARGUMENT

This Court should reject each of appellants' myriad arguments and uphold the outstanding work of the district court in the twenty years of litigation that preceded the judgment at issue. Especially given the deference due, this Court should affirm regarding both liability and remedies.

1. The district court properly found that the Treaties violated the NIA and that appellants' defenses were meritless. Despite the NIA's unequivocal direction that "no purchase or grant of lands" from an Indian tribe, "within the bounds of the United States, shall be of any validity in law or equity" unless "made by a treaty or convention entered into pursuant to the constitution," the State purchased the Reservation in 1795 and 1807 without federal authority. As the court found, the State acted without good faith. That finding was not clearly erroneous, as demonstrated amply by the undisputed facts that the State affirmatively legislated that it would auction the land for at least four times what it paid the Cayugas and that auction prices were actually nine times higher; that this legislation was vetoed as unfair but the veto then overridden; and that State-led investigations repeatedly recognized that the State had profited handsomely and improperly.

Appellants challenge various elements of liability, but their arguments fail. First, they argue that the district court erred in finding the Cayugas' tribal status on summary judgment, but the court properly gave great weight to federal recognition of the Cayugas' continuing tribal status since the time of the Treaties. Appellants

rely on inapposite caselaw relating to unrecognized tribes. Second, appellants contend that the Treaties were not subject to the NIA because the State was implicitly exempted or because the statute protected only a certain type of Indian land. Both arguments contradict the NIA's plain language, which covered all sales "within the bounds of the United States" and all Indian "lands." Third, appellants argue that the United States has ratified the Treaties. As the Supreme Court has held, however, only Congress can extinguish Indian title, and it must do so plainly and unambiguously. Although appellants infer federal approval from individual officials' actions, findings of various tribunals, and treaties that did not purport to ratify the 1795 and 1807 Treaties, they fail to show any plain and unambiguous intent by Congress to extinguish the Cayugas' title.

Appellants' defenses also fail. First, they argue that the Cayugas abandoned the land by 1800 — five years after the 1795 Treaty — but they do not explain how a tribe could abandon any right to challenge a land transaction under the NIA by vacating the land pursuant to that transaction. Furthermore, the defense of abandonment is inapplicable to "recognized" title, and both Congress and the State have recognized the Cayugas' property right in the Reservation. Second, appellants invoke the equitable defenses of election-of-remedies and laches. The Supreme Court has recognized, however, that such equitable defenses are presumptively unavailable in suits under the NIA, which states that transactions that violate its terms lack "any validity in law or equity." The defense of election-

of-remedies fails for the additional reason that the Cayugas took no action inconsistent with this suit simply by receiving additional compensation. The defense of laches fails on the facts, for the district court did not abuse its discretion in concluding that the Cayugas did not unreasonably delay but rather repeatedly sought fair compensation — only to have the State repeatedly fail to honor its self-confessed "moral obligation" given its unfair profits at the Cayugas' expense — and then brought suit soon after it finally became possible in 1974. Furthermore, though the Supreme Court has not reached the issue whether laches could bar suits by tribes like this one, this Court has held that laches is legally unavailable. Even absent that holding, laches would be unavailable because: the United States' presence defeats laches; laches is inapplicable in actions at law brought within the relevant statute of limitations; and applying such equitable defenses here would be profoundly inequitable.

2. The district court's remedies analysis was also proper. Despite the State's numerous criticisms, the court properly set the parameters for the jury award. First, the State contends that the only possible measure of damages was the value of the Reservation in 1795, but the remedy in a suit to recover land normally includes ejectment, which the court denied based on the unique circumstances of this case. CFMV damages were necessary to provide a just substitute for ejectment. Second, the State asserts that the court should have followed New York law limiting FRV to six years before the complaint rather than allowing FRV since

1795, but applying that state law would improperly frustrate the federal policy of ensuring that NIA violations do not go unremedied. Third, the State contests the decision that it was liable for all damages as the original tortfeasor, but that decision not only was fair given the State's blameworthiness, but also comported with the common law principle that tortfeasors are liable for the entirety of indivisible injuries they cause. Fourth, the State requests an offset for the United States' "proportionate responsibility," but the United States was not a defendant. The State's recourse, if any, was an action in contribution, but it has not appealed the court's decision to reject a contribution claim for untimeliness. Fifth, the State argues that it deserved an offset as a good-faith occupier for the incidental effect of infrastructure — that is, the effect that infrastructure like roads has on nearby land values — but awarding such an offset was both unfeasible and unnecessary under the common law.

The district court's evidentiary rulings in the two trials were also correct. First, the court properly did not submit evidence regarding equitable issues to the jury. Because the State deserved no offset against damages whether or not it acted in good faith, the issue of good faith was irrelevant. Furthermore, the availability of any offset and the defenses of mistake and failure-to-mitigate (which were waived in any event) were issues for the court, not the jury. Second, the court did not abuse its discretion in accepting the United States' expert, whose testimony regarding CFMV and FRV was both relevant and reliable. Even if that acceptance

had been manifestly erroneous, the jury did not credit his testimony, awarding less than even the State's expert suggested. Third, at the bench trial, the court did not abuse its discretion in excluding evidence regarding the fairness of the compensation the State provided in the Treaties. The excluded evidence was either speculative or duplicative. Moreover, its admission was unlikely to alter the court's finding that the State did not fairly compensate the Cayugas.

This Court should also reject the State's attack on the jury verdict. The State obscures the proper analysis by arguing that no evidence supported the jury's decision to award the same FRV damages in every year. Litigants can argue that particular parts of a special verdict are unsupported by the evidence, but there is no requirement that evidence support the relationship between separate parts. The State's argument is at root an argument that the verdict is inconsistent. There was sufficient evidence to support each FRV award, as the jury could have determined FRV in any particular year by adjusting the experts' suggested values based on perceived shortcomings in their methodologies. And although awarding constant FRV values was economically questionable, it was logically consistent, as the fact that FRV is a certain value in one year does not preclude its being the same value in any other year. Moreover, the State waived its right to challenge the verdict by failing to object before the jury was discharged or during the sixty-day period afforded by the court to file motions in relation to the verdict, instead making the

strategic decision to ask the court during the ensuing bench trial to "look behind" the verdict solely for purposes of interest calculations.

The district court's decision to award about $211 million in prejudgment interest was no abuse of discretion. The underlying theme of the State's legal arguments regarding interest is that this award was somehow unfair. To the contrary, the judgment is manifestly fair given the magnitude of the State's ill-gotten gains and the loss suffered by the Cayugas, who have been deprived of their homeland for two centuries. The court adopted a conservative methodology, under which interest compounded from 1795 at the lowest justifiable rates, and then reduced the resulting award by 60%, or over $316 million, based on factors including "the passage of 204 years" and the United States' failure to protect the Cayugas. Although the State contends that the court should have picked a later accrual date, refused to compound interest, or reduced the resulting award by an even greater percentage, it shows no abuse of discretion in an interest analysis that, if anything, was overly generous to the State.

Finally, though the State contends that the judgment should run exclusively to the United States as trustee, the district court did not abuse its discretion by refusing to exclude the Cayugas from the judgment. The State contends that the judgment leaves it exposed to claims from other interested tribes, but the amendment that the State proposes would not affect any such exposure. The question how the judgment will be distributed is a question for another day.

ARGUMENT

PART I: LIABILITY

Much as it does today, the NIA at the time of the Treaties provided that "no purchase or grant of lands" from an Indian tribe "shall be of any validity in law or equity" unless "made by a treaty or convention entered into pursuant to the constitution." SPA638. As the Supreme Court's Oneida decisions established, "Congress' clear policy" was "that no * * * entity should purchase Indian land without the acquiescence of the Federal Government," with those who violate the NIA being subject to liability in federal suits to vindicate unextinguished tribal property rights. County of Oneida v. Oneida Indian Nation ("Oneida VI"), 470 U.S. 226, 232–50 (1985); Oneida II, 414 U.S. at 666–82.

A plaintiff under the NIA must establish that: it represents a tribe in a trust relationship with the United States; the challenged transaction addressed Indian land; and Congress has not ratified the transaction. Golden Hill Paugussett Tribe v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994). The district court properly found that the Treaties violated the NIA and that appellants' defenses were meritless. Although liability does not depend on bad faith, we discuss this issue first because it pertains to many issues discussed below.

I. THE STATE ACQUIRED THE RESERVATION IN BAD FAITH.

The district court did not clearly err in finding that the State repeatedly acted in bad faith or without good faith in dealing with the Cayugas. Most importantly,

the State acted in bad faith or without good faith regarding the Treaties.[3] SPA184–87; SPA199–02; SPA215–29. Far from being clearly erroneous, that finding was inescapable given the Treaties' unconscionable terms.[4] Despite purporting to promote the impoverished Cayugas' "better Support," the legislation enabling the 1795 Treaty guaranteed that they would receive only a fraction of their Reservation's worth and that the State would garner a minimum 300% profit, which actually became far more. SPA184–87; SPA216. The State suggests that subdivision may increase land's value (B192–93), but it explains neither why it withheld any added value from the Cayugas nor how subdivision alone could have caused such exorbitant profits. Indeed, the State's Council of Revision vetoed the legislation as unfair, but the Legislature overrode the veto. SPA185–87; G363:464–65. Then, in 1807, the State paid only one-third of the remaining land's worth. SPA227. Later State-led investigations repeatedly acknowledged that the State had profited improperly as a result of its "superior knowledge, ability and

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[3/] The State also lacked good faith in negotiating the 1789 Treaty after ratifying the Constitution, which prohibits states from making treaties (SPA164; SPA221), and in refusing repeatedly to honor its self-confessed moral obligation to compensate the Cayugas fairly (SPA232–34).

[4/] Given the strength of the evidence, the argument that the plaintiffs should have borne the burden regarding good faith (B190–91) is irrelevant. Furthermore, the State properly bore the burden because the "good faith argument is akin to an affirmative defense." SPA123; see Oneida Indian Nation v. New York ("Oneida V"), 719 F.2d 525, 541–42 (2d Cir. 1983), aff'd in part, rev'd in part, 470 U.S. 226 (1985); McCall v. Scott, 239 F.3d 808, 818 n.10 (6th Cir. 2001); Herman v. RSR Sec. Servs., 172 F.3d 132, 142 (2d Cir. 1999).

position" compared to the Cayugas' "ignorance, helplessness and dependence." SPA230–31; G374:77–78; G463; G464.

Furthermore, the State had at least "general awareness" of the NIA yet acted in "calculated disregard" of it. SPA200–02; SPA220; SPA223–24. The State was informed of Acts of Congress (SPA188–89), and both Governor Clinton and Governor Jay knew of the NIA's requirements by 1795. Clinton received letters referencing the NIA as early as 1791 (T2957; G203:169; G405; N9), and both were sent the Attorney General's opinion that the NIA prohibited treaties held without Congress's authority (SPA192; G267). A State Supreme Court Justice wrote Jay soon after his election and informed him of both the NIA's requirements and Clinton's reluctance to comply: "There is the Rub with Your Predecessor, and I would not trust him to make a full and seasonable Communication of this Business to You." SPA196; T2966–67; G376. Jay could have halted the 1795 Treaty but chose to proceed while "forbear[ing] officially to consider and decide" his opinion of the NIA's effect. SPA196–97; G238. Thus, the State's expert historian would not dispute that the State was aware of the NIA by 1795. T5022. Although the court refused to find "that the State willfully defied" the NIA in 1795 because the issue may have "fallen between the cracks" (SPA202), that explanation contradicts the record and would hardly excuse the State's behavior even if true. Furthermore, the State disregarded the NIA again in 1807 despite having complied in several intervening treaties with other tribes. SPA224–29.

