CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Defendant-Petitioner Miller Brewing Company hereby states that it is a wholly-owned subsidiary of SABMiller plc.

Respectfully submitted,

MILLER BREWING COMPANY,

By its attorneys,

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TABLE OF ABBREVIATIONS

Commonly Used Abbreviations

1789 Treaty	February 25, 1789 treaty between the Cayugas and the State (SPA632-34)
1795 Treaty	July 27, 1795 treaty between the Cayugas and the State (SPA687-90)
1807 Treaty	May 30, 1807 treaty between the Cayugas and the State (SPA699-700)
BIA	United States Department of the Interior, Bureau of Indian Affairs
Buffalo Creek Treaty	January 15, 1838 treaty between the New York Indians (including the Cayugas) and the United States, executed at Buffalo Creek, New York (7 Stat. 550, SPA706-721)
Cayugas	The historic Cayuga Indian Nation, which treated with the State in the 1795 and 1807 Treaties
CFMV	current fair market value
FMV	fair market value
FRV	fair rental value
ICC	Indian Claims Commission
ICCA	Indian Claims Commission Act, U.S.C. §§ 70 et seq. (repealed)
Nation	Cayuga Indian Nation of New York (Plaintiffs-Appellees)
New York Cayugas	Cayugas remaining in New York during 1800s and 1900s, which submitted the 1906 Memorial to the State

NIA	Nonintercourse Act, 25 U.S.C. § 177
Phase I	Jury trial on damages in the district court
Phase II	Hearing on interest in the district court
Treaties	The 1795 and 1807 Treaties between the Cayugas and the State
Tribal Plaintiffs	The Nation and the Tribe
Tribe	Seneca-Cayuga Tribe of Oklahoma (Plaintiffs-Appellees)
Western Cayugas	Cayugas who moved west during the 18th and 19th Centuries

Cayuga Cases

Cayuga I	Cayuga Indian Nation v. Cuomo, 565 F.Supp. 1297 (N.D.N.Y. 1983) (SPA561-590)
Cayuga II	Cayuga Indian Nation v. Cuomo, 667 F.Supp. 938 (N.D.N.Y. 1987) (SPA550-560)
Cayuga III	Cayuga Indian Nation v. Cuomo, 730 F.Supp. 485 (N.D.N.Y. 1990) (SPA542-549)
Cayuga IV	Cayuga Indian Nation v. Cuomo, 758 F.Supp. 107 (N.D.N.Y. 1991) (SPA532-541)
Cayuga V	Cayuga Indian Nation v. Cuomo, 762 F.Supp. 30 (N.D.N.Y. 1991)
Cayuga VI	Cayuga Indian Nation v. Cuomo, 771 F.Supp. 19 (N.D.N.Y. 1991) (SPA527-531)

Cayuga VII	Cayuga Indian Nation v. Pataki (unpublished opinion) (SPA521)
Cayuga VIII	Cayuga Indian Nation v. Pataki, 1999 U.S. Dist. LEXIS 5228 (N.D.N.Y. 1999) (SPA487-517)
Cayuga IX	Cayuga Indian Nation v. Pataki, 1999 U.S. Dist. LEXIS 6264 (N.D.N.Y. 1999)
Cayuga X	Cayuga Indian Nation v. Cuomo, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999) (SPA453-486)
Cayuga XI	Cayuga Indian Nation v. Pataki, 79 F.Supp.2d 66 (N.D.N.Y. 1999) (SPA353-362)
Cayuga XII	Cayuga Indian Nation v. Pataki, 79 F.Supp.2d 78 (N.D.N.Y 1999) (SPA337-352)
Cayuga XIII	Cayuga Indian Nation v. Pataki, 83 F.Supp.2d 318 (N.D.N.Y. 2000) (SPA282-290)
Cayuga XIV	Cayuga Indian Nation v. Pataki (unpublished opinion) (SPA268-281)
Cayuga XV	Cayuga Indian Nation v. Pataki, 2000 U.S. Dist. LEXIS 7045 (N.D.N.Y. 2000) (SPA256-67)
Cayuga XVI	Cayuga Indian Nation v. Pataki, 165 F.Supp.2d 266 (N.D.N.Y. 2001) (SPA68-255)
Cayuga XVII	Cayuga Indian Nation v. Pataki, 188 F. Supp.2d 223 (N.D.N.Y. 2002) (SPA11-66)

Oneida Cases[1]

Oneida I	Oneida Indian Nation v. County of Oneida, 464 F.2d 916 (2d Cir. 1972)
Oneida II	Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)
Oneida III	Oneida Indian Nation v. County of Oneida, 434 F.Supp. 527 (N.D.N.Y. 1977)
Oneida IV	Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982)
Oneida V	Oneida Indian Nation v. New York, 719 F.2d 525 (2d Cir. 1983)
Oneida VI	County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)
Oneida VII	Oneida Indian Nation v. New York, 649 F.Supp. 420 (N.D.N.Y. 1986)
Oneida VIII	Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988)

[1] The following list sequentially reflects published cases in litigation initiated by the Oneida Indian Nation. Most, but not all, of the cases listed are cited in the brief. This shorthand method of identifying the Oneida Indian Nation cases conforms with other submissions by the State.

PRELIMINARY STATEMENT

This is an appeal by the State of New York, numerous state agencies and individual defendants in their official capacity (collectively, "State"), the Counties of Cayuga and Seneca ("Counties"), and a class of private landowners represented by Miller Brewing Company ("Private Landowners") (collectively, "Defendants"), from a judgment awarding approximately $248 million in damages and prejudgment interest against the State for violating the Nonintercourse Act, 25 U.S.C. § 177 (the "NIA"), a statute which governs certain transactions involving Indian tribes. In 1795 and 1807, the State entered into treaties in which the Cayuga Indian Nation sold to the State for fair consideration 64,015 acres of forest land in central New York (the "Treaties").

In 1980, after receiving annuity payments under the Treaties for 185 years and additional compensation from the State based upon the settlement of a 1906 proceeding, the Cayuga Indian Nation of New York ("Nation"), an alleged successor of the historic Cayuga Indian Nation, brought this lawsuit, seeking return of the 64,015 acres and billions of dollars in damages and prejudgment interest. One year later, the Seneca-Cayuga Tribe of Oklahoma ("Tribe") (collectively with the Nation, the "Tribal Plaintiffs"), another alleged successor, successfully moved to intervene over the opposition of the Nation. In 1992, after liability had been

determined except as to the State, which had raised an Eleventh Amendment objection, the United States contradicted an almost 200-year history of affirming the validity of the Treaties and intervened as a plaintiff to keep the lawsuit from being dismissed on Eleventh Amendment grounds.

The district court determined that the United States never properly ratified these land transfers pursuant to the NIA, even though the United States: 1) encouraged the State to enter into the Treaties, 2) knew about and sent representatives to both Treaties, 3) failed to take any steps to invalidate them and 4) subsequently approved or ratified the Treaties through various official acts and public statements. It held the State liable for violating the NIA, even though the Nation and Tribe abandoned the land in question, and waited almost 200 years before bringing suit. In the remedial phase of the litigation, the Nation, the Tribe, and the United States (as trustee) jointly received more than $247 million in damages. Approximately $211 million of that amount was prejudgment interest awarded by the court. That ruling was seriously flawed for numerous reasons, including the court's decision to compound interest from 1795, even though Plaintiffs' delay and the State's good faith warranted a significantly later accrual date. It also refused to take into account the jury's error in mistakenly allocating the exact same amount of damages for lost rent for every year from 1795 to 2000.

This appeal is taken by all the Defendants[2] from a Judgment and an Amended Judgment in Civil Actions Nos. 80-CV-930, 80-CV-960 (consolidated), dated and entered by the clerk of the Northern District of New York on October 2, 2001, see 165 F.Supp.2d 266, and March 19, 2002, SPA9, see 188 F.Supp.2d 223 respectively. A198-199.[3] The total judgment of $247,911,999.42 consisted of $36,911,672.62 in damages awarded by a jury verdict on February 17, 2000, and $211,000,326.80 in prejudgment interest awarded by the court (McCurn, S.J.) in a Memorandum-Decision and Order on October 2, 2001. The State Defendants timely filed a Notice of Appeal from the Amended Judgment and Judgment on May 2, 2002.[4] A159. The State's appeal from the Amended Judgment and

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2 The State Defendants consist of the State, the individual State officials or their successors who are listed in the Notice of Appeal, and the State agency defendants that are also listed in the Notice of Appeal.

3 "A" refers to the Joint Appendix. "SPA" refers to the Special Appendix which was filed pursuant to Second Circuit Local Rule 32(d). Because of the voluminous record, the parties have agreed upon a deferred Appendix as reflected in this Court's Scheduling Order. Therefore, citations are either to pages of those Appendix volumes that have already been filed with the Court or to pages from the district court record that will be included in the Deferred Appendix.

4 On June 17, 2002, the clerk entered a Second Amended Judgment, based upon a decision and order issued by the Court that day. A201. The Second Amended Judgment made a technical correction to the Amended Judgment to add the words "as trustee" to the Plaintiffs' award as it pertains to the United States and also contained the court's rulings certifying liability questions for immediate appeal on behalf of the Counties and Private Landowners pursuant

Judgment brings up for review numerous interlocutory rulings issued during the 22 years that the case was before the district court. The Counties and Private Landowners have also filed Notices of Appeal and have been granted permission to appeal under 28 U.S.C. § 1292(b).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the State's appeals under 28 U.S.C. § 1291 because the Amended Judgment and Judgment are final as against them. In its decision and order of March 11, 2002 the district court directed the entry of final judgment against the State in compliance with Fed.R.Civ.P. 54(b). SPA35. This Court has jurisdiction over the appeals by the Counties and the Private Landowners pursuant to its order granting their motion under 28 U.S.C. § 1292(b) and pursuant to the doctrine of pendent appellate jurisdiction. All defendants filed timely notices of appeal within 60 days of entry of the March 11, 2002 judgment. See Fed.R.App.P. 4(a)(1)(B).

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to 28 U.S.C. § 1292. SPA1-3. On July 24, 2002, the State timely filed an additional Notice of Appeal with respect to the Second Amended Judgment (which included an appeal from the earlier Judgments, decisions and orders as well). A133-140. That Notice of Appeal was intended to be operative "in the event the Second Amended Judgment dated June 17, 2002 is determined to affect the substantive rights of the parties." A137. The other Defendants also filed additional Notices of Appeal and the Tribal Plaintiffs filed an additional Notice of Cross-Appeal. A147, 153, 141.

The State maintains that subject matter jurisdiction over the Tribal Plaintiffs' complaints is lacking because of the bar of the Eleventh Amendment. The Tribal Plaintiffs claim that the district court has subject matter jurisdiction under 28 U.S.C. § 1331 insofar as they asserted questions under federal common, statutory and constitutional law. This Court has jurisdiction to entertain the United States' complaint-in-intervention under 28 U.S.C. § 1345.

ISSUES PRESENTED

A. Liability Issues.

1. Did the district court err when it concluded, without holding an evidentiary hearing, that the Nation and the Tribe are entitled to sue under the NIA where Defendants presented substantial evidence that both groups are not, and have not remained continuously since the time of the disputed transactions, "tribes of Indians" within the meaning of the NIA?

2. Did the court err when it denied as a matter of law the following defenses asserted by Defendants to the Tribal Plaintiffs' claims under the NIA and federal common law: a) abandonment; b) ratification; c) election of remedies; and d) laches?

3. Did the historic Cayuga Nation release and relinquish any rights it retained to its former reservation lands by entering into the federal Treaty of Buffalo Creek?

4. (a) Did the court err when it held that New York was subject to the 1793 and 1802 versions of the NIA, given that those versions (unlike the 1790 version) were not intended to apply to the original thirteen states?

(b) Did the court err when it concluded that the NIA was intended to apply to transactions between states and tribes pertaining to land that was not aboriginal Indian land?

5. Did the court err in holding, as a matter of law, that the Treaties were not ratified or approved by the United States?

6. Did the court err when it rejected the State's Eleventh Amendment defenses against the Nation and the Tribe and held that the intervention of the United States—twelve years after the Tribal Plaintiffs' complaints were filed—defeats the State's Eleventh Amendment immunity?

7. Did the court err when it held that a private right of action exists under the NIA?

B. Remedy Issues.

8. In awarding prejudgment interest, did the court err as a matter of law and abuse its discretion when it: (a) used an accrual date of July 27, 1795 and also compounded interest from July 27, 1795 despite Plaintiffs' delay in bringing this action and the extremely prejudicial effect of compounding interest over 205 years; (b) found that the State had failed to act in good faith; (c) refused to adjust the jury's year-by-year award of fair rental value damages due to the mistake in the allocation of the rental amounts; (d) refused to allow an offset to the jury's damages award for public infrastructure; and (e) concluded that the interest determination would be made by the court and not the jury?

9. Did the court err in determining that the evidence was legally sufficient to support the jury verdict for fair rental value damages?

10. Did the court err as a matter of law when it determined that Plaintiffs' damages are not limited to the damages, if any, incurred at the time of the conveyances?

11. Did the court err as a matter of law and abuse its discretion in its rulings prior to and during the damages trial that: (a) rejected well-established limitations on the scope of fair rental value damages in ejectment cases; (b) found the State liable for all damages as a matter of law; (c) refused to allow the jury to

consider, as an offset from its award of fair rental value damages, the $70,000 payment made by the United States to the Tribe to settle a lawsuit it brought before the Indian Claims Commission; (d) found that the subject land could be valued with public infrastructure in place; and (e) denied the State an opportunity to present testimony in support of defenses that should have been considered by the jury in its award of damages?

12. Did the court err in allowing the United States' expert to testify before the jury even though his methodology and opinions failed to meet the relevancy and reliability standards of Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999)?

13. Did the court err in denying the State's motion under Fed.R.Civ.P. 59 & 60 to amend the judgment to run solely in favor of the United States as trustee for the historic Cayuga Indian Nation?

STATEMENT OF THE CASE

This case has yielded one of the largest damages judgments in history against the State and has, for over two decades, cast a shadow over the titles to the homes and businesses of thousands of Central New York landowners. This case concerns the purported failure of the State to comply with requirements allegedly imposed by one of Congress's oldest statutory enactments, the NIA. That statute,

enacted at a time in the Nation's history when congressional authority to regulate Indian affairs in the original thirteen states was sharply disputed, requires the federal government to attend the negotiations of certain treaties involving Indian tribes. It was unclear then—and remains unclear now—whether the provisions of the NIA in effect at the time of the transactions at issue even applied to the original thirteen states. Moreover, the NIA was—and is—equally unclear as to what acts of the federal government suffice to "ratify" a particular transaction.

Against this uncertain statutory backdrop, representatives of the historic Cayuga Indian Nation ("Cayugas") met with four New York treaty commissioners at Cayuga Ferry in July of 1795 to negotiate a treaty for the conveyance of a 64,015-acre parcel near Cayuga Lake, to which the Cayugas had a right of use and occupancy by virtue of an earlier treaty with New York. As discussed in greater detail below, the 1795 Treaty was the result of years of efforts by the Cayugas to sell their interests in the parcel—efforts that were expressly supported by senior United States officials, including Commissioner of Indian Affairs Timothy Pickering. Pursuant to the 1795 Treaty, the Cayugas conveyed to the State their interests in all but two square miles of the parcel in exchange for a cash payment and a perpetual annuity. Two federal officials were present during the negotiations and signed the treaty. Twelve years later, the Cayugas sold any interest they had in

the remaining two square mile parcel to the State; this 1807 Treaty was, again, entered into voluntarily by the Cayugas in exchange for fair consideration and in the presence of a federal official.

The Cayugas have received annuities from the State for over two centuries. During this period, the two groups of Indians claiming to be descendants of the historic Cayugas—the Nation and Tribe—never disavowed the 1795 and 1807 treaties or sought to have them voided as in violation of the Act. Instead, both groups sought and obtained additional compensation assuming the Treaties were valid: the Nation obtained additional compensation from the State in 1913, and the Tribe obtained a monetary settlement against the United States in 1978 on the theory that the federal government breached its fiduciary duty to the Cayugas.

Indeed, it was not until November of 1980—over one-hundred and eighty-five years after representatives of the governments of the Cayugas, New York, and the United States met at Cayuga Ferry—that the Nation and the Tribe asserted for the first time in this action that the State had violated the NIA and federal common law when it entered into the Treaties. During the course of the extensive proceedings below, the court held that New York had not complied with the NIA and also rejected a host of defenses, including that Plaintiffs' claims were barred by laches and election of remedies. In 1992, after most liability issues were

resolved, the United States intervened on behalf of the Tribal Plaintiffs, despite having affirmatively encouraged the State to enter into the Treaties, and despite having affirmed their validity repeatedly in the intervening 200 years. After a lengthy trial on damages against the State, a jury awarded the Plaintiffs approximately $37 million in damages, consisting of $1.9 million in net rent and $35 million for current fair market value. Thereafter, the court concluded that the Plaintiffs were entitled to approximately $211 million in prejudgment interest—over one hundred times the rent—yielding a total award of almost $250 million. This appeal followed.

In the Statement of the Case, certain themes will bear heavily on the issues of law presented by the court's liability and remedial rulings. These include:

- The good faith conduct of the State prior to and during the negotiation and execution of Treaties and in their aftermath;
- The acts and omissions of the Cayugas and their purported successors during the centuries after the transactions, which is relevant to the defenses of laches, election of remedies, and abandonment;
- The inconsistent conduct of the United States and its representatives, reflecting the federal government's encouragement and approval of the Treaties, which is relevant to the defenses of ratification and laches;
- The interests of the present-day landowners of Central New York who, despite being indisputably innocent of any wrongdoing, have lived under the threat of ejectment and uncertain titles during the twenty-plus years of this litigation; and,

- The rulings of the court at the remedial stage of the proceedings which resulted in damages and interest grossly disproportionate both to the Tribal Plaintiffs' actual injury and the State's alleged misconduct.

Defendants respectfully submit that the facts described below demonstrate that the court's liability and remedial rulings were erroneous in numerous respects.

A. Factual History Of The Relationship Between The Cayuga Indian Nation And The State of New York.

1. Dealings Between The Cayugas And New York – 1776-1790.

a. 1776-1778: The Cayugas Remove From Cayuga Lake After Supporting The British During The Revolutionary War.

The American Revolution split the Iroquois Confederacy, also known as the Six Nations, between the Americans and the British. A1817-18, 34-35; T4658, 4835; N-61, p.7; G-212, pp.97-98.[5] The Cayugas, among others of the Six Nations, were loyal to the British, fought alongside British troops, and attacked noncombatant settlers in Western New York and on the American frontier. T3024-25, 4658; G-324, pp.136-46, G-369, pp.87-88.

In 1778, New York Governor George Clinton asked General George Washington for military assistance. Washington dispatched U.S. Major-General John Sullivan, whose forces advanced upon the Cayugas' homelands surrounding the northern part of Cayuga Lake, destroying their homes and crops. T4658-59, 2852, 3150-5; G-417, pp.9-10, 69; S-725, pp.460-63. The Cayugas, and some of the other Iroquois tribes, retreated to the vicinity of Fort Niagara, a British

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[5] "T" or "Tr." refer to the transcript of the Phase I jury trial and the Phase II hearing on interest. "T(D)" refers to the transcript of the Daubert hearing. "S," "G," and "N" refer to exhibits submitted by the State, United States, and Tribal Plaintiffs, respectively.

stronghold near the shores of Lake Ontario, where they remained under British protection until after the war. A1697; T3164, 4658.

b. 1777-1786: New York Acquires The Right Of Preemption To The Cayugas' Former Aboriginal Lands And Then New York Elects To Enter Into A Peace Treaty With Its Former Enemies.

Under the doctrine of discovery, the discovering European nations held fee title to lands in the Americas subject to the native inhabitants' aboriginal title. Aboriginal title is an Indian tribe's possessory right to land that it has actually and exclusively used and occupied "from time immemorial." The underlying fee title of the sovereign is known as the "preemption right." See T2890-91. The sovereign also held the exclusive right to extinguish aboriginal title, which was known as the "right of extinguishment." See generally Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572-74 (1823). In 1777, New York acquired Great Britain's fee title interest, the right of preemption and the right of extinguishment to Indian lands within the State. See SPA626-27; G-491, p.185.

On September 5, 1784, Governor Clinton met with representatives of the Six Nations at Fort Stanwix, in present-day Rome, New York. See id. at 469. In the ensuing treaty, Clinton reestablished peace and friendship with the Six Nations. T4661-66, 3223; S-623, pp.13-18. Just six weeks later on October 22, 1784, the United States entered into a treaty at Fort Stanwix with the Cayugas (and other

Iroquois that had sided with the British) which granted peace, but in return extinguished Indian title to millions of acres of Iroquois lands without paying compensation. Most of these lands were in the Northwest Territory, west of New York. T4665-66, 3237-39; G-211, pp.54-55; Seneca Nation of Indians v. New York, 206 F.Supp.2d 448, 472 (W.D.N.Y. 2002), app'l pend'g, Nos. 02-6185(L) et al.[6]

In 1784, a large number of Cayugas and other Iroquois moved to a 675,000-acre reservation in Canada on Lake Ontario. A1879, 1907-09, 1698, 1504; T4674-76. The majority of Cayugas who remained in the United States resided near Buffalo Creek, in the western part of New York, with other Iroquois who had settled in that region following the Sullivan campaign. T4674-76, 2895-96. At this time, a chief named Fish Carrier was the leader of the Cayugas at Buffalo Creek. T4671-72; S-623, p.19.

At some point in the 1780s, a small number of families led by a chief named Steel Trap returned to the sites of villages that Cayugas had formerly inhabited

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[6] In adopting a report that would authorize the 1784 confederal Fort Stanwix Treaty, Congress provided that any extinguishment of Iroquois land "'shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits.'" Seneca Nation, 206 F.Supp.2d at 476 (citing 25 J. Continental Cong. 693 (Oct. 15, 1783)).

near Cayuga Lake. T4672, 2896-97; S-623, p.21. This group has been called the Cayuga Lake faction. S-623, p.21.

c. 1787-1788: The Buffalo Creek Majority Twice Attempt To Sell Its Former Homelands To Private Parties.

The Cayugas and other Iroquois residing at Buffalo Creek did not intend to return to their aboriginal homelands, and, in 1787 and 1788, made two attempts to sell their former homelands near Cayuga Lake to private parties. On November 30, 1787, they attempted to sell, in the form of a 999-year lease, virtually all of their aboriginal lands to a private company led by John Livingston. T4676-78, 2888. In return, Livingston's group agreed to pay an annuity of $2,000. G-363, p.457; S-35, pp.119-22, n.1. The lease was invalidated by the New York Legislature because it effectively constituted a sale in violation of New York's preemption right and Article 37 of the New York Constitution. SPA626-27; see also S-623, p.22; T4677, 2890. Thereafter, on March 18, 1788, the New York Legislature passed a statute that expressly prohibited leases of Indian lands to private parties. S-35, p.438-40, n.1; T4677-78; 3248-50.

Despite New York's actions, on July 9, 1788, Fish Carrier and other members of the Cayuga majority at Buffalo Creek signed another instrument with the Livingston group, agreeing to a similar lease. T4679, A1701, 1524-29; S-15;

S-623, p.23. The New York Legislature also refused to ratify this lease. T4679; S-623, p.23.

d. 1789: The State Agrees To Purchase The Cayugas' Aboriginal Lands And Provide A Reservation For Those Members Who Wish To Remain At Cayuga Lake.

In early 1789, the State invited the Cayugas to attend a treaty to purchase their aboriginal lands. T4680. The State was concerned that the Cayugas would continue their efforts to sell lands to private parties and that those private parties would make settlements "in [d]efiance of [the State's] [a]uthority." S-35, p.336; id. at 335-38.

On February 25, 1789, the Cayugas entered into a treaty with New York ("1789 Treaty") in which they ceded all of the Cayugas' aboriginal lands—approximately 1,600 square miles or 3 million acres—"to the people of the State of New York forever." SPA632-34; S-728. The State set aside 64,015 acres (100 square miles) of the ceded lands for the Cayugas, for their common "use and cultivation," "but not to be sold, leased, or in any other manner aliened or disposed of to others." SPA632. This parcel is the land at issue in this lawsuit. The 1789 Treaty also provided for "five hundred dollars in silver" to be paid on June 1, 1789

to the Cayugas; an additional $1,625 to be paid on June 1, 1790; and a cash annuity of $500 to be paid every year thereafter. SPA632.[7]

Although the entire Cayuga leadership was invited to join in the 1789 Treaty, only Steel Trap and his followers from the Cayuga Lake faction attended. S-35, pp.405, 410-11, 414; S-623, pp.21, 23-29; T4680-81. Governor Clinton elected to enter into a treaty with the Cayuga Lake faction because its leaders assured him that they had authority to act on behalf of the entire Cayuga Nation. S-35, pp.269, 271, 411; T4688, 4965-66, 4982-83.

e. 1789-1790: The Buffalo Creek Majority Ratifies The 1789 Treaty After It Unsuccessfully Seeks To Dispose Of All Of The Cayugas' Aboriginal Lands.

When the signed 1789 Treaty was presented to the Buffalo Creek majority, it objected to the transaction and, in a letter from Joseph Brandt to Clinton, requested that the State "not make any further Settlements or Surveys on the Lands till the Money is paid to us agreeable to the Sales we made at Buffalo Creek last Summer [with the Livingston lessees]." S-35, p.331; T4685, 2905-06. The letter continued:

> It is not that we have any Objections to you having the Lands; it is equal to us who has it, as we have sold it in public Council . . . ; but we expect to be paid the Money we then agreed for with Dr. Benton [one of the principal

[7] The 1789 Treaty was entered into when the Articles of Confederation were still effective, since the United States Constitution did not take effect until March 4, 1789. See Owings v. Speed, 18 U.S. (5 Wheat.) 420, 423 (1820).

> Livingston lessees], and to have the Distribution of it ourselves, and not that a few Individuals shall run away with the whole, to the Prejudice of all the Five Nations. . . .

Id.; see also T4685, 2904; S-35, pp.340-43. Among other things, the Buffalo Creek majority complained that the parcel set aside for the Cayugas' use could not be sold. T4684-85; S-35, pp.323-25; S-623, pp.27-28.

Ten months later, Clinton met with the Buffalo Creek majority to reach an agreement concerning the 1789 Treaty. After Clinton assured Fish Carrier that he had not intended to depart from the Tribe's ancient customs by dealing only with Steel Trap's Cayuga Lake faction, S-35, p.404, Fish Carrier attempted to dispose of the reservation that had been created for the Cayuga Lake faction under the 1789 Treaty, stating that the Buffalo Creek majority "do[es] not consider the Reserv[ation] as our own. This is the purport of our Agreement at a full Council at Buffalo Creek [with the Livingston lessees]. . . ." S-35, p.421; see also A1520, A1700. Clinton again declined the offer, stating:

> We have no Right, nor are we disposed to interfere, if some of you choose to reside in one Place and others in another; but while any of you wish to continue at your ancient Place of Residence, we cannot consistent with Justice dispose of any of the Lands comprized in the Reservation. . . . We came not here to violate Agreements but to confirm them . . . .

S-35, pp.422, 423; see also T4693-95. On June 22, 1790, Fish Carrier and the other Cayuga representatives acceded to the Governor's proposals and executed an instrument that ratified and confirmed the previous cession of February 25, 1789. In exchange, the Buffalo Creek majority received an additional $1,000. S-35, pp.427-30; S-623, pp.30-34; T4695-96.

f. July 1790: Congress Enacts The First Trade and Intercourse Act.

On July 22, 1790, Congress passed the first Indian Trade & Intercourse Act, ch. 33, 1 Stat. 137. SPA635-36. Section 4 of that statute was the first version of what is now referred to as the Nonintercourse Act, which provided that:

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

SPA636. In 1793, Congress reenacted the NIA to, among other things, remove the reference to "states" in describing the sale of Indian lands, and also to omit the words "whether having the right of pre-emption to such lands or not." SPA638.