This Court thus should reject the State's portrayal of itself as a reluctant purchaser that merely acceded to the Cayugas' demands and encouragement from the United States. The Treaties were the culmination of long and repeated efforts to acquire Cayuga land. See pages ("pp") 4–9. While certain Cayugas were amenable to selling, their motivation was their indigence and the State's repeated violation of promises to protect them from encroachment by settlers. pp5–6. And though the State repeatedly asserts that the United States "encouraged" it to enter the Treaties (B2; B11; B21–22), the State provides no support.[5] The United States did not stop the Treaties or attempt to quash them, but neither did it encourage the State to treat with the Cayugas without fulfilling the NIA. The State shows no clear error in the finding that it acted in bad faith or without good faith.

II. THE CAYUGAS ESTABLISHED THE ELEMENTS OF LIABILITY UNDER THE NIA.

A. The Cayugas Are "Tribes" Entitled to Invoke the NIA.

The district court had "little hesitation" in finding the Cayugas' tribal status on summary judgment. SPA555. Appellants never dispute that the Cayugas were a "tribe" under the NIA when the Treaties were signed. Appellants also never dispute that the Cayugas are currently "tribes" in some sense. Indeed, the United States recognizes the Cayugas as tribes and has maintained government-to-

[5] Pickering and Chapin helped certain Cayugas communicate desires to negotiate (B22; B31; B107) but did not endorse negotiation, let alone negotiation that violated the NIA. Pickering made clear that the NIA controlled. SPA191–93.

government relations with them since the Treaty of Canandaigua in 1794. A477–78; A571–72; A595–96. No court has ever denied that a recognized tribe was a "tribe" under the NIA. Nonetheless, appellants request remand because the court relied on federal recognition without considering the Cayugas' continuing status under United States v. Candelaria, 271 U.S. 432 (1926), which states that "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory" is a "tribe" under the NIA. Id. at 442.

Recognized tribes like the Cayugas need not show their continuing status as "tribes" under Candelaria. Appellants cite Golden Hill to assert that the Cayugas must show "continuous tribal existence" since 1795 (B72), but that decision does not require them to have satisfied Candelaria since then. Golden Hill addressed whether an unrecognized tribe could invoke the NIA. 39 F.3d at 55. In this context, the decision notes that an NIA plaintiff must show it "is an Indian tribe" and later acknowledges the Candelaria formula. Id. at 56, 59. It also states in dictum that tribal status for purposes of federal recognition "is not necessarily the same as tribal status under the [NIA]" and that criteria for federal recognition and Candelaria "might not always yield identical results." Id. at 57, 59. The decision recognizes that the plaintiff must be a tribe in some sense, but it never holds that the plaintiff must have been a tribe under Candelaria continuously since the NIA violation.

Such a holding would be unreasonable. The Candelaria Court did not purport to establish an inalterable test for being a "tribe" under the NIA. It merely presented a "more reasonable view" than the contemporaneous one protecting only "nomadic and savage Indians." 271 U.S. at 441–42; cf. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 588 (1st Cir. 1979) (term must be "broad enough and flexible enough" for changing and diverse conditions). Indeed, the Candelaria formula requires the tribe to "inhabit[] a particular * * * territory," 271 U.S. at 442, and thus necessarily applies when the tribe has territory, not centuries after a tribe is dispossessed through an NIA violation. Moreover, like Golden Hill, Candelaria addressed whether a plaintiff that was not a recognized tribe could sue under the NIA — a fundamentally different question from that here. Appellants cite no case applying Candelaria to question a recognized tribe's status.

The proper question is whether the Cayugas have shown a continuous tribal existence in the sense that they succeed to the rights of the Cayugas who treated with the State, not in the Candelaria sense. (After all, this case turns on the NIA's application in 1795 and 1807, not whether the NIA would affect a land transaction with the Cayugas today.) The United States recognizes the Cayugas' continuous tribal existence since 1794. A571–72; A595–96. This recognition should control because it is not "heedless" or "manifestly unauthorized." Baker v. Carr, 369 U.S. 186, 215–17 (1962); see United States v. Sandoval, 231 U.S. 28, 47 (1913); The Kansas Indians, 72 U.S. 737, 755–57 (1866); United States v. Holliday, 70 U.S.

407, 419 (1866). In particular, courts defer to the political branches in determining whether a government holds a former government's treaty rights. Terlinden v. Ames, 184 U.S. 270, 288 (1902); New York Chinese TV Progs. v. U.E. Enters., 954 F.2d 847, 852 (2d Cir. 1992). Deference to federal recognition of tribal status makes sense given agency expertise and the need for uniformity in government-to-government relations, which would suffer if tribes had to relitigate their status under each of the numerous statutes that apply to tribes.

Even if federal recognition of the Cayugas' continuous existence were not controlling, no evidence here warrants remand. "[I]t is for Congress to say when the tribal existence shall * * * have terminated, and Congress must so express its intent * * * in clear terms." United States v. Boylan, 265 F. 165, 171 (2d Cir. 1920); see Mashpee, 592 F.2d at 586. The record shows no termination of the Cayugas' tribal rights. Appellants claim that "expert testimony indicat[ed] that the Nation had not existed continuously since * * * the Treaties" (B74), but the cited affidavit provides no support.[6] Similarly, though they assert that the Nation "only began efforts to organize as a 'tribe' in 1971" (B80), their evidence details the Nation's efforts to become more organized. A5534–37; A5539; A5565–72. The Cayugas indisputably have continued to exist as unique political and legal entities. Indeed, the State has paid them annuities since the Treaties. B32.

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[6] It discusses whether the Cayugas who signed the Treaties were a splinter group and notes that only 130 Cayugas lived in the State in 1937. A528–35.

Furthermore, remand would be unnecessary even if the Cayugas were required to show continuous tribal status under Candelaria, for appellants show no genuine issue of material fact. While refusing to hold itself bound by federal recognition, the district court properly accorded it "great weight." SPA555. That deference accorded with Golden Hill's statement that administrative resolution of "factual issues regarding tribal status will * * * considerabl[y] assist[]" judicial determinations of tribal status. 39 F.3d at 60; see Mashpee, 592 F.2d at 582.

Golden Hill does not hold, as appellants argue, that federal recognition is irrelevant unless it follows procedures the Bureau of Indian Affairs adopted in 1978. B73; B79–80. This Court stayed proceedings pending the application of those procedures to an unrecognized tribe. 39 F.3d at 58–61. Before 1978, in the absence of those "uniform, systematic procedure[s]," such "deferral * * * was not required nor would it aid a court in its determination." Id. at 59–60. That statement does not imply that pre-1978 recognitions deserved no deference, just that "deferral" — meaning "postponement" — was unnecessary. Deference to such recognitions was the rule long before 1978. E.g., Holliday, 70 U.S. at 419.

Indeed, summary judgment would have been appropriate even if federal recognition did not merit great weight. Appellants claim, for instance, that the Nation "has no rules or regulations peculiar to it" and lacked "titular or nominal leadership until 1971" (B80–81), but the deposition they cite states that the Nation follows the Great Law, comparable to the Constitution (A5551; A5561), and that it

had chiefs, clan-mothers, and meetings even before it reorganized in 1971 (A5533–37; A5539). Appellants show no triable issue regarding tribal status.

B. The Treaties Were Within the NIA's Scope.

Appellants' further arguments that the NIA did not apply to the Treaties fail. These arguments depend on an understanding of different types of Indian title. "Aboriginal" title is a tribal right to occupy lands in which the sovereign holds fee title, known as the "pre-emption" right. Felix Cohen, Handbook of Federal Indian Law ("Cohen Handbook") 486–93 (1982). Although extinguishable by the sovereign or voluntary abandonment, aboriginal title exists without need for sovereign action. Id. By contrast, "recognized" title is a tribal right confirmed through treaty, statute, or the like and that remains valid until clearly and specifically extinguished by the sovereign. Id. at 492–93.

First, appellants contend that the State was not subject to the versions of the NIA effective in 1795 and 1807, when the Treaties were signed. B164–67. The 1790 version covered sales of Indian lands "to any person or persons, or to any state, whether having the right of pre-emption to such lands or not." SPA636. In 1793, Congress changed the NIA to apply to sales "within the bounds of the United States." SPA638. Without any supporting cases or legislative history, appellants contend that the removal of the explicit reference to states with pre-emption rights implicitly demonstrates Congress's intent to exempt such states. B165.

This argument is unsupportable, as Attorney General Bradford found in 1795 when he affirmed that the NIA constrained the State's attempts to purchase Cayuga land. SPA191–92; G267. Appellants admit that the 1790 version unmistakably applied to all states. B165. Indeed, the NIA likely was passed specifically to restrain this State. T2954–55; G211:61. If Congress had intended to limit the NIA dramatically by exempting such major purchasers of Indian land, it surely would have done so clearly. SPA574–75.

Instead, the amendment created "a stronger prohibition" by "omitt[ing] the earlier limitation on the class of prohibited grantees." Mohegan Tribe v. Connecticut, 528 F.Supp. 1359, 1364 (D. Conn. 1982); see Tonkawa Tribe v. Richards, 75 F.3d 1039, 1046 (5th Cir. 1996). The 1793 version manifested Congress's unmistakably clear intent[7] to subject every sale "within the bounds of the United States" to the NIA. See Mohegan Tribe v. Connecticut, 638 F.2d 612, 620 (2d Cir. 1981) ("Congress intended the statute to apply throughout the United States."). If states were exempt, Congress would not have specifically added an exception allowing state agents to negotiate regarding Indian land "in the presence" and "with the approbation" of federal commissioners. SPA638–39.

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[7] Furthermore, Congress's intent need not be "unmistakably clear," as appellants contend. B164. This standard applies when subjecting states to a statute would raise serious constitutional questions. Jinks v. Richland County, 123 S.Ct. 1667, 1673 (2003). The NIA raises no such questions. See Morton v. Mancari, 417 U.S. 535, 551–55 (1974); Oneida II, 414 U.S. at 667.

Indeed, appellants' logic absurdly suggests that Congress meant to exempt people when it removed the 1790 NIA's explicit reference to "persons." SPA575–76; see Mohegan Tribe, 528 F.Supp. at 1364.

Second, appellants argue that the NIA applies only to land held under aboriginal title, not recognized title. B167–71. Even if appellants had not waived this argument (B167 n.61), it fails. Every version of the NIA has protected "lands" held by Indians; none has made any distinction based on the source of title. SPA636–74. Appellants invoke the NIA's purposes, but legislative purposes are irrelevant when the statute is clear. Marvel Characters v. Simon, 310 F.3d 280, 289–90 (2d Cir. 2002). Furthermore, appellants misstate the NIA's purpose:

> The obvious purpose * * * is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government * * * to vacate any disposition of their lands made without its consent.

Tuscarora Indian Nation v. Federal Power Comm'n, 362 U.S. 99, 119 (1960); see Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664 (1979); Oneida V, 719 F.2d at 536–37. That purpose is served by protecting all Indian lands, whatever the source of title. Certainly, Congress also wished to promote peace (B168) by, for instance, "prevent[ing] Indian unrest over encroachment by white settlers," Golden Hill, 39 F.3d at 56, but protecting all Indian land is also consistent with that purpose. Thus, though appellants cite an irrelevant Supreme Court decision that did not mention the NIA and an incorrect district court decision (B169–70), the vast majority of

courts have held, sensibly, that the NIA applies to all Indian lands. Tonkawa Tribe, 75 F.3d at 1045–46 (citing cases).

C. The United States Has Not Ratified the Treaties.

Appellants misstate the law in arguing that the United States has ratified the Treaties. As they admit, ratification must be "plain and unambiguous."[8] B103–06. They err, however, in arguing that this standard alone controls. B106. Congress sets the terms by which Indian title can be extinguished. United States v. Santa Fe Pac. Ry., 314 U.S. 339, 347 (1941); cf. Fletcher v. Peck, 10 U.S. 87, 142–43 (1810) (Indian title must be "respected by all courts" until "legitimately extinguished"). Congress set these terms in the NIA — purchases of Indian land are invalid unless "made by a treaty or convention entered into pursuant to the constitution" (SPA638) — and only Congress can alter these terms.

The natural interpretation of the NIA requires a government-to-government agreement approved under the Treaty Clause — that is, by the President with the Senate's advice and consent. U.S. Const. Art. II, § 2; see Mohegan Tribe, 638 F.2d at 618–19 (purchases invalid "unless accomplished by a federal treaty"); Mashpee Tribe v. Watt, 542 F.Supp. 797, 805 (D. Mass 1982), aff'd, 707 F.2d 23 (1st Cir. 1983). Appellants argue that the word "convention" shows that approval need not follow Treaty Clause procedures (B102), but the Treaty Clause empowers

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[8/] Appellants argue that such approval need not also be "explicit." B104–06. We see little difference. Appellants' argument fails regardless.

Congress to enter into both treaties and conventions. United States v. Lue, 134 F.3d 79, 82–84 (2d Cir. 1998) (convention "well within" Treaty Clause); see Asakura v. Seattle, 265 U.S. 332, 341 (1924) (Treaty Clause covers "all proper subjects of negotiation between our government and other nations"). "Convention" is another word for an intergovernmental agreement, Black's Law Dictionary 332 (7th ed. 1999), and its inclusion in the NIA shows just that Congress meant to allow any agreement under the Treaty Clause without prescribing the formal terminology for the agreement.

Furthermore, appellants' contrary interpretation conflicts with other parts of the NIA. If Treaty Clause procedures were unnecessary, appellants fail to explain why the NIA refers to the "presence" and "approbation" of federal treaty commissioners or why it includes the phrase "pursuant to the constitution." SPA638. Contemporaries like Pickering sensibly understood this phrase to require action under the Treaty Clause. A1139. And even if the NIA were ambiguous, it should be read broadly to protect Indian interests. Wilson, 442 U.S. at 666.

The Supreme Court's discussion in Oneida VI is instructive. Appellants incorrectly suggest that this decision recognizes that approval under the NIA need not follow the Treaty Clause. B103. In truth, the Court noted that the 1790 NIA, which did not even include the later-added phrase "pursuant to the constitution" (SPA636), "prohibited the conveyance of Indian land except where * * * entered pursuant to the treaty power of the United States." 470 U.S. at 231–32. The Court

thus considered whether certain treaties showed plain and unambiguous intent by Congress to extinguish Indian title. Id. at 247–48. The Court never hinted that any action other than action under the Treaty Clause was relevant.

Appellants also incorrectly suggest that ratification can consist of a "longstanding understanding" that a state could dispose of Indian land. B110–11. They rely on United States v. National Gypsum, 141 F.2d 859 (2d Cir. 1944), but that case involved a federal treaty authorizing transfer of Indian land to the State to hold in trust. Id. at 860–62. The issue was whether trust authority in that "unique" situation included leasing authority. Id. at 862–63. The Court did not hold or imply that a "longstanding understanding" of a state's authority could excuse an NIA violation. Indeed, such a holding would conflict with Oneida VI.

Appellants admittedly identify no action under the Treaty Clause to ratify the Treaties (B102) and fail to show any other form of "plain and unambiguous" ratification by Congress.[9] For instance, they describe the presence of individual federal officials at the Treaties' negotiation (B107–10) and findings of the British-American Arbitral Tribunal and the ICC (B121–27), neither of which purported to ratify the Treaties or had authority to extinguish Indian title.[10] SPA543–47; SPA558–59. Appellants also emphasize the Treaty of Buffalo Creek, in which the

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[9] Appellants have not "at a minimum" shown factual disputes requiring remand. B107. The disputes concern the legal consequences of undisputed facts.

[10] The United States never "specifically accepted" such findings (B123), but rather merely paid money in settlement of claims. A1378; A2286–2302.

Cayugas and other tribes agreed to remove from the State (B114–20), but that treaty did not even mention Cayuga land in the State, let alone express intent to extinguish title thereto.[11] SPA547–58; SPA707–12; see Oneida Indian Nation v. County of Oneida, 434 F.Supp. 527, 538–40 (N.D.N.Y. 1977). That treaty contained even less "plain and unambiguous" language of ratification than treaties that Oneida VI found insufficient. 470 U.S. at 248 (treaties referring to "the last purchase" and "land heretofore ceded"). Similarly, the notion that the Treaty of Canandaigua authorized the State to extinguish the Cayugas' title (B110–14) fails because that treaty did not plainly and unambiguously authorize the State to do anything. It referred to the tribal right "to sell [land] to the people of the United States, who have the right to purchase," and did not indicate that these rights were immune to the NIA and other applicable law. SPA677.

III. APPELLANTS' DEFENSES ARE MERITLESS.

A. The Abandonment Defense Fails.

Appellants argue that the defense of "abandonment" applies because the Cayugas left the Reservation "no later than 1800" — five years after the 1795 Treaty. B100. Appellants provide no support for the surprising proposition that a tribe abandons any right to challenge a land transaction under the NIA by vacating

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[11] Appellants quote the Supreme Court's recognition that "tribes divested themselves of their title to lands in New York" in this treaty. B118. That quotation refers to special treaty provisions addressing other tribes' land. New York Indians v. United States, 170 U.S. 1, 21 (1898); SPA710–11.

the land pursuant to that transaction.[12] "[T]he voluntary physical abandonment of land by a tribe should not be confused with invalid tribal efforts to convey property to non-Indians." Cohen Handbook 493. If an invalid sale constituted "abandonment," of course, the NIA would be a nullity.

Appellants' argument also fails legally. Although aboriginal title can be abandoned, the United States recognized the Cayugas' property right in the Reservation in the 1794 Treaty of Canandaigua. To wit, Article II "acknowledged the lands reserved" to the Cayugas "to be their property" and guaranteed that "said reservation[] shall remain theirs, until they choose to sell the same," while Article IV reconfirmed that Article II "described and acknowledged what lands belong to the * * * Cayugas." SPA677. Appellants claim that this treaty created no reservation but rather acknowledged one the State had earlier created (B90–91), but that claim is irrelevant even if true. Even without the canon to construe such treaties liberally in favor of Indian parties, see Oneida VI, 470 U.S. at 247, the Treaty of Canandaigua obviously recognized the Cayugas' right to the Reservation. SPA535–38; see Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278–79 (1955) (recognized title established when Congress "definite[ly] inten[ds] * * * to accord legal rights, not merely permissive occupation"). Indeed, the Oneida II

[12/] Even if abandonment could defeat claims regarding the 1807 Treaty, that would pertain only to remedies.

Court acknowledged that this and other treaties "recognize[d] and guarantee[d] the rights of Indians to specified areas." 414 U.S. at 665 n.3, 667.

Contrary to appellants' argument (B94–100), Congress did not divest the State of any property interest by recognizing the Cayugas' right to the Reservation. Reading the first paragraph of the 1789 Treaty out of context, appellants argue that the State received the land in fee, with the Cayugas retaining only a "limited use right." B93–94. That argument contradicts the next paragraph, which confirms the Cayugas' right "to hold [the Reservation] to themselves and to their posterity forever, for their own use and cultivation but not to be * * * aliened or disposed of to others." SPA632. Courts must read such treaties as the Indians would have understood them. Worcester v. Georgia, 31 U.S. 515, 582 (1832). Rather than adopt appellants' technical reading, the Cayugas would have understood the 1789 Treaty to reserve full title to the Reservation. See id. at 552–53. Moreover, even if the Cayugas had only a limited use right, with the State holding the underlying fee, the Treaty of Canandaigua did not "take" anything by imbuing the Cayugas' right with federal imprimatur. See Oneida II, 414 U.S. at 670 (state pre-emptive rights coexisted with federal control over extinguishment of Indian occupancy); Mohegan Tribe, 638 F.2d at 616–17; G267.

Thus, both the 1789 Treaty and the Treaty of Canandaigua recognized the Cayugas' right to the Reservation. Appellants argue that courts have "long held"

that recognized rights may be abandoned, but they cite no case after 1932.[13] B85–87. As the district court found, modern cases have distinguished between aboriginal and recognized title and established that "if an Indian tribe possesses recognized title in certain land, then Congress, and only Congress, may divest the tribe." SPA534–38; e.g., Solem v. Bartlett, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land."); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586–87 (1977). Appellants suggest that such cases are inapposite because they do not expressly address abandonment (B87–88), but they establish that Congress has plenary authority to set the terms of Indian property rights. Congress has done so here: the Treaty of Canandaigua, much like the State's 1789 Treaty, recognized that the Reservation belonged to the Cayugas, without conditioning that property right on the "abandonment" theory appellants propose.[14]

B. Equitable Defenses Are Unavailable.

Appellants invoke the defenses of election-of-remedies and laches (B128–63), but such equitable defenses are presumptively unavailable in NIA suits, especially when the United States is a plaintiff. Indeed, the NIA itself states

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[13/] For instance, appellants rely on Williams v. Chicago, 242 U.S. 434 (1917). B85–86. As the district court noted, the treaty at issue there did not give the tribe a reservation that belonged to it. SPA538.

[14/] For similar reasons, appellants err in contending that the Cayugas relinquished any property right upon signing the Treaty of Buffalo Creek. B118–20. The case they cite involves the relinquishment of aboriginal land pursuant to a statute authorizing the extinguishment of title through "voluntary cession." Santa Fe, 314 U.S. at 344, 356–58.

that transactions that violate its terms lack "any validity in law or equity." SPA638. The district court did not abuse its discretion in rejecting these defenses.

1. Election of remedies. — As the district court found, the election-of-remedies defense is inapplicable because a transaction that violated the NIA "is invalid, as if it did not occur at all." SPA557. Appellants claim that the court misunderstood the way the defense functions, but they misunderstand the court, whose reasoning turned not on the principle that the Cayugas effectively "ratified" the Treaties (B138–41), but the more basic principle that equity will not protect NIA violations. The Supreme Court has established, applying logic that extends to all equitable defenses, that laches "cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." Ewert v. Bluejacket, 259 U.S. 129, 138 (1922); see Oneida VI, 470 U.S. at 244 n.16; United States v. Washington, 157 F.3d 630, 649 (9th Cir. 1998). A tribe's actions cannot support an equitable defense because, again, it takes a sovereign act to extinguish Indian title. Oneida II, 414 U.S. at 670; Santa Fe, 314 U.S. at 347.

Appellants fail to meet the defense's requirements in any event. Assuming that the "harsh" election-of-remedies doctrine continues to exist in federal practice (SPA557), it turns on whether the plaintiff previously received a remedy on an inconsistent theory, not whether it has made any inconsistent statements. B129–30. (Such statements might be relevant to estoppel, but appellants do not

claim the Cayugas are estopped.) Thus, though appellants emphasize the Nation's assertion that it "want[ed] no lands of the whites" (B133) and the Tribe's proposal to waive related claims (B137), those statements are irrelevant.

The Cayugas' theories for requesting compensation were not inconsistent with this suit. Contrary to appellants' claim, the Cayugas did not take "the position that the Treaties were valid and enforceable." B132. The Nation and the Tribe claimed, respectively, that the State had compensated them unfairly and that the United States had failed to secure them fair compensation. B133–38. These theories depended not on the Treaties' legal validity, but on the Treaties' real-world result: dispossession without adequate compensation. In other words, the Cayugas recognized that the Treaties dispossessed them but took no position on whether that dispossession was lawful. The Cayugas did not affirm the Treaties by, for instance, claiming any violation thereof.[15] They thus acted unlike those parties who trigger the election-of-remedies defense by seeking to void contracts after suing for breach. B130–31; see United States v. Oregon Lumber, 260 U.S. 290, 294–95 (1922). The defense does not bar a suit for "further relief that the

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[15/] Appellants claim that the Nation affirmed the Treaties by seeking the difference between what the State paid and received for the Reservation (B133), but that merely indicates that the Nation sought fair compensation, not that it waived any possessory right. Similarly, the Tribe claimed compensation because the United States failed to prevent the dispossession (B136), but that theory does not presuppose that the dispossession was lawful or permanent.

court may grant consistently with that already given." 25 Am. Jur. 2d Election of Remedies § 18 (1996).