The United States soon advised the Iroquois Tribes about the NIA. In December 1790, President Washington delivered a speech in Philadelphia to the Senecas and other members of the Six Nations in which he referred to United

States Indian Commissioner Pickering's explanation of how the statute would protect their interest in their lands. S-741, p.142; N-44; T3928-33. Washington also pointed out that the Six Nations had legal remedies in federal court if private land speculators took advantage of them. S-741, p.142. Washington's speech would have been communicated to the Cayugas who, at the time, lived among the Senecas. T4196-98.

2. Dealings Between The Cayugas And New York - 1791-1807.

a. 1791-1792: After Washington Repudiates His Indian Commissioner's Approval Of A Lease Between The Cayugas And A Private Citizen, The United States Supports The Efforts Of The Buffalo Creek Majority To Sell The Cayuga Lake Parcel.

In July 1791, Secretary of War Henry Knox dispatched Pickering to meet in a treaty session at Newtown Point with the chiefs of the Six Nations to secure their neutrality in the United States' dispute with certain Indians in the Ohio Valley. T3865-66; G-203, p.168. During the treaty session, the Cayugas raised with Pickering their desire to lease the reservation at Cayuga Lake. T4697-98, 2938-39.

At the conclusion of the treaty, the Cayugas executed a 20-year lease of all but one square mile of the Cayuga Lake parcel to John Richardson, who had settled on the reservation with the consent of the Cayuga Lake faction, in exchange for an annual payment of $500 in cash and cattle. G-267; G-404. Pickering purported to

ratify this transaction "in behalf of the United States." S-623, pp.35-36; G-267; T4698-700.

New York officials objected to the Richardson lease and Knox, on behalf of President Washington, rescinded Pickering's ratification on August 17, 1791. T4699-700; A1701, 1535, 1712, 1768; G-203, p.169; S-623, pp.36-37. Knox reiterated that the State's interest in the lands that it reserved to the Cayugas was "unquestioned" and encompassed "all possible alienations" of Indian lands. G-203, p.169.

Fish Carrier was very upset at the United States' rescission of the Richardson lease. T4702; A1701, 1549; S-623, pp.36-37. Several months later, Knox asked Clinton to "do every thing in your power to accord to the reasonable desires of the Fish Carrier and his people. . . ." A1702; see also A1562; T4702-04. Although both the Buffalo Creek majority and the Cayuga Lake faction attempted to sell the reservation to the State in 1793 and 1794, no treaty was then entered into. T4704-10; S-623, pp.37-40; S-19, pp.848-66; S-59, pp.32-36.

b. November 1794 - January 1795: The United States Encourages New York To Treat With The Cayugas.

On November 11, 1794, the United States (represented by Pickering) and the Cayugas, among other tribes, entered into a treaty at Canandaigua (7 Stat. 44). In Article II of that treaty, the United States acknowledged the lands reserved to the

Cayuga Nation in its 1789 Treaty with the State "to be their property" and that such lands "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." SPA677. As the United States has recognized, the reference to the "people of the United States" was not to the federal government but to the State or its designees. S-718, pp.46-48. Thus, this language was an express acknowledgement that the State had the right to purchase the Cayugas' interest in the land.

During the treaty negotiations, the Cayugas called upon Pickering to assist them in selling the Cayuga Lake parcel to "the York people." A1788, 1784-87; see also A1715, S-73; S-623, pp.40-45. Fish Carrier complained that "we reap no benefit from it, not even to the value of a penny. We want to dispose of it, so that our women and children may reap some benefit from it." Id. Fish Carrier also expressed frustration with Clinton's commitment to preserving the reservation for the Cayuga Lake faction: "The York people [have] not com[e] forward to bargain for our land according to our request. . . . [W]e desire by all means that our requests may be complied with by the York people." A1788. Pickering responded by helping Fish Carrier draft a petition requesting that New York treat with him. A1715. At the direction of President Washington, Pickering later transmitted the

speech Fish Carrier made at the treaty session to Governor Clinton. S-79; see also A1369-70; S-623, pp.45-46; T4717, 3468-70.

c. April 1795: New York Enacts A Statute Appointing State Treaty Commissioners To Treat With The Cayugas And Purchase The Cayuga Lake Parcel.

In response to the efforts of the Buffalo Creek majority and other Iroquois tribes to sell the Cayuga Lake parcel to New York, the State enacted Chapter 70 of the Laws of 1795 on April 9, 1795 appointing commissioners to negotiate the State's purchase of the lands reserved to the Cayugas in the 1789 Treaty. SPA680-86. The Legislature expressly acted to allay controversy over the title to lands that the tribes had attempted to lease to private parties and to allow the tribes a means of income. Id.

Article III of the statute authorized the state agents to purchase land that the Cayugas wished to sell for an annuity "not [to] exceed an annual interest of six per cent of the principal sum which would arise from the sale of such residue [lands], if the same was sold at four shillings per acre." SPA681-82. Articles VI and VII provided that the land purchased from the Cayugas would be sold at public auction for a minimum of sixteen shillings per acre. Id.; see S-623, pp.46-47.[8]

[8] See discussion infra at p.193 n.71, discussing the disapproval of the Council of Revision, see N.Y. Const. Art. III (1777); SPA623, and the Legislature's subsequent approval of the statute. T4717-18, 5067.

d. June - July 1795: Secretary of War Pickering Objects To New York's Planned Treaty With The Cayugas.

On April 6, 1795, Israel Chapin, Jr. became the federal Superintendent of the Affairs of the Six Nations. A1164, 1370-71; S-60. Between early May and early June 1795, Chapin advised Pickering about the impending treaty negotiations between the State and the Cayugas regarding the Cayuga Lake parcel. G-277. On June 13, 1795, Pickering sought an opinion from United States Attorney General William Bradford about the applicability of the NIA to the potential treaty.[9] See G-267. Bradford responded that "unless there be something in the circumstances of the case under consideration to take it out of the prohibition of the law," the 1793 NIA required "a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress." G-267; A1398. After receiving Bradford's opinion, Pickering wrote to Chapin instructing him to "give no aid or countenance to the measure."[10] G-277; A1396. After being advised that Jasper Parrish, who was an interpreter in the federal service, had gone to Buffalo Creek to

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[9] Because of the passage of time, Chapin's letters of May 6, May 22 and June 4, 1795 (which are referenced in Pickering's June 29, 1795 letter to Chapin, G-277) and Pickering's letter of June 13, 1795, are lost.

[10] In his June 29, 1795 letter to Chapin, Pickering mentioned that he had also written to Governor Clinton and had enclosed a copy of Bradford's opinion. G-277; A1396. Due to the passage of time, Pickering's letter to Clinton is lost and it is unknown whether that letter arrived in Albany before Governor Clinton's term of office expired.

invite the Cayugas to treat with the State, Pickering sent another letter to Chapin in which he reiterated that the planned treaties with the Cayugas "could not be held without the authority of the United States." G-278; A1400. He wrote that neither Chapin nor Parrish were to countenance any treaty "unless a commissioner of the U. States holds the treaty. . . ." Id.

e. July 1795: The New York Treaty Commissioners Reach A Fair And Equitable Resolution Of All Issues With The Cayugas And Two Federal Officials Witness And Sign The 1795 Treaty.

Before Pickering's letters arrived, Chapin left Canandaigua to participate in the treaty between the Cayugas and the State. The State's treaty commissioners, led by Philip Schuyler, met with representatives of the Buffalo Creek majority and Cayuga Lake faction beginning on July 19, 1795, at Cayuga Ferry. S-80, p.1; T4718, 21; S-623, p.47; S-623. Chapin and Parrish also attended. A1165, 1175, 1274, 1866-67; SPA680.

Schuyler advised the Indians that the State Legislature had received the Cayugas' request at Canandaigua to dispose of the Cayuga Lake parcel and that the Legislature was "exceedingly happy to find that your intentions and theirs perfectly

coincided on the subject." S-80, p.2; S-623, pp.47-48.[11] Schuyler then laid out five propositions for the terms of the treaty:

1. The State would pay the Cayuga Nation a perpetual annuity for any lands they elected to dispose of, for an amount to be negotiated at the treaty;
2. Those lands the Cayuga Nation elected to keep would be reserved to them forever, "and no White person shall be permitted to reside thereon";

3. If the Cayugas wished, the reserved lands could be divided into individual lots for each Cayuga family's use, with restraints against selling or leasing them to others;

4. The annuities would be distributed to the Cayugas by a person acceptable to them and to the State, and the money would be distributed among the Cayugas according to their intentions; and

5. The entire Cayuga Nation should unite and live on the reservation lands they elect to hold onto, and learn the arts of farming; "But this is entirely left to you to decide upon and must only be considered as a recommendation on our part flowing from our good-will towards you."

S-80, pp.3-5; S-623, pp.48-49; T4719.

After several days of negotiations and counter-proposals, the parties reached an agreement. On July 27, 1795, a treaty was executed between the Cayugas and the State (the "1795 Treaty"). SPA687-90. Sixteen representatives signed for the Cayugas and Schuyler and three other treaty commissioners signed for the State.

[11] The record contains Schuyler's contemporaneous records of what occurred at the Treaty. S-102-S-104; S-106-S-108; see also G-298; T4722-29.

SPA689. The 1795 Treaty was also witnessed and signed by federal agents Chapin and Parrish. SPA690; T4729-30; A1165, 1175, 1372.

Under the terms of the 1795 Treaty, the Cayugas sold to the State their interest in 60,815 acres of the lands reserved to them in the 1789 Treaty, and in return received a payment of $1,800 and a perpetual annuity of $1,800 to be paid to the United States Indian Agent at Canandaigua. The Cayugas also reserved a tract of land two miles square for the Cayuga Lake faction, one square mile surrounding a purported silver mine, and another one square mile on the west side of the Lake for Fish Carrier and his progeny. SPA688-89; S-623, p.54.[12] This is one of the treaties claimed by the Plaintiffs to have violated the NIA.

f. July 1795: Governor Jay And President Washington Decide Not To Interfere In The 1795 Treaty.

On July 1, 1795, John Jay, outgoing Chief Justice of the United States Supreme Court, became Governor of New York. A1367, 1385. In a letter dated July 3, 1795, Pickering wrote to Jay and enclosed a copy of Bradford's opinion

[12] According to the State's appraisal expert, the price paid to the Cayugas of 50 cents an acre compared favorably with contemporary sales data for large, unimproved tracts of land in the region. T1781-82; S-614. As discussed infra, the State attempted but was not permitted to show at trial that the Cayugas received fair consideration for its reservation lands.

letter.[13] A1367. On July 13, 1795, Jay responded, advising Pickering that the arrangements for the treaty at Cayuga Ferry had already been completed and that, as Governor, he had to respect the New York State Legislature's authority under Article 37 of the New York Constitution regarding Indian affairs.[14] Jay advised Pickering that he was not prepared "on this occasion . . . officially to consider and decide" whether the 1793 NIA was proper under the U.S. Constitution. G-238, p.1 (emphasis in original). He concluded that he was confident that the President was "dispos[ed] to promote" "harmony between the United States" and New York. Id. at p.2.

Two days after the Treaty negotiations had begun, Pickering transmitted Jay's response to President Washington. A1372-73; G-289. On July 27, 1795, the same day, Washington responded to Pickering and wrote:

> If the meeting of the [New York] Commissioners, appointed to treat with the Onondagoes, Cayuga, and Oneida Indians, took place at Albany the 15th. instant, as was expected by the extract of Genl. Schuylers letter to the Governor of New York; any further sentiment now on the unconstitutionality of the measures would be recd. too late. If it did not take place, according to expectation

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[13] Because of the passage of time, Pickering's letter of July 3, 1795 is lost. The letter is referred to by Pickering in correspondence with President Washington dated July 21, 1795. G-289.

[14] Jay was a federalist and his beliefs in favor of the supremacy of the central government were well known. A1385-86.

> It is my desire that you would obtain the best advice you can on the case and do what prudence, with a due regard to the Constitution and laws, shall dictate.

G-388 (emphasis in original); A1372-73.

Upon returning to Canandaigua, Chapin received Pickering's letters. In response, Chapin reported that the treaty had taken place and that the State had purchased most of the lands reserved to the Cayugas. Chapin informed Pickering that he had received no special directions and assumed that the State Commissioners were fully authorized by the United States to transact the business. G-269; see also A1371, 1948-49, 1980.

Pursuant to Article 37 of the State Constitution, the 1795 Treaty had to be ratified by the Legislature. SPA627. In the nine months between the signing of the treaty and its ratification by the State Legislature, the United States purposefully chose to remain silent. Less than two months after the 1795 Treaty was completed, Pickering corresponded with Jay about the NIA in connection with a proposed treaty with the St. Regis Indians without suggesting that the 1795 Treaty was invalid. A1771, 1712.

On March 26, 1796, the 1795 Treaty was submitted by Chapin, a United States official, to a New York State Supreme Court Justice for formal public filing.

SPA690; A1372. The Treaty was ratified by the State Legislature on April 1, 1796. SPA692.

g. 1796-1802: The Subject Lands Are Subdivided Into 250-Acre Parcels And Sold At Auction In Fee Title To Speculators And Settlers.

After the 1795 Treaty, the State surveyed the land and divided it into 234 lots consisting of 250 acres each. T1158-59, 3666; A1871. In November 1796, the State auctioned these lots. T1153, 2997. Due to the availability of generous credit terms, the bid prices greatly exceeded the market value for the subdivided parcels. See, e.g., T2182-83, 5427-29. The 250-acre parcels sold for an average of $4.50 per acre. T2998. However, the State received a total down payment of only $5,550 (roughly 2% of the total purchase price) and provided state-financed mortgages on most of the lots. T1162, 1203, 3669; S-113, 114.

Soon thereafter, land speculation slackened and the value of lands in the area declined. T3008. By 1802, it became clear that the landowners could not make mortgage payments based upon a per-acre price of $4.50. T1165-67, 3670-72. The State passed a series of laws forgiving interest payments—and in some instances principal payments—on those lots. T3008; see also T1165-78, 1203-04, 3670-81; S-118-31.

h. 1799-1807: The Cayugas Sell Their Remaining Lands In New York And Sign The 1807 Treaty.

Between 1795 and 1800, the minority faction at Cayuga Lake moved to Buffalo Creek. T4736, 3012-13. By 1799, there were no Cayugas remaining on the lands that had been reserved in the 1795 Treaty.[15] A5511-12; T3008.

In 1799, Chapin, still a federal agent, asked Jay on behalf of the Cayugas whether the State would purchase the remaining Cayuga Lake land since it was no longer occupied by Cayugas. A1374; T3491. Jay responded that he would consider purchasing the remaining land only if it could be bought on reasonable terms and with the consent of the Cayugas. S-65; see also T4735-36, 3491, 3494-95. One year later, Jay stated that he had been advised that "the whole Cayuga Tribe are now removed to the westward" and "that they will be anxious to know whether I will purchase their Reservation." A5511-12; S-66; T4737-38.

On February 16, 1801, at the direction of President Adams, acting Secretary of War Dexter stated that the sale of the Cayugas' remaining reservation lands

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[15] Prior to 1790, many Cayugas permanently migrated from New York, some settling in Sandusky, Ohio and then moving to Indian Territory in Oklahoma. A333-34. From 1790 to 1795, the majority of the remaining Cayugas left Buffalo Creek to move to Canada or to the western frontier. There were 349 Cayugas at Buffalo Creek in 1789. A1819, 1491-92. A British census conducted in 1795 confirms that the vast majority of the Cayuga tribe were then residing at Grand River, north of Lake Erie, in Canada. A1706, 1609, 1819; see also A1697, 1949, 1481-94.

could go forward if the Cayugas could find a suitable person to attend the negotiations of the transaction. A1249, 1374. On February 26, 1807, New York Governor Morgan Lewis signed an agreement in principle in Albany with two Cayugas who were accompanied by Parrish. T4738; S-50. Parrish was present at the negotiations in his capacity as an Indian agent of the United States and as an interpreter. T4738-39; Cayuga Indian Nation v. United States 36 Ind. Cl. Comm. 75, 96 (1975) ("Cayuga ICC II"); A2181, 2502-03, 1374-75. Parrish vouched for the Indians' authority to represent the Cayuga Nation and also signed and witnessed the agreement. Id. Subsequently, the New York Legislature ratified the agreement. SPA702. On May 30, 1807, the Cayugas signed a Treaty in Albany (the "1807 Treaty") approving the transfer of approximately 3,200 acres to New York for $4,800, which payment was transmitted to the Cayugas through Parrish. SPA699-700; A1145-48, 1869-70; T4738-39, 3497. This is the other treaty claimed by Plaintiffs to have violated the NIA.

3. Events After The 1795 And 1807 Treaties.

In the two centuries that have passed since the Treaties, the State has paid and the Cayugas have accepted the annuities called for thereunder. S-612. Generations of innocent landowners purchased and improved the subject land, paid

taxes and built businesses and schools. Local municipalities and the State also spent millions of dollars on infrastructure improvements.

a. The Federal Government Implements A Policy Of Removing Indian Tribes, Including The New York Indians, To The Western Frontier.

Both prior to and after the Treaties, many Iroquois living in New York, including Cayugas, removed west to Sandusky, Ohio to reside on a reservation created for them by the United States. T3011; A333. Beginning around 1830, the United States pursued a national policy of removing Indian tribes, including the New York Indians, to the western frontier. T3500. In 1832, following the Indian Removal Act of 1830, 4 Stat. 411, 25 U.S.C. § 174, the Iroquois living at Sandusky were moved by the United States to the Neosho Reservation in what is now Northeastern Oklahoma. T4612-13, 3014-15, 3018, 3529. Around the same time, the Indians remaining in New York agreed to relocate to land reserved for them by the United States in Green Bay, Wisconsin. SPA707; A5619.

Not all of the New York Indians were able to relocate to Wisconsin at that time, and they asked the President to take their Wisconsin lands and provide them a new home within Indian territory in Kansas. SPA707; A1376, 5619. On January 15, 1838, the remaining New York Indians including the Cayugas signed the

federal Treaty of Buffalo Creek, 7 Stat. 550, providing for their permanent removal to Indian Territory in Kansas.[16] SPA706-721; see also A1377, 5631; T4743.

b. In The Nineteenth Century, The Cayugas Reaffirm The 1795 and 1807 Treaties Through New Treaties With New York And Through Efforts To Obtain Additional Compensation For The Cayuga Lake Parcel.

Due to the federal government's removal policy, the Cayugas remaining in New York and those who moved west (for purposes of this Statement only we will call the first group the "New York Cayugas" and the latter group the "Western Cayugas") had to find new mechanisms to distribute the annuities that were being paid each year by New York under the 1789 and 1795 Treaties. On at least six occasions between 1829 and 1850, Dr. Peter Wilson[17] and other representatives of the Cayugas in New York negotiated new treaties with the State that changed the manner and method of distributing the annuities. A1950-51, 1953-54, 2021-25, 2036-45, 2050; T4458-59, 4740-48; S-625, pp.142-44, 439-42, 493-95; S-665, pp.95-96; see also S-624, pp.5-11; S-625, pp.493-95; T4743-44. The United States agreed to be responsible for the redistribution. See, e.g., S-625, pp.438-39; S-624,

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[16] At the time of the Treaty of Buffalo Creek, there were about 130 Cayugas remaining in New York State, most of whom were dispersed among the Senecas and living on Seneca reservations. A1376.

[17] Wilson, a medical doctor, was the principal spokesperson and an articulate advocate for the New York Cayugas from around 1839 through the early 1870s. T3020, 3513-14.

pp.6-7; S-665, pp.91-95; A1375, 1940; T4740. In petitioning New York for modification of the Treaties, the Cayugas reaffirmed their validity. See T4740-48, 3588-89.

Wilson also sought additional compensation for the Cayugas under the Treaties. In 1853 and again in 1861, Wilson petitioned the State to award the Cayugas additional amounts with respect to the 1795 transaction.[18] G-459, G-460; T4751-52. During these efforts, Wilson never claimed that the underlying Treaties were invalid and did not assert that the Cayugas were entitled to possession of the land. S-624, p.11; T4460, 4751.

c. At The Beginning Of The Twentieth Century, The United States Asserts Before An International Arbitration Tribunal That The State Acted In Good Faith And Did Not Violate Any Federal Law When It Entered Into The 1795 And 1807 Treaties.

Prior to the war of 1812, the Canadian Cayugas were paid a share of the $500 and $1800 annuities under the Treaties of 1789 and 1795. A1877, 1899, 1950, 2013-20. After the onset of the War of 1812, the Canadian Cayugas no longer received a share of the annuities and the State instead divided the annuities between the New York Cayugas and Western Cayugas. A1950; S-624, p.22.

[18] The Cayugas' petitions were in the form of a Memorial. See Black's Law Dictionary 998 (7th ed. 1999).

Beginning around 1849 and continuing through the end of the nineteenth century, the Canadian Cayugas attempted to again obtain a share of the annuity payments. S-625, pp.496-500; S-624, pp.8-11; T4740, 3516. Those efforts were opposed by the New York Cayugas. See T4744, 49-50; S-624, pp.10-11; S-625, pp.37-48, 237-250, 493-95; A1952, 2013-20.

In 1910, an International Arbitration Tribunal was created, with the approval of the United States Senate, to resolve certain claims existing between the United States and Great Britain. One of the claims to be resolved by the Tribunal was the Canadian Cayugas' claim to a share of annuities from the 1795 and 1807 Treaties. A1377-8; S-665, p.1; S-624, p.22. The United States opposed this claim and asserted that: 1) the 1789 Treaty between New York and the Cayugas validly extinguished all aboriginal title to the Cayugas' lands and granted the Cayugas only a right to use and occupy the subject land; 2) New York made concerted efforts to protect all Cayugas by invalidating private sales to speculators that would have benefited only a few Cayuga chiefs; 3) New York faithfully paid all annuities required under the treaties; and 4) laches barred the Canadian Cayugas' claim. S-

624, pp.23-25; S-664, pp.1, 227-28, 241-42, 259-60, 281; S-665, pp.6-10, 80-82, 94, 102-04[19]; T4762-65; 3575-79.

On January 22, 1926, the Arbitration Tribunal concluded that the United States was liable to the Canadian Cayugas for failing to restore to them certain rights they enjoyed prior to the War of 1812. Cayuga Indian Claim, 20 Am. J. Int'l Law 574 (Am. & Br. Claims Arb. Trib. 1926); S-20, pp.328-29; S-624, p.25; T4761-62. The Tribunal also found that the 1795 Treaty was subject only to New York law and that the United States did not have an interest in the Treaty. S-20, pp.327-28; S-624, p.25. The Tribunal awarded the Canadian Cayugas $100,000 to be paid by the United States. A1378; G-205, p.331; T3055. That award did not affect the annuities being paid to the Cayugas residing in the United States. T4233.

[19] Although the court reserved on admitting S-20, S-664, S-665, S-689, S-690, S-694 and S-718 at the prejudgment interest ("Phase II") hearing (see T3572, 5711-12), the court later relied upon the United States' prior inconsistent positions, as well as a primary exhibit from the arbitration proceedings, in his decision awarding prejudgment interest. Cayuga XVI, SPA173 (citing S-19), 252 (citing inconsistent positions). In addition, the Court may take judicial notice of these documents since they are public records from official proceedings. See Fed.R.Evid. 201(b); Rothman v. Gregor, 220 F.3d 81, 92 (2d Cir. 2000).

d. Based On A Memorial Brought In 1906, The New York Cayugas Succeed In Obtaining Additional Compensation From The State And Elect To Forego Any Claim Against The State For A Violation Of The NIA.

At the beginning of the twentieth century, the New York Cayugas renewed their efforts to obtain additional compensation from New York based upon the State's alleged profits from the 1796 auction and the resale of the lands purchased in 1807. T3516-18. On February 27, 1906, the New York Cayugas presented a Memorial to the Commissioners of the Land Office ("Land Commissioners")[20] seeking monetary compensation plus interest. A2076-86, 1955; T4752-53; S-624, p.12; see also S-643, p.157. Their attorneys made clear that "the Cayugas want no lands of the whites" and that if the additional compensation were used to purchase land, it would be land located at a state reservation held by the Senecas. S-635, p.15; see also A1956, 2074; S-624, pp.13-14 & n.37; T4754, 3518.

In response to a report from the Land Commissioners, who were directed by the Legislature to investigate the claim, see A3890-91; G-374, pp.17, 76-78; G-375, pp.110-12; T4753, 3044, the Legislature enacted a statute. N.Y. Laws of 1909, ch. 255, SPA722. The statute authorized the Land Commissioners to

[20] Pursuant to Chapter 234 of the N.Y. Laws of 1841, § 1, the Board of Land Commissioners was authorized, inter alia, to hear and determine, with respect to any Indian tribe, all questions that relate to monies under the control of the State and to any of their lands in the State.

negotiate, subject to the approval of the Governor, a settlement of the New York Cayugas' claim for an amount not to exceed $247,609.33 plus interest from February 27, 1906.[21] A1957; see G-375, pp.29, 111. The amount was calculated by computing the difference between the total bid price for the 250-acre subdivided lots at the 1796 auction ($277,609.33) and the value of the $1,800 perpetual annuity that the Cayugas received in the 1795 Treaty ($30,000)—a value that assumes the annuity to be capitalized at 6%, the interest rate contained in Chapter 70 of the Laws of 1795. See A2080-82; S-635, pp.5-7. The settlement process was complicated by a report prepared by New York Attorney General O'Malley at the request of Governor Charles Evans Hughes that, among other things, concluded that the 1795 Treaty was fair and that the higher price paid for the resale of individual lots was for the purchase of the fee title. A2116-37; G-375, pp.108-129.

On April 18, 1911, the New York Cayugas renewed their efforts to obtain a settlement for the full amount authorized by the 1909 statute. They asserted that if

[21] On or about December 1910, the Western Cayugas presented a Memorial to the Land Commissioners seeking their fair share of any settlement between the New York Cayugas and the State. A5642-45; G-375, pp. 330-34. In that Memorial, the Western Cayugas expressly relied on the validity of the Treaties, stating that the 1789 Treaty "makes the annuity and principal from which it comes an absolute vested right, inalienable except by direct treaty with the State." A5645; G-375, p.334.

the State did not settle with them, they had the right to have the United States sue the State for damages and interest from 1795, based upon a violation of the NIA. A2181-83, 1960, 1956, 2148; T4758, 3052, 3561, 3558-61; S-642, pp.16-18; S-624, pp.17-18. Following a determination by the New York Court of Appeals that the Land Commissioners were obligated to negotiate a settlement within the terms of Chapter 255 of the Laws of 1909, People ex rel. Cayuga Nation v. Commissioners, 100 N.E. 735, 736 (N.Y. 1912); see also A1961-62, 2187-2208; S-624, pp.18-19; S-643, S-644, the State entered into a legislatively approved settlement for the full amount set forth in the 1909 statute ($247,609.33), less attorney's fees and disbursements. A1962-63, 2213-40; see also S-624, p.19. The State made annual interest payments to the Cayugas under the terms of the settlement until 1919, which were split between the New York Cayugas and the Western Cayugas. Thereafter, payments were stopped because the State Attorney General determined that the settlement agreement did not comply with the 1909 statute.[22] A5661, 1964, 2247.

[22] The Attorney General's opinion, A5647-61, also noted that the 1909 statute did not make a provision for payment to the Western Cayugas, but found that deficiency harmless because the New York Cayugas had consented to a reduced share for themselves. A5651-52, 2243, 1964; S-624, pp.19-20. Nevertheless, once the settlement was declared invalid, the Land Commissioners resolved that an award to the Western Cayugas of any portion of a settlement fund would be "without authority and void" because it could

Throughout the 1920s, members of the New York Cayugas disagreed among themselves about the merits of entering into another settlement.[23] A 1924 report by the New York Attorney General revealed that some Cayugas opposed entering into the settlement because:

> they had been advised by counsel that the Allied Nations of Indians, including the Cayugas, held a just claim against the State of New York, arising out of various land transactions, and aggregating in amount considerably in excess of the sum above referred to. They contended that if they were to enter into an agreement under the provisions of the 1909 statute, as amended in 1920, it might prejudice their rights with respect to this larger claim.

A2256; see also A1965, 2253-63; N-32, p.5. On August 26, 1930, one year after a "test case" brought on behalf of the St. Regis Mohawks on grounds similar to this proposed larger claim was dismissed, see Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929), a new agreement was reached in which the New York Cayugas would receive annual interest payments forever, including the interest that had accrued from the date payments had stopped. A1965-66, 2234; 2259-63;

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not be approved by the Governor in accordance with the provisions of Chapter 255 of the Laws of 1909. S-624, pp. 20-21.

[23] On May 10, 1920, the State enacted an amendment to the 1909 statute to authorize that a portion of the principal included in any settlement shall be used to pay the Senecas "for the residency and occupancy of lands for said Cayugas on the [Seneca] reservations and such as will provide for said Cayugas and secure homes for them." SPA724; A1964, 2252.

Cayuga Nation of Indians v. United States, 28 Ind. Cl. Comm. 237, 248 (July 20, 1972) ("Cayuga ICC I"), N-34, p.2; S-624, pp.19-22. These interest payments would be paid in addition to the annuities paid each year forever under the Treaties. See SPA724, A1964, 2252. In December of 1931, Governor Franklin D. Roosevelt signed an executive order confirming the agreement. See N-34.

From 1931 through 1958, the State paid the interest payments under the 1930 settlement. G-21; S-689, pp.15-16. After an agreement could not be reached with the Senecas, the New York Cayugas asked the State to release the money previously set aside for payment to the Senecas. T4463-64. In 1958, the State passed a law authorizing the return of the amount set aside, resulting in a new principal of $433,447.66 and annual interest payments of $21,673. SPA726. Since 1958, the New York Cayugas have received those interest payments together with the $2,300 annuities paid under the Treaties. T4464; A599-600, 982, 1966, 2266, 3953; Cayuga ICC I, at 248; S-624, p.22.

e. The Western Cayugas Succeed In Obtaining Additional Compensation From The United States Before The Indian Claims Commission Based Upon The Validity Of The 1795 and 1807 Treaties.

Although the Western Cayugas were unable to participate in the New York Cayugas' 1930 settlement with the State, they did succeed in obtaining additional compensation directly from the United States under the Indian Claims Commission

Act (the "ICCA"). SPA727-35.[24] On August 11, 1951, the Western Cayugas, represented by counsel, sued the United States before the Indian Claims Commission ("ICC"), see A2267-75, 1967-68, and claimed that the federal government had breached its fiduciary duty by failing to:

> protect Petitioners and keep them secure in the use and possession of their land [and by] failing to lend any aid or assistance to petitioners but permitted them to be exploited and to be unconscionably deprived of their land and property for a grossly inadequate consideration.

A2270-73, ¶¶ 11, 16, 20. As relief, the Western Cayugas sought a "judgment for the fair market value of the land." A2271-73.

In 1970, the ICC held a trial on the United States' liability to the Western Cayugas. S-624, pp.25-26; see also A2466-79; Cayuga ICC I at 237-50. The United States maintained, inter alia, that New York, as a state with the right of preemption, was not subject to the NIA. Cayuga ICC I at 238; A2467; S-690, pp.18-21; see also id., pp.18, 41-42; S-718, pp.46-48. On July 20, 1972, the ICC found that the United States would be liable to the Western Cayugas under the ICCA and the NIA if the Cayugas received unconscionable consideration. Cayuga ICC I at 250; A2276, 84, 1968. In a later ruling, the ICC found that "the United

[24] The ICCA was enacted in 1946 to settle once and for all the claims arising from the federal government's historical dealings with the Indians. The orders of the ICC were appealable to the U.S. Court of Claims. See generally Seneca Nation, 206 F.Supp.2d at 498-99.

States had actual knowledge of the treaties of July 27, 1795 and May 30, 1807 . . . and further that a representative of the United States was in attendance at the latter treaty." A2482; see also A1969, 2285, 2481-2503, 2504.

Thereafter, the attorney for the Western Cayugas proposed that a final judgment be entered in the amount of approximately $70,000. A1969, 2288-89. The settlement proposal also provided that "the plaintiffs waive any and all claims arising out of the transactions giving rise to this claim." Id. The proposed settlement was accepted by the United States and, on May 11, 1978, the ICC entered final judgment approving the settlement. A2286-2304, 1970; S-624, pp.26-28; T4766.

B. Summary of Proceedings - The Liability Phase.

1. 1980-1983: The Complaints, Class Certification, Intervention By The Tribe, Motions To Dismiss.

This lawsuit consists of three complaints consolidated by District Judge McCurn. The principal action, 80-CV-930, was commenced in November 1980 by the Cayuga Indian Nation of New York (the "Nation").[25] That complaint asserts that the 1795 and 1807 Treaties were entered into without the express consent of

[25] The Nation claims to be the group of Indians referred to as the "New York Cayugas" in the preceding discussion. The current membership roll of the Nation lists approximately 450 persons, 300 of whom live in the state. T4455; see also A617.

the United States and without the presence of federal Treaty Commissioners in violation of, inter alia, the NIA. A204-269. The named defendants include the Governor, various state agencies and officials, Seneca and Cayuga Counties, county officials, other local governmental entities, utilities, and landowners with property interests in the claim area. A204-05. The Nation sought: a declaration that defendants' titles and interests in the lands are void; the ejectment of the current landowners; the return of the 64,015 acres and monetary damages for their loss of use and possession of that land since July 1795. A227-28. The Nation's complaint did not expressly seek damages for the current fair market value ("CFMV") of the subject land or prejudgment interest ("interest").

In 1980, the Nation moved to certify a defendant class of landowners pursuant to Fed.R.Civ.P. 23(b)(1)(B). A270-85. In a Decision and Order dated March 25, 1981, 89 F.R.D. 627, SPA591-97, the court certified a defendant class action with respect to liability. SPA596. Defendant Miller Brewing Company was named as a representative of the defendant landowner class. SPA595.

In November 1981, the Seneca-Cayuga Tribe of Oklahoma (the "Tribe")[26] was granted leave to intervene as a plaintiff-intervenor. A335-41. The Tribe filed

[26] The Tribe claims to include the "Western Cayugas" described in the preceding discussion.

an amended complaint-in-intervention on November 20, 1981 that was virtually identical to the Nation's complaint. A350-59.

In April 1982, Defendants moved to dismiss the complaints for lack of subject matter jurisdiction and for failure to state a claim. Those motions were largely denied in a decision issued on May 26, 1983. Cayuga Indian Nation v. Cuomo, 565 F.Supp. 1297 (N.D.N.Y. 1983), SPA561-590 ("Cayuga I").[27] Thereafter, defendants filed their answers. A369-86, 387-404, 416-26, 427-35.

2. 1983-1990: The District Court Finds That The Tribal Plaintiffs Are "Tribes" Entitled To Sue Under The NIA And Rejects The Defenses Of Ratification, Election Of Remedies And Collateral Estoppel.

In December 1983, the Nation moved for partial summary judgment, seeking a determination that the 1795 and 1807 Treaties were invalid under the NIA and federal common law, and that the Nation is the current owner of the subject lands. A457-58. Defendants opposed the motion, claiming that genuine issues of material fact existed concerning whether the Nation was a "tribe of Indians" entitled to sue for relief under the NIA. Alternatively, Defendants asserted that further factual development of the record was needed on the issues of ratification and abandonment. Defendants also asserted that certain defenses—

[27] Cayuga I was actually the court's third opinion. However, it has been cited as Cayuga I, probably because it was the first decision to address issues relating to liability and remedy, and Defendants have followed that designation here.

including election of remedies—entitled them to summary judgment. A44c-f (Dkt. Nos. 137, 166, 171, 190, 194). In Cayuga Indian Nation v. Cuomo, 667 F.Supp. 938 (N.D.N.Y. 1987), SPA550-60 ("Cayuga II"), the court found that, based upon their status as federally recognized Indian tribes, both the Nation and the Tribe constituted "tribes of Indians" entitled to sue under the NIA. However, it held that the record was incomplete on whether the United States ratified the Treaties and that additional development of the record was necessary on this issue. SPA556. The court rejected the Defendants' arguments that the suit was barred by various defenses, including election of remedies. SPA556-59.

Two years later, the Tribal Plaintiffs again moved for partial summary judgment on liability. They claimed that, after further discovery, Defendants had been unable to present evidence showing that the Treaties had been ratified by the United States. A1344-45. Defendants argued, inter alia, that ratification was established by the fact that federal officials were present at both treaties and that the United States approved of the Treaties through subsequent treaties and official acts. A44i (Dkt. No. 248). In Cayuga Indian Nation v. Cuomo, 730 F.Supp. 485 (N.D.N.Y. 1990), SPA542-49 ("Cayuga III"), the court concluded that the NIA requires the presence of federal treaty commissioners and ratification of the treaty pursuant to the Treaty Clause of the United States Constitution, U.S. Const. art. II,

cl. 2, § 2. Although there was a factual dispute with respect to the first requirement, the court held that there was no evidence that the Treaties were ratified pursuant to the Treaty Clause. Furthermore, the court concluded that even if such ratification were not required, "explicit" ratification in some other manner by the United States was necessary and the record did not contain evidence of such explicit federal approval of the Treaties. Cayuga III, SPA545-48.

3. The Court Rejects Defendants' Remaining Defenses And Grants Plaintiffs' Motion For Partial Summary Judgment On Liability.

In 1991, the court rejected Defendants' remaining defenses of abandonment and laches. The abandonment defense resulted from the fact that the historic Cayuga Indian Nation voluntarily abandoned the subject land. In Cayuga Indian Nation v. Cuomo, 758 F.Supp. 107 (N.D.N.Y. 1991), SPA532-41 ("Cayuga IV"), The court held that the 1794 Treaty of Canandaigua created recognized title in the lands that had been reserved to the Cayugas in the 1789 Treaty and thus title could only be extinguished by congressional action. Cayuga IV, SPA536-38.

Regarding laches, Defendants contended that Plaintiffs were capable of commencing litigation challenging the Treaties long before this lawsuit was filed, but inexcusably delayed filing suit, causing Defendants severe and serious prejudice. A44m (Dkt. No. 316). In support of this argument, Defendants pointed to the fact that four dissenting Justices in County of Oneida v. Oneida Indian

Nation, 470 U.S. 226, 255-56 (1985) ("Oneida VI") (Stevens, J., dissenting), would have applied the laches defense to bar a similar tribal land claim (the Oneida VI majority held that the defense had not been preserved, id. at 244 & n.16). In Cayuga Indian Nation v. Cuomo, 771 F.Supp. 19 (N.D.N.Y. 1991), SPA527-31 ("Cayuga VI"), the court rejected the argument, based on its view that Second Circuit precedent established that tribal land claims "should be held by courts to be timely, and therefore not barred by laches, if, at the very least, such a suit would have been timely if the same had been brought by the United States." Cayuga VI, SPA529. Since the court understood that a suit by the United States would not have been time-barred, it concluded that the Tribal Plaintiffs' lawsuit was not barred by laches as a matter of law. Cayuga VI, SPA530.

After disposing of these defenses, the court granted partial summary judgment on liability to the Tribal Plaintiffs against all defendants except the State. SPA530. The State was not included because it had reasserted an Eleventh Amendment immunity defense based upon an intervening Supreme Court decision. Cayuga VI, SPA530-31, n.2. In response to the State's motion, the Counties and the Private Landowners also moved to dismiss on the ground that the State was an indispensable party. A2414-19.

4. 1992-1998: The United States Intervenes To Protect The Nation's And Tribe's Complaints From Being Dismissed On Eleventh Amendment Grounds.

In response to the State's renewed Eleventh Amendment motion, the United States, despite its nearly 200-year history of affirming the validity of the Treaties, moved to intervene in the main lawsuit on its own behalf and on behalf of the Tribal Plaintiffs. A2581-87. The United States' complaint-in-intervention sought a declaration that the Tribal Plaintiffs are entitled to possession of the subject land, ejectment of the 7,000 families that currently reside there, and damages and interest. A2593, 2597. The motion to intervene was granted in November 1992 and Defendants filed answers and counterclaims to the United States' complaint-in-intervention. A2602-62.

After a stay of proceedings during (ultimately unsuccessful) settlement negotiations, the court found on July 10, 1996, that the State and its agencies were entitled to Eleventh Amendment immunity against the Tribal Plaintiffs, but that its officials could be sued for prospective relief under the Ex parte Young doctrine. See Cayuga Indian Nation v. Pataki, SPA523 ("Cayuga VII"). The court denied

the remaining defendants' motion to dismiss on indispensable party grounds. Cayuga VII, SPA523.[28]

After the July 1996 ruling, proceedings were stayed again while the parties resumed settlement discussions with a court-appointed mediator. These discussions were not successful, and the stay was lifted in February 1998. A54, 56 (Dkt. Nos. 394, 411).

C. Summary Of Proceedings - The Remedial Phase.

1. The District Court Sets Forth Parameters For The Remedy Phase Of The Lawsuit.

As discussed above, by June 1998, the court had concluded that the State violated the NIA when it entered into the 1795 and 1807 Treaties, and rejected all of Defendants' arguments to bar Plaintiffs' suits. With these liability issues resolved, Defendants sought to define the scope of the remedial phase of the lawsuit. Defendants moved for a determination that ejectment is not a proper remedy, that Plaintiffs are not entitled to prejudgment interest against the State, and that damages should be limited to the loss suffered by the Cayugas at the time of the Treaties, as measured by any difference between the value of what the Cayugas received and the fair market value ("FMV") of the subject lands at that

[28] In March 1996, the United States moved to dismiss Defendants' affirmative defenses and counterclaims to its complaint-in-intervention under the law of the case doctrine. A2663. The motion was granted. Cayuga VII, SPA524.

time. In addition, the State asserted that the subject lands should be valued as a single 64,000-acre tract and that, for purposes of determining damages at the time of the Treaties, it would be most efficient to use a single valuation date of July 27, 1795. A2743-73; see also A57 (Dkt. Nos. 422 & 425).

On April 15, 1999, the court issued an opinion establishing the parameters for the upcoming trial on damages and post-trial hearing on interest. Cayuga Indian Nation v. Pataki, 1999 U.S. Dist. LEXIS 5228 (N.D.N.Y. 1999), SPA487-517 ("Cayuga VIII"). The court held that the land should be valued as a single, large tract and not as smaller, individual tracts, and that damages at the time of the Treaties should be based upon a single valuation date of July 27, 1795. Cayuga VII, SPA494. However, it rejected Defendants' argument that damages should be limited to the difference, if any, at the time of the Treaties between the FMV and what the Cayugas received. Instead, the court ruled that Plaintiffs' potential damages would consist of 1) damages at the time of the Treaties and 2) the fair rental value ("FRV") of the Cayugas' loss of use and possession of the subject land, known as "mesne profits,"[29] for the years of dispossession following the initial conveyances. Cayuga VIII, SPA497-505. The court also ruled that the

[29] Black's Law Dictionary 1227 (7th ed. 1999) defines "mesne profits" as "the profits of an estate received by a tenant in wrongful possession between two dates." Another definition is "profits which have accrued while there was a dispute over land ownership." See http://law.com/dictionary (visited 1/23/03).

determination of interest was an issue for the court and not for the jury and that, once a full factual record was developed, the court would decide: 1) the accrual date; 2) the rate of interest; 3) whether interest should accrue simply or compounded; and 4) the effect of equitable factors on the potential award. SPA508-13 & n.35.

On July 1, 1999, the court issued a second opinion in which it ruled out ejectment as a remedy.[30] The court also denied a renewed motion from the State to dismiss the Tribal Plaintiffs' complaints against individual State defendants on Eleventh Amendment grounds. See Cayuga Indian Nation v. Pataki, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999), SPA457, 470 ("Cayuga X"). However, the court acknowledged that, to the extent the Tribal Plaintiffs raised claims or issues at the upcoming trial not raised by the United States, the State's Eleventh Amendment defense might still apply. Cayuga X, SPA467.

2. The District Court Issues Several Rulings That Define The Scope Of The Trial.

In a series of rulings that preceded the jury trial on damages, the court made a number of decisions that substantially affected the scope of the trial.

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[30] Those facts that pertain to ejectment will not be addressed at this time because these issues will arise, if at all, in the Tribal Plaintiffs' cross-appeal.

First, in Cayuga Indian Nation v. Pataki, 79 F.Supp.2d 66 (N.D.N.Y. 1999), SPA353-62 ("Cayuga XI"), the court determined that the State alone could be held liable for all of the Plaintiffs' damages as the "original or primary tortfeasor," depending upon the proof at the upcoming trial. Cayuga XI, SPA358. The court also granted the United States' motion for separate trials and directed that the first trial on damages ("Phase I") and a subsequent proceeding on prejudgment interest ("Phase II") be held against the State. Cayuga XI, SPA360-61. Thus the remaining remedial proceedings described infra pertain only to the State, as do the remedial rulings of the court challenged by the State in this appeal.

Second, in Cayuga Indian Nation v. Pataki, 79 F.Supp.2d 78 (N.D.N.Y 1999), SPA337, 347-49 ("Cayuga XII"), and just prior to trial, A4513-17, the court ruled that equitable testimony was irrelevant to the jury trial and, even if relevant, its prejudicial impact upon the jury would outweigh its probative value. The jury was informed that equitable considerations would be considered by the court at the prejudgment interest hearing. Tr. 1/24/00 at 21, 2748-49. The court told the jury that it would even consider a reduction in damages at Phase II as a result of the Plaintiffs' delay. Id.

Third, also in Cayuga XII, the court ruled that CFMV damages were a proper measure of damages because it had decided, in rejecting ejectment, that

Plaintiffs would not obtain possession of the subject land. SPA350; see also T182; A4214, 4251-53. Consequently, Plaintiffs were authorized to seek both FRV damages from 1795 to 2000 and CFMV damages at trial.

Fourth, after conducting an evidentiary hearing to evaluate the relevancy and reliability of the experts' appraisal methodologies under Daubert and Kumho Tire, the court granted the State's motion in limine to preclude the Tribal Plaintiffs' expert from testifying at the jury trial. It also determined that, at least at that juncture, the suggested appraisal methods of the United States' expert, Hale, and the State's expert, Dorchester, were reliable and relevant. Cayuga Indian Nation v. Pataki, 83 F.Supp.2d 318, 323, 328 (N.D.N.Y. 2000), SPA285-86, 289 ("Cayuga XIII").

3. The Jury Trial.

The jury trial was held from January 18, 2000 through February 17, 2000. Dorchester, the State's principal appraisal expert, testified that Plaintiffs' FRV damages were between $6.7 million and $11 million. See S-617. Dorchester calculated FRV damages as 2% of the FMV of the land in each year. Dorchester based the 2% figure on his research and experience that a reasonable return on land is 5½% and that land has an average annual appreciation of 3½%, leaving the return based on rent as 2%. T1835-36; S-322. In calculating the CFMV damages

of the subject land, Dorchester appraised the property, in accordance with the court's April 15, 1999 decision, as a large single tract of unimproved land that includes public infrastructure. T1689, 1708-09. Dorchester used two different configurations of the subject land to determine his CFMV appraisal figures: one was based upon "the land as it was most likely comprised in 1795 . . . and the other was . . . as the land has been changed through development activities of clearing of land and drainage . . . as of 1999." T1799. Under the first configuration, Dorchester testified that the Cayugas' CFMV damages were $25 million and under the second configuration they were $40 million. T1801, S-617. In both instances, he testified that the highest and best use of the subject lands as a single, undivided tract was as an investment holding. T1760-61, 1787, 1790.

Hale, the United States' expert, testified that the Tribal Plaintiffs' FRV damages were $70.5 million and their CFMV damages were $264.7 million. G-500, 505. Hale used three different methods to compute the FRV of the claim area from 1795 to 2000. In addition, contrary to the State's understanding of the court's April 15, 1999 ruling, Hale estimated the CFMV of the claim area using recent sales data regarding small sized parcels of various categories of real estate to draw his conclusions about the value of the 64,000-acre tract.

After hearing the testimony, the court presented a Special Verdict Form that would have asked the jury whether it found that Plaintiffs were entitled to recover damages against the State ("Question 1") and if so, the total amount for FRV damages. See T2372. Plaintiffs objected to the form because Question 1 allowed the jury to award no damages, and because the FRV damages did not contain a year-by-year breakdown for rent. T2379-80; see also A4752-54. The State opposed an annual breakdown because "a year by year breakdown is going to force the jury to feel that they have to award a certain amount in each single year and it's going to create confusion with the jury." T2374. The court agreed with Plaintiffs and struck Question 1 from the original Special Verdict Form. T2380-81. The court also agreed to include a year-by-year breakdown of rental damages from 1795 to 1999.[31] However, the jury was specifically instructed not to adjust rental damages to current day value, since any adjustments for inflation, interest or otherwise was a matter to be decided by the court at the Phase II hearing. T2773-74.

4. The Jury Verdict.

[31] The court did add the words "if any" to the Verdict Form so that the question on rental payments read: "What amounts, if any, do you find that plaintiffs have been damaged for loss of use and possession of the claim area from 1795 to date as measured by a fair rental value, without improvements but with infrastructure, less credit, if any, to the State for payments made to plaintiffs?" T2386.

On February 17, 2000, the jury returned a verdict finding CFMV damages of $35 million and FRV damages of $3.5 million. A4758-67. The jury also gave the State a credit for all of the payments it had made to the Cayugas, approximately $1.6 million. Thus, the total Phase I damages award amounted to approximately $36.9 million. Id. In determining the year-by-year breakdown of FRV damages, the jury chose to award the exact same rental damages, $17,156.86, each year with the exception of the first and last years, where the rent damages were prorated. A4758-67. $17,156.86 equals exactly $3.5 million divided by 204 years.

5. The District Court Sets The Parameters For The Phase II Hearing.

In late March 2000, the court directed the parties to brief the issues that would be raised at the Phase II hearing. A98 (Dkt. No. 753). The State identified seven equitable issues, including issues that were excluded by the court at the Phase I proceedings. A4776-4915. Plaintiffs, in turn, wrote that the only issue to be decided at Phase II was the calculation of interest based on economic testimony. A4916-55.

In a ruling issued on May 16, 2000, the court decided that it would hear testimony and allow documentary evidence at the Phase II hearing with respect to the historical context of the Treaties. Cayuga Indian Nation v. Pataki, 2000 U.S.

Dist. LEXIS 7045, at *10 (N.D.N.Y. May 16, 2000), SPA265-67 ("Cayuga XV"). The court summarized its holding as follows:

> In particular, the State will be allowed to proffer evidence as to the fairness of the consideration paid in the original transactions, and the related issue of its purported good faith at the time of those transactions; the role of the Cayugas, the U.S. and the State in connection with the 1795 and 1807 treaties; and the plaintiffs' alleged unreasonable delay in asserting their interests in the subject land.

Cayuga XV, SPA265. However, contrary to the court's rulings at the Phase I trial that equitable considerations could result in a reduction in damages at Phase II, the court ruled on April 18, 2000 that it would not consider laches or the value or benefit attributable to infrastructure improvements as a basis for reducing the jury's damages award. Cayuga Indian Nation v. Pataki ("Cayuga XIV"), SPA268-281.[32]

6. The Phase II Hearing.

The Phase II hearing was conducted from July 17, 2000 through August 18, 2000. A total of 10 witnesses testified at the hearing, including four historical experts and four economic experts. Excerpts from the prior testimony of three

[32] The court also made clear that interest would be derived solely from the jury's award of rental damages. Cayuga XIV, SPA274.

witnesses were read into the record. The court also accepted into evidence a total of 284 exhibits consisting principally of historical materials.

a. The Historical Evidence.

The State's principal expert historical witness was Professor Alexander von Gernet. He testified about the historical context and aftermath of the Treaties. The Plaintiffs' historical witnesses were Professors Peter Whitely (U.S.) and Laurence Hauptman (Tribal Plaintiffs). The experts' reports were admitted into evidence. S-623, pp.1-100, S-624, pp.1-31; G-362; N-61.

The State sought to introduce the testimony and supplemental expert report of Scott Anderson, a historical geographer who had testified at the Phase I trial and was very familiar with the market price of land in the claim area during the late 1700s. T1208-10. Anderson reviewed 28 treaties entered into between the federal government and Indian tribes from 1790 to 1810, and calculated the price paid per acre in 14 of the treaties, a price per acre substantially lower than the price paid by the State. The court granted the United States' motion to strike the portion of Anderson's testimony that dealt with this matter, on the basis that Anderson's methodology was too broad and his conclusions were too speculative. His Supplemental Report (S-686) was also not admitted. See T5458-59.

b. The Economic Evidence.

Plaintiffs' economists, Drs. Peter Temin and Mark A. Berkman, computed prejudgment interest by using a risk-free nominal interest rate, which equals the real interest rate plus an adjustment for inflation. T5737-44, 5935-53, 5988-90; N-64, pp.3, 9, 13; G-4, pp.5-7; G-10; G-20. Next, they multiplied the FRV damages awarded by the jury and the risk-free nominal interest rate and compounded the principal and interest annually. G-4, p.7; T5750-52, 5754, 5894-95, 5902, 5933-35, 5956-57, 5968-69. They used July 27, 1795 as the accrual date. T5739, 5869, 5928, 5968-72, 6013-14; G-3, G-5; N-36, p.13. Using this methodology, Temin and Berkman arrived at figures of approximately $1.75 billion and $527 million, respectively. T5780; N-36, p.13; T5928; G-4, p.7; G-5. This massive difference was attributable to a slight variation (0.64%) in the interest rates used by the two experts. See S-762, T5874.

Plaintiffs' economists defined prejudgment interest as the opportunity cost to the Cayugas of not having the use of the rental damages awarded by the jury each year. T5733-34, 5929; N-64, pp.6-9. The economists acknowledged that they had never been asked to compound interest over such a lengthy period of time, T5876, 5992, 6012-13, and that their calculations were a "theoretical exercise" bearing no relationship to the real life situation of the Cayugas. T5834.

The State's economists were Dr. Richard S. Grossman and John Dorchester.[33] T6068-73, 6132-37; S-721. The State's economists 1) adjusted the jury's FRV damages award on the ground that the jury had, contrary to the court's instructions, awarded FRV damages in 2000 year dollars, and not in the dollars of the year that the rent was presumed to have been owed, S-721; T6356-71; 2) computed interest using both simple and compound interest and various accrual dates since 1974, explaining that compounding makes no financial sense over 204 years and that accrual dates in proximity to the filing of the complaints took into account Plaintiffs' delay in bringing the claim; and 3) adjusted Plaintiffs' low-risk interest rates to account for overhead costs and the difficulty the Cayugas would have had through the mid-nineteenth century gaining access to financial markets. T6403, 6415, 6429-30, 6502-03, 6527-32, 6543-44.

Plaintiffs moved to preclude Dorchester's testimony and reports, arguing that he was not competent to give economic testimony or testify about equitable issues, and that his calculations of interest attempted to reconfigure the jury verdict. T6096-132. Plaintiffs also claimed that the court had sufficient evidence from Phase I concerning the fairness of the original transactions. T6102, 6109,

[33] Dorchester, the State's principal witness at Phase I, also testified at Phase II as one of the State's economic experts based on his academic background in finance and economics and his considerable experience in the field of real estate economics. T6132-37.

6123. Even though the court had excluded testimony at Phase I concerning the fairness of the consideration paid at the time of the Treaties, it granted the motion to preclude Dorchester from testifying on this issue, stating:

> [O]ur review . . . indicates that there has already been testimony on same, not only from Mr. Dorchester but other witnesses; . . . On the issue of fairness, I already have enough evidence, complete evidence in that regard before me in Phase I, and in some of the testimony that has come in this phase.

T6127 (emphasis added). The court also precluded Dorchester from testifying about interest to the extent his testimony and supplemental report would "look behind the verdict and . . . ask the Court to reconsider it, merely to fit in with the testimony of Mr. Dorchester [in] Phase I." T6127-28.