Furthermore, as the district court found, the Cayugas lacked a "true choice of remedies" among which to elect. SPA557. A suit to invalidate the Treaties was unavailable until 1974, after they supposedly elected their remedies.[16] SPA232; pp44–46. The defense is thus inapplicable.

Moreover, even if appellants satisfied the technical requirements of this equitable defense, their attempt to invoke it is manifestly inequitable. Courts should not apply the doctrine "in a formulaic way, but rather with due consideration for the equities," with its purpose being "to prevent a double redress." 25 Am. Jur. 2d Election of Remedies §§ 2, 4. To avoid double redress, the district court accounted for the State's past payments. A4758–67. It would be remarkable and inequitable to preclude the Cayugas now from receiving full relief because they, in desperate straits and lacking effective alternate recourse, managed to procure relatively small sums. To the contrary, the State should be precluded from invoking this equitable defense because it lacks clean hands. pp22–25; Precision Instrument Mfg. v. Automotive Maint. Mach., 324 U.S. 806, 814 (1945).

Finally, the United States' presence defeats the defense. Appellants do not claim that the United States has elected any inconsistent remedy but argue that it

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[16/] The suit that the Tribe settled in 1975 began in 1951. B136.

cannot maintain this action if the Cayugas cannot proceed. B143–44. The case they cite, which holds that NIA rights "are exclusively tribal" in the sense that individual Indians cannot sue, provides no support. Thompson v. County of Franklin, 15 F.3d 245, 252 (2d Cir. 1994). The United States may sue whether or not the Cayugas are subject to an affirmative defense. See United States v. Minnesota, 270 U.S. 181, 194–95 (1926) (state's immunity to suit by Indians did not prevent suit by United States on Indians' behalf). The Cayugas' actions could not compromise the United States' sovereign authority to enforce federal law. Heckman v. United States, 224 U.S. 413, 437–38 (1912) (illegal transfer of Indian land violated both "proprietary rights of the Indian" and "governmental rights of the United States"); see Wilson, 442 U.S. at 657 n.1; Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 473 (1976); Boylan, 265 F. at 173.

Appellants also suggest briefly that the United States might be subject to equitable estoppel that would prevent it from pursuing this action if the Cayugas could not proceed. B144. The Supreme Court has not decided whether the United States can ever be equitably estopped, OPM v. Richmond, 496 U.S. 414, 419–23 (1990), and that possibility is particularly remote in NIA cases (pp39–40). Furthermore, to establish estoppel, appellants must show a misrepresentation upon which they reasonably and detrimentally relied and "affirmative misconduct" by the United States. United States v. Paredes-Batista, 140 F.3d 367, 375 (2d Cir. 1998). Appellants fail even to assert these elements.

2. Laches. — Appellants' invocation of laches fails both factually, because the Cayugas did not unreasonably delay, and for multiple legal reasons.

a. No unreasonable delay. — Although many years passed between the Treaties and this suit, the district court did not abuse its discretion in refusing to hold the Cayugas responsible for any delay. SPA236; see Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (laches turns on equities of delay, not mere passage of time). From the Treaties through the mid-1800s, the impoverished, relatively unsophisticated Cayugas were occupied with protecting their annuities against claims by the Canadian Cayugas. pp9–10. The Cayugas thereafter strove for fair compensation. SPA230–32; pp10–11. Although State investigations repeatedly recognized that the State profited improperly from the Treaties (G374:77–78; G463; G464), a century passed after the Cayugas' first request before the State finally provided compensation for what it perceived as a "moral obligation," not a legal claim. SPA230–34; pp10–11. As the district court found, the record shows the Cayugas' "perseverance and fortitude," not unreasonable delay. SPA236.

Throughout this time, the courts were essentially closed to the Cayugas' legal claim. SPA232. The Supreme Court stated in 1831 that Indian tribes "cannot maintain * * * action[s] in the courts of the United States." Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831). Although the State asserts that tribes deprived of land could ask federal courts for relief (B160), the cases it cites do not address the circumstances here. E.g., United States v. Forness, 125 F.2d 928, 932 (2d Cir.

1942) (suit by United States); Tuscarora Nation v. Power Auth., 257 F.2d 885, 887 (2d Cir. 1958) (suit for injunction by Indians in possession), vacated, 362 U.S. 608 (1960). The courts instead agreed that suits for wrongful possession of Indian lands did not raise federal questions even if the property rights came from federal law. E.g., Taylor v. Anderson, 234 U.S. 74, 75–76 (1914); Seneca Nation v. Christy, 162 U.S. 283, 289–90 (1896); Deere v. St. Lawrence River Power, 32 F.2d 550, 551–52 (2d Cir. 1929). In 1966, Congress enacted 28 U.S.C. 1362, which expanded federal jurisdiction to encompass tribal claims. See Moe, 425 U.S. at 472 (statute contemplated tribal claims that the United States as trustee could have brought but did not bring).

Nevertheless, even after 1966, federal courts would not hear possessory actions by tribes. In 1972, this Court cited "a long and unbroken line of Supreme Court decisions" to decide that an action like this action "present[ed] no federal question." Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 920 (2d Cir. 1972). The Supreme Court reversed in 1974, holding for the first time that such actions present federal questions establishing federal court jurisdiction. Oneida II, 414 U.S. at 666–67; see id. at 683–84 (Rehnquist, J., concurring) (earlier "strict rule that mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case" applied even regarding "land grants to Indians"). After that decision, the Cayugas again attempted to settle with the State

and filed this lawsuit only when Congress disapproved the resulting agreement. SPA480; T4432–34; T4491–92.

Before 1974, the Cayugas also lacked any true recourse in state court. In 1885, in rejecting an action by the Canadian Cayugas, the New York Court of Appeals found that the Treaties were "made by competent authority, and obligatory upon [the] parties." Cayuga Indians Residing in Canada v. State, 99 N.Y. 235, 237 (1885). Although erroneous, this language effectively foreclosed relief in the State's courts for the Cayugas. Furthermore, these courts refused even to hear tribal possessory actions absent special legislative authorization. B162. The State Legislature never provided the Cayugas that authorization during their century of efforts to obtain fair compensation.

Furthermore, even if a court might have defied pre-1974 caselaw to entertain an action like this one, the Cayugas' actions were manifestly reasonable. See Travelers Ins. v. Cuomo, 14 F.3d 708, 714 (2d Cir. 1993) (no unreasonable delay where caselaw gave "little hope" even though "probably distinguishable"), rev'd on other grounds, 514 U.S. 645 (1995). State officials repeatedly found that the Cayugas had no legal claim, only a "moral" one that "surviv[ed] any lapse of time" and over "which no court had jurisdiction." SPA231; S635:2; G445:ex.5; People ex rel. Cayuga Nation v. Commissioners of Land Office, 207 N.Y. 42, 49 (1912). Thus, the Cayugas diligently sought relief through the State bureaucracy and

brought this action soon after it finally became possible.[17] The finding that the Cayugas did not unreasonably delay was no abuse of discretion.

b. Legal unavailability. — Furthermore, laches fails here as a matter of law. First, this Court has already held that laches is unavailable in NIA suits that would have been timely if filed by the United States. SPA529–30. In Oneida Indian Nation v. New York ("Oneida IV"), 691 F.2d 1070 (2d Cir. 1982), this Court rejected the argument that an NIA claim was "barred by the nearly 200 years" elapsed since the challenged treaties. Id. at 1083. The Court stated: "a suit by the United States as trustee * * * is not subject to state delay-based defenses. It would be anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves." Id. at 1084 (citations omitted). Noting that the earlier decision in Mohegan Tribe had "allud[ed] to but not reach[ed]" the possible application of "federal common law of laches," the Court expressly addressed the existence of any "delay-based defense founded on federal law." Id. A similar suit by the United States would have been within the statute of limitations, and the Court reasoned: "at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States." Id.

17/ Their dogged attempts to gain relief and protracted inability to sue distinguish this case from appellants' primary authority (B147–48), which found in dictum that a 200-year delay triggered laches where the plaintiffs presented "no information" explaining the delay. Robins Island Pres. Fund v. Southold Dev., 959 F.2d 409, 421–24 (2d Cir. 1992).

Thus, the Court's conclusion explicitly affirmed the dismissal of defenses based on "time-bars or laches." Id. at 1097.

The argument that Oneida IV did not rule on laches (B151–53) is unpersuasive. The Court made its holding clear and then applied Oneida IV's reasoning in Oneida V. 719 F.2d at 537–38. Thus, this Court still later recognized the matter as settled. Oneida Indian Nation v. New York, 860 F.2d 1145, 1149 n.1 (2d Cir. 1988).[18] And thus the dissenting justices in Oneida VI recognized that the unavailability of laches would be the law of this Court until the Supreme Court addressed the question. 470 U.S. at 261 n.10 (Stevens, J., dissenting).

Second, the United States' presence as a plaintiff defeats laches. The United States is not subject to laches. United States v. California, 332 U.S. 19, 39–40 (1947); United States v. Summerlin, 310 U.S. 414, 416 (1940); United States v. Angell, 292 F.3d 333, 338 (2d Cir. 2002). This principle applies fully when the United States brings suit on behalf of Indians, and in particular suits to enforce Indian treaty rights. Nevada v. United States, 463 U.S. 110, 141 (1983); Board of Comm'rs of Jackson County v. United States, 308 U.S. 343, 350–51 (1939); Minnesota, 270 U.S. at 196. Although appellants argue otherwise (B158–59), their authorities do not even discuss laches.

[18/] Appellants argue that this decision followed the laches holding in Oneida IV "as merely 'law of the case' rather than circuit precedent." B153. A matter cannot be law of the case unless it is actually decided. United States v. Crowley, 318 F.3d 401, 420 (2d Cir. 2003).

Third, even if the United States were not a plaintiff and even if Oneida IV were not binding, other precedent would compel the same result. Again, laches cannot "give vitality to a void deed and * * * bar the rights of Indian wards in lands subject to statutory restrictions." Ewert, 259 U.S. at 138. The Oneida IV Court noted: "as with the borrowing of state statutes of limitations, the application of laches would appear to be inconsistent with established federal policy." 470 U.S. at 244 n.16. The Court thus suggested, without holding, that laches was inapplicable. Id.; see Washington, 157 F.3d at 649; Swim v. Bergland, 696 F.2d 712, 718 (9th Cir. 1983).

That suggestion accords with general principles of laches. Appellants assert that adherence to a statute of limitations will not always defeat laches (B149–51), and that is true — but only in certain cases. To wit, laches can sometimes (though "rarely") apply in an "equity action" filed within the relevant statute of limitations. Ikelionwu v. United States, 150 F.3d 233, 238 (2d Cir. 1988); see Holmberg, 327 U.S. at 394–96; Alsop v. Riker, 155 U.S. 448, 460–61 (1894); Felix v. Patrick, 145 U.S. 317, 332–33 (1892); Conopco v. Campbell Soup, 95 F.3d 187, 191 (2d Cir. 1996). As the Oneida IV majority and dissent agreed, applying laches in an action at law would be novel. 470 U.S. at 244 n.16; id. at 261–62 (Stevens, J., dissenting). Accordingly, this Court has held: "The prevailing rule * * * is that when a plaintiff brings a federal statutory claim seeking legal relief, laches cannot bar that claim, at least where the statute contains an express limitations period

within which the action is timely." Ivani Contracting v. City of N.Y., 103 F.3d 257, 259–60 (2d Cir. 1997); see United States v. Mack, 295 U.S. 480, 489 (1935); United States v. RePass, 688 F.2d 154, 158 (2d Cir. 1982).