7. The District Court's Rulings On Prejudgment Interest And On The Parties' Post-Judgment Motions.

On October 2, 2001, the court issued a 183-page Memorandum-Decision and Order on interest. Cayuga Indian Nation v. Pataki, 165 F.Supp.2d 266 (N.D.N.Y. 2001), SPA68-255 ("Cayuga XVI"). In that decision, the court concluded that the Plaintiffs were entitled to interest of about $211 million on the approximately $2 million jury verdict for FRV damages. The total amount of the judgment, including the jury verdict of FRV and CFMV damages, was almost $248 million; accordingly, over 80% of the total award resulted not from the jury's

decision, but rather from the court's interest calculations. Cayuga XVI, SPA255. The judgment directed payment by the State only to the Tribal Plaintiffs. SPA67.

On March 11, 2002, the court addressed the State's post-judgment motions. Cayuga Indian Nation v. Pataki, 188 F.Supp.2d 223 (N.D.N.Y. 2002), SPA11-66 ("Cayuga XVII"). It denied the State's motions for judgment as a matter of law and for a new trial. SPA48, 51. The court also determined that the requirements of Fed.R.Civ.P. 54(b) were satisfied with respect to the State, but not with respect to the other Defendants though Plaintiffs were awarded full damages for all of their claims. The court directed the clerk to enter a new judgment that would be considered final as against the State. Cayuga XVII, SPA27, 32.

In its Cayuga XVII decision, the court agreed with the State's contention that the judgment should be amended to run jointly to the United States and the Cayugas. SPA42-45. The court did not agree with the State's further contention that the judgment should run exclusively to the United States and that the federal government should then be responsible for apportioning the judgment to all proper tribal descendants of the historic Cayuga Indian Nation. SPA44-45. The United States had asked that this relief be denied without prejudice, to allow it to resolve the issues involved in the allocation of the judgment between potentially competing tribal interests. Id.

Thereafter, in April 2002, the Tribal Plaintiffs moved pursuant to Fed.R.Civ.P. 60(a) to amend the March 11, 2002 Judgment, because it omitted the words "as trustee" after "United States." A5382-83. The Counties and the Private Landowners moved for entry of a final judgment pursuant to Fed.R.Civ.P. 54(b), or alternatively for certification of an appeal on liability issues pursuant to 28 U.S.C. § 1292(b). The Tribal Plaintiffs conditionally cross-moved for permission to appeal the denial of ejectment of the Counties and Private Landowners from the subject lands.[34] In a bench decision issued on June 13, 2002 and in a subsequent (Second) Amended Judgment the court granted the Tribal Plaintiffs' Rule 60(a) motion, as well as the parties' respective motions for permission to appeal. A5423-26; SPA2-3. By order dated December 12, 2002, this Court granted, pursuant to § 1292(b), the district court's certification of issues for immediate appellate resolution. A5428-30.

[34] At about the same time, the United States moved to amend its complaint-in-intervention to drop all defendants with the exception of the State. A5312-20. This motion followed the federal government's recent decision not to seek ejectment or any other relief from the Counties and the Private Landowners and to seek only damages against the State in all of the New York land claim lawsuits. A112 (Dkt. No. 883).

TREATY, CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant treaties, constitutional and statutory provisions are reproduced in the Special Appendix at pages 598-739.

PART I: LIABILITY ISSUES

SUMMARY OF LIABILITY ARGUMENTS

This appeal was set in motion by the district court's entry of judgment against the State of New York, requiring the State to pay almost $248 million in damages to the two groups of plaintiffs alleging to be descendants of the historic Cayuga Indian Nation. Part II of this brief, for which a summary of argument is provided at pages 173-76, is submitted by the State and focuses on the court's rulings in the remedial phase of this litigation. Part I, submitted collectively by all of the Defendants in this case—the State, the Counties, and a defendant class of thousands of Central New York landowners—explains why this litigation should never have reached the remedial stage in the first place.

Before summarizing the court's specific legal errors in the liability phase of the litigation, it is instructive to step back and take a broader view of the claims that are at the heart of this litigation, which has yielded one of the largest damage judgments in history against the State and cast a shadow of uncertainty over the titles of thousands of private and municipal property owners. As the foregoing Statement of the Case makes clear, Plaintiffs' claim reduces, in essence, to the following: Shortly after the founding of the American republic, their alleged ancestors agreed to convey to the State their interest in a parcel of land they had

long wished to part with. While they did so voluntarily, and while federal officials were present at the Treaties, Plaintiffs asserted that the Treaties did not satisfy the alleged requirements of the NIA—a federal statute the very constitutionality of which was uncertain at the time of the disputed transactions and the precise requirements of which remain uncertain today. After these alleged violations, the Plaintiffs did nothing to challenge the validity of the 1795 and 1807 Treaties for almost two hundred years and, instead, on three separate occasions they successfully sought and obtained additional compensation for the conveyances under theories that presupposed that the Treaties were valid.

There are several independent reasons that such an action should not have survived a motion to dismiss, let alone resulted in an adverse liability ruling against the Defendants at summary judgment. There were several distinct errors in the court's liability holdings, any one of which, if accepted, would compel reversal here. Bonnanzio v. Bonnanzio, 91 F.3d 296, 301 (2d Cir. 1996) (legal errors reviewed de novo).

First, the court applied the wrong legal standard when it concluded that the Nation and the Tribe are "tribes of Indians" within the meaning of the NIA, as they must be to sue under the statute. (Point I.) In its tribal status analysis, the court erroneously conflated the question whether the federal government had recognized

the Nation and the Tribe for other purposes, such as receiving federal benefits, with the analytically distinct issue of whether the Plaintiffs are "tribes" within the meaning of the NIA. This Court's precedent dictates that the mere fact of the federal government's recognition of the Tribe and the Nation sheds little light on the NIA tribal status inquiry and that, accordingly, the court erred in disregarding the substantial evidence submitted by Defendants demonstrating that the Plaintiffs are not currently "tribes" within the meaning of the NIA, and have not existed continuously as "tribes" since the 1795 and 1807 Treaties.

Second, in rejecting Defendants' affirmative defense of abandonment, the court misapprehended the nature and implications of the Cayugas' interest in the subject land at the time of the Treaties. (Point II.) The court concluded that the 1794 Treaty of Canandaigua conferred "recognized title" to the parcel on the Cayugas and that, as a result, the parcel could not be voluntarily abandoned. This decision was wrong. At the time of that treaty, the State owned the subject land in fee, free from Indian title, but subject to specific use rights conferred on the Cayugas by virtue of the 1789 Treaty with the State. As a result, the United States did not confer—and, indeed, could not have conferred—title of any sort upon the Cayugas, recognized or otherwise, at the Treaty of Canadaigua. As the Cayugas

held neither aboriginal nor recognized title to the disputed parcel, they could (and did) voluntarily abandon that land.

Third, the court erred in concluding that there were no genuine issues of material fact as to whether the federal government ratified the Treaties. (Point III.) The court concluded as a matter of law that neither the presence of federal officials at both treaties, nor Congress's subsequent ratification of the 1838 federal Treaty of Buffalo Creek, evidenced a federal affirmation of the transactions sufficient to satisfy the NIA. In so doing, the court held that the NIA requires ratification pursuant to the Treaty Clause of the United States Constitution, or at least "explicit" ratification—standards more stringent than those set forth in controlling precedent and incorrect as a matter of law. Alternatively, the court should have concluded that the Cayugas' participation in the Treaty of Buffalo Creek, in which the tribe agreed to remove from the New York, constituted a release and relinquishment of any interest they had in the subject lands.

Fourth, this suit should have been barred by the Cayugas' actions during the many generations following the Treaties. The fact that the Cayugas (or their alleged tribal successors-in-interest) waited almost 200 years before bringing a suit alleging that the transactions were void—and that the Cayugas, during that intervening period, successfully obtained additional compensation under the

contrary remedial theory that the transactions were valid—calls for the application of two distinct common law defenses: election of remedies (Point IV) and laches (Point V). While these doctrines are infrequently applied in contemporary federal practice, they are uniquely appropriate in the present context, where the claims themselves are derived from, and brought under, federal common law.

Fifth, the NIA did not apply to the disputed transactions at issue in this case. (Point VI.) Shortly after it was enacted in 1790, Congress amended the statute to eliminate language which made clear that the statute applied to states "whether having the right of preemption or not." This change was significant, as it meant that the version of the NIA in effect at the time of the 1795 and 1807 treaties did not apply to the original thirteen states—including, of course, New York.

Sixth, the court erred in rejecting the State's Eleventh Amendment defense. (Point VII.) The United States' intervention in this action notwithstanding, the claims brought by the Tribal Plaintiffs should have been barred on Eleventh Amendment grounds. The court also erred in implying a private right of action under the NIA. (Point VIII.)

Finally, Defendants wish to emphasize what this case is not about. The history of this Nation's mistreatment of certain Indian tribes is well-documented, and Defendants do not attempt to deny these past injustices. However, the record

here makes clear that New York made significant efforts—both during the period leading up to the 1795 and 1807 Treaties, and during subsequent efforts to offer the Cayugas additional compensation under these Treaties—to treat the Cayugas fairly and respectfully. While Defendants do not dispute the past wrongdoings against Indians generally, Defendants strongly contest the suggestion that these injustices resulted from the conduct of the State of New York. Certainly, no wrongdoing against the Cayugas was perpetrated by the Private Landowners and the Counties, which derive their title from the State; which never dealt with Indians in alleged violation of the NIA; and, with respect to the Private Landowners, were not even born at the time of the challenged transactions.

As a result of the recent emergence of this and other tribal land claims, literally hundreds of thousands of landowners in New York State and elsewhere—landowners who are undoubtedly innocent of any wrongdoing—have been forced to live under the shadow of ejectment from homes and communities they have built over generations as well as financial ruin. Should the district court's liability ruling be allowed to stand, this shadow will only loom larger. Moreover, the astonishing damages award against the State, if sustained, will necessarily limit the resources available for a wide range of taxpayer-funded programs. No principle of law—nor, for that matter, any principle of justice or equity—compels these results.

This Court should embrace "the common-law wisdom that ancient claims are best left in repose," Oneida VI, 470 U.S. at 273 (Stevens, J., dissenting), and reverse the district court's liability rulings.

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT THE TRIBAL PLAINTIFFS ARE "TRIBES" WITHIN THE MEANING OF THE NIA

To prevail on an NIA claim, a plaintiff must establish that it is a "tribe of Indians" within the meaning of the statute. 25 U.S.C. § 177; see Golden Hill Paugussett Tribe v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994); Tonkawa Tribe of Oklahoma v. Richards, 75 F.3d 1039, 1044 (5th Cir. 1996); see also SPA638. This inquiry into tribal status has two distinct temporal components in this case. First, both alleged tribal entities—the Nation and the Tribe—must demonstrate that they were "tribes" at the time of suit. Second, both groups also must show that they are the same tribal entity that treated with New York in the disputed Treaties. See Mashpee Tribe v. Sec'y of the Interior, 820 F.2d 480, 482 (1st Cir. 1987) ("Mashpee II"). In order to satisfy both of these criteria, Plaintiffs must demonstrate, among other things, that they have had a continuous tribal existence since the Treaties. See, e.g., Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 585-87 (1st Cir. 1979) ("Mashpee I"); Golden Hill, 39 F.3d at 59.

The court found that both the Nation and the Tribe were "tribes" for purposes of the Act. Cayuga II, SPA554-55. In reaching this conclusion, the court relied heavily—indeed, it appears that it relied exclusively—on the fact that the federal government had recognized both alleged tribes for purposes of providing certain federal benefits. This was erroneous. As this Court's decision in Golden Hill makes clear, whether a group of Indians constitutes a "tribe" for NIA purposes is analytically distinct from whether the group is federally recognized. Indeed, Golden Hill instructs that in the present circumstances, where the alleged tribal entities were recognized by the Bureau of Indian Affairs of the Department of the Interior ("BIA") prior to the promulgation of uniform recognition procedures, the mere fact of recognition offers little, if any, insight into the NIA inquiry. Instead, the controlling standard for tribal status under the NIA is the four-factor test set forth in United States v. Candelaria, 271 U.S. 432, 442 (1926)—a test that the court never even cited (let alone applied) in its analysis of the tribal status issue. Because the court did not decide whether Plaintiffs are currently tribes, it also did not reach the separate question of whether they are successors to the historic Cayuga Nation and have continuously maintained tribal status. Accordingly, the case should be remanded for consideration of whether the Nation and the Tribe can meet the controlling Candelaria test.

A. The District Court's Determination That The Tribal Plaintiffs Were "Tribes" For NIA Purposes Erroneously Turned On The Fact Of Federal Recognition.

The issue of tribal status arose in connection with the Nation's motion for summary judgment, and the parties took sharply divergent approaches to addressing the question. Defendants asserted that the governing standard for determining tribal status was established by Candelaria. There the Supreme Court defined a "tribe" under the NIA as a "body of Indians of same or similar race, united in a community, under one leadership or government, and inhabiting a particular though somewhat ill-defined territory." 271 U.S. at 442. Accordingly, Defendants devoted their briefing to whether these four Candelaria factors were met. In the process, Defendants introduced substantial evidence raising genuine issues of material fact as to whether the Nation's members were "united in a community," A5523-27, 5529, 5538, 5557-58, 5573-76, 5585, 5588, 5594-95, or shared a common "leadership or government," A5531-37, 5539, 5543-49, 5551-54, 5560-64, as defined under applicable precedent. Moreover, Defendants introduced expert testimony indicating that the Nation had not existed continuously since the time of the Treaties and thus cannot be said to be the same tribal entity that treated with the State in 1795 and 1807. A528-535.

The Nation asserted that these factual issues were immaterial to whether it was a "tribe" within the meaning of the NIA. Instead, the Nation relied on a two-page affidavit, submitted by a BIA official, stating that "[t]he United States Government recognizes the Cayuga Indian Nation of New York as a federally recognized Indian tribe." A477; see also A595. The Nation asserted that such federal recognition, standing alone, sufficed to establish its tribal status under the NIA and obviated any need for examination of the Candelaria factors. With respect to the question of whether it is the same tribal entity that treated with the State in 1795 and 1807, the Nation contended that the federal government's position was similarly dispositive. Again, the Nation pointed to the BIA official's affidavit, which offered the federal government's view that the Nation is the "political and tribal entity with which the United States treated as the Cayuga Nation in the . . . [1794] Treaty of Canandaigua." A477; see also A595.

The court accepted the Nation's position that it constituted a "tribe" for NIA purposes, and placed preeminent importance on the fact of federal recognition in doing so. While the court stopped short of concluding that it was "bound" by the federal government's recognition of the Nation, it afforded that federal recognition "great weight." Cayuga II, SPA555. Indeed, the court did not even recite the Candelaria test in its opinion, let alone respond to or address any of the factual

evidence submitted by Defendants in support of their position that certain elements of that test had not been satisfied. Evidencing the undue weight the court assigned to federal recognition in its tribal status analysis, it even declared sua sponte that the plaintiff-intervenors, the Tribe, was a "tribe" under the Act—even though the Tribe had not even moved for summary judgment, and despite the fact that the court had not entertained briefing from Defendants as to the Tribe's tribal status under the statute.

B. The District Court's Emphasis On Federal Recognition Was Erroneous Under Controlling Second Circuit Law.

In Golden Hill, this Court explained how a court should weigh the BIA's recognition of a group as a tribe for purposes of eligibility for federal Indian benefits, see 25 C.F.R. 83.7, in the course of deciding whether that group constitutes a "tribe" under the NIA. 39 F.3d at 59-61. This Court's reasoning confirms that the district court erred by affording "great weight" to federal recognition of the Nation and the Tribe.

In Golden Hill, a group of Indians sued under the NIA to recover twenty acres of alleged aboriginal land in Bridgeport, Connecticut. Id. at 54-55. At the time they filed suit, the Plaintiffs were not a federally recognized tribe, but had presented a petition to the BIA seeking recognition. Id. The district court dismissed the action, holding that the plaintiffs were required to exhaust the BIA's

administrative procedures before seeking a judicial determination of tribal status under the NIA. See Golden Hill Paugussett Tribe v. Weicker, 839 F.Supp. 130, 135 (D. Conn. 1993).

This Court affirmed, but did so on a different ground. It disagreed that exhaustion principles were applicable and, instead, invoked the doctrine of primary jurisdiction to provide the BIA an opportunity to consider the plaintiffs' pending petition for federal recognition. See Golden Hill, 39 F.3d at 59-61. The Court concluded that the Candelaria test, and not the mere fact of federal recognition, governed whether plaintiffs qualified as a "tribe of Indians" under the statute, because the Candelaria test was developed "after Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior." Id. (emphasis added) (citations omitted).

The Golden Hill Court explained, however, that while "tribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Nonintercourse Act," id. at 57, there was enough overlap between the two that BIA resolution of "factual issues regarding tribal status will be of considerable assistance to the district court in ultimately deciding [plaintiff's]

Nonintercourse Act claims," id. at 60 (emphasis added). In so reasoning, this Court indicated that any judicial deference to BIA recognition of tribal status attached only to factual findings made in reaching that conclusion and thereby indicated that BIA recognition of tribal status does not require a federal court to recognize a plaintiff as a "tribe of Indians" under the NIA as a matter of law. See id. ("A federal court, of course, retains final authority to rule on a federal statute, but should avail itself of the agency's aid in gathering facts and marshaling them into a meaningful pattern"). In other words, any weight afforded to BIA recognition of tribal status stems from not from the recognition itself, but from the BIA's factual findings that underlie the recognition.

Golden Hill demonstrates that the court erred in finding that the Nation and the Tribe are each a "tribe of Indians" within the meaning of the NIA, for at least two reasons. First, Golden Hill confirmed that the Candelaria test, not mere federal recognition, governs whether the Nation and the Tribe qualify as a "tribe of Indians" under the statute.[35] The court's limited analysis of the issue, which did not recite or apply the Candelaria test, was accordingly flawed.

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[35] The decision thus also eliminates any doubt as to whether the question of tribal status is a nonjusticiable "political question"—an argument asserted by the Cayugas at summary judgment, and which the district court declined to address. Cayuga II, SPA554-55. This Court in Golden Hill explicitly noted that, even after the BIA considered the Indians' recognition application, a

Second, while Golden Hill identified circumstances under which federal recognition can shed light on the judicial inquiry into tribal status under the NIA, those circumstances plainly are not present here. In Golden Hill, judicial forbearance pending a BIA determination was deemed appropriate because of the similarities between the controlling Candelaria test and the BIA's standards for federal recognition, as set forth in its regulations. But in this case the BIA never applied those standards to the Nation or the Tribe. In 1978, the Department of the Interior promulgated regulations setting forth the criteria and procedures for determining tribal status for purposes of federal benefit eligibility. See 43 Fed. Reg. 3961 (Sept. 5, 1978). These regulations, however, expressly exempted from the new standards those groups "currently acknowledged as Indian tribes" at that time by the Department of the Interior, including the Nation and the Tribe. 25 C.F.R. § 88.3; see also 59 Fed. Reg. 9280, 9280 (1994) (describing history of BIA recognition procedures). Where a group is "grandfathered" in as a tribe under the 1978 regulations, Golden Hill explicitly states that judicial deference to the BIA's determination is inappropriate:

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federal court would still "retain final authority" to determine whether the group was or was not a "tribe" under the NIA. 39 F.3d at 60.

> Before the promulgation of the [1978] acknowledgement regulations there did not exist a uniform, systematic procedure to determine tribal status within the Department of the Interior. Therefore, deferral of the issue of the tribal status was not required nor would it aid a court in its determination.

39 F.3d at 59-60 (emphasis added); see also Mashpee I, 592 F.2d at 581 (declining to continue an NIA action despite the pendency of a petition for federal recognition before the DOI, on the ground that the DOI "has not historically spent much effort deciding whether particular groups of people are Indian tribes" and thus has not "develop[ed] special expertise in distinguishing tribes from other groups of Indians").

Had the court properly applied Candelaria here, it would have found that genuine questions of material fact existed as to whether essential elements of that test were satisfied. As to the Nation, Defendants cited to considerable record evidence establishing a lack of meaningful Cayuga "leadership or government." Candelaria, 271 U.S. at 442. This element of the Candelaria test requires a showing that a group of the alleged tribe exercises influence over "significant elements in the lives of the people," and that such leadership is "passed on in some orderly way." Mashpee I, 592 F.2d at 583, 585. But Frank Bonamie, who purported to be a Chief of the Nation, admitted in his deposition that the Nation has no rules or regulations peculiar to it, A5544; maintains no judicial system or

other dispute resolution mechanisms, A5551-54; and only began efforts to organize as a "tribe" in 1971, prior to which point the Cayugas did not even have titular or nominal leadership. A5534-37, 5539, 5565-72, 7475. This testimony, along with other evidence submitted to the court, more than sufficed to establish a genuine issue of material fact on whether the Nation maintains a standing "leadership or government"—as they must, under Candelaria, to assert an NIA claim.[36]

In addition to raising doubts concerning the Nation's present status as a tribe, the evidence submitted by the Defendants showed that the Nation had not existed continuously since the time of the Treaties. See, e.g., Mashpee I, 592 F.2d at 580, 586-87 (affirming trial court instructions permitting jury to consider whether alleged tribe had existed "continuously" since time of alleged violation, and noting ability of tribe to abandon its tribal status); Mashpee II, 820 F.2d at 482 (plaintiff must remain a tribe to sue under the NIA).[37] Defendants introduced

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[36] Defendants also raised serious doubts as to whether the Nation had satisfied other elements of the Candelaria test. Evidence was submitted, for example, calling into question whether the Nation was, at the time the lawsuit was initiated, "united in a community." Candelaria, 271 U.S. at 442. On this issue, Mr. Bonamie's deposition—in which he testified that he knew of no distinctively Cayuga religious ceremonies, songs, beliefs, or customs, A5557-58—was again instructive.

[37] The fact that a group of Indians has once been recognized as a tribe by the United States government does not mean that the tribal status continues

substantial factual evidence from Bonamie's deposition that the Nation had only begun efforts to reorganize as a tribe in the early 1970s, less than a decade prior to suit. A5534-39, 5568-72. Accordingly, a genuine issue of material fact remains as to whether the Nation is a successor and whether it existed continuously as a tribe since the 1795 and 1807 Treaties—and, therefore whether the Nation is the same tribe that treated with New York.

Defendants presented further evidence at summary judgment showing that the Nation did not satisfy the Candelaria tribal status standard—elaboration of these facts is unnecessary to demonstrate that the court's ruling was erroneous. It is indisputable that the court failed to apply the controlling Candelaria test and, instead, conflated the issue of whether the Nation is a "tribe" under the Act into the issue of federal recognition. It is equally indisputable, under Golden Hill, that the court's conflation of these two inquiries was erroneous, as there is no reason to believe that federal recognition of the Nation sheds light on whether any—let alone all—of the Candelaria requirements are satisfied. The court's legal analysis of the Nation's tribal status was clearly in error; and it is also clear that Defendants would

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indefinitely. See Mashpee I, 592 F.2d at 586-87 ("a tribe, even if it is federally recognized, however, can choose to terminate tribal existence. . . . If all or nearly all members of a tribe choose to abandon the tribe, then, it follows, the tribe would disappear.").

have had a strong probability of defeating the Nation's motion for summary judgment had the proper standard been applied. This error warrants remand.

The court's conclusion that the Tribe is a "tribe" under the NIA was, if anything, even more fundamentally flawed. The court announced this conclusion when it decided that on the Nation's motion for summary judgment. Cayuga II, SPA555. At that point, the Tribe had submitted nothing arguing that it satisfied the test for tribal status set forth in Candelaria; instead, the Tribe simply asserted that it, too, was recognized by the federal government "as a successor tribe to the historic Cayuga Nation." A567, 572. Under Golden Hill, of course, the mere fact of federal recognition does not suffice to establish definitively that an entity is a "tribe" for NIA purposes—particularly where, as here, that determination was made before the BIA adopted its 1978 uniform procedures for federal recognition. In short, no determination was made—indeed, no determination could have been made on the submissions presented to the court—as to whether the Tribe had met its burden to satisfy the Candelaria test. Furthermore, the Tribe presented no evidence to show that it was a successor to the historic Cayuga Nation and that it has continuously maintained its tribal status. Accordingly, the court's tribal status holding as to the Tribe warrants reversal and remand.

POINT II

THE DISTRICT COURT ERRED IN REJECTING THE DEFENSE OF ABANDONMENT

On summary judgment, Defendants argued that the Cayugas abandoned the subject lands prior to 1800 and thus could not satisfy the "tribal lands" requirement of the NIA. 25 U.S.C. § 177. The court's rejection of this defense was incorrect for two reasons. First, it applied the wrong legal test and erroneously determined that the issue of whether abandonment could preclude Plaintiffs' claims turned on whether the Cayugas' property interest was "recognized title." Cayuga IV, SPA534. Under relevant Supreme Court authority, the availability of the abandonment defense does not depend on whether the property interest in question has been "recognized," but rather on the nature of the property interest at stake. Where, as here, the Cayugas' property interest was, at most, one of use and occupancy only, abandonment of the subject land by the Cayugas is a complete defense. Second, even if "recognized title" were relevant, which it is not, the court erred in holding that the 1794 Treaty of Canandaigua conferred "recognized title" on the Cayugas. Prior to that treaty, the State lawfully extinguished whatever interests the Cayugas held in the subject lands. As a result, at the time of the

Treaty of Canandaigua, New York held fee title to the subject land, free from Indian title, and Canandaigua cannot be construed to diminsh New York's interest.

A. Because the Cayugas Held Only A Limited Right Of Occupancy, Their Interest In The Subject Land Could Be Extinguished By Abandonment.

Federal courts have long held that Indian rights of occupancy can be extinguished by voluntary abandonment regardless of whether that property right has been "recognized." See, e.g., Williams v. City of Chicago, 242 U.S. 434, 437 (1917); Buttz v. N. Pac. R.R. Co., 119 U.S. 55, 69-70 (1886); Shore v. Shell Petroleum Corp., 60 F.2d 1, 3 (10th Cir. 1932); Indians of Fort Berthold v. United States, 71 Ct. Cl. 308 (Ct. Cl. 1930); see also Spalding v. Chandler, 160 U.S. 394, 402-03, 407 (1896); United States v. Cook, 86 U.S. (19 Wall) 591, 593 (1873).

In Williams, the Supreme Court held that an Indian nation can voluntarily abandon lands that are acknowledged to it under a treaty with the United States that recognizes only the nation's right of occupancy. 242 U.S. 434. Williams involved the 1795 Treaty of Greenville (7 Stat. 49) which provided that the Pottawatomie Nation and other Indian tribes:

> have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet

> enjoyment of their lands against all citizens of the United States and against all other white persons who intrude upon the same.

Id. at 437. Subsequently, in 1833 the Pottawatomie Nation sold to the United States their lands in Northern Illinois, but not the adjoining lake beds of Lake Michigan. Most of the members thereafter removed west of the Mississippi River, leaving another group of Indians known as the Pokagon Band "in possession, occupation, control, and sovereignty" over the Nation's lands that were not ceded to the United States. Id. at 436. Subsequently, the Pokagon moved to Northern Michigan. Id.

The Pokagon Band brought suit in the early 20th century to recover possession of a part of downtown Chicago which had been reclaimed over the years from Lake Michigan. They argued that while their predecessors had sold the dry land to the United States, they had never parted with their title to the lake beds. The Pokagon posited that they retained title to the lake beds, despite their removal, because there had been no sale to the United States. See 61 L. Ed. 414, 416 (argument of counsel).

The Supreme Court unanimously rejected this argument, finding that abandonment alone was sufficient to extinguish the Tribe's interest, which was one of treaty-recognized occupancy only. The Court explained that:

> under [the 1795 Treaty] no tribe could claim more than the right of continued occupancy; and that when this was abandoned, all legal right or interest which both the tribe and its members had in the territory came to an end.

Williams, 242 U.S. at 437-38. Similarly, in Shore, the Tenth Circuit held that a tribe abandoned its former lands because an 1825 federal treaty (7 Stat. 240) had provided the tribe only with a right of occupancy. Shore, 60 F.2d at 2, 3.

Like the tribes in Williams and Shore, the Cayugas ceded all of their aboriginal lands to the State in the 1789 Treaty and received, in return, a limited right of use and occupancy that was "not to be sold, leased, or in any manner aliened or disposed of to others." SPA632. The interest sold by the Cayugas to New York in the Treaties consisted only of their right of use or occupancy—a right that, as a matter of law, could be abandoned by the Cayugas without federal involvement. There is no dispute that the Cayugas voluntarily abandoned the subject land no later than 1800. See T3008, 3011, 3013, 3491; G-326 p.502; A1373-74. At that time, all their interests in the lands ended.

Because precedent makes clear that a limited right of use or occupancy can be abandoned, the court's holding that "if an Indian tribe possesses recognized title in certain land, then Congress, and only Congress may divest the tribe of title to its land" was in error. Cayuga IV, SPA534. The cases relied upon by the court, Solem v. Bartlett, 465 U.S. 463 (1984), and Tee-Hit-Ton Indians v. United States,

348 U.S. 272 (1955), do not support its holding. Solem did not involve abandonment but instead addressed whether reservation boundaries were diminished for jurisdictional purposes by a Congressional act that authorized the sale and disposition of surplus lands within the borders of an Indian reservation. Solem, 465 U.S. at 470. Since Solem addressed reservation status (not possessory rights) and abandonment was not raised or considered by the Court, the case is inapposite.

Likewise, in Tee-Hit-Ton Indians the Supreme Court held that an Alaskan clan, whose claims of ownership had not been recognized by Congress, was not entitled to compensation for the taking of timber by the United States from that land. 348 U.S. at 288-89. The Court made clear that the recognized title concept pertains to a tribe's right to compensation under the Fifth Amendment for a taking by the United States of their interest in land. Id. at 285. The Supreme Court did not hold or even suggest that an Indian tribe could not abandon a "recognized" right of occupancy. Consequently, the court erred in holding that because the Cayugas had "recognized title" to the subject land they could not have abandoned their interest in those lands.

B. Even If The District Court Was Correct In Ruling That Recognized Title Could Not Be Abandoned, It Erred In Ruling That The Cayugas Had Recognized Title.

In any event, the court was incorrect in concluding that the Cayugas held "recognized title" to the lands based upon the 1794 Treaty of Canandaigua. In so holding, the court rejected Defendants' argument that the State had a property right in the subject lands and that granting the Cayugas "recognized title" in them would impermissibly affect New York's property interest. The federal government could not do this by treaty and, in any event, did not do so in the Treaty of Canandaigua.

1. The District Court's Construction Of The Treaty Of Canandaigua Is Contrary To The Clear Terms Of The Treaty.

The articles of the Treaty of Canandaigua at issue in this litigation are Article II and IV. Article II provides in full:

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

7 Stat. 44, Art. II, SPA677. Article IV notes in relevant part that the treaty "described and acknowledged what lands belong to the . . . Cayugas." Id.

As a general rule, treaties should be construed liberally in favor of the Indians. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 465 (1995) (citation omitted); Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 766 (1985). There are, however, strict limits on this guideline for interpretation. Courts cannot "under the guise of [liberal] interpretation . . . rewrite congressional acts [i.e., treaties] so as to make them mean something they obviously were not intended to mean." Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179 (1947). See also Choctaw Nation v. United States, 318 U.S. 423, 432 (1943) ("Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice.").

The court reasoned that "the treaty's plain language confers reserved title to the Cayugas." Cayuga IV, SPA538. This reasoning is contrary to the terms of Articles II and IV of the treaty. As is apparent from the text of Article II, the lands described as "reserved" to the Cayugas were those reserved by New York in its 1789 Treaty with the Cayugas. SPA677 ("The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property . . . ."). The United States did not purport to reserve the land by virtue of the Treaty of Canandaigua in 1794; it merely "acknowledged" that the Cayugas

had certain rights to land derived from the 1789 Treaty with New York. Also, the land referred to as "reservations" were "reservations" created by New York, pursuant to New York law, after it extinguished whatever Indian title the Cayugas held. See infra Point II(B)(2)(a).

Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua in 1794—it merely "acknowledged" that the lands were "called" "reservations" in the 1789 Treaty with New York.[38] Finally, the United States' assertion that it would never claim the land for the United States or disturb the Cayugas' use did not confer an interest—it merely promised that the United States would not claim the land or disturb their use of the same.

The court's conclusion that the Treaty conferred recognized title on the Cayugas is not only unsupported in the Treaty's text; it is at odds with the weight of authority discussing the effect of the Treaty of Canandaigua. In Andrews v. New York, the court noted that the Treaty of Canandaigua "did not create the Onondaga Reservation, but confirmed the Onondaga's aboriginal right of

[38] Indeed, publications of both the federal government and Indian groups have characterized the Onondaga reservation, acknowledged in the same article of the Treaty of Canandaigua as the Cayugas' "reservation," as a state, not a federal reservation. U.S. Department of Commerce, Federal and State Indian Reservations, An EDA Handbook at 303 (1971); Confederation of American Indians, Indians Reservations, A State and Federal Handbook at 198 (1986).

possession." 79 N.Y.S.2d 479, 482 (Ct. Cl. 1948). Similarly, in Seneca Nation of Indians v. United States, the court explained that:

> [T]he purpose of [the Treaty of Canandaigua] was to reconfirm peace and friendship between the United States and the Six Nations, to correct an inadvertent error in the boundaries theretofore allotted to the Indians, and to relinquish any rights the United States may have acquired through this error. There was no purpose to divest New York and Massachusetts of their rights, nor was there any purpose to prevent or supervise sales or transfers of Seneca territory.

173 Ct. Cl. 917, 922 n.5 (1965) (emphasis added). Finally, in People ex rel. Ray v. Martin, the Court stated that the Treaty of Canandaigua "did not create any reservation but confirmed the Senecas' aboriginal right of possession." 60 N.E.2d 541, 544 (N.Y. 1945). The court improperly ignored each of these statements as dicta. Cayuga IV, SPA537; but see Oneida Indian Nation v. New York, 194 F.Supp.2d 104, 140 (N.D.N.Y. 2002) (in context of motion to strike, court notes that land that had been reserved to the Oneidas in a 1788 Treaty of Fort Schuyler and that this was recognized in later treaties, including the 1794 Treaty of Canandaigua).

2. The Treaty Of Canandaigua Cannot Be Construed To Confer Recognized Title On The Cayugas Because New York Held More Than A "Right Of Preemption" In The Subject Land.

a. In The 1789 Treaty, New York Lawfully Extinguished Whatever Rights The Cayugas Held In The Subject Land.

The treaty between the Cayugas and New York, referred to in the Treaty of Canandaigua, is dated February 25, 1789. The Constitution took effect on March 4, 1789. See, e.g., Oneida Indian Nation v. New York, 691 F.2d 1070, 1079 (2d Cir. 1982) ("Oneida IV"). As a result, at the time of the 1789 Treaty, New York could—and did—lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. See Oneida Indian Nation v. New York, 860 F.2d, 1145, 1160-61, 1162 (2d Cir. 1988) ("Oneida VIII").

The 1789 Treaty contains five paragraphs, the first of which states in its entirety: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." SPA632. This unambiguous grant did not exclude any of the Cayugas' lands, reserve a parcel from the cession or limit the cession in any way.[39] As a result, whatever interest the Cayugas had in the subject land was lawfully extinguished and New York's "mere expectancy," Cayuga IV, SPA539,[40] ripened into full title. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584-85 (1823)

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[39] The consideration for this cession is found in subsequent paragraphs of the Treaty.

[40] The court held that the State had only a right of preemption which the court viewed as not "a property right, but rather a mere expectancy concerning the property, with no right vesting in such person until Congress acts to extinguish the Indian interest in the land." Id.

(once Indian title is eliminated the fee holder is left with unencumbered fee title by operation of law); see also Cayuga Indian Claim, 20 Am. J. Int. L. at 590-91, S-20, p.326 ("The title of the Cayuga Indians, one of occupation only, had been extinguished by the treaty of 1789. . . .").

Consequently, the only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited use right granted by the State in the Second Article of the Treaty. See SPA632 ("Secondly: the Cayugas shall, of the said ceded lands, hold to themselves, and to their posterity, forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened, or disposed of to others, all that tract of land, beginning at . . . ."). That parcel is the "reservation" referred to in the Treaty of Canandaigua and the 64,000 acres which comprise the subject land in this litigation. Cayuga IV, SPA538.[41] Contrary to the court's suggestion, id., SPA541, the 64,000 acre parcel was not exempted from the extinguishment effected by the first paragraph of the 1789 Treaty. By the express terms of the treaty, the Cayugas ceded the parcel to the State, which then granted to

[41] The court misconstrued the 1789 Treaty, stating that "[b]y this treaty the Cayugas relinquished approximately 3,000,000 acres in what is now central New York State to the State, reserving for their own use the 64,015 acres that is the subject of the present dispute." Cayuga IV, SPA541 n.4 (emphasis added). The court's use of the phrase "reserving for their own use" suggests that it construed the 1789 Treaty as extinguishing Indian title to all of the Cayugas lands, excepting the 64,000 acre parcel. As shown by the express terms of the 1789 Treaty, this construction is incorrect.

the Cayugas a right of "use and cultivation" in the same. SPA632. Thus, after the 1789 Treaty and prior to the Treaty of Canandaigua, New York held more than a mere right of preemption to the 64,000 acre parcel; it held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law.

b. The United States' Treaty Making Power Does Not Extend To The Divestment Of A State's Interest In Land.

Treaties, like statutes, are entitled to a presumption of constitutionality. See In re Air Crash in Bali, 684 F.2d 1301, 1309 (9th Cir. 1982). When construing a treaty or a statute, the court must presume that the government did not intend to act outside of its authority. This rule is fundamental and the Court has applied it to construe treaties in a manner contrary to the interests of Indian Tribes, despite the countervailing canon that treaties are to be construed liberally in their favor. See Oneida VIII, 860 F.2d at 1163-66.

Here, the court's construction of the Treaty of Canandaigua is erroneous because the United States could not affect New York's interest in land through an Indian treaty. The federal government has no authority "to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State." Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 478 (1850). To that end, the Supreme Court has asserted, "[i]t would not be contended that [the Treaty making power of the United States] extends so far as to authorize what the Constitution

forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of territory of the latter, without its consent." Geofroy v. Riggs, 133 U.S. 258, 267 (1890); see also Green v. Biddle, 21 U.S. (8 Wheat.) 1, 42-43 (1823) ("It is incontestable that there are some attributes of sovereignty of which a State cannot be deprived, even with the concurrence of Congress and the State itself. . . . Of all the attributes of sovereignty, none is more indisputable than that of its action upon its own territory"). It bears emphasis that the United States had no interest to give the Cayugas in 1794. The lands to which Britain held fee title passed to the individual states upon the Revolution. See Massachusetts v. New York, 271 U.S. 65, 85-86 (1926); Shively v. Bowlby, 152 U.S. 1, 14-15 (1894); Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523, 526-27 (1827); Johnson, 21 U.S. (8 Wheat.) at 584. Indeed, before the ICC the United States made precisely this argument. See S-718, pp.22-23, 26 ("Since the United States had no property rights in the lands claimed by the Indians in the original states it could not create any property right in the Indians in lands within those states. . . . The United States could not create any rights in the Indians. Nor could it deprive the states or their grantees of their rights."). Now, the United States takes a directly contrary position.

Furthermore, pursuant to the 1789 Treaty, New York held the right of reversion if the Cayugas abandoned their right to "use and cultivat[e]" the subject land. SPA632. If the Treaty of Canandaigua had conferred "recognized title" such that title could only be extinguished by Congress and the land could not be abandoned, the United States would effectively have illegally deprived New York of its property rights. This the United States did not do by the Treaty of Canandaigua. Cf. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (takings clause implicated when the federal government precludes use of a "stick in the bundle of rights which are commonly characterized as property").

c. The Treaty of Canandaigua Does Not Clearly Express An Intent To Divest The State Of Its Interest In Land And, Therefore, It Cannot Be Interpreted As Conferring Recognized Title On The Cayugas.

Although the Supreme Court has not held that the treaty-making power of the United States extends to the divestment of a state's interest of land, it has observed that if such authority were to exist, it must be shown unmistakably in the treaty:

> But if the treaty-making power be as far reaching as is contended— which we are not now prepared to hold— we are of opinion that no treaty should be construed as intended to divest rights of property— such as the state possessed in respect of these lands—unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question.

United States v. Minnesota, 270 U.S. 181, 209 (1926); see also Oneida VIII, 860 F.2d at 1163-64 (rejecting Indian plaintiffs' construction of Treaty of Fort Stanwix that would have divested New York of land it had acquired). The Treaty of Canandaigua does not express an intent to divest the State of its interest in the subject lands.

First, the intent to divest a state of its land must "be shown in the treaty"; extrinsic evidence as to intent is irrelevant. See Minnesota, 270 U.S. at 209; Oneida VIII, 860 F.2d at 1163-64; cf. Tee-Hit-Ton Indians, 348 U.S. at 278-79 (recognized title requires a "definite intention by congressional action or authority to accord legal rights, not merely permissive occupancy"). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest.

The United States acknowledged before the ICC that Canandaigua did not "divest[] or impair[] the rights of the [S]tate of New York . . . , nor did it enlarge the rights of the Indians." S-718, p.46. The provision recognizing the right of the Indians to sell their lands "to the people of the United States, who have the right to purchase"

> was an acknowledgment of the then well-known fact that . . . New York . . . had the right to purchase the Indian

> lands. Moreover, it was an acknowledgment that the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales to those 'who have the right to purchase.'

S-718, p.47; see also S-690, pp.41-42 (in proceedings before ICC, the United States "object[ed] to so much of this proposed finding [No. 2 by the Cayugas] as infers that the United States, by Article II of the Treaty of November 11, 1794, 7 Stat. 44, recognized the Cayuga lands as a 'reservation.' Article II states that the Cayuga lands in question were those which were called 'reservations' in treaties with the State of New York . . . ."); S-665, p.8 (U.S. Answer before International Arbitration Commission that the only interest Cayugas held in the subject land after 1789 was a right of use and occupation).

d. The District Court's Construction Of The Treaty Of Canandaigua Requires That The United States Violated The Fifth Amendment To The Constitution.

The United States' power of eminent domain extends to the taking of state-owned property without the state's consent. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534-35 (1941). But the United States must pay just compensation to the property owner for the property it takes. U.S. Const. Amend. V; see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands, 461 U.S. 273, 291 (1983). A compensable taking occurs "[I]f a government has committed

or authorized a permanent physical occupation of [the] property." Southview Assocs. v. Bongartz, 980 F.2d 84, 92-93 (2d Cir. 1992).

Under this standard, if the United States took New York's property rights in the subject lands by the Treaty of Canandaigua, New York would have been entitled to compensation for the taking. No such compensation was ever given. And, in any event, even if the United States attempted to effect a taking by the Treaty of Canandaigua, it was incomplete because title does not pass until "the owner receives compensation." United States v. Dow, 357 U.S. 17, 21 (1958) (citation omitted); see also Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 340 (1963); Stringer v. United States, 471 F.2d 381, 384 (5th Cir. 1973). Because compensation was never paid, title did not pass to the Cayugas and they have no compensable interest in the subject lands.

C. Since There Is No Dispute That The Cayugas Voluntarily Abandoned The Subject Lands By 1800, Defendants Are Entitled To Summary Judgment On The Abandonment Defense.

Because the court erred in holding that the defense of abandonment was unavailable, and because there is no dispute in the record that the Cayugas voluntarily abandoned the subject land no later than 1800, Defendants are entitled

to summary judgment on the abandonment defense. See T3008, 3011, 3013, 3491; A1373-74.

POINT III

THE DISTRICT COURT ERRED IN DETERMINING THAT THE FEDERAL GOVERNMENT DID NOT RATIFY THE TREATIES

The versions of the NIA in effect at the time of the 1795 and 1807 Treaties provide that "no purchase or grant of lands" from an Indian tribe shall be valid unless "made by a treaty or convention entered into pursuant to the Constitution." SPA638. During proceedings below, Defendants argued that the federal government's undisputed knowledge of the Treaties and the presence of federal officials at those Treaties evidenced the required federal approval. Alternatively, Defendants asserted that the federal government affirmed the transactions after the fact both through the Treaty of Buffalo Creek, and official acts it took concerning the subject lands before the British-American Arbitration Tribunal and the Indian Claims Commission. The court concluded that these indicia of federal approval were insufficient to satisfy the NIA's requirement; in the court's view, the NIA required the federal government to ratify the Treaties through the formalities set forth in the Treaty Clause of the United States Constitution, U.S. Const. art. II, cl. 2, § 2. Cayuga III, SPA545-48. Both the court's understanding of the proper

standard for ratification under the NIA, and its conclusion as to the lack of significance of the various acts of the federal government acknowledging the validity of the Treaties, were erroneous.

A. Federal Approval Under The NIA Does Not Require Compliance With The Treaty Clause Of The United States Constitution.

The current version[42] of the NIA provides that

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law and equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. In Cayuga III, the court accepted the argument of the Plaintiffs that this language "requires all Indian land conveyances be entered into in accordance with the treaty-making powers of the of the federal government as set forth in Article II, section 2 of the Constitution." SPA544. As it was undisputed that the federal government never ratified the Treaties through Treaty Clause formalities—i.e., with the "Advice and Consent of the Senate"—the court

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[42] In addressing the "ratification" issue, the court applied the language from the contemporary version of the NIA, rather than the 1793 and 1802 enactments which were in effect at the time of the disputed 1795 and 1807 conveyances, respectively. See Cayuga III, SPA543. While this analytical approach was incorrect, it is an error of little consequence here, as the critical requirement that conveyances be made by "treaty or convention entered into pursuant to the Constitution" was added to the NIA in 1793, and has remained in the statute since that time.

concluded that the United States could not have approved the conveyances in the manner required by the NIA. SPA545. This holding was in error.

The text of the NIA itself demonstrates that the Treaty Clause is not the sole source of federal approval for agreements between states and Indian tribes. The statute excludes from its prohibitions transactions "made by treaty or convention entered into pursuant to the Constitution." The fact that the statute references two distinct forms of agreements—treaties or conventions—makes plain that there could be mechanisms for federal approval outside the strictures of the Treaty Clause. The word "conventions" cannot be ignored as mere surplusage. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (courts should be "reluctant to treat statutory terms as surplusage in any setting"). As a result, the phrase "entered into pursuant to the Constitution," cannot be read, as the district court suggests, to require that Treaty Clause procedures be the sole and exclusive means of federal ratification of Indian land conveyances. Instead, Congress clearly envisioned that less formal actions could manifest federal approval. Cf. J. L. Brierly, The Law of Nations 243 ("a treaty suggests the most formal kind of agreement; a convention or pact generally, but not always, an agreement less formal or less important").

Accordingly, the Supreme Court has recognized that federal approval under the NIA can be manifested through conduct other than that set forth in the Treaty

Clause. While the court found that the Supreme Court's decision in Oneida VI, 470 U.S. at 246-48, compelled the conclusion that the NIA required that federal approval be manifested through formal Treaty Clause ratification, SPA545, Oneida VI says no such thing. The defendants in the Oneida VI litigation had argued that the United States affirmed the disputed land conveyance through subsequent treaties that, it was argued, referenced with approval the earlier, disputed sale. While the Supreme Court concluded that these subsequent treaties did not suffice to evidence federal approval of the disputed transactions, nothing in the Court's analysis of the issue[43] suggests that the NIA requires the United States to affirm Indian land conveyances through formal Treaty Clause ratification procedures. Indeed, the Supreme Court's decision in Oneida VI states only that federal

[43] In concluding that Oneida VI required approval through Treaty Clause formalities, the court focused not on the Supreme Court's analysis of the ratification issue itself, but rather on the Court's introductory comment that the 1790 version of the NIA "prohibited the conveyance of Indian land except where such conveyances were entered pursuant to the treaty power of the United States." Cayuga III, SPA545 (quoting Oneida VI, 470 U.S. at 231-32). This comment in Oneida VI is, only dicta, as in that case (as here) it was the 1793 version of the NIA, and not the 1790 version, that was in issue. More important, the 1790 version of the NIA does not even contain the critical "pursuant to the Constitution" language disputed here, which was added when Congress reenacted the statute in 1793. Compare SPA636 (1790 version of the NIA) with SPA638 (1793 version).

approval must be "plain and unambiguous," 470 U.S. at 248, and says nothing about the form such "plain and unambiguous" consent must take. [44]

After holding that the NIA requires approval by federal treaty, the court went on to conclude, in the alternative, that Plaintiffs were entitled to summary judgment in any event because the various indicia of federal approval pointed to by Defendants—which are discussed infra at Point III(B)—did not demonstrate that the federal government "plainly, unambiguously, and explicitly ratified the 1795 and 1807 New York treaties." Cayuga III at 545, 548. The court's choice of this formulation is peculiar in two respects. First, it suggests that the court was aware of the controlling test for federal approval set forth in Oneida VI, but concluded nonetheless that that decision requires ratification by formal federal treaty. Second, it recites the Oneida VI test incorrectly; as seen above, while Oneida VI does require that federal approval be "plain and unambiguous," nothing in the Supreme Court's decision requires that such approval be "explicit." To the contrary, the Oneida VI Court noted that congressional intent to extinguish Indian title "will not be lightly implied," 470 U.S. at 248—a formulation which, of

[44] The court's conclusion in Cayuga III that Oneida VI requires ratification by Treaty Clause formalities is puzzling, as the court previously had reached the opposite conclusion. See Cayuga II, SPA556 ("Although it could have, however, the Court did not set down an unequivocal rule [in Oneida VI] that any conveyance of Indian land must be by express federal treaty in order to comply with the Nonintercourse Act.").

course, necessarily assumes that approval by implication is possible under certain circumstances.

In addition to being at odds with the Supreme Court's analysis in Oneida VI, both of the court's alternative holdings—that approval must be by federal treaty, and that federal consent must be "explicit"—conflict with the decisions of other courts concluding that "implicit" forms of federal approval can suffice to satisfy the requirements of the NIA. For example, in Seneca Nation of Indians v. United States, 173 Ct. Cl. 912, 913 (1965), property belonging to the Senecas was condemned by New York without contemporaneous consent or approval from the federal government. Id. at 913. The Senecas sued the United States, claiming that it was liable for damages because federal officials did not set aside the taking as violative of the NIA. Rejecting this argument, the court held that a subsequent Act of Congress, which provided that New York fish and game laws should apply to the Seneca's Reservation except for the laws "acquired by the State of New York by condemnation proceedings," constitutes "implicit ratification of New York's ownership of the tract [and] must be taken as Congress's approval of the original appropriation, as well as 'of the state's continued claim of right.'" Id. (emphasis added). Thus, the federal government's after-the-fact "implicit ratification" cured any lack of contemporaneous federal approval. Moreover, as will be discussed in

greater detail shortly, in United States v. Nat'l Gypsum Co., 141 F.2d 859, 863 (2d Cir. 1944) this Court, in determining whether leases of Indian land were void, considered the post-transaction conduct of the federal government to adduce whether the NIA's approval requirement was complied with.

Accordingly, the court's holdings that (i) federal approval under the NIA must be reflected by means of a formal treaty, and that, in the alternative, (ii) only "explicit" government action could ratify a conveyance, were both in error. As will be shown below, had the court correctly applied the controlling standard in its ratification analysis—i.e., that federal approval must be "plain and unambiguous" it would have found that several independent bases exist for concluding that the United States approved the 1795 and 1807 conveyances.

B. The District Court Erred In Concluding, As A Matter of Law, That The Federal Government Did Not Ratify The 1795 And 1807 Treaties.

1. Defendants Established Issues Of Fact As To Whether The Federal Government Ratified The 1795 And 1807 Treaties By Its Conduct Prior To Those Treaties, And By Its Involvement In Their Negotiation And Subsequently Effectuating The Terms Of The Treaties.

Under the applicable "plain and unambiguous" standard discussed above, Defendants came forth with sufficient evidence establishing, at a minimum, disputed issues of material fact as to whether the federal government's involvement in the negotiation, consummation and subsequent implementation of the Treaties constituted federal ratification. The evidence established that federal officials actively participated in the treaty process. See supra pp.25-27. In 1795, the Cayugas asked Timothy Pickering to convey to New York their proposal to sell their property to the State. The State acted upon Pickering's request and eventually purchased the land. A1715, 1784-88; SPA680. In doing so, the State received assistance from federal Indian agent Israel Chapin, who arranged the negotiations between the parties. Both he and Jasper Parrish, the federal interpreter, attended the negotiations and witnessed and signed the treaty on July 27, 1795. A1165, 1175, 1274, 1866-67; SPA680. Chapin submitted the Treaty for recording in March of 1796, although he was aware of Pickering's professed concerns about it. SPA690; A1372.

Importantly, neither President Washington nor Governor Jay were of the view that the 1795 Treaty was void. Washington merely stated that if the Treaty had been held, "any further sentiment now on the unconstitutionality of the measure would be received too late," and if not, instructed Pickering to use his best judgment. G-388 (emphasis in original); A1372-73. Washington apparently believed that, if the treaty had already been entered into, it was unnecessary to provide further approval because it was now enforceable and in effect. Under this view, the treaty was already "constitutional" and no further action on the part of the federal government was needed. The actions of the federal agents in carrying out New York's treaty obligations confirm his view. Likewise, Jay—a prominent federalist—refused to agree with Pickering that New York lacked the authority under the 1793 NIA to enter a valid treaty.

The federal government played an identical role in arranging for and eventually consummating the Cayugas' sale of its remaining parcel to the State in 1807. A1373-74; 2502-03; T4735-39, 1374-75; S-50; SPA699-700. On February 16, 1801, Acting Secretary of War Dexter, at the direction of President Adams, stated that the sale of the Cayugas' remaining reservation lands could go forward. A1374. Parrish was then present at the February negotiations in his capacity as an

Indian agent of the United States and as an interpreter and signed and witnessed the Treaty. T4738-39; A2502-03, 1374-75.

In addition, the federal government's conduct after the Treaties adds further compelling evidence that the United States knew about, and approved of, the 1795 and 1807 Treaties. For instance, the federal government distributed the State's payments to the Cayugas, and its agents' reports to the Secretary of War document these transactions. This evidence demonstrates that the agents undertook this responsibility as part of their official duties as United States Indian Agents. SPA699-700; A1335, 1145-48, 1869-70; T4738-39; 3497. In short, they were just as much a part of the treaty process as New York's agents. The court did not even address this probative evidence.

One of the purposes underlying the NIA is to assure federal scrutiny over transactions involving Indians. See generally Federal Power Comm'n. v. Tuscarora Indian Nation, 362 U.S. 99 (1960). Here the extensive federal involvement throughout the negotiations and consummation of the 1795 and 1807 Treaties plainly provided the federal involvement necessary to assure the fair and proper sale of the subject land. Schaghticoke Tribe of Indians v. Kent Sch. Corp., 423 F.Supp. 781, 784 (D. Conn. 1976); Seneca Nation, 173 Ct. Cl. at 923.

Furthermore, in subsequently enforcing the treaties and paying the Cayugas, the federal government continued to be involved.

The conduct of the federal government throughout the negotiation and implementation of both treaties and for nearly two centuries thereafter demonstrates federal consent.

2. Controlling Precedent Establishes That The Federal Government's "Longstanding Understanding" Of A State's Authority To Dispose Of Indian Lands Can Also Constitute Federal Approval Under The NIA.

Second Circuit precedent also makes clear that when land has been set aside by a State for an Indian tribe with the understanding of the United States that the State had authority to deal with that land, the State's exercise of that authority without further federal involvement does not violate the NIA.

In Nat'l Gypsum Co., the United States sought to have two leases of Tonawanda lands declared void. 141 F.2d at 859-60. The Tonawandas had been granted a reservation in Kansas, but never acceded to it. Id. Instead, in 1857 they had relinquished any claim to the lands in exchange for payment by the United States. They then purchased a reservation in New York. Id. Title to the New York lands was eventually transferred to the New York Comptroller and New York law permitted the Tonawanda to enter into the leases. Id. at 860. The Court found that "[f]or many years it had been the understanding of the Department of

the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the [State] Comptroller in trust empowered the State to provide for leases of reservation land. . . ." Id. at 863. The Court also noted that an act providing for leases of Seneca land with federal approval did not include Tonawanda land, "Congress apparently [having] left the making of leases on the Tonawanda Reservation to State Authority." Id. Based on the "longstanding understanding" of the respective governments, the Court held that "a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C. § 177." Id.