This action fits squarely within that rule. Although no statute of limitations applies directly to the Cayugas' claims, appellants do not dispute that these claims would have been timely under 28 U.S.C. 2415 if filed by the United States and that it would be "anomalous to allow the trustee to sue under more favorable conditions tha[n] those afforded the tribes themselves." SPA529–30. And although the complaints stated some equitable claims, the judgment on appeal resolved legal claims for ejectment and mesne profits.[19] A227–29; A357–59; A2596–97. Laches does not apply when "the plaintiff does not ask [for] equitable relief but seeks only to enforce its legal title in an action not barred by any statute of limitations." 25 Am. Jur. 2d Ejectment § 25.

Fourth, the State cannot invoke laches due to its unclean hands. pp22–25; Precision Instrument, 324 U.S. at 814. On a related note, this Court should reject the argument that laches should bar this suit because of "the legitimate and reasonable expectations of the subsequent occupiers of the land." B154–55 (citing

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[19/] Contrary to appellants' unsupported claim (B157), "ejectment is an action at law, not in equity." 25 Am. Jur. 2d Ejectment § 1 (footnote omitted); accord Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 45 (1989); Oneida VI, 470 U.S. at 256 (Stevens, J., dissenting); West 14th St. Commercial v. 5 W. 14th Owners, 815 F.2d 188, 195 (2d Cir. 1987). But see Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (dictum).

Felix, 145 U.S. at 334–35). Those subsequent occupiers are not subject to the judgment on appeal. Moreover, neither their concerns nor those of the State could justify denying the Cayugas any remedy whatsoever. Appellants' equitable defenses fail because their application here would be profoundly inequitable.[20]

[20/] We do not discuss the Eleventh Amendment given appellants' admission that this Court's decisions preclude its invocation here (B172–73), nor need we address the request that the Court "reconsider[]" its holding in Mohegan Tribe (B167 n.60). Similarly, this Court should not revisit its holding in Oneida V that the NIA provides a private right of action. Appellants argue that intervening Supreme Court authority requires congressional intent to create a private remedy (B173–74), but this Court found such intent. 719 F.2d at 532–36.

PART II: REMEDIES

IV. THE DISTRICT COURT PROPERLY SET THE PARAMETERS FOR THE JURY AWARD.

Because the NIA is silent as to remedies, the district court endeavored "to fashion a federal common law remedy * * * uniquely tailored to fit * * * this unparalleled land claim litigation." SPA356. It did so properly.

A. The Use of CFMV and FRV to Measure Damages Was Proper.

Contrary to the State's argument (B214–19), the district court did not err in measuring damages by CFMV and FRV rather than limiting damages to the value of the Reservation in 1795. Ordinarily, the remedy in a suit to recover land includes both ejectment and mesne profits. 25 Am. Jur. 2d Ejectment §§ 1, 54. This case is unique, however, and the court expressed many legitimate concerns in denying ejectment. SPA477–86. The court awarded CFMV (in addition to FRV) as a substitute to "produce results * * * as satisfactory to the Cayugas as those which they could properly derive from ejectment." SPA478–79.

If ejectment is unavailable, reasonable damages must include CFMV. Damages limited to the land's value in 1795 would not substitute for ejectment. As the court understated, such an award would "border on the inequitable."[21]

[21/] Amazingly, the State argues that such an award would properly compensate the Cayugas even while arguing that they should receive little if any interest. B179–80; B218–19. It contends that the Cayugas' delay "caused any inequity" (B219) but, again, they deserve no blame for any delay. pp44–47.

SPA500. Indeed, absent ejectment, only full compensation through CFMV could prevent further suits "for a continuing violation of [the Cayugas'] federal right to possession." SPA350; T2775; United States v. Imperial Irrigation Dist., 799 F.Supp. 1052, 1069 (S.D. Cal. 1992) (awarding CFMV to compensate tribe for all future trespass damages); cf. Oneida IV, 691 F.2d at 1083 (courts can "award monetary relief for the wrongful deprivation" if ejectment is "impossible").

The award of CFMV and FRV accounted for these unique circumstances. The State argues that the only possible measure of damages was the Reservation's value at the Treaties' signing (B215–17), but its authorities do not address analogous circumstances. For instance, it cites a decision that construed a statute limiting relief to damages and thus did not involve ejectment as the expected remedy. Shoshone Tribe v. United States, 299 U.S. 476, 484 & n.1 (1937). Cases under the Just Compensation Clause of the Fifth Amendment and the ICC Act are similarly irrelevant because, among other reasons, only damages were available. SPA498–99; see Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990); Klamath & Modoc Tribes v. United States, 174 Ct. Cl. 483, 487 (1966).

Indeed, though the State contends that damages should turn on the Reservation's value at the time of deprivation, Shoshone Tribe itself indicates that damages can include not only that value, but also "such additional amount * * * as may be necessary to [an] award of just compensation, * * * measured either by interest * * * or by such other standard as may be suitable in the light of all the

circumstances." 299 U.S. at 496 (emphasis added); see Szekely v. Eagle Lion Films, 242 F.2d 266, 269 (2d Cir. 1957) (sometimes "a different value * * * is necessary to give just compensation"). Moreover, given the Cayugas' continued claim to a right of possession, it is far from clear that the Treaties effected a "total deprivation of the property," as appellants assert. B215; cf. Shoshone Tribe, 299 U.S. at 484 n.1 (statute allowed extinguishment of title after payment of damages). Given the denial of ejectment, the district court properly recognized that damages must include CFMV to be a just substitute.

B. FRV Was Compensable for the Entire Time of Dispossession.

The district court allowed FRV damages since 1795. SPA505. The State argues that New York law limited recovery of FRV to six years before the suit (B220–24), but the Supreme Court has decided "that Indians have a common-law right of action for an accounting of 'all rents, issues and profits' against trespassers on their land." Oneida VI, 470 U.S. at 235–36 (emphasis added).

Even if the issue were unsettled, resort to state law is improper when its "application * * * would frustrate federal policy or functions." Wilson, 442 U.S. at 672–73. Oneida V and Oneida VI held that applying state statutes of limitations against Indian land claims would contravene federal policy. 719 F.2d at 537–38; 470 U.S. at 240–44; see Forness, 125 F.2d at 932 ("[S]tate law cannot be invoked to limit the rights in lands granted by the United States to the Indians * * * ."); cf. United States v. Little Lake Misere Land, 412 U.S. 580, 594–603 (1973) (refusing

to apply inconsistent state law to federal land acquisition). Applying a six-year limitation on FRV would similarly frustrate federal policy.[22]

The fact that the six-year rule limits remedies rather than barring any claim completely is irrelevant. The rule functions as a statute of limitations. Willis v. McKinnon, 178 N.Y. 451, 454–56 (1904). It would be nonsensical to prevent an Indian land claim from lapsing while allowing essential remedies to do so. See Oneida V, 719 F.2d at 538 (rejecting state law that would permit NIA violation "to go unremedied"). A six-year limitation on FRV would severely limit the remedies available to an NIA plaintiff — indeed, the damages here would be virtually negated — and thereby frustrate federal policy.[23]

C. As the Original Tortfeasor, the State Is Liable for All Damages.

As the district court found, "the State could be deemed an original or primary tortfeasor" and thus responsible for all the damages at issue. SPA358. This approach was not only fair, but also necessary to providing an effective remedy. It obviated the daunting alternative: individualized proceedings for thousands of separate landowners. SPA354. The time and expense necessary to win a full and fair remedy under that alternative would be prohibitive. If any party

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[22/] The United States proposed that the district court could follow the New York rule or choose otherwise if the rule "place[d] an undue burden on a federally protected right." A3589 & n.1.

[23/] The State also suggests that historical FRV values were incalculable (B223–24), but both sides' experts found sufficient evidence upon which to base their opinions (T185–229; T1251–56; T1764–82).

should bear such a burden, it is the State in a contribution action, as the original tortfeasor, a bad-faith actor, and the recipient of two centuries' worth of undeserved benefit. These unusual circumstances justify the court's approach.

Moreover, despite the State's arguments (B224–25), this approach follows general common law principles. The State's own authorities establish that "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm * * * is subject to liability to the injured party for the entire harm." Restatement (Second) of Torts ("Restatement") § 875 (1965); accord id. § 879; Prosser and Keeton on Torts ("Prosser Treatise") § 52, at 345–48 (5th ed. 1984). Although the State refers to proximate cause (B226), the harm for which the Cayugas received damages is dispossession, and it is indisputable that such dispossession was the direct consequence of the State's actions. SPA358. Furthermore, the State's contribution to that dispossession is not reasonably divisible from the contribution of any other tortfeasor.[24] See Restatement § 433A cmt.i; Prosser Treatise 347–52. Thus, the State was liable for the entire harm.

[24/] The harm is divisible in the sense that individual landowners cannot be liable for harm predating their involvement (SPA357), but such chronological division would not affect the State as the original tortfeasor. Restatement § 433A cmt.c ("[T]he earlier wrongdoer may be liable for the entire damage, while the later one will not."); Prosser Treatise 352. Thus, the State errs in relying on dictum from New Orleans v. Christmas, 131 U.S. 191 (1889) (B224–25), for the defendant therein was merely an intermediate link in an invalid chain of title, not the original tortfeasor like the State. Id. at 192–94. And unlike the State, that defendant had no reason to know its title was invalid. Id. at 193.

Although this action is not strictly one in trespass (SPA356), related principles provide further support. One who "intentionally causes a third person to enter land * * * is as fully liable as though he himself enters." Restatement § 158 & cmt.j; see id. § 877; Prosser Treatise 72–73. New York courts follow this rule. E.g., State v. Fermenta ASC, 630 N.Y.S.2d 884, 894 (Sup. Ct. 1995); Zenith Bathing Pavilion v. Fair Oaks S.S., 240 N.Y. 307, 313 (1925). Having intentionally caused others to enter the Reservation, the State is fully liable.

D. The United States' "Proportionate Responsibility" for Damages Is Not at Issue.

The district court reduced the interest award by over $316 million based on factors including the United States' failure to protect the Cayugas. SPA254–55. Nevertheless, the State requests additional setoffs of $70,000, for the United States' 1970 payment in settlement of the Tribe's ICC suit, and "the federal government's proportionate responsibility for the Cayugas' damages." B229–30. We take no position on the $70,000 request; however, no "proportionate" reduction is warranted. The State is a defendant; the United States is not. No court has held the United States jointly liable. Even if one could, the State would remain liable "for the entire harm" but could seek contribution from others. Restatement §§ 875, 886A. The State sought leave to amend its answer to seek contribution from the United States (A5009–14), but its motion was denied as untimely (A4983) and the State has not appealed that denial (B231 n.85).

E. Damages Properly Depended on the Value of the Property as Unimproved But with the Incidental Effect of Infrastructure.

Good-faith occupiers may offset "the value of their improvements" against FRV damages. Oneida V, 719 F.2d at 541. This rule contemplates that requiring forfeiture of that value would "work an injustice and provide little * * * added deterrence." Id. Essentially conceding good faith for purposes of the jury trial, the plaintiffs sought no damages based on the actual value of any public infrastructure, whether or not constructed by the State. Instead, the expert witnesses valued the property as unimproved but with the incidental effect of infrastructure — that is, valuing only the land, without improvements, but including infrastructure's effect on the land's value (like the effect of having nearby roads). T40–42; T1708–09. That was the only feasible approach for, as the district court recognized, assessing this incidental effect would be practically impossible. SPA277–78. Even the State's expert saw "no way" to do so. T1141(D). Thus, the jury was instructed to value the land as unimproved but with infrastructure in place. T2767–68.