As noted above, the 1789 Treaty extinguished all of the Cayugas' aboriginal rights, and conferred to them a state-created right of use and cultivation to the subject lands. See supra Point II(B)(2)(a). The understanding of both federal and state governments at the time and in the nearly two centuries since then was that the Cayugas had the right to sell that land to the State, and the State had the right to buy it from the Cayugas.

The Treaty of Canandaigua clearly reflects that understanding. By its terms, that Treaty does nothing more than acknowledge the right of the Cayugas under their treaty with the State and confirms that the United States will not interfere

with those rights. Thus, Article II of the Treaty provides that "[t]he United States acknowledge the lands reserved to the Oneidas, Onondaga and Cayuga Nations, in their respective treaties with the State of New York. . . . to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof." SPA677. The Treaty does not confer any right in the United States to purchase the land or prohibit the State from doing so.

Rather, the Treaty recognizes the State's right to do so. Thus, Article II continues: "the said reservations [created by the State treaties] shall remain theirs [the Onondaga, Oneidas and Cayugas], until they choose to sell the same to the people of the United States, who have the right to purchase." SPA677. The distinction between the "United States"—the federal government which undertook not to interfere with the area reserved for the Cayugas by the State—and the "people of the United States"—to whom the Cayugas could choose to sell—is critical and intended. The "people of the United States" does not refer to the federal government. It refers to the State or such of its assignees who had the right to acquire land within the State from Indian tribes.

The United States Commissioner who negotiated the Treaty of Canandaigua, Timothy Pickering, expressly noted at the time in his personal papers that under New York law no purchase from the Indians was valid unless made "under

authority, and with the consent of the legislature of that state" and that, accordingly, "the United States had no better right than individuals to receive from the Indians a cession of the same lands." See S-718 at 49-50. Thus, when the treaty says "people of the United States" it acknowledged both the rights of the Indians to sell and the rights of the State to purchase.

The United States recognized the true meaning of the Treaty of Canandaigua long before it brought this action. Responding to claims brought by the Cayugas and other New York tribes in the ICC, the United States said:

> In the first place [the treaty] recognizes the right of the state to purchase Indian title by describing the lands currently belonging to them by reference to the transactions which had occurred previously between the Indians and the state [] of . . . New York. . . . And the very language used to spell out the undertaking by the United States is an explicit acknowledgement of that right. The treaty says "the United States will never claim the same nor disturb * * * [the Indians] * * * in the free use and enjoyment thereof; but it shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase." No other Indian treaty has been found which contains any such provision recognizing the right of the Indians to sell their lands to anyone other than the United States. This provision was an acknowledgement of the then well-known fact that . . . New York had the right to purchase the Indian lands. Moreover, it was an acknowledgement that the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales to those "who have the right to purchase."

S-718 at 47-48. In addition, the United States in the ICC proceeding cited with approval the following findings of the American & British Claims Arbitration Tribunal of 1926: "Nor was the subject matter [of the treaty of 1795] one of federal cognizance. . . . At the time of the treaty of 1795, the Cayuga Indians held the reservation of New York . . . . The dealings of New York with the Cayuga Nation as a New York entity and with respect to lands held of New York, were a matter for that State only." S-718 at 24, and 25 (quoting Cayuga Indian Claim, 20 Am. J. Int'l L. at 590-91, S-20, p.326, 327).

Under Nat'l Gypsum, then, the United States' acknowledgement of the State's right to purchase in the Treaty of Canandaigua and the "longstanding understanding" of both governments is sufficient authority for the State to purchase without violating the NIA.

3. The District Court Erred In Holding That The 1838 Federal Treaty Of Buffalo Creek Did Not Ratify The 1795 And 1807 Treaties. In Any Event, The Cayugas Released And Relinquished Any Claim To Their Former Lands In New York When They Entered Into The Buffalo Creek Treaty.

Even if this Court finds that the 1795 and 1807 Treaties were not entered into in compliance with the NIA, the 1838 federal Treaty of Buffalo Creek, SPA706, constituted federal ratification of those treaties. In any event, the

Cayugas' agreement in Buffalo Creek to leave New York released and relinquished any claim they may have had to New York lands.

a. The Buffalo Creek Treaty.

In Buffalo Creek, the Senecas "and their friends, the Cayugas . . . residing among them . . . agree . . . to remove from the State of New York to their new homes [west of the Mississippi] within five years, and to continue to reside there." SPA710; see Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 877 n.1 (2d Cir.1996); A1895. In exchange, the United States agreed "to set apart" lands west of Missouri in what is now Kansas "as a permanent home for all the New York Indians, now residing in the State of New York," specifically including the Cayugas. SPA708-09 The United States also agreed, inter alia, to protect and defend the New York Indians in their "new homes" and to make payments to the Cayugas when they removed. SPA709-10.

Buffalo Creek was a removal treaty. Its express purpose was to carry out the "policy of the Government in removing the Indians from the east to the west of the Mississippi, within the Indian territory." SPA708. The Treaty recited that it was the culmination of over twenty years of federal efforts to facilitate the removal of the New York Indians from the State. SPA707-08. The Treaty was amended and ratified by the United State Senate on June 11, 1838, upon the condition that it

would be "binding and obligatory" upon each tribe consenting to the amended treaty. New York Indians v. United States, 170 U.S. 1, 21-22 (1898). The Cayugas consented, SPA720, and President Van Buren proclaimed the Treaty on April 4, 1840. SPA707, A1377.

A party of Cayugas ultimately moved to the Kansas lands, although many did not stay. A1896; see also New York Indians, 170 U.S. at 27-28. Subsequently, the United States sold the Kansas lands that it had granted to the New York Indians. The Cayugas and other tribes eventually sued the United States, successfully claiming that the Treaty of Buffalo Creek validly conveyed these lands to the New York Indians and that the United States was liable for their value. Id. at 26-30, 36. The Supreme Court found that the failure of some of these Indians to remove to Kansas did not "result in a cancellation of the [1838] treaty, and a restoration to [the Indians] of [the] rights" they had given up through the treaty. Id. at 19. According to the Court, in Buffalo Creek the Cayugas (among others) agreed to remove from New York. The Court concluded that this agreement, rather than the actual fact of removal, gave the New York Indians binding rights to their new western homeland. Id. at 24-29, 34. The Cayugas, among others, were found to be entitled to share in the award. See New York Indians v. United States, 30 Ct. Cl. 413, 467, 480, 484 (1895).

b. The District Court Erred In Holding That Buffalo Creek Did Not Ratify The 1795 And 1807 Treaties.

Buffalo Creek confirmed federal consent to the earlier Cayuga sales to the State. As discussed above, at the time the United States executed Buffalo Creek, it was well aware of and, in fact, had participated in the execution of the 1795 and 1807 Treaties. By ratifying Buffalo Creek, the President and the Senate plainly and unambiguously approved the removal of the Cayugas from New York and the prior extinguishment of their title to land in New York. In doing so, the federal government necessarily manifested its consent to the Treaties.

The language in Buffalo Creek plainly and unambiguously recites the Cayugas' unqualified agreement to "remove from the State of New York." SPA708-09. This language clearly sets forth the intent to extinguish the Cayugas' interest in land in New York and to create a "permanent home" for them within Indian territory.[45]

[45] Legislative history in other statutes supports the view that Congress intended to extinguish the Cayugas' interest, if any, in the subject lands. For example, the legislative history of 25 U.S.C. § 233, which granted jurisdiction to the State for civil actions between Indians (or to which Indians are a party) states that the "Cayuga Indians have no reservation" in New York. S. Rep. No. 81-1836, at 5 (1950). Thus, consistent with the federal government's action in removing the Cayugas via the Buffalo Creek treaty, more than 100 years later Congress continued to express the view that the Cayugas' reservation was no more.

Moreover, the Supreme Court has noted with respect to Buffalo Creek that "[t]hese proceedings, by which these tribes divested themselves of their title to lands in New York, indicate an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas." New York Indians, 170 U.S. at 21. The fact that Congress passed a special jurisdictional statute permitting the New York Indians to seek compensation for the Kansas lands further demonstrates Congressional approval of the divestment of the Cayugas' lands in New York. Act of January 28, 1893, ch. 52, 27 Stat. 426. The legislative history of that statute reflects an understanding that the New York Indians "gave up the New York lands" when they agreed to Buffalo Creek. 24 Cong. Rec. 588 (1893). See also New York Indians, 30 Ct. Cl. at 450 ("[t]he treaty of 1838 was designed to release the Eastern lands from Indian tenure and to remove the Indians into a country not then settled by whites"), rev'd on other grounds, 170 U.S. 1 (1898). Through Buffalo Creek and subsequent actions approving the Cayugas' removal from New York, the federal government unequivocally ratified the 1795 and 1807 Treaties.

c. In Any Event, The Cayugas Released And Relinquished Any Claim To Their Former New York Lands When They Agreed To Remove.

An Indian tribe may prospectively relinquish its right to its former lands by accepting a new reservation. In United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941), the Walapai Tribe, recognizing that white settlement had made its homelands untenable, requested that a reservation be set aside for it in an area that would not be of interest to non-Indians. Id. at 356-57. Although few of the Walapais actually moved to the new reservation, the Court found that the "creation [of the reservation] at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation." Id. at 357-58 (footnote omitted). The Walapais' "acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation . . . it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved." Id. at 358; accord Menominee Indian Tribe v. Thompson, 161 F.3d 449, 458-59 (7th Cir. 1998); Sokaogon Chippewa Cmty. v. Exxon Corp., 2 F.3d 219, 222-24 (7th Cir. 1993). Similarly, in the present case, by accepting federal lands elsewhere in the United States, the

Cayugas released and relinquished any rights to land they still had in New York. A730-31.

Plaintiffs cannot disavow the binding import of Buffalo Creek based upon the failure of some of the Cayugas to remove. See Santa Fe, 314 U.S. at 357-58 (acceptance of new reservation released and relinquished claims to other lands although few Indians moved to the new reservation). The agreement of the Cayugas and the other New York Indians to remove to the west, rather than their actual removal, was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in the Indian territory. See New York Indians, 170 U.S. at 15 (recognizing the binding nature of Buffalo Creek). Accordingly, in Buffalo Creek, the Cayugas accepted the new reservation and thereby released and relinquished any claim to lands in New York that they had already ceded to the State. See Santa Fe, 314 U.S. at 356-58; see also Oneida VI, 470 U.S. at 269 n.24 (Stevens, J., dissenting) (noting the existence of a serious question whether the Oneida abandoned their claim to New York lands when they accepted the Buffalo Creek Treaty); but cf. Oneida Indian Nation v. City of Sherrill, 145 F.Supp.2d 226

(N.D.N.Y. 2001), app'l pend'g Nos. 01-7795, 01-7797 (2d Cir.) (holding that Buffalo Creek did not disestablish or diminish Indian reservation in New York).[46]

[46] A number of Cayugas left New York prior to the early nineteenth century and moved with certain Senecas to Sandusky, Ohio, where they joined with members of other tribes. A976-77, 1895. In leaving New York and agreeing in subsequent treaties with the United States to accept lands first in Ohio and then in Oklahoma, see Treaty of Sept. 29, 1817, 7 Stat. 160; Treaty of Sept. 17, 1818, 7 Stat. 178; Treaty of Feb. 28, 1831, 7 Stat. 348, these Cayugas also released and relinquished any claim they had to New York lands. See Santa Fe, 315 U.S. at 356-58.

4. The District Court Erred In Determining That The Federal Government Did Not Ratify The 1795 Treaty Through Its Participation In The British-American Arbitral Tribunal.

The court erroneously determined that "any payments the federal government made pursuant to an arbitration award published more than one hundred and thirty years after the 1795 agreement at most constitutes an implicit ratification of the conveyance and, therefore, is not evidence of a plain, unambiguous and explicit ratification of the 1795 agreement." SPA547. Because Defendants' adduced sufficient proof to raise a triable issue of fact of "plain and unambiguous" approval of the 1795 Treaty, there exist genuine issues of material fact as to whether the federal government's participation in an international arbitral tribunal constituted federal approval of the 1795 Treaty.

In 1910, the United States and Great Britain entered into an agreement (the "Agreement") to establish an arbitral tribunal to resolve certain claims existing between the two governments (the "Tribunal"). Among the claims listed for determination was a claim by Great Britain on behalf of the Cayuga Indians of Canada. This claim related to New York State's refusal to resume partial payment of the annuity provided by the 1795 Treaty to the Canadian Cayugas, which had ceased when the Canadian Cayugas fought against the United States in the War of

1812. New York had continued to make the payments required under the 1795 Treaty, but only to the Cayugas residing in the United States. A1950; S-624, p.22.

In 1911, the Agreement and list of claims were approved by the Senate. A1378. Through this Agreement, the United States recognized that the obligations under the Treaties were enforceable and, indeed, could be adjudicated in an international forum. In 1926, the Tribunal published its Award requiring the United States to pay $100,000 to Great Britain as trustee for the Canadian Cayugas. A1378. Thereafter, funds to pay the Award were included in the President's budget and approved without alteration by Congress. A1378. Through these actions, the government effectively embraced the 1795 Treaty and made it its own.

The Tribunal determined that the United States' liability "did not accrue until, New York having definitely refused to recognize the claims of the Canadian Cayugas, the matter was brought to the attention of the authorities of the United States, and that Government did nothing to carry out the treaty provision." S-20; G-205 (emphasis added). By finding the United States liable for failing to carry out the payment provisions of the 1795 Treaty, the Tribunal and the United States by agreement necessarily determined that the Treaty was valid. By then approving

the payment of the Award, the federal government plainly and unambiguously recognized the Treaty, as the source of its liability.

In holding to the contrary, the court relied on language in the Tribunal decision that the 1795 Treaty was not a federal treaty. Cayuga II, SPA556. The court's reasoning in this regard misses the point. Whether the transaction was a "contract," "treaty," "convention" or "agreement" is irrelevant; what is relevant is whether that transaction was ratified by the United States. The Tribunal specifically determined that the 1795 Treaty was "a contract of New York with respect to a matter New York was fully competent to contract." S-20; G-205 (emphasis added). This determination was accepted and approved by the United States by express agreement.

The Supreme Court's conclusion in Oneida VI that subsequent federal treaty language did not ratify an earlier Indian land conveyance is not to the contrary. 470 U.S. at 246-48. There the Court found that references in later treaties to "the last purchase" and to "land heretofore ceded" were not plain and unambiguous. Id. In contrast, here the Tribunal expressly determined that the 1795 Treaty was valid and based liability upon the United States' failure to carry out the payment provision to the Canadian Cayugas. The President and the Senate considered and specifically accepted that finding. Applying the standards set forth in Oneida VI,

the Tribunal's award and its acceptance by the federal government raise, at the very least, disputed issues of material fact concerning whether the federal government ratified the 1795 conveyance.

5. The Action Of The ICC In Its Resolution Of The Tribe's Claims Constituted Further Federal Ratification Of The Treaties So As To Satisfy The Requirements Of The NIA.

The amount of compensation afforded the Cayugas in the Treaties became the subject of proceedings before the ICC initiated by the Tribe. In Cayuga II, the court rejected Defendants' argument that these proceedings constituted federal ratification of the Treaties. This holding was erroneous. As discussed below, the evidence demonstrates that there are genuine issues of material fact regarding whether the ICC's award to the Tribe of the fair market value of the land conveyed in the 1795 and 1807 Treaties, and the federal government's payment of that award, constituted federal ratification of those Treaties.

a. The ICC Functioned As An Arm Of Congress.

When considering the issue of federal ratification vis-à-vis the actions of the ICC, it is important to understand the relationship of the ICC to Congress. In

short, the ICC, as an Article I tribunal,[47] functioned as an arm of Congress. See Arizona v. California, 530 U.S. 392, 402-03 (2000).

The ICC was empowered by Congress to hear and determine "claims based upon fair and honorable dealings that are not recognized by any existing rule or law of equity." 25 U.S.C. § 70a(5). In Otoe and Missouria Tribe of Indians v. United States, 131 F.Supp. 265 (Ct. Cl. 1955), the Court of Claims analyzed the legislative history of § 70a(5). Its conclusion is particularly apt here:

> The legislative history of the Act establishes that from the beginning . . . certain members of Congress desired the enactment of a bill which would settle extra-legal or moral claims of Indians against the United States, including claims based on their Indian title property right in land which the Government had either taken without the formality of a treaty, or which the Government had acquired under ratified treaties procured by fraud, duress, unconscionable consideration, etc., or concerning which the Government had been guilty of dealings less than fair and honorable.

131 F.Supp. at 283.

It necessarily follows that when the ICC scrutinized a particular transaction and ordered that a tribe be compensated for the fair value of lands conveyed based upon "fair and honorable dealing" grounds, it did so on behalf of Congress.

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[47] See United States v. Dann, 470 U.S. 39, 45 (1985) ("The second purpose of the Indian Claims Commission Act was to transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of native American claims.").

b. The Resolution Of The Tribe's Claim By The ICC Constituted Federal Ratification Of The Treaties.

On August 11, 1951, the Tribe, as the alleged successor of the historic Cayuga Nation, instituted proceedings against the United States before the ICC to recover additional compensation for the land sold to the State pursuant to the three treaties executed in 1789, 1795 and 1807. The liability of the United States was predicated on the alleged breach of a special fiduciary duty owed by the federal government to the Cayugas.

On February 2, 1970, a trial was held before the ICC on the issue of liability. S-624, pp. 25-26. On July 20, 1972, the ICC ruled that, in 1795 and 1807, the United States failed to fulfill its obligation to the Cayugas under the NIA. The ICC determined that the United States would be liable to the Tribe if the Cayugas received less than conscionable consideration for the land it conveyed to New York under the treaties. Cayuga ICC I at 250; A984; A2479, 1968, 2276-84. The United States appealed the ICC's liability determination to the Court of Claims. The Court of Claims reversed and remanded the case to the ICC in light of the then-recent decision in United States v. Oneida Indian Nation, 477 F.2d 939 (Ct. Cl. 1973), to determine whether the United States had knowledge of the two treaties.

After remand, the ICC held a trial in 1974 on the limited issue of whether the United States had knowledge of or participated in the 1795 and 1807 Treaties. In an interlocutory order issued on March 27, 1975, the ICC ruled that its previous finding that the United States did not send a representative to participate in the negotiations or consummation of the treaties was erroneous and vacated that finding. The ICC further found that "[t]he United States had actual notice of both the treaties of July 27, 1795 and May 30, 1807," and that "[a] representative of the United States was in attendance at the treaty of May 30, 1807." Cayuga ICC II, at 83; A2481-82, 2489; see also A1969, 2285, 281; S-69. The ICC ordered that the case would "proceed to a determination of the extent of the defendant's liability to the plaintiff under the 1795 and 1807 treaties." A2487.

Proceedings to assess damages never occurred. Instead, settlement negotiations commenced. The ICC held a hearing on April 8, 1978 on a proposed settlement of $70,000. The ICC found that the parties had agreed to the settlement; that the Tribe had passed a Resolution approving the settlement; and that the Assistant Secretary of Indian Affairs had approved the settlement. A2286-2304, 1970; S-624 p.26-28; T4766. The ICC approved the agreement and entered final judgment.

By entering judgment for the Tribe for the purported fair market value of the land, the ICC scrutinized and affirmed the 1795 and 1807 Treaties plainly and unambiguously ratifying the same.

C. Conclusion.

For nearly two hundred years, the United States has been aware of, has approved, and has even enforced and effectuated the 1795 and 1807 Treaties. The United States involvement began with the participation of its agents in the negotiation, consummation and implementation of the Treaties. Its approval of these Treaties was reaffirmed in the Treaty of Buffalo Creek, by the acceptance of the Tribunal's award to the Cayugas in 1926, and, finally, by the judgment of the ICC approved by Congress to effectuate a full and final payment for the lands transferred.

The long history of federal ratification was never challenged until the United States, turning a blind eye towards its two hundred years of approval of the Treaties, reversed course and joined in this lawsuit on behalf of Plaintiffs. The overwhelming evidence of federal approval, however, demonstrates, at the very least, the existence of genuine issues of material fact that entitled defendants to a trial on liability. The court's judgment on liability under the NIA should be reversed and at the least, this matter should be remanded for trial.

POINT IV

PLAINTIFFS' LAWSUIT IS BARRED BY THE ELECTION OF REMEDIES DOCTRINE

The election of remedies doctrine prevents a party from seeking a form of relief, such as damages, based upon a claim that is inconsistent with a theory of relief the same party has already advanced in a prior proceeding. Prior to this action, both the Nation and the Tribe sought and successfully obtained additional compensation based upon the theory that they received inadequate compensation from the State for selling the subject land in the 1795 and 1807 Treaties—a theory of recovery which necessarily presupposes and affirms the validity of the transactions at issue. Plaintiffs' present cause of action is premised upon the inconsistent theory that the 1795 and 1807 Treaties are void ab initio because they were entered into in violation of the NIA. Despite the legal and logical inconsistency between the claim asserted in the current suit and the positions the Tribal Plaintiffs took in earlier proceedings, the court refused to apply the election of remedies doctrine to bar their claims, on the grounds that the "receipt of additional consideration is no remedy at all for an invalid conveyance of land." Cayuga II, SPA556-57; cf. Oneida Indian Nation v. New York, No. 74-CV-187,

slip op. at 4-6 (N.D.N.Y. March 25, 2003) (striking election of remedies defense in NIA claim, relying on reasoning in Cayuga II). The court's analysis was incorrect.

A. The Election Of Remedies Doctrine.

The common law doctrine of election of remedies prevents a party from obtaining remedies that are based upon legally or factually inconsistent legal theories. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974). As this Court explained, "[t]he rule is that, if the second remedy sought to be invoked is based upon a theory which is irreconcilable with that upon which the first proceeding is founded, the party would be barred by a binding election of remedy." Equitable Trust Co. v. Connecticut Brass & Mfg. Corp., 10 F.2d 913, 915-16 (2d Cir. 1926). The doctrine is designed to "mitigate [the] possible unfairness" of a plaintiff recovering twice for a single injury based on two contradictory or inconsistent claims, and "rests on the moral premise that it is fair to hold people responsible for their choices." 25 Am. Jur. 2d Election of Remedies, § 2 (1996); see also Gens v. Resolution Trust Corp., 112 F.3d 569, 573 (1st Cir. 1997).[48]

[48] At one time, the doctrine, as applied in certain jurisdictions, also prevented a party from pleading inconsistent theories of recovery. Modern pleading requirements no longer prevent a party from pleading inconsistent theories of recovery or seeking inconsistent remedies. See, e.g., Fed.R.Civ.P. 8(a)(3). However, the more liberal pleading requirements reflected in the Federal Rules of Civil Procedure do not alter the "substantive aspect" of the election of remedies doctrine, described above. Olympia Hotels Corp. v. Johnson Wax

While the detrimental reliance of another party on the plaintiff's earlier election is not a prerequisite to the application of the doctrine, potential prejudice to defendants is a consideration modern courts have found important in considering election of remedies defenses. See, e.g., Medcom Holding Co. v. Baxter Travenol Labs., 984 F.2d 223, 229 (7th Cir. 1993); Guy James Constr. Co. v. Trinity Ins., Inc., 644 F.2d 525, 529 (5th Cir. 1981).

The doctrine is commonly applied in contract cases, where a plaintiff attempts to sue to void a contract after asserting a claim for relief in an earlier proceeding—such as, for instance, the right to damages or performance—that is premised on the contract's validity. See, e.g., Stuart v. Hayden, 169 U.S. 1, 14-15 (1898); ARP Films, Inc. v. Marvel Entm't. Group, Inc., 952 F.2d 643, 649 (2d Cir. 1991). The Supreme Court has also invoked the doctrine to bar a plaintiff from asserting inconsistent remedial theories in the context of a dispute over a land transaction. In United States v. Oregon Lumber Co., 260 U.S. 290, 295 (1922), the government had initiated a suit seeking to set aside land patents it had issued to a lumber company, on the ground that the company had engaged in fraud when it

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Dev. Corp., 908 F.2d 1363, 1371 (8th Cir. 1990); see also Myzel v. Fields, 386 F.2d 718, 740 n.15 (6th Cir. 1967) ("[T]he pragmatic doctrine of federal pleading does not abandon the concept of election of remedies altogether. When it becomes prejudicial to the defendant to allow plaintiff to pursue inconsistent forms of relief, the doctrine is still applied.").

purchased certain government lands. After this litigation had been dismissed on statute of limitations grounds, the United States brought a subsequent action seeking damages for the alleged value of the lands. The Court affirmed the dismissal of the second action on the ground that the government had elected its theory of recovery in the first action. Id. at 294-95.

Although a binding election often occurs through a judgment in a pending lawsuit, an election can also occur where the plaintiff chooses a particular remedy in a proceeding that took place in pais, outside of court. See Oregon Lumber, 260 U.S. at 295 ("[a]ny decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies . . . .") (emphasis added); Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1083 (4th Cir. 1987) ("If the claim that was compromised could have sought a different remedy . . . then the compromise can act as a binding election of remedies"); Metcalfe Bros., Inc v. Am. Mut. Liab. Ins. Co., 484 F.Supp. 826, 831 (W.D. Va. 1980); Myers v. Ross, 10 F.Supp. 409, 411 (S.D. Fla. 1935).

B. The Election Of Remedies Doctrine Applies Here.

This is a textbook case for the application of the election of remedies doctrine. Both the Nation and the Tribe sought, and obtained, additional compensation for the 1795 and 1807 Treaties; in asserting these claims, and in

accepting this additional compensation, both groups necessarily took the position that the Treaties were valid and enforceable. Now, in this action, both groups advance exactly the opposite contention: that the Treaties are void, and that they are accordingly entitled to regain possession of the land, in addition to all of the mesne profits that Defendants purportedly obtained from their wrongful use and possession of the land. The election of remedies doctrine exists precisely to preclude this result; and the court's cursory reasoning as to why it does not is unpersuasive.

1. The Nation Successfully Pursued A Claim, Initiated In 1906, For Additional Money Damages Based On The Continuing Validity Of The Treaties Of 1795 And 1807.

In a 1906 Memorial to the State of New York, the Nation, represented by counsel,[49] sought additional money based upon the alleged inadequacy of the compensation that the historic Cayuga Indian Nation received at the time of the 1795 and 1807 Treaties. A2076-85. The Nation did not, as it is doing now, seek to invalidate the Treaties or obtain any damages for the loss of use and possession of the land since 1795. Instead, it asserted a theory based on the premise that the Treaties are valid: it sought the difference between what the State paid the historic Cayugas at the time of the Treaties and what the State subsequently sold the land for to private parties. A2080. This theory necessarily contradicts a claim that the Treaties are void or illegal; indeed, during the course of its efforts to receive compensation from the State, the Nation made it clear that "[t]he Cayugas want no lands of the whites." A1956, 2074; S-624, pp.13-14 & n.37; T4754; S-635, p.15. New York settled these claims with the Nation, first in 1913 and again in 1930,[50]

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[49] The fact that a party is represented by counsel often serves as adequate proof that the litigant has made an informed choice of remedies. See Harjo v. Camp, 169 F.2d 545, 547 (10th Cir. 1948); Cowan v. Inland Waterways Corp., 121 F.Supp. 683, 687 (E.D. Ill. 1954).

[50] The 1913 settlement was determined to be improper because it had not been formally approved by the Governor. See infra Point IV(B)(2).

providing a principal amount ($247,609.33) virtually identical to that sought in the 1906 Memorial. See A2080; see also supra pp.37-41 (discussing 1906 Memorial in greater detail).

The record establishes that the Nation made this election voluntarily, with full knowledge that it was foregoing an alternative, but inconsistent, theory of recovery. Its attorneys advised the Land Commissioners at a 1911 hearing:

> [W]e prefer to come to the State of New York and set forth our equities as against the state . . . yet, if the State of New York should refuse us any equitable adjustment we contend that we have the right to invoke the Federal Government to pursue the State of New York in the Federal Courts and compel the State of New York to account for every dollar, with one hundred years interest, that they made by virtue of this transaction.