The State's request for an additional offset for the incidental effect of infrastructure (B231–33) is unfounded. Allowing such an offset would not prevent injustice to good-faith occupiers but rather give them windfalls at the true owners' expense. Thus, under the common law, good-faith occupiers may offset FRV damages "to the extent that the land has been increased in value by [their] improvements, or for the value of the labor and materials employed in making such

improvements, whichever is least." Restatement (First) of Restitution § 42(1) (1937) (emphasis added); accord id. § 53(2). This rule recognizes that it often may be "harsh to the one making the improvements by mistake" but that it would be "more harsh to require the one receiving the benefits to pay." Id. § 42 cmt.a; see id. § 158 cmt.a. New York courts follow this rule. E.g., Grosch v. Kessler, 256 N.Y. 477, 478–90 (1931); Woodhull v. Rosenthal, 61 N.Y. 382, 397 (1875); Haight v. Pine, 42 N.Y.S. 303, 305–06 (App. Div. 1896). FRV damages properly included the incidental effect of infrastructure.[25]

V. THE DISTRICT COURT'S EVIDENTIARY RULINGS WERE CORRECT.

A. The District Court Properly Precluded the State from Presenting Equitable Issues to the Jury.

1. Good faith. — The State argues that it was entitled to have the jury determine its good faith and thus its right to an offset for infrastructure. B235–39. Again, however, the State deserved no offset whether or not it acted in good faith. That issue accordingly was irrelevant at the jury trial. The district court acted within its discretion in excluding the State's proposed evidence, especially given its likely prejudicial effect. A4516.

[25/] The State also seeks to offset CFMV damages, but CFMV substituted for ejectment. SPA478–79. Ejectment would have yielded the land as improved with offsets only for the improvements' actual value, as the State admits. B233 n.88.

Furthermore, even if good faith were relevant, the availability of any offset was an equitable issue. Green v. Biddle, 21 U.S. 1, 77–78, 81–83 (1823) ("maxim of equity"); Haight, 42 N.Y.S. at 305 ("equitable defense"); see Tull v. United States, 481 U.S. 412, 424 (1987) (restitutionary damages are equitable). The right to a jury trial does not extend to equitable defenses. Liberty Oil v. Condon Nat'l Bank, 260 U.S. 235, 242 (1922); Granite State Ins. v. Smart Modular Techs., 76 F.3d 1023, 1027 (9th Cir. 1996).

2. Mistake. — The State also claims that the jury should have been allowed to consider the equitable defense of mistake. B239–40. The State's failure to plead this affirmative defense in its answers constitutes waiver. Satchell v. Dilworth, 745 F.2d 781, 784 (2d Cir. 1984). At minimum, the State should have briefed this defense to liability during summary judgment proceedings. Where a party fails to show a genuine issue of material fact, the grant of summary judgment does not violate that party's right to a jury trial. Fidelity & Deposit v. United States, 187 U.S. 315, 319–21 (1902). The district court, which had already granted summary judgment on liability, had no obligation to allow the jury to consider this defense. Cf. Alcoa S.S. v. Ryan, 211 F.2d 576, 578 (2d Cir. 1954) (defense "seems one for court and not jury trial").

Moreover, like appellants' other equitable defenses, the defense of mistake was legally infirm. First, it could not "give vitality to a void deed." Ewert, 259 U.S. at 138; pp39–40. Second, though the State bases its defense on the United

States' actions and argues that "[p]rinciples of equitable estoppel apply" (B239–40), the State neither makes the showing necessary for such estoppel (pp43), nor explains how this defense applies against the Cayugas. Finally, the evidence that the Treaties resulted from the State's vigorous efforts, not from a "mistake" induced by the Cayugas or the United States (pp4–9), makes evident that no reasonable factfinder could have found the defense applicable here.

3. Mitigation. — Finally, the State complains that the jury heard no evidence regarding the plaintiffs' alleged failure to mitigate damages. B240–42. The State also failed to plead and thus waived this defense. Satchell, 745 F.2d at 784. Furthermore, the State's argument is merely laches repackaged: the asserted failure to mitigate is the "unreasonable delay" in bringing suit. B241. The district court had already rejected laches as a defense to liability on summary judgment. SPA529–30. Moreover, laches is "traditionally decided by a judge, sitting in equity without a jury." World Brilliance v. Bethlehem Steel, 342 F.2d 362, 366 (2d Cir. 1965); accord Danjac LLC v. Sony, 263 F.3d 942, 962 (9th Cir. 2001); Mile High Indus. v. Cohen, 222 F.3d 845, 857 (10th Cir. 2000). Thus, the court properly reserved laches for its own consideration. SPA348.

B. Accepting Hale's Testimony Was Not Manifestly Erroneous.

The State contends that the district court should have excluded Hale, the plaintiffs' only witness at the jury trial. B242–47. Hale found CFMV by isolating 153 recent, arm's-length sales of unimproved property in the area, calculating

average value per-acre in nine categories of land, and applying those averages. T42–183; T866–68. He similarly found FRV in 1795 through 1899 (the period the State questions) by examining 2419 deeds to determine land value and applying a set rate of return. T185–229. Far from being manifestly erroneous and thus an abuse of discretion, the ruling allowing his testimony — which followed a lengthy Daubert hearing — was well-founded. Furthermore, it did not affect the State's substantial rights.

1. Relevance. — The State claims that Hale's testimony was irrelevant because he considered the value of portions of the land and then aggregated. B243–45. The State relies on the faulty assumption adopted by its expert, Dorchester, based on a misreading of a prior ruling (SPA494), that the land had to be valued as if it were incapable of division. T1689; T2136–37. Hale's approach reflects reality: different portions of a single tract of 64,015 acres normally can be used for different purposes. T183; T348–49. Indeed, the State did subdivide the Reservation and then sell it in hundreds of individual parcels. SPA682; T1284–86; T1888–90.

Moreover, even if the land were indivisible, Hale's testimony was relevant. The State argues that Hale's numbers required "adjustment" for parcel size (B244) but his statistical analysis correlating parcel size and price per-acre showed otherwise. T739–41(D); T929–31(D). And even if some adjustment were necessary, relevance turns on the "liberal" standard of whether evidence has "any

tendency" to show "any fact * * * of consequence." Daubert, 509 U.S. at 587. Finding Hale's testimony relevant was not manifestly erroneous.

2. Reliability. — The reliability inquiry examines an expert's "principles and methodology," not his conclusions. Id. at 595. Consistent with Daubert, Hale's principles and methodology were empirically replicable, scientific in manner, and consistent with accepted practices. Id. at 592–95. Hale did not rely on "computer models," as the State argues (B245), but the Counties' own data on actual property sales. T42–70. Using computers to filter out extraneous data, he isolated 153 sales that formed the basis for his value calculations. T70–93.

Without questioning the data or the filtering, the State faults Hale for failing to appraise individual parcels and describes a recent sale at a price per-acre different from the average Hale found for its category. B245. Of course the sales prices of some individual properties will vary from the averages — some lower, as the State emphasizes, and others higher (T1459–72; T2237–39) — but averaging accounts for variations mathematically and provides a rational basis for valuing the property as a whole without having to appraise the 5601 parcels in the property at issue. T126–28; T138; T867; T2237. Dorchester similarly classified land into types and then averaged within type (T2108–09; T2209–11), and his averages similarly did not always predict actual sales prices (T2239–41).

The State also complains that Hale did not have sufficient properties within each land category to make averaging meaningful. B246. Hale testified that he

had all the data he needed (T71), and the State's misleading emphasis on just a few of his nine categories of land should not obscure the fact that he considered 153 sales in calculating CFMV and that these sales represented the universe of recent, arm's-length sales of unimproved property in the area. T42–183. By contrast, Dorchester used only 78 sales and found average values in sub-classes as small as three. T1958–64; T2039–48.

The criticism that Hale calculated FRV from 1796 through 1799 based on little data (B247) is similarly unfounded. Again wrongly focusing on parts of a larger whole, the State emphasizes that Hale found few deeds for particular years while ignoring that he considered 2419 deeds for this time period. T210. Furthermore, Hale accounted for year-to-year variations by employing a five-year moving average. T220–22. Thus, for instance, his FRV value for 1799 was based not on four sales, as the State asserts (B247), but forty-two (T893–94).

The State's quibbles concern the weight of the evidence, not its admissibility. See Campbell v. Metropolitan Prop. & Cas. Ins., 239 F.3d 179, 186 (2d Cir. 2001). "A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion per se inadmissible" but instead will be grist for cross-examination. Amorgianos, 303 F.3d at 267. Indeed, the State cross-examined Hale before the jury for nearly three days. The State has not shown that it was manifestly erroneous to allow Hale to testify.

3. Substantial rights. — Even if allowing Hale's testimony were manifestly erroneous, an evidentiary ruling merits reversal only if it affects substantial rights — that is, if it likely swayed the factfinder materially. Constantino, 203 F.3d at 174. Dorchester's figures for CFMV and FRV were about ten times smaller than Hale's. T293–94; T1855–57. Far from following Hale, the jury awarded even less than Dorchester proposed and $121 million less than the Counties' own recent assessment. SPA276–77; A4758–67; T2165–66. As the district court noted, quoting comments made to the press, "[e]vidently even the State's own counsel 'never expected the [jury] award to come in so low.'" SPA274. The State has shown no prejudice from Hale's testimony.

C. The District Court Properly Precluded Speculative and Duplicative Testimony on the Adequacy of the Compensation Paid by the State.

During the bench trial, the district court precluded certain testimony from the State's witnesses Scott Anderson and John Dorchester — both of whom had testified before the jury — concerning the fairness of the compensation paid by the State. T5458–59; T6128. Contrary to the State's argument (B194–96), the court did not thereby abuse its discretion. Furthermore, these evidentiary decisions did not materially affect the court's factfinding.

The district court properly found Anderson's testimony too speculative. T5458. The State called Anderson to show that the United States bought Indian land elsewhere for less than the State paid. B59; B195–96. He took the acreage

involved in various treaties with the United States and divided by the price paid, without considering location or other pertinent circumstances. T5441–42. He did not consider whether the tribes held full title to the land being ceded, whether the lands were already occupied by white settlers, and whether the treaties contained other terms such as guarantees of protection against hostile tribes, rights to other reservations, or hunting and fishing rights. T5442–47. Moreover, his testimony did not address whether the United States had provided fair compensation; indeed, the United States was prepared to show that the ICC later ordered additional payment precisely because the compensation had been unfair. T5449–53. The rejection of Anderson's testimony was no abuse of discretion.

The district court found that Dorchester's proposed testimony regarding the adequacy of the compensation duplicated earlier testimony. T6128. Indeed, Dorchester had testified during the jury trial on this very topic. T1745–50; T1781–83; T1890–97. The State's counsel conceded that Dorchester would have testified "to essentially the same result, the same conclusions," just in more detail. T6130. Furthermore, the court had earlier heard the State's historian opining on the fairness of the transaction. T4819–26. It also admitted and later considered Dorchester's report, which contained his relevant views. SPA242; T6130–31. Again, the court acted well within its discretion.

Moreover, even if either decision were an abuse of discretion, neither likely affected the factfinder's judgment materially. There was overwhelming evidence

that the State did not adequately compensate the Cayugas, including the evidence that it legislated for an enormous profit at the Cayugas' expense and that various State bodies later acknowledged the resulting "large profits" made possible by the State's "superior knowledge, ability and position" in negotiations compared with the Cayugas' "ignorance, helplessness and dependence." pp22–25. The precluded testimony was unlikely to change anything.

VI. NO NEW TRIAL IS NECESSARY.

The jury issued a special verdict awarding $17,156.86 in FRV for each year between 1796 and 1999 and smaller amounts for partial years in 1795 and 2000. A4758–67. Arguing that there was insufficient evidence to find the same FRV for each full year, the State requests a new trial. B208–13. Because this argument depends on a comparison of parts of the verdict, not on the evidence supporting any particular part, it is actually an argument about verdict consistency, not about the sufficiency of the evidence. Either way, the argument fails: there was sufficient evidence to support the separate parts of the verdict and these parts are consistent. Furthermore, the State waived its right to challenge the verdict.