A2182-83 (emphasis added); see also S-642, pp.17-18; S-624, pp.17-18; T3560-61, 4758. The Nation's attorneys further explained that they had already submitted a brief based on the alternative theory that the Treaties were void because they did not have the consent of the United States. They stated that their brief demonstrated:

> our right to recover in the Federal Courts, on the ground that, under the Federal treaty, the act of the State of New York, in taking this land, constituted a wrong on the Indians, because . . . nobody could purchase the lands of the Indians except the United States, or with their consent.

A2182; S-642, pp.16-17; T3559.

Accordingly, the Nation was well aware at the time that it was pursuing a settlement from the State that it—or the United States, on its behalf—could have initiated judicial actions seeking to void the 1795 and 1807 Treaties. See also infra at Point V(H)(1). Instead, the Nation elected to pursue remedies that presupposed the validity of these transactions and asserted its intent to pursue a claim of invalidity only "if the State of New York should refuse" to cooperate. S-642, p.17. The Nation's election of this remedy resulted in a settlement with the State.[51] Having made this choice, the Nation should not be permitted to advance an inconsistent theory of recovery here.

2. The Tribe Elected Its Remedy By Entering Into A Settlement In 1975 Of Its Lawsuit Before The ICC Against The United States.

The Tribe likewise elected, in a settlement with the United States, to accept additional monetary compensation on a theory that necessarily assumed the validity of the 1795 and 1807 Treaties. Because that theory of recovery is

[51] Although the Tribe did not participate in the eventual settlement with the State of the Nation's 1906 Memorial, it filed its own Memorial in December 1910 seeking its share of any settlement between the Nation and the State. A5642-43; G-375, pp.330-34. In that Memorial, the Tribe expressly relied on the validity of the Treaties, discussing the payment of the annuities "arising and growing out of the said treaties between the State of New York and the Cayuga Nation of Indians . . . ." A5645. The Tribe maintained that position in its subsequent dealings with the United States in the ICC. See infra. Point IV(B)(2).

inconsistent with the Tribe's complaint-in-intervention in the present lawsuit, the Tribe's instant lawsuit is also barred by the prior election.

As discussed supra, in 1951, the Tribe filed suit against the United States under the ICCA. S-658. Although asserted against a different party,[52] the Tribe's argument closely resembled that asserted by the Nation during its earlier efforts to secure additional compensation from New York. The Tribe's petition charged that the federal government had breached its fiduciary duty by failing to secure a fair price for the 1795 and 1807 conveyances to New York. S-658, ¶¶ 11, 16, 20; see also Cayuga Nation of Indians v. United States, 41 Ind. Cl. Comm. 308, 313 (1978) ("Cayuga ICC III"), A986, 991. It alleged that the United States, as trustee for the historic Cayugas, allowed the Tribe's ancestors to be "unconscionably deprived of their land and property for a grossly inadequate consideration." S-658, ¶¶ 11, 16, 20. Thus the Tribe's ICC lawsuit was premised on the continuing validity of the Treaties.

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[52] The fact that the Tribe's election was made in a proceeding where the only defendant was the United States does not prevent different defendants from raising the doctrine of election of remedies as a defense. A plaintiff who has successfully elected a remedy against one defendant for a specific transaction or injury may not then seek an inconsistent theory of recovery against a different defendant based on the same transaction. See In re J.A.M.A. Realty Corp., 92 F.2d 3, 8 (2d Cir. 1937); see also 28A C.J.S. Election of Remedies, § 12 ("The mere fact that remedies are pursued against different persons does not establish their consistency so as to preclude application of the doctrine of election of remedies"); Guy James Constr., 644 F.2d at 529.

This ICC claim ultimately resulted in settlement negotiations between the Tribe and the United States, which took place during the early 1970s. Those negotiations, and the settlement which resulted from them, confirm the close relationship between the theories advanced by the Nation in its 1906 Memorial and the Tribe's claims before the ICC. During these discussions, the Tribe demanded "[its] share of the $254,000 agreed to by New York in 1913 which would have been approximately $81,000." A992; Cayuga ICC III at 314. In 1975, the Tribe's attorneys accepted $70,000 as a complete settlement and agreed to "waive any and all claims arising out of the transactions giving rise to this claim." A1969-70, 2288-89; see also A988; Cayuga ICC III at 310.

Just like the Nation, the Tribe successfully pursued in this earlier proceeding a remedial course that directly contradicts its theory of recovery in the instant lawsuit. It is indisputable, moreover, that the Tribe did so in full knowledge of its option to pursue a claim that the Treaties violated the NIA and related federal common law principles; indeed, the Tribe settled the ICC litigation a year after the Supreme Court reaffirmed that such a suit could be brought in federal court. See Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). The Tribe's attempts to claim that the 1795 and 1807 Treaties are void, less than a decade after it accepted additional compensation and thereby affirmed their continuing validity,

is precisely the conduct that the doctrine of election of remedies operates to prohibit.

3. The District Court Erroneously Concluded That The Doctrine Of Election Of Remedies Was Inapplicable.

As seen above, both the Nation and the Tribe knowingly elected, in earlier proceedings, to pursue theories of recovery that are fundamentally inconsistent with the claims that they assert here. The court, however, rejected the Defendants' election of remedies defense on the ground that "[n]either plaintiff was afforded a true choice of remedies, as the receipt of additional consideration is no remedy at all for an invalid conveyance of land." Cayuga II, SPA557. The court also emphasized that the doctrine of election of remedies is not "generally accepted in federal practice." Id. Neither of the propositions offers a sound basis for rejecting the application of the election of remedies doctrine here.

First, the court stated that the Tribal Plaintiffs could not have logically "elected" the remedy of further compensation because "any conveyance of land in contravention of the dictates of the Nonintercourse Act is invalid, as if it did not occur at all." Id. This comment presumably refers to a distinction at common law between those contracts that are voidable (such as contracts induced by fraud) and those that are void (such as contracts which are illegal or contrary to public policy). While a party can affirmatively "ratify" a voidable contract, he or she does not

have the power to affirm a contract that is void ab initio. See generally Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 31 (2d Cir. 2001). According to the court, "any conveyance of land in contravention of the dictates of the [NIA] is invalid, as if it did not occur at all." Cayuga II, SPA557. Thus, the court reasoned that Plaintiffs cannot "place an imprimatur of validity on the conveyances" through their earlier conduct, and, accordingly, the Plaintiffs had no real choice (or authority) to "elect" an alternative remedy through its conduct in prior proceedings. Id.

This reasoning misapprehends the scope of, and the purposes served by, the election of remedies doctrine. The doctrine is not founded upon the premise that a plaintiff has explicitly "ratified" a transaction by earlier actions, but rather that the plaintiff is foreclosed by basic principles of equity from taking inherently contradictory positions with respect to that transaction in different proceedings. See, e.g., Alexander, 415 U.S. at 49 (doctrine "refers to situations where an individual pursues remedies that are legally or factually inconsistent"); Equitable Trust Co., 10 F.2d at 915-16 ("[I]f the second remedy sought to be invoked is based upon a theory which is irreconcilable with that upon which the first proceeding is founded, the party would be barred by a binding election of remedy."). In other words, whether the election of remedies doctrine applies in

the instant case does not turn (as the court appeared to assume) on whether the 1795 and 1807 Treaties are actually invalid; rather, it turns on whether the Plaintiffs invoked a remedy in prior proceedings that was "inconsistent with and repugnant to" its current claim that the conveyances are invalid.

It is not surprising, then, that courts have applied the election of remedies doctrine to bar not only claims involving voidable contracts, but also suits—like those at issue here—alleging that the contract or transaction at issue was void ab initio. For example, in Berger v. Mercantile Trust Co., 352 S.W.2d 644, 650 (Mo. 1962), the Supreme Court of Missouri expressly rejected a plaintiff's argument that "the defense of election of remedies is not applicable because the [contractual provision at issue] was void and hence could not be ratified." "One cannot rely on a contract as valid and seek to recover because of its breach, which constitutes an affirmance of the contract," the court explained, "and then have a recovery on the ground that the contract is void, which constitutes a disaffirmance of the same contract." Berger, 352 S.W.2d at 650 (quoting Brown v. Mfrs. Trust Co., 16 N.E.2d 350, 352 (N.Y. 1938)). Courts in New York and New Jersey have reached the same conclusions, applying the doctrine to bar claims that contracts are void on grounds of illegality or as contrary to public policy. See Lizak v. Rottenbucher, 53 A.2d 362, 366 (N.J. Chanc. 1947) (barring claim that contract is "invalid and

contrary to public policy" on election of remedies grounds); Brown, 16 N.E.2d at 352. It is plain that the Berger court, when it referred to the purported "affirmance" by the plaintiff of the contract, was not suggesting that the plaintiff could literally "ratify" a void contract, but rather was referring to the position taken towards that contract's validity in earlier proceedings. This is not a distinction that was recognized by the court; accordingly, the court's conclusion that the alleged invalidity of the transactions at issue barred an election of remedies defense was erroneous.

The court's other objection to Defendants' election of remedies defense, that the doctrine is not "generally accepted in federal practice," Cayuga II, SPA557, is misguided. The Supreme Court itself has commented on the defense, Alexander, 415 U.S. at 49, and federal courts of appeals have applied the doctrine recently in federal question cases. See, e.g., Artis v. Norfolk & Western Ry., 204 F.3d 141, 143 (4th Cir. 2000).[53] To be sure, the doctrine is not frequently applied in cases arising under federal law, but this phenomenon is explained by a factor having nothing to do with federal courts' disposition toward the doctrine: namely, that

[53] Perhaps the court was referring to the application of the doctrine as a bar to pleading alternative theories in the same complaint, which has indeed fallen into desuetude; however, as discussed supra at n. 48, modern trends towards liberal pleading rules have not foreclosed the doctrine's applicability in cases where, as here, a plaintiff pursues inconsistent remedies in successive proceedings.

election of remedies is at its essence a common law defense and thus is unlikely to be applied except in those relatively few substantive areas of federal law still governed, in the era of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), by common law principles. This case, of course, involves one of those few substantive areas; it was error, then, for the court to offer this rationale to reject the possible application of a common law defense to a defendant confronted with a federal common law claim.[54]

In sum, the bases for the court's holding that Defendants could not assert an election of remedies defense are unsupported by law, logic, or equity. Indeed, this is a case where the application of the defense is particularly appropriate. As noted above, certain modern courts have emphasized, in considering whether to apply the doctrine, whether the plaintiffs' earlier election causes prejudice to the defendants. This is a case where such prejudice is manifest. In the course of the 1906 Memorial, the New York Cayugas reiterated that they were not seeking to disturb any titles or return of any of the subject land, and that they would pursue a claim based on the invalidity of the Treaties only if the State did not reach a settlement.

[54] While Plaintiffs assert a claim both under the federal common law and under the NIA, their private right of action under the NIA—to the extent it exists at all, see infra Point VIII—is wholly derivative of their claim under common law. See Oneida VI, 470 U.S. at 678 (NIA simply "put[] into statutory form" existing common law prohibitions against extinguishment of Indian title without federal consent).

See A1960, 2181-83; S-642, pp.17-18; vG (2000), pp.17-18; T3560-61, 4758. After the settlement, defendant landowners continued to live upon, farm and improve the subject land; to establish and grow businesses; and to pay taxes for schools, the construction of roads, and other infrastructure improvements.

The State, for its part, continued to pay additional compensation based upon the Treaties and the settlement of the 1906 Memorial in good faith. The governmental defendants and utility companies spent millions of dollars building and improving infrastructure within the disputed parcel, including schools, offices, roads, bridges and other transportation networks. All of the defendants had sound reason to rely on the Treaties, in light of the positions taken by the Nation and the Tribe that presupposed their validity. Far from being a case where the doctrine is inapplicable, this litigation is one where equitable principles militate strongly in favor of its application; and, accordingly, the court should have applied the doctrine here, and entered summary judgment on behalf of Defendants.

C. The United States Lacks Standing, As Trustee, To Maintain A Lawsuit Where The Tribal Plaintiffs Are Foreclosed From Suing By Virtue Of Their Conduct Or Status.

Finally, Plaintiffs are not relieved of the election of remedies doctrine because of the presence of the United States. The United States has no independent basis to maintain the action where the Tribal Plaintiffs' lawsuit would

be dismissed on this basis. Cf. Thompson v. County of Franklin, 15 F.3d 245, 252 (2d Cir. 1994) ("the invalidation of land treaties under the [NIA] involves the vindication of rights that are exclusively tribal in nature").

Moreover, it would be inequitable to allow the lawsuit to be maintained by the United States despite the Tribal Plaintiffs' election of remedies. The United States is substantially responsible for the prejudice to Defendants. Throughout the nineteenth and twentieth centuries, the United States defended New York's conduct at the Treaties. See supra pp. 32-42. In addition, for the past 200 years, the United States has steadfastly recognized the State's and the Counties' exercise of jurisdiction over the subject lands. The United States' conduct should prevent it from pursuing this lawsuit where the claims of the Tribal Plaintiffs are barred. See Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 60-61 (1984) (defense of estoppel may apply in specific situations where the government's need to enforce the law is outweighed by the countervailing interest of citizens in some minimum standard of "decency, honor, and reliability" in their dealings with their Government); Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 95-96 (1990) (defense of equitable tolling applies to United States in suits brought by former employees challenging job discrimination).

POINT V

THE DISTRICT COURT'S REJECTION OF LACHES WAS ERROR

The preceding Point established that the Tribal Plaintiffs' contradictory positions in earlier proceedings should have barred their claim. Plaintiffs' claim should also be barred for a related, yet distinct reason: the Plaintiffs' unjustifiable delay in bringing the instant action and the resulting change in Defendants' circumstances.

In the ordinary case this matter would never be before the Court. The two disputed transfers of land took place 185 years before Plaintiffs brought suit. During that time, countless innocent good faith purchasers have transformed the parcels from wilderness into cities, towns and neighborhoods. As a result, the condition and value of the parcels are profoundly and irreversibly changed. The defense of laches applies in these circumstances and it was error for the court to deny that defense.

The equitable delay-based defense of laches is available as a federal common law defense and, in contrast to the statute of limitations, its application to Indian tribes does not violate federal policy. See, e.g., Ewert v. Bluejacket, 259 U.S. 129, 137-38 (1922) (applying laches analysis to Indian land claim); Felix v.

Patrick, 145 U.S. 317, 329-35 (1892) (holding Indian land claim barred by laches). Despite the Supreme Court's approval of laches in Ewert and Felix, the court rejected the defense here. The court held that, as a matter of law, laches could not bar the Tribal Plaintiffs' claims because they could be considered "timely" under an analogous federal statute of limitations governing claims by the United States on behalf of Indians. Cayuga VI, SPA529. As shown below, the court's holding is error because "timeliness" under a statute of limitations is not dispositive of a laches defense. Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) ("statutes of limitation are not controlling measures of equitable relief").

A. The Federal Common Law Defense Of Laches.

A claim will be held barred by laches when: (1) plaintiff knew of the defendant's claimed misconduct; (2) plaintiff inexcusably delayed in taking action; and (3) defendant was prejudiced by the delay. See, e.g., Ikelionwu v. United States, 150 F.3d 233, 237 (2d Cir. 1998); Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423 (2d Cir. 1992); Southside Fair Hous. Comm. v. City of New York, 928 F.2d 1336, 1354 (2d Cir. 1991). Laches is particularly applicable where, as here, a plaintiff seeks to recover land, because the value in quieting title and securing one's right to possess property outweighs the

former owner's right to regain possession after a lengthy delay. See Robins Island Pres. Fund v. Southold Dev. Corp., 755 F.Supp. 1185, 1193-95 (E.D.N.Y. 1991).

In Robins Island, this Court held that a claim to property that had not been prosecuted for more than 200 years was barred by laches. The plaintiff, a conservation group, filed the action seeking a declaration that it was the owner of three-fourths of Robins Island, a 445-acre island located in the Peconic Bay in Suffolk County, New York. The conservation group alleged that title to the land had been conveyed to its purported predecessor-in-interest more than 200 years before in alleged violation of a Treaty between the United States and Great Britain. Id. at 1187. Plaintiff also sought possession of the subject land and fair rental value damages during the period of defendant's use and occupancy. See id. at 1186, 1188.

On appeal, this Court found that "it requires no strenuous debate to conclude that two centuries is too long," 959 F.2d at 424, and determined that defendants were prejudiced by the delay because property had been purchased and titles had been recorded and transferred over the course of two centuries in reliance on the validity of such title. Id. This Court observed that "[t]here must arrive a point at which title to land is settled." Id. In addition, the Robins Island defendants were prejudiced because the delay made it "impossible . . . to obtain witnesses or

marshal evidence to support its contentions that [plaintiff's predecessor] relinquished his claim." Id. This Court's reasoning in Robins Island should apply to this case as well; Plaintiffs' 185-year-old claim should be barred by laches.

B. The District Court Committed Reversible Error When It Held That If A Claim Was Timely For Purposes Of An Analogous Statute Of Limitations It "Is Therefore Not Barred By Laches."

Below, the Tribal Plaintiffs claimed that they should be granted partial summary judgment on laches because "this case was timely filed within the express statutory and regulatory framework established by Congress in 1982 to govern Indian land claims." Cayuga VI, SPA528. The statutory and regulatory framework relied upon by the Tribal Plaintiffs was 28 U.S.C. § 2415, a federal statute of limitations that governs claims brought by the United States on behalf of Indians. Id. The court agreed, holding that, since if the United States had brought the Tribal Plaintiffs' claim it would have been "timely" filed, laches could not bar the claim as a matter of law. Id. The court wrote:

> This court holds that the second circuit's decision in [Oneida IV] stands for the proposition that claims brought by Indian tribes in general, including the plaintiffs herein, should be held by courts to be timely, and therefore not barred by laches, if, at the very least, such a suit would have been timely if the same had been brought by the United States.

Cayuga IV, SPA529 (emphasis added) (quotations omitted). As shown below, it was error for the court to conclude that if a claim is "timely" under an analogous statute of limitations, it is "therefore not barred by laches." It was also error for the court to read this Court's decision in Oneida IV to compel such a result.

C. "Timeliness" Under An Analogous Statute Of Limitations Is Not Dispositive Of Laches.

Defenses based on statutes of limitations and laches present distinct inquiries. While a court analyzing a statute of limitations defense considers the passage of time, a court determining whether laches applies considers the prejudicial effect of plaintiff's delay as it relates to defendant's changed circumstances. See Stone v. Williams, 873 F.2d 620, 623 (2d Cir. 1989) ("[I]n contrast to a statute of limitations . . . laches asks whether the plaintiff in asserting her rights was guilty of unreasonable delay that prejudiced the defendants. . . . The answers to these questions are to be drawn from the equitable circumstances peculiar to each case") (citations omitted), vacated for other reasons, 891 F.2d 401 (2d Cir. 1991). Because of these distinct requirements, many courts have held that claims may be barred by laches—even if brought within an applicable limitations period—if plaintiff's delay in bringing suit was "unreasonable" under the circumstances. See, e.g., Holmberg, 327 U.S. at 396; Alsop v. Riker, 155 U.S. 448, 460-61 (1894) ("equity, in the exercise of its inherent power to do justice

between parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations."); Martin v. Consultants & Admrs., Inc., 966 F.2d 1078, 1100 (7th Cir. 1992) (laches may apply in cases governed by a statute of limitations) (Posner, J., concurring).[55]

The ability of laches to defeat a claim brought within an applicable statute of limitations has been recognized in numerous contexts. See, e.g., Danjaq LLC v. Sony Corp., 263 F.3d 942, 952 (9th Cir. 2001) (copyright); United States v. Rodriquez-Aguirre, 264 F.3d 1195, 1208 (10th Cir. 2001) (civil forfeiture); Hutchinson v. Spanierman, 190 F.3d 815, 823 (7th Cir. 1999) (claims to property based on intestate succession); A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1030 (Fed. Cir. 1992) (patent infringement); Trustees of the Carpenters & Millrights Health Benefit Trust Fund v. Lillard & Clark Constr. Co., Inc., 780 F.Supp. 738, 742 (D. Colo. 1990) (ERISA); James v. Nashua Sch. Dist., 720 F.Supp. 1053, 1061 (D.N.H. 1989) (claims pursuant to the federal Education of the Handicapped Act); Cane Tennessee, Inc. v. United States, 44 Fed. Cl. 785,

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[55] See also Armstrong v. Maple Leaf Apartments, Ltd., 622 F.2d 466, 472 (10th Cir. 1979) ("The court in the proper case applies laches although the period of time may be much shorter than provided in a statute."); Cornetta v. United States, 851 F.2d 1372, 1378 (Fed. Cir. 1988) ("[laches] must be applied apart from and irrespective of the statute of limitations").

795 (1999) (constitutional takings). Moreover, as this Court has recognized, the fact that a statute of limitations has not run simply means that there is no presumption of laches, and that the burden of proving laches remains with the defendant. See Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 192 (2d Cir. 1996).

In light of the foregoing, it was error for the court to dismiss summarily the Defendants' laches arguments merely because the Cayugas' claims would have been timely filed if brought by the United States under an analogous statute of limitations.

D. Contrary to the District Court's Holding, The Second Circuit's Decision In Oneida IV Should Not Be Read To Foreclose The Defense Of Laches In Ancient Indian Land Claims.

The court stated that the laches defense in this case was barred by the Court's decision in Oneida Indian Nation v. New York, 691 F.2d 1070, 1084 (2d Cir. 1982) ("Oneida IV"). However, as a subsequent panel of this Court has remarked, Oneida IV contains "no discussion of a defense of laches," but instead merely listed it in its conclusion rejecting various defenses. Oneida VIII, 860 F.2d at 1149. Indeed, this Court in Oneida IV assumed, arguendo, that federal "delay-based defenses" applied to the claim, but concluded that the claim was "timely." The Court's entire discussion reads as follows:

There remains the question whether a delay-based defense founded on federal law may be asserted. See Mohegan Tribe, supra, 638 F.2d at 615 n.3 (alluding to

> but not reaching existence of a defense based on 'federal common law of laches'). Assuming some federal time bar might be applicable, we can turn for guidance to 28 U.S.C § 2415, which provides a federal statute of limitations for suits brought by the United States on behalf of tribes. Under § 2415(a) & (b), an action for money damages based on contract or tort that accrued prior to . . . July 18, 1966, is timely if filed prior to December 31, 1982, and under § 2415(c) there is no time limit for an action to 'establish the title to, or right of possession of, real or personal property.' Without having to decide whether § 2415 applies to restrict suits by tribes, we believe for reasons elaborated above [sic] that at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States. Accordingly, since the instant action accrued prior to 1966 and was filed in 1979, we hold that it is timely.

691 F.2d at 1084 (emphasis added). While it is unclear what (if anything) the Oneida IV Court concluded with respect to laches, it is clear that the Court assumed—without deciding—that laches was available as a matter of law to Indian land claim defendants. It appears that the Court went on to conclude that the Oneidas' claim satisfied the statute of limitations found in 28 U.S.C. § 2415.

Contrary to the court's ruling granting partial summary judgment, Oneida IV did not hold that claims by Indians "should be held by courts to be timely, and therefore not barred by laches, if, at the very least, such a suit would have been timely if the same had been brought by the United States." Cayuga IV, SPA529 (emphasis added). Given the depth and breadth of the case law cited above

illustrating the need to consider unreasonable delay under laches apart from timeliness under a statute of limitations, the cited paragraph from Oneida IV simply cannot be read as establishing a Second Circuit rule on laches. One cannot assume—as did the district court—that this Court chose to ignore the Supreme Court's admonition that "statutes of limitation are not controlling measures of equitable relief." Holmberg, 327 U.S. at 396. Tellingly, a subsequent panel of this Court remarked that Oneida IV "contain[s] no discussion of the defense of laches" and referred to the Oneida IV Court's laches holding as merely "law of the case," rather than circuit precedent. Oneida VIII, 860 F.2d 1145 at 1149 & n.1. The court committed error when it concluded that this Court held in Oneida IV that if a claim is brought within an applicable statute of limitation, it cannot be barred by laches as a matter of law.

E. Laches Is Not Foreclosed By The Supreme Court's Decision In Oneida VI.

In Oneida VI, the Supreme Court held that a state statute of limitations would not be used to limit claims of Indian tribes to enforce federal common law rights in land. 470 U.S. at 240-44. Although the majority raised questions about the validity of a laches defense, the Court concluded that it was not properly preserved for appeal and therefore waived. Id. at 244-45 & n.16. Four dissenting Justices disagreed with the majority's conclusion that the laches defense was

waived and, in a scholarly dissent by Justice Stevens, offered a lengthy analysis of laches, concluding that it should provide a complete defense to a similar NIA claim. Id. at 255-56 (Stevens, J., dissenting). As a result, the court committed error when it relied on the Supreme Court's decision in Oneida VI to hold that even if the Cayugas' claim were timely filed for purposes of the statute of limitation, laches could not be employed as a matter of law.

1. Justice Stevens' Dissent In Oneida VI Provides A Compelling Argument Why Laches Should Be A Complete Defense To The Cayugas' Claims.

Justice Stevens' dissent on behalf of four Justices in Oneida VI argued that laches should be applied in circumstances that closely parallel those in the instant case. He observed that the Supreme Court has held that federal provisions that protect unconsented alienations of tribal land must yield to the legitimate and reasonable expectations of the subsequent occupiers of the land when claims are brought after an extended delay that prejudices the rights of the current occupant of land. Oneida VI, 470 U.S. at 265 (Stevens, J., dissenting) (citing Ewert; Wetzel v. Minnesota Railway Transfer Co., 169 U.S. 237 (1898); and Felix).

In Felix, the case most factually similar to the Cayugas' suit, plaintiffs tried to set aside a conveyance made by their ancestor, an Indian, in apparent violation of federal statutory restrictions. Felix, 145 U.S. at 334. Relying on laches, the

Supreme Court held that plaintiffs' 28-year delay was unreasonable. In a passage that eerily anticipated the facts of this case, the Court reasoned

> That which was wild land 30 years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by person who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases. The bill charges all these with notice of the defect in Patrick's title, and prays that the conveyances to them be declared null and void, and that plaintiffs be admitted into possession of their lands, and that Patrick account for rents, profits, and issues, so far as he has received them. If the views put forward in their brief be correct, that these instruments were of no greater effect than if they had been forgeries, it is difficult to see how these transfers can be supported, and it needs no argument to show that the consequences of setting them aside would be disastrous . . . The decree prayed for in this case, if granted, would . . . result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation.

Id. at 334-35. Based on this reasoning, the Court affirmed the dismissal of the claim on laches. Id. at 335.

The next time the Supreme Court addressed the application of laches to Indian tribes was in Ewert. There, the Court found that the defendant could not satisfy the elements of the defense, but did not suggest that the defense was unavailable. Ewert, 259 U.S. at 138. "A close examination of the Ewert case . . . indicates that the Court applied the doctrine of laches, but rejected relief for the

defendant in the circumstances of the case." Oneida, 470 U.S. at 263 (Stevens, J., dissenting) (emphasis in original).[56]

This Court's decision rejecting laches in Ivani Contracting Corp. v. City of New York, 103 F.3d 257, 260-62 (2d Cir. 1997), is inapposite for several reasons. First, plaintiff's suit was brought within an applicable 3-year limitations period, id. at 258-59, not 185 years after a claim for which there is no statute of limitations. Second, the Ivani Court expressly relied on separation of powers concerns that arise where Congress either provides an express statute of limitations or decides to borrow a state statute of limitations, id. at 260-61, concerns not applicable here, where no federal or state statute of limitations applies to the Plaintiffs' claims. Finally, the Ivani Court distinguished a case analogous to the present one, Dickey v. Alcoa S.S. Co., 641 F.2d 81 (2d Cir. 1981), on the grounds that the application of laches in that case was a result of unique historical considerations. Ivani notes

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[56] The Court of Appeals for the Tenth Circuit has also applied the laches defense to a case involving an Indian land claim. Armstrong, 622 F.2d 466. There, the court affirmed the district court's ruling that laches defeated an Indian's action to quiet title, cancel deeds and eject landowners where the Indian alleged that conveyances were void ab initio because they were not approved according to federal statute. Id. The court held that "delay of over eight years with knowledge of the facts and law and with reliance by defendants on the deed, the creation of substantial improvements, and the detriment by reason of the delay, are more than sufficient to require the application of the doctrine [of laches]." Id. at 472. Again, the court made no mention of a federal policy against the application of the laches defense to Indian land claims.

that Dickey was decided before a statute of limitations was imposed by Congress on certain admiralty claims, which were historically subject to a laches defense. Ivani, 103 F.3d at 260-61. Like Dickey, there is no statute of limitations for the Cayugas' claims, see Oneida VI, 470 U.S. at 240, and, to the extent that some courts consider 28 U.S.C. § 2415 to impose a statute of limitation, that statute was first enacted in 1966, more than a century after the Cayugas' claims were barred by laches.[57] Also like Dickey, the instant claims were historically subject to a laches defense. As a result, Ivani is not relevant to this case.