A. The Evidence Was Sufficient to Support the Verdict.

The State obscures the proper analysis by contending that "no evidence supported the jury's award of the same amount of FRV damages in each year." B208. The question whether the evidence supporting the special verdict was sufficient naturally encompasses separate inquiries into the evidence supporting

each separate part of the verdict. The State cites no authority for the notion that this Court must consider whether evidence supports the relationship between different parts of the verdict even if evidence supports each separate part. Whether these separate parts make sense when read together pertains to the discrete issue of the verdict's consistency, as we discuss below. pp69–71.

Under the proper analysis, the individual parts of the verdict are supported by sufficient evidence. As the State notes, both sides' experts found that FRV increased through time, beginning lower than the jury found and ending higher. B210. The State's concern is the supposed "overstate[ment]" of FRV "in the early years." B208. Although the jury assigned FRV values in these years higher than those proposed by the expert witnesses, there is no "require[ment] that a jury's award fall within the estimates given by expert testimony." Leefe v. Air Logistics, 876 F.2d 409, 411 (5th Cir. 1989). There need only be some evidence from which the jury could have reached its result. Norton, 145 F.3d at 118.

There was evidence supporting FRV damages of $17,156.86 even in the early years. Indeed, "there were a myriad of conclusions which reasonable persons could have drawn." SPA47. Both sides presented evidence regarding rental values in all the years at issue (S322; S323; G505), and the jury could have reached its results by adjusting either expert's figures based on perceived shortcomings in methodology. Hale testified that his analysis incorporated a number of conservative elements — for instance, he calculated FRV as if the land was being

used for agriculture, not commercial or other more lucrative uses, and with a low rate of return on the land. T187–89; T263–65. The jury could have found Hale's analysis overly conservative and increased his figures accordingly. Similarly, it could have adjusted Dorchester's figures after rejecting underlying assumptions — for instance, that the land could be valued only as one undivided parcel (T1689; T2136–37).

Whatever approach the jury actually took, the question is whether there is any view of the evidence supporting the verdict. Perhaps the jury calculated FRV by determining an amount and dividing it evenly among the years at issue. SPA95. What the jury actually meant to do, however, is unknowable and irrelevant. Cf. Platis v. Stockwell, 630 F.2d 1202, 1204 (7th Cir. 1980) (rejecting conjecture that jury manipulated special verdict to achieve pre-determined award). This Court should upset the verdict "only if there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture.'" Norton, 145 F.3d at 118. Because sufficient evidence supported each part of the special verdict, the district court did not abuse its discretion in refusing to order a new trial.

B. The Verdict Was Consistent.

Focusing on the sufficiency of the evidence, the State does not purport to argue that the verdict was inconsistent. B7; B208–13. Nevertheless, its argument that the verdict makes no economic sense as a whole effectively challenges the

verdict's consistency. A verdict is inconsistent when components are logically incompatible — for instance, findings that someone acted both in "good faith" and "maliciously or wantonly or oppressively." Finnegan v. Fountain, 915 F.2d 817, 820 (2d Cir. 1990). This Court will "adopt a view of the case, if there is one, that resolves any seeming inconsistency," Turley, 167 F.3d at 760, and even when "the jury has taken action * * * at first blush difficult to explain," Gentile v. County of Suffolk, 926 F.2d 142, 154 (2d Cir. 1991).

Under these principles, the verdict is clearly consistent. Each FRV entry refers to a separate year, and the fact that FRV is a certain figure in one year need not have any logical bearing on FRV in any other year. As the district court stated: "although a jury's verdict might be inconsistent from an economic standpoint, it does not necessarily follow * * * that that verdict is logically inconsistent." SPA94–95. "Logical, not economic consistency is the touchstone." Webb v. GAF, 936 F.Supp. 1109, 1125 (N.D.N.Y. 1996). Indeed, "juries are not bound by what seems inescapable logic to judges." Indu Craft v. Bank of Baroda, 47 F.3d 490, 497 (2d Cir. 1995).

Even if it were necessary to delve into the jury's intent, the State's conjecture that the jury intended each award of $17,156.86 to be in "year 2000 dollars" is unsupported. The State proposes that the jury calculated the various FRV awards by taking ten percent of CFMV and dividing by the number of years at issue. B211. Even if true, that proposition does not necessarily imply that the

jury intended each resulting award of FRV to be in year 2000 dollars. The jury could have used CFMV as a starting point but nevertheless intended each particular award to be in the dollars of the particular year. SPA95.

Although that approach might overstate FRV in the early years and understate it later, the State's conjecture that each FRV award was in year 2000 dollars poses greater problems. First, it assumes the jury disobeyed the instruction not to "adjust[] for the effect of inflation or the loss of use of the money" by "convert[ing] the value of the dollar at the time of the injury * * * to an equivalent value in current dollars." T2773–74. Second, the conjecture presupposes that the jury thought the current value of two centuries' worth of FRV would be only ten percent of the CFMV — an unsupportable suggestion. T6465–66. Third, as the State's economist testified, the conjecture implies that the jury thought the Cayugas owed the State almost $8 million, because the total FRV award, if in year 2000 dollars, was less than the State's setoffs in year 2000 dollars. T6448–53. Of course, the jury awarded the Cayugas almost $2 million in FRV minus setoffs (A4767), making clear that the State's conjecture is wrong.

C. The State Waived Any Issue Concerning Jury Error.

Furthermore, as the district court proposed without definitively holding, the State waived its right to challenge the verdict. SPA51; SPA84–86. The State did not object when the verdict was read, even after counsel for the State examined the verdict form and the jurors were individually polled. T2808–12. The court gave

the parties sixty days to file "motions in relation to the verdict" (T2813), but the State filed none. Months later, in briefing for the bench trial, the State suggested that the court should "look behind" the verdict. DN812:70–76. The State made explicit, however, that it was not moving the court to "rewrite or reject" the verdict, just to consider adjusted figures in calculating any additional award of interest. DN872:74–75; DN877:53–54; T6110. The State did not seek to overturn the verdict until after the bench trial and after judgment. A5256–57.

Whether the State argues the record was legally insufficient to support the verdict or that the verdict was inconsistent, the argument came too late. The State claims, without citation, that there is no basis for waiver because "the jury made a mistake and the verdict is based on legally insufficient evidence." B213. A party waives its right to challenge the sufficiency of evidence by failing to move for judgment as a matter of law before and after the verdict. Norton, 145 F.3d at 117. The State so moved before the verdict (T2310–29) but failed to renew its motion for a year-and-a-half afterward, after another trial and judgment. It thus waived its right to challenge the sufficiency of the evidence.

Similarly, a litigant can waive an argument that a verdict was inconsistent, with this Court considering such waiver questions on a case-by-case basis. Denny v. Ford Motor, 42 F.3d 106, 111 (2d Cir. 1994). If the State wished to challenge the verdict, it should have done so while the jury was sitting or at minimum during the sixty-day period afforded by the court. If not for the State's failure, the court

could have resubmitted the matter to the jury or ordered a new jury trial before the twenty-three day bench trial that the State now claims should not have proceeded.

The argument that the State lacked sufficient time to notice the supposed error (B213) is unpersuasive. The State demonstrably was aware that such an "error" was possible: in closing arguments, counsel for the State specifically cautioned the jury that awarding $20,000 in 1795 could have "tremendous ramifications" in later interest calculations. T2458. In examining the verdict form, counsel could not fail to notice that the jury had awarded $17,156.86 in every full year at issue. A4758–67. And even if this "error" were too subtle to identify before the jury's discharge, the State surely should have acted within the sixty days allowed to file motions relating to the verdict. T2813. Instead, it made the strategic decision to ask the court to "look behind" the verdict solely for purposes of calculating interest rather than seek to overturn the verdict.[26] The State should bear the consequences of its decision.

Finally, the State suggests that the waiver issue is itself waived because "Plaintiffs did not raise waiver in reply to the State's arguments at the Phase II proceedings or in its motion for a new trial." B213. The United States expressly raised waiver in responding to the motion for a new trial. DN904:21–25.

[26/] We do not contend that the State's eventual motion for a new trial was untimely under Rule 59, which allows parties to file such a motion within ten days of a judgment. T2812–13. The issue is not whether the motion was timely, but whether the State had already waived issues regarding jury error.

Furthermore, as the State has conceded, the district court could consider waiver sua sponte. DN896:25.

VII. THE AWARD OF PREJUDGMENT INTEREST WAS PROPER.

Applying the analysis from Wickham Contracting v. Local Union No. 3, 955 F.2d 831 (2d Cir. 1992), the district court found prejudgment interest appropriate based on factors like the need to provide full compensation (SPA99–104), the "essentially remedial" nature of the NIA (SPA104–09), and the State's lack of good faith (SPA113–235). To calculate the award, the court adopted the methodology of the United States' economist, Mark Berkman, who compounded interest beginning in 1795 at the lowest justifiable rates for a result of $527,500,817. SPA243–48; T5927–28. Berkman's methodology was conservative (T5932; T5935; T5989; T6062–63), yet the court reduced his suggested award by 60% for reasons including the passage of time since the Treaties and the United States' failure to protect the Cayugas, yielding an interest award of $211,000,326.80.[27] SPA249–55.

Without disputing that some interest was justified, the State contends for various reasons that the award was too high. The relative size of an interest award is no reason to overturn it. First Jersey Sec., 101 F.3d at 1476 (approving interest

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[27] The court also rejected the methodology of the Cayugas' expert, which was identical except that his interest rates were slightly higher (T5988–91), because the resulting figure was too large. SPA244–46.

award termed "grossly disproportionate"). Moreover, the underlying theme of the State's arguments — that the award of interest was somehow unfair — ignores the improper benefits the State has garnered from the Treaties. The State has had the profits from the Treaties at its use for two centuries. It has enjoyed benefits like vastly increased tax revenue and the ability to regulate development of the area. Cf. The Kansas Indians, 72 U.S at 756–57 (disallowing state taxes of Indian lands). The Cayugas, by contrast, have received no benefit save annuity payments of a few dollars per person. S635:8; T4465–66. For two centuries, the Cayugas have lacked the opportunities of landed tribes, including significant federal benefits, and have suffered economically, socially, culturally, and religiously. T3624–51.

The judgment at issue including interest may be large, but it is no larger than merited by the Cayugas' loss.[28] How does one measure the loss of a homeland for two centuries? How different would the Cayugas' circumstances be today if the State had not flouted the NIA? Especially given the relatively low amount the jury awarded in its verdict (p65), where CFMV damages alone were supposed to enable

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[28/] The State argues that the "astonishing" damages award will lessen its resources for other programs. B71. This attempt to stampede the Court into denying justice is improper. See West Virginia v. United States, 479 U.S. 305, 313 (1987) (rejecting notion that potential "hardship upon the citizens" affected state's liability for prejudgment interest); Oneida IV, 691 F.2d at 1083 ("[W]e know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed.").

the Cayugas to purchase equivalent land (SPA478–79), the notion that the award of interest was an abuse of discretion is meritless.

A. Prejudgment Interest Accrued from the Date of Injury.

The State argues that prejudgment interest should accrue only from 1980, when this case began, and that compound interest from then would be $2,970,949. B182–86; B188–200 & n.70. As the district court recognized, the "first and most obvious accrual date" is the "date of injury or deprivation" in 1795. SPA248. Both sides' economists testified that accrual generally should begin from the date of injury. T5928; T6436–37. Indeed, that is the usual accrual date in federal cases. E.g., Wickham, 955 F.2d at 839; McCrann v. U.S. Lines, 803 F.2d 771, 773–74 (2d Cir. 1986). Using the date of injury was no abuse of discretion.

1. Delay. — The State raises the notion of unreasonable delay yet again to contend that such delay occasioned a later accrual date. B182–86. The State relies on Kansas v. Colorado, 533 U.S. 1 (2001), in which the Supreme Court calculated interest from the date a complaint was filed. B182–83. The State forgets that the district court did invoke Kansas in reducing the prejudgment interest award under Berkman's already conservative methodology by 60% — a reduction of over $316 million — "due to the long passage of time" and other factors. SPA250–51; SPA254–55. The court surely did not abuse its discretion by refusing to adopt the State's artificially late accrual date to reduce Berkman's result an additional 99%.

Moreover, as the district court recognized in another case, "Kansas is anything but a definitive ruling regarding the governing accrual date." Oneida Indian Nation v. County of Oneida, 214 F.R.D. 83, 97 (N.D.N.Y. 2003). Kansas made no law regarding when accrual should begin, as no particular date commanded a majority. 533 U.S. at 15 & n.5. Furthermore, the case involved an interstate dispute over a water-rights compact and turned on entirely dissimilar equities — "[i]n particular, * * * the fact that in the early years * * * , no one had any thought that the pact was being violated." Id. at 4–5, 14–15. Given the State's bad faith (pp22–25), the equities here are completely different.

Indeed, Kansas does not support the argument that the district court should have considered whether the State could have foreseen its liability for interest. The State emphasizes the Court's recognition of "the uncertainty over the scope of damages that prevailed during the period" (B182), but that uncertainty mattered only because the plaintiff there (unlike the Cayugas) had the "power to begin the process by which those damages would be quantified." 533 U.S. at 16. The Court did not hold that uncertainty over the availability of interest alone would justify denying full compensation. Moreover, the Court was reviewing a special master's assessment of the equities, to which it owed no deference. Id. at 4–6. It never implied that a different accrual date would have been an abuse of discretion.

Citing Jackson County, the State also asserts that the district court's accrual date did not account for "the interplay between Plaintiffs' delay * * * and state

sovereign interests." B183. Jackson County does not hold, as the State implies (B183–85), that an interest award that exceeds what state law would allow is improper. Federal law controls prejudgment interest awards for federal claims. West Virginia, 479 U.S. at 308–09. Although the Jackson County Court referred to state law, it did so only because applying state law would not impinge upon federal interests. 308 U.S. at 351–52. Indeed, the Supreme Court later applied the Jackson County analysis to reject certain state law limiting prejudgment interest as inconsistent with federal policy. West Virginia, 479 U.S. at 308–11; see United States v. Texas, 507 U.S. 529, 533–34 (1993). Like state statutes of limitations, state law limiting interest to that accruing after the complaint (B185) is inconsistent with the federal interest in ensuring fair compensation for tribes who suffer NIA violations. pp54–55.

Moreover, the facts of Jackson County were quite different. The defendant was a county that "in all innocence" relied on a federal fee patent and was undeserving of the consequences of an "unexcused delay" before suit. 308 U.S. at 352–53. By contrast, the State acted in bad faith, disregarding the NIA, and the Cayugas did not unreasonably delay. pp22–25; pp44–47.

2. Good faith. — The State also contends that a later accrual date was appropriate because it acted in good faith throughout its dealings with the Cayugas. B188–200. Again, far from being clearly erroneous, the court's contrary factual findings were well-supported. pp22–25. Moreover, the court found that the

State's good faith, even if proven, would not change its conclusion that prejudgment interest was warranted. SPA119. Indeed, one of its reasons for reducing the award by 60% was the questionable finding that the State "lack[ed] * * * fraudulent or calculated purposeful intent." SPA254. The interest analysis likely would not change even if some of the court's factual findings regarding good faith were reversed.

Furthermore, the State's claim to a "good faith dispute as to * * * liability" (B199–200) is irrelevant. Such a dispute "is merely a characteristic of most ordinary lawsuits" and "not an extraordinary circumstance that can justify denying prejudgment interest," which is not a "penalty" but "an element of just compensation." Milwaukee v. Cement Div., 515 U.S. 189, 197–98 (1995); see Lodges 743 & 1746 v. United Aircraft, 534 F.2d 422, 447 (2d Cir. 1975) ("wrongdoing by a defendant" unnecessary).

Finally, there is a significant question whether the district court should have considered equitable factors like good faith at all. It attempted to distinguish recent Supreme Court precedent disapproving of an equities-balancing approach (SPA114–18), but the court's factual distinctions are irrelevant given how categorically the Supreme Court rejected that approach. West Virginia, 479 U.S. at 311 n.3; see Milwaukee, 515 U.S. at 193. Thus, in Kansas, the equities were relevant only because the compact at issue implicitly incorporated the law of prejudgment interest in effect in 1949. 535 U.S. at 13–14; id. at 20–21 (op. of

O'Connor, J.). No exception to the rule against balancing equities while calculating prejudgment interest is apparent here.

B. The District Court Properly Compounded Interest.

The State argues that awarding compound interest was improper because compounding had a dramatic effect given the long time period at issue. B186–87. Of course the effect of compounding interest over two centuries is dramatic, but properly so. Prejudgment interest serves to make the plaintiff whole. SPA516. All the economists at trial agreed that compounding was necessary to compensate the Cayugas fully. SPA240; T5752–54; T5956–57; T6254–55; T6387–89.

Thus, "compound prejudgment interest is the norm in federal litigation." In re Oil Spill, 954 F.2d 1279, 1332 (7th Cir. 1992); see, e.g., United States v. Pend Oreille County, 135 F.3d 602, 613 (9th Cir. 1998) (interest on trespass award to tribe compounded for forty years); Sands v. Runyon, 28 F.3d 1323, 1328 (2d Cir. 1994); Wilson v. Great Am. Indus., 979 F.2d 924, 934 (2d Cir. 1992); see also 28 U.S.C. 1961(b) (post-judgment interest compounded annually). The decision to compound does not constitute an abuse of discretion simply because it results in a larger award. Instead, the refusal to compound interest for that reason is an abuse of discretion. Saulpaugh v. Monroe Cmty. Hosp., 4 F.3d 134, 145 (2d Cir. 1993).

The State also argues that compounding, though "theoretical[ly]" accurate, ignores the possibility that the Cayugas may not have used fair compensation in a way that would have earned interest. B188. Interest awards compensate for the

"time value of money" regardless of how the money would have been used. Oldham v. Korean Air Lines, 127 F.3d 43, 54 (D.C. Cir. 1997). Perhaps, as the State suggests, the Cayugas may have used fair compensation "to purchase land, machinery, livestock and buildings." B188. But compounding "recognizes * * * that whatever [the Cayugas] did with their money in one year gives them benefit that leads them into the next year." T5956. Prejudgment interest is not based on "what the tribe would have earned * * * had it actually invested," but on an estimate of "how much benefit the tribe lost by not having that income stream." T6062–63; see T5733–34; T5831–32; T5899–5901. The State provides no authority for the dubious proposition that the decision whether to compound should depend on the plaintiff's ability to invest in interest-bearing accounts.

Moreover, the district court did take such "real-world" economic uncertainties into account in its 60% reduction of the interest award. B249–50; B254. Even if such uncertainties justified a reduction, there is no justification for arguing that the court abused its discretion by not also refusing to compound.

C. The District Court Did Not Abuse Its Discretion by Failing to Reduce the Resulting Award by More Than Sixty Percent.

The State's miscellaneous other reasons for a general reduction to the interest award also fail. Again, the district court reduced the award under the methodology it adopted by 60%, or over $316 million, based on various factors. SPA254–55. Although the State argues that the court should have considered other

factors or that certain factors should have weighed more heavily, the weighing of such factors is clearly within the court's discretion.

1. Alleged jury errors. — Again, the State's argument that the jury erred in assigning each year the same FRV does not warrant a new trial. pp67–74. Similarly, the district court did not err by refusing to reduce its interest award based on an adjustment of the jury verdict. Even if, as the State argues, the court had discretion to "look behind" the verdict and award interest based on a reworked version (B202–03), it surely is no abuse of discretion to accept a verdict as written. The State cites no authority imposing an obligation to alter any verdict.[29]

2. Infrastructure. — The district court also did not err in refusing to allow the State an additional offset before calculating interest for the incidental effect of infrastructure. Again, the State deserved no such offset, which would be nearly impossible to value anyway. pp58–59. Furthermore, as the court found, the jury appears not to have awarded any value for infrastructure given the size of the verdict and the constancy of the FRV awards despite uncontested evidence of infrastructural changes over time. SPA276–77.

3. United States' conduct. — Finally, the State argues that the United States' conduct should have had greater effect. B183; B186. The district court reduced

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[29] Contrary to the State's argument (B200–01), the court considered evidence regarding alleged jury errors but found it unpersuasive. SPA240–41. The court properly disallowed further evidence as irrelevant. T6127–28.

the interest award by 60% based in part on findings that the United States failed to protect the Cayugas' interests adequately and previously took positions inconsistent with those taken here.[30] SPA251–52. The court provided no legal authority, however, for the proposition that any failures of the United States should redound to the Cayugas' detriment. Such failures would not affect the State's liability as a bad-faith tortfeasor but rather would seem, at most, to be potential grounds for contribution. p57; cf. Jackson County, 308 U.S. at 352–53 (denying interest award against county that acted "in all innocence" on federal fee patent given unexcused delay by United States in acting on Indians' behalf). In any event, even if the United States' conduct was relevant, the State neither cites authority nor presents any reasoning why the court's already generous deduction was so insufficient that it was an abuse of discretion.

D. Prejudgment Interest Is Not a Jury Issue.

The State also errs in asserting that the jury should have determined prejudgment interest. B205–08. Notably, the State does not request reversal on this ground, but rather argues that the issue should be decided by a jury if this Court remands for new proceedings on interest. B205; B208. As the district court

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[30/] Although appellants repeatedly emphasize such positions (e.g., B2; B98–99), which were taken in unsuccessful defense of the public fisc (SPA547; A2286–2302), this Court can consider the merits of the parties' arguments regardless of any inconsistency. p43; cf. Bates v. Long Island R.R., 997 F.2d 1028, 1038 (2d Cir. 1993) (judicial estoppel applicable only when prior inconsistent position was adopted by court).

recognized, however, early precedents in this Court that entrusted the jury with interest determinations were overruled long ago in cases like Wickham. SPA512. Indeed, the State itself cites these cases. B206. This issue is settled.

VIII. THE JUDGMENT PROPERLY RUNS TO THE CAYUGAS AS WELL AS THE UNITED STATES.

The State's last argument is that the judgment should run solely to the United States as trustee and that the district court erred by "expos[ing] the State to a final judgment that runs jointly to the Tribal Plaintiffs." B248–51. The State requests that the judgment be amended to protect it against claims by other interested tribes (B248), even though it never tried to join any such tribes and none moved to intervene.

The argument that the district court abused its discretion by failing to exclude the Cayugas from the judgment is unfounded. Obviously, the Cayugas are plaintiffs and the judgment should inure to their benefit. Moreover, it is unclear how excluding the Cayugas from the judgment would change the State's vulnerability to claims by other tribes. As the court recognized, execution of the judgment will raise significant issues of law and policy, including "how the principal should be allocated between the [Nation], the [Tribe], and other potentially interested parties." SPA44–45. Indeed, if the United States' participation in this litigation binds other tribes to this judgment, as the State contends (B249–50), the State will be protected regardless of whether the judgment

runs to the Cayugas as well. In any event, these are issues for another day.

SPA44–45.

CONCLUSION

For these reasons, we respectfully request that this Court affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify under Federal Rule of Appellate Procedure 32(a)(7)(C) that the attached Brief for the United States as Appellee is proportionately spaced, has a typeface of 14 points or more, and contains 20,991 words. (The Court ruled in an order dated February 21, 2003, that this brief may be up to 21,000 words long.)

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CERTIFICATE OF SERVICE

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