F. Laches Applies To Plaintiffs' Equitable Relief And Should Also Apply To That Portion Of Plaintiffs' Complaints Seeking Damages.

It is well-established that laches is an equitable remedy that applies to requests for equitable relief. Ivani, 103 F.3d at 259. Plaintiffs' complaints sought equitable relief in the form of a declaration of Plaintiffs' current ownership of and right to possess lands in the New York. A207, 227, 350, 357, 2596-97; see also Green v. Mansour, 474 U.S. 64, 72 (1985); Samuels v. Mackell, 401 U.S. 66, 70 (1971); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297 (1943). Plaintiffs also sought an accounting of various monies received by defendants from the subject land, A228, 358, and equitable relief in the form of ejectment of the

[57] Indeed, Justice Stevens' dissent in Oneida noted that to the extent that a court reads 28 U.S.C. § 2415 to revive extinguished claims, an inquiry of the statute's constitutionality is required. Oneida VI, 470 U.S. at 272, n.29.

current landowners. See Cayuga X, SPA473-74. Thus, laches should apply to these claims.

Beyond their request for equitable relief, Plaintiffs seek damages including mesne profits. A228, 358, 2597. The fact that Plaintiffs assert mixed equitable and legal claims should not prevent the application of laches. By seeking mesne profits, Plaintiffs seek virtually the same relief that was sought in Robins Island, where this Court did not hesitate to apply a laches defense. In addition, there is no good reason not to apply laches with respect to Plaintiffs' request for mesne profits since, as Justice Stevens' opinion in Oneida VI illustrates, the same elements, unreasonable delay and prejudice, apply in that context as well. Oneida VI, 470 U.S. at 261-62; see also Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 822 (7th Cir. 1999) ("We have also recognized in other contexts that although laches is an equitable doctrine, courts increasingly apply it in cases at law in which plaintiffs seek damages").

G. Laches Applies To The United States.

The fact that the United States intervened in this suit does not prevent the application of laches to either the United States or the Tribal Plaintiffs. The Supreme Court has applied laches and the related doctrines of estoppel and equitable tolling in suits brought by the United States or its agencies. See

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 373 (1977) (federal courts have the authority to limit or deny back pay relief in Title VII actions based upon EEOC delay); Heckler, 467 U.S. at 60-61; Irwin, 498 U.S. at 95-96 (defense of equitable tolling applies to United States in suits brought by former employees challenging job discrimination).

H. The Present Record Contains Overwhelming Evidence That Both The United States And The Cayugas Are Guilty Of Laches.

1. Plaintiffs' Delay Is "Unreasonable" Because They Have Long Known Of The State's Alleged Misconduct And Have Inexcusably Delayed In Taking Action.

As discussed above, see, e.g. Point IV(B), there is no doubt that the United States and the Cayugas knew of the State's allegedly unlawful conduct for a very long time. Nothing barred the United States from suing New York for a violation of the NIA many years earlier. Both the Constitution and subsequently-enacted federal law plainly authorize the federal courts to entertain lawsuits by the United States against a State. See U.S. Const. art. III, § 2, cl. 1 ("The [federal] judicial Power shall extend . . . to Controversies to which the United States shall be a Party . . . ."); 28 U.S.C. § 1251(b)(2), 1345. The courts have also long recognized the right of the United States to sue in federal court on behalf of a tribe to enforce or protect Indian tribal rights. See, e.g., Heckman v. United States, 224 U.S. 413, 444

(1911); Santa Fe Pac. R.R., 314 U.S. at 343; United States v. Boylan, 265 F. 165 (2d Cir. 1920).

The Cayugas were capable of pressing their federal claims in the federal courts at least as early as 1875. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (creating federal question jurisdiction); Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369-70 (1968) (citing cases); Deere, 32 F.2d at 551 (citing cases).[58]

Contrary to their claim below, the Tribal Plaintiffs could have sued based upon a violation of the NIA prior to the Supreme Court's 1974 decision in Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) ("Oneida II"). See Cayuga XVI, SPA230-32. Although Oneida II was the first Supreme Court decision to hold that the federal courts could entertain a possessory claim arising under the NIA, the federal courts had long entertained tribal claims based upon federal law. Oneida II merely confirmed a long line of Supreme Court decisions holding that based upon the primacy of federal law, tribes alleging a deprivation of Indian land could obtain relief in federal court. Oneida II, 414 U.S. at 667-78. See also United States v. Forness, 125 F.2d 928 (2d Cir. 1942) (holding in suit by United States to set aside certain leases granted by Senecas, that Indian rights are

[58] 28 U.S.C. § 1362, enacted in 1966, explicitly provided federal court jurisdiction with no jurisdictional amount for civil actions brought by Indian tribes that arise under the Constitution, laws or treaties of the United States.

federal); see also Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885, 893 (2d Cir.), judg. vac. on grounds of mootness sub nom. McMorran v. Tuscarora Nation of Indians, 362 U.S. 608 (1960) ("Tuscarora Nation") (holding that New York's eminent domain authority over tribal land was subject to federal law); compare Deere, 32 F.2d 550 (dismissing a claim on behalf of the St. Regis Tribe under the NIA for failure to plead properly that defendants' construction of the NIA denied them a federal common law right to possession of the contested lands.).

Thus, the situation here is distinguishable from the circumstances at issue in Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 714 (2d Cir. 1993), rev'd on other grounds sub nom. New York Conference of Blue Cross v. Travelers Ins. Co., 514 U.S. 645 (1995), where this Court concluded that prior case law excused plaintiffs' delay because it had made plaintiffs' success virtually impossible. In this case, prior decisions of the Supreme Court and this Court did not make Plaintiffs success virtually impossible and, in fact, decisions had acknowledged the ability of the plaintiffs to sue in federal court for alleged violations of tribes' possessory interests.[59]

[59] The fact that Plaintiffs' success was not assured does not excuse their delay. "[S]peculation about what the law may or may not be cannot, without more, excuse [a party's] inaction." First Nat'l Bank v. Roeland Park State Bank &

Plaintiffs also were not foreclosed from attempting to enforce their federal claims in the New York state courts. Due to their status as dependent domestic nations and wards of the state, Indian tribes were generally required to obtain legislative authorization before suing in the New York state courts to seek to obtain former lands. See Oneida Indian Nation v. Burr, 522 N.Y.S.2d 742, 743-44 (3rd Dep't 1987). However, once a tribe was legislatively authorized to sue, the New York courts entertained tribal claims based upon alleged violations of federal law. See Oneida II, 414 U.S. at 672 n.8; Seneca Nation of Indians v. Christie, 27 N.E. 275 (N.Y. 1891) (action in ejectment brought pursuant to Ch. 150 of the New York Laws of 1845), writ of error dismissed, 162 U.S. 283 (1896).

2. Defendants Have Suffered Substantial Prejudice As A Result Of Plaintiffs' Delay.

Defendants have suffered substantial prejudice by Plaintiffs' delay. Plaintiffs' lawsuit has cast a shadow upon the private landowners' title to real estate in the subject land in Cayuga and Seneca counties. Private Landowners face a continuing claim for ejectment and damages despite the fact that they have

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Trust Co., 357 F.Supp. 708, 712 (D. Kan. 1973). If Plaintiffs were unsuccessful in the lower federal courts, they could have sought review in the Supreme Court. See Marrero Morales v. Bull S.S. Co., 279 F.2d 299, 301 (1st Cir. 1960) (refusing to excuse plaintiff's delay based on harmful precedent because "the possibility of the appellant taking an appeal and obtaining a reversal of the [harmful] decision was available to him").

owned and occupied the subject land in good faith for 200 years, invested in the lands, improved the property, built businesses and communities, paid taxes and conveyed their homes and farms and businesses to their children and others, all of whom believed in good faith that title to the lands was valid. The defendant governmental entities and utility companies spent millions of dollars building and improving the infrastructure, including schools, offices, roads, bridges and other transportation networks.

In addition, crucial documents explaining what transpired at critical times during the past two centuries have been lost due to the passage of time. See, e.g., supra at n.9 & n.10. The persons who were witnesses to what transpired during the eighteenth, nineteenth and early portion of the twentieth century are long dead.

Finally, as the Robins Island Court recognized, there is a strong public interest in quieting land titles and ensuring that homes and businesses have clear title. Those interests strongly support the application of laches in this case. See also Conopco, 95 F.3d at 193 (public interest needs to be considered in laches determination).

POINT VI

THE DISTRICT COURT ERRED IN HOLDING THAT THE 1793 AND 1802 VERSIONS OF THE NIA BARRED NEW YORK FROM PURCHASING THE LANDS RESERVED TO THE CAYUGAS IN THE 1789 TREATY

A. Neither The 1793 NIA, In Effect At The Time Of The 1795 Treaty, Nor The 1802 NIA, In Effect At The Time Of The 1807 Treaty, Barred A State From Purchasing Indian Lands Within Its Borders.

The original version of the NIA enacted in 1790 expressly applied to states. However, Congress omitted "states" in the provision setting forth the scope of the statute in the subsequent versions of the statute which are applicable here. A clear expression of congressional intent is required to make states subject to federal statutes. Congress "must make its intention to do so unmistakably clear in the language of the statute." Vermont Agency of Nat'l Resources v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000) (citation and quotation omitted). The requirement of a clear and manifest expression of congressional intent is especially strong where Congress preempts the historic powers of the states by regulating in a field which the states have traditionally occupied. Will v. Michigan Dept. of Police, 491 U.S. 58, 65 (1989) (citing Rice v. Santa Fe Elev. Corp., 331 U.S. 218, 230 (1947)). In the closely-related Eleventh Amendment context, the Supreme Court has required that Congress must unequivocally express its intent to abrogate

the states' immunity. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); Atascadero State Hosp. v. Scanlan, 473 U.S. 234, 242-43 (1985) (cited in Will, 491 U.S. at 65).

New York had the sovereign power under the Articles of Confederation to extinguish title to Indian lands in the state and to acquire them from the Indians without the approval or involvement of the United States. See Oneida VIII, 860 F.2d at 1154. The versions of the NIA in effect at the time of the 1795 and 1807 Treaties contain no provision in unmistakably clear and unequivocal language that altered that balance.

In contrast, the 1790 act was, by its plain terms, applicable "to any state, whether having the right of pre-emption to such lands or not." See Act of July 22, 1790, § 4, 1 Stat. 137, 138, SPA635-36. When Congress revised the NIA in 1793, it expressly removed that language, thereby eliminating any manifestation of an intent to continue to bind the original thirteen states, which held the right of preemption. See Act of March 2, 1793, § 8, 1 Stat. 329, 330, SPA637. By deleting the prior reference to the states, Congress freed the states to purchase Indian lands within their borders without any federal participation or approval. Notably, the Supreme Court has held that, because the NIA contains no clear expression of congressional intent to impose statutory restrictions on the federal government, the

NIA is inapplicable to the United States. See Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960).

The contemporaneous record also supports non-applicability of the 1793 NIA to pre-emption states such as New York. Although United States Attorney General Bradford opined that the 1793 NIA applied to New York's purchase of Indian land in the State, Governor Jay, after serving as the first Chief Justice of the Supreme Court, did not regard the matter as settled. A1020-21, 1367-68, 1385-86. The subsequent conduct of the United States, the Cayugas and New York in implementing the payment and other provisions of the 1795 and 1807 Treaties is also consistent with their belief in the validity of the Treaties.

Accordingly, the court erred in its holding that New York's acquisition of the lands at issue was subject to the NIA See Cayuga I, SPA574-76. The court relied on this Court's decision in Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980), cert. denied, 452 U.S. 968 (1981), to support its holding. However, the court's reliance on Mohegan Tribe was misplaced, because there this Court did not address the argument that the NIA was inapplicable to Indian land purchases by states. Rather, this Court rejected different arguments concerning the NIA's scope, namely that the NIA was not intended to apply only in Indian country and that the

NIA's "surrounded by settlements" exception was not meant to apply to Indian land transactions. Mohegan Tribe, 638 F.2d at 626-28.[60]

Finally, the court erroneously concluded that the language of the revised NIA was unqualified, reflecting congressional intent to apply the NIA to the states. See Cayuga I, SPA574-75. In fact, as noted above, the Supreme Court has held that the language of the NIA is not unlimited and, as a result, does not apply to the United States. See Tuscarora, 362 U.S. at 120.

B. The NIA Only Applies To Transactions Involving Aboriginal Title.[61]

While Defendants believe the 1793 and subsequent versions of the NIA narrowed its scope, expressly excluding states with the right of pre-emption from its ambit, the 1790 version of the NIA shows that it was always intended to be limited, at most, only to lands held by Indian tribes through aboriginal title. The

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[60] Defendants respectfully submit that this Court's holding in Mohegan Tribe, although not dispositive of the issue here, was wrong and should be reconsidered by this Court. Defendants believe that the Court should have followed Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667-68 (1979), in which the Supreme Court "implicitly confirmed that the various versions of the Trade and Intercourse Acts were intended to apply only in Indian country." See Connecticut v. Mohegan Tribe, 452 U.S. 968, 971 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

[61] Although Defendants did not assert this argument below, this Court has the discretion to entertain the issue on appeal and we urge it to do so since the argument involves a question of law on a matter of significant importance. See Booking v. Gen. Star Mgmt. Co., 254 F.3d 414, 418-9 (2d Cir. 2001); Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994).

statute was never intended to apply to the purchase of state-created property rights by the state that created such rights. Because the Cayugas no longer held aboriginal title to the subject land (based upon the cession that occurred in the 1789 Treaty) the NIA has no application to the challenged land transfers.

1. The History And Intent Of The NIA Indicate That The Statute Only Applied To Land Held In Aboriginal Title.

The NIA was intended to apply to lands held in aboriginal title. The initial impetus for the Act was concern for peace along the frontier. Francis Prucha, American Indian Policy in the Formative Years 44 (1962); see also Mashpee Tribe v. Watt, 542 F.Supp. 797, 803 (D. Mass. 1982) aff'd, 707 F.2d 23 (1st Cir. 1983). The NIA accomplished that goal in two ways. It precluded sales of the Indian aboriginal title to foreign governments, whose ownership of land within the United States' borders could pose a hostile threat to the security of the United States, and it lessened the likelihood of skirmishes between tribes and settlers resulting from uncontrolled encroachment on Indian territory and private acquisition of Indian lands by private parties. See Mohegan Tribe, 638 F.2d at 621-22; Golden Hill, 39 F.3d at 56; see also United States v. S. Pac. Transp. Co., 543 F.2d 676, 698 (9th Cir. 1976).

These concerns applied most pointedly to aboriginal title, a right founded on long-standing tribal occupation and the predominant form of Indian interest in land

at the time of the original NIA. See Wilson, 442 U.S. at 665. The NIA had no application to other forms of Indian land rights created by the states in which such land was located.

As mentioned above, Section 4 of the 1790 NIA provided that the land sale restrictions applied to states "whether having the right of preemption . . . or not." SPA638-39. The "right of preemption" is a concept that relates solely to aboriginal title. See Oneida VIII, 860 F.2d at 1150; Oneida IV, 691 F.2d at 1075. The NIA's reference to the pre-emption right confirms that the NIA only applies, at most, to land held by Indians through aboriginal title.

The Supreme Court's early decisions confirm this view, assuming the power of the states to deal with tribes in the circumstances presented here. See New Jersey v. Wilson, 11 U.S. 164 (1812). In Wilson, the Court, without comment, addressed a challenge to state taxation of land acquired by private citizens from the Delaware Indian tribe in 1803. The land had been set aside for the Tribe in 1758 and its sale to private citizens in 1803 was authorized by the New Jersey legislature. Id.

There is no indication in Wilson that the procedures now allegedly imposed by the NIA were followed in connection with the sale at issue there, or that there was any federal involvement with the sale. Nevertheless, Chief Justice Marshall's

opinion contains no suggestion that the transaction was improper. The Wilson decision reflects a contemporary understanding that the NIA did not reach state created property rights, but covered only aboriginal lands.

2. Recent Case Law Suggests That The Scope Of The NIA Is Limited To Aboriginal Title.

Recent eastern Indian land claims cases recognize that the NIA was directed at aboriginal title. In Mashpee Tribe v. Watt, 542 F.Supp. 797 (D. Mass. 1982), aff'd on other grounds, 707 F.2d 23 (1st Cir. 1983), the court concluded that the NIA's "purpose would in no way be served by restricting the alienation of property by Indians from non-Indians in settled sections of the country. It seems clear, therefore, that the Non-Intercourse Acts imposed restrictions only on the alienation of land held under aboriginal title." Id.

That conclusion is consistent with relevant Second Circuit case law. In Golden Hill, this Court stated:

> In enacting the Non-Intercourse Act Congress codified the widely accepted principles that Indian nations held "aboriginal title" to land they had lived on from time immemorial and that discovering nations held "title in fee," subject to the Indians right of occupancy and use of the land. . . . The Act created a trust relationship between the federal government and American Indian tribes with respect to tribal lands covered by the Act.

39 F.3d at 56 (emphasis added). In short, the NIA required federal government participation to extinguish aboriginal title. See Oneida II, 414 U.S. at 667; Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376 n.6 (1st Cir. 1975).[62]

3. The Cayugas' Aboriginal Title Was Extinguished Before the Constitution Became Effective and the NIA Was Adopted.

The 1789 Treaty between the Cayugas and the State unequivocally extinguished all aboriginal title of the Cayugas. As a result, after the 1789 Treaty, whatever interest the Cayugas had in the subject lands was lawfully extinguished and New York held unencumbered fee title. See Oneida VIII, 860 F.2d at 1160-61, 62; see also M'Intosh, 21 U.S. (8 Wheat.) at 584-85 (once Indian title is eliminated the fee holder is left with unencumbered fee title by operation of law). The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited use right granted by the State in the Second Article of the Treaty. SPA632-33. Consequently, the NIA did not apply to the subject land because the

[62] Some courts have found that the NIA is not limited to aboriginal rights, see, e.g., Tonkawa Tribe of Oklahoma v. Richards, 75 F.3d 1039, 1045 (5th Cir. 1996), but those decisions are in error. Neither the Tonkawa opinion nor the cases it cited contain any meaningful discussion of the origins or historic purpose of the NIA. Moreover, Tonkawa did not address the purchase by a state of a lawfully created state property right and did not address the issue presented in this case.

Cayugas did not have aboriginal title to the lands in issue when they sold their interest in the lands to the State in 1789.

POINT VII

THE ELEVENTH AMENDMENT REQUIRED DISMISSAL OF THE TRIBAL PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS

The court erred in not holding the Tribal Plaintiffs' claims against the State defendants completely barred by the Eleventh Amendment, notwithstanding the United States' intervention as a plaintiff in this action. See Cayuga X, SPA464-469. Accordingly, Plaintiffs' claims against the State and the State defendants should have been dismissed based on the Eleventh Amendment.[63] The State recognizes that in Seneca Nation of Indians v. New York, 178 F.3d 95, 97 (2d Cir. 1999), this Court held that the Eleventh Amendment does not bar a tribal land claim action in federal court against the State where the United States has intervened as a plaintiff, even where, as in this action, the tribes commenced the action and the United States did not intervene until years later.[64] The State

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[63] The court dismissed Plaintiffs' claims against the State official defendants based on his conclusion that the remedy of ejectment, the only remedy that Plaintiffs sought against them, was not available against any defendant. See Cayuga X, SPA469. The State defendants raise the Eleventh Amendment defense on behalf of the State official defendants as an alternative ground for affirmance of this ruling.

[64] In denying the State's Eleventh Amendment defenses in Seneca Nation, this Court "note[d] that the State of New York retains its Eleventh Amendment immunity to the extent that the [tribal plaintiffs] raise claims or issues that are

maintains that the decision in Seneca Nation was incorrect and asserts this argument in this appeal to preserve it for any further appellate review of this Court's ruling here.

POINT VIII

THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS HAVE A PRIVATE RIGHT OF ACTION UNDER THE 1793 NIA

In one of the earliest opinions in this litigation, the court held that the Tribal Plaintiffs had a right to sue on two theories: first, a federal common law right of action for unlawful possession; and second, an implied private right of action under the NIA. Cayuga I, SPA578-85. Shortly after that decision, the Second Circuit reached the same conclusion in Oneida Indian Nation v. Oneida, 719 F.2d 525, 535 (2d Cir. 1983) ("Oneida V") holding that the Oneidas stated a claim alternatively under the NIA or under federal common law.

While the Supreme Court's decision in Oneida VI establishes that tribes can assert certain land claims under federal common law, the Court did not reach the question of whether a implied right of action existed under the NIA. 470 U.S. at 233. Defendants submit that this Court's conclusion in Oneida V that there is an

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not identical to those made by the United States." 178 F.3d at 97 (citing Arizona v. California, 460 U.S. 605, 614 (1983)).

implied private right of action under the NIA was in error. For the reasons set forth in Judge Meskill's eloquent dissent in that case, id. at 547-49, this Court's interpretation of the NIA—and particularly the 1793 NIA at issue in this case, which has an explicit remedial scheme including criminal enforcement mechanisms, SPA638—conflicts with current Supreme Court authority, which emphasizes that statutory rights of action will be implied only where the statute "displays an intent to create not just a private right but also a private remedy." Alexander v. Sandoval, 523 U.S. 275, 287 (2001).[65] This Court should revisit the issue in light of intervening Supreme Court precedent and clarify that the Tribal Plaintiffs' only basis for the instant claim is under the federal common law.

[65] The district court concluded that the test set forth in Cort v. Ash, 422 U.S. 66, 78 (1975), did not control the inquiry into whether there is a private right of action under the NIA, reasoning that the Cort standard "was devised in response to problems inherent in modern legislation." Cayuga I, SPA582. The Supreme Court has flatly rejected this methodological approach. See Sandoval, 523 U.S. at 287 ("Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago [when the statute at issue was enacted]. . . . We abandoned that understanding in Cort . . . and have not returned to it since. Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.")

PART II: REMEDIES

SUMMARY OF REMEDIES ARGUMENTS

The court conducted an evidentiary hearing ("Phase II") with respect to prejudgment interest ("interest"). The court erred and abused its discretion in awarding Plaintiffs one of the largest interest awards ever adopted, approximately $211 million compounded from July 27, 1795. As demonstrated in Point IX(A), that ruling was seriously flawed because: 1) Plaintiffs' delay compelled a much smaller interest award based upon a significantly later accrual date; 2) it is fundamentally unfair to award interest for 205 years where, as here, New York would not have been subject to any interest award in 1795; 3) the State acted in good faith in its dealings with the Cayugas; and 4) the jury verdict on which the interest was calculated was flawed due to jury mistake in allocating the rent and the failure of the court to allow the state to reduce the damage award by an offset for public infrastructure. Also, as discussed in Point IX(B), the determination to award interest should have been made by the jury, not the court.

At the conclusion of the damages trial ("Phase I"), the jury found that the current fair market value ("CFMV") of the lands at issue was $35 million and that the fair rental value ("FRV") damages were $3.5 million before deductions for the State's payments. However, in allocating the $3.5 million FRV damages over 204

years, the jury mistakenly allocated an identical amount of rent to each year although all of the testimony showed that the rent increased over time due to an increase in the fair market value ("FMV") of the subject land. The State also established that the jury's allocation of rent was mistaken because it was based upon current dollars and not, as the court had instructed, dollars of the year that the rent was owed. Nevertheless, the court refused to overturn this portion of the verdict. This erroneous allocation of increased FRV damages to the earlier years and the mistaken use of inflated dollar FRV amounts in those years was extremely prejudicial to the state when combined with the court's erroneous decision to award Plaintiffs compound interest for 205 years on the FRV damages. See Point X.

The interest award was based upon the jury verdict for FRV damages, which itself was based on erroneous rulings by the court. As the State demonstrates in Point XI, the court constructed a framework for awarding the Cayugas damages that ignored Supreme Court and common law precedents. It determined that damages should include, based upon the proof at trial, the Cayugas' loss of possession for 205 years and the CFMV of the subject land (a quasi-ejectment theory of recovery) even though the Supreme Court had held in a closely related context involving the United States' taking of a tribe's land, that the proper

measure of damages is to be based upon the tribe's damages at the time of the original conveyance.

Even with respect to the measure of damages adopted by the court, the case law holds that remedies for loss of property based upon the law of ejectment should follow state law unless there is a need for a uniform federal rule. In rejecting New York law, which limits the recovery of rental value to a period commencing six years before the action is commenced and calculates mesne profits, see supra n.29, based only on the unimproved value of the property (see New York Real Property Actions and Proceedings Law ("RPAPL") § 601), the court did not provide any reason for adopting a different federal rule. See Point XII(A) and (D). In contrast, the court determined that it would follow New York law, not federal law, in holding that the State could be held liable for all of the Cayugas' damages as the original wrongdoer. That ruling was also at odds with Supreme Court precedent. See Point XII(B).

After ruling that the State could be held liable for all of Plaintiffs' damages, the court refused to allow the State to present to the jury certain defenses, such as its good faith, Plaintiffs' delay, mistake, mitigation and the United States' responsibility for the Cayugas' damages, to reduce the damages award. Instead, the court ruled that these were equitable considerations that were relevant, if at all,

at Phase II. That ruling was wrong because the State was entitled as a good faith purchaser, and as a party that was being held accountable for 205 years of damages, to reduce its damages liability. See Point XII(C), (E).

Furthermore, both prior to and during the Phase I trial, the court erred in allowing the United States' expert to testify in support of Plaintiffs' request for hundreds of millions of dollars in FRV and CFMV damages. That testimony should have been excluded because it was neither relevant to the issues before the jury nor reliable. See Point XIII.

Finally, any money judgment should run exclusively to the United States as trustee for all successors-in-interest of the historic Cayuga Indian Nation, to ensure that Defendants are not exposed to multiple claims by other interested tribes. The court mistakenly entered a judgment that runs jointly to the Tribal Plaintiffs and to the United States, as trustee. See Point XIV.

POINT IX

THE DISTRICT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AWARDING PLAINTIFFS APPROXIMATELY $211 MILLION IN COMPOUND PREJUDGMENT INTEREST FROM JULY 27, 1795

In Cayuga XVI, the court awarded Plaintiffs interest of almost $211 million on the approximately $1.9 million fair rental value jury damages award, compounded from July 27, 1795 to June 2000. The court started with the interest amount proposed by the United States' expert ($529 million) that included interest compounded from July 27, 1795, and thereby ignored its earlier admonition that "it would be contrary to commonsense to have [interest] begin accruing as of the time of the conveyance." Cayuga VIII, SPA514. Although the court reduced the potential interest amount by 60% based upon four equitable factors,[66] it nevertheless erred in awarding interest on the FRV compounded over 205 years.

As shown below, the court's interest award was in error and constituted an abuse of discretion for three principal reasons: 1) Plaintiffs' delay itself, or as part

[66] Those four factors were: (1) the passage of 204 years; (2) the failure of the U.S. to intervene or to seek to protect the Cayugas' interests prior to 1992; (3) the lack of fraudulent or calculated purposeful intent on the part of the State to deprive the Cayugas of fair compensation; and 4) the financial factors enumerated by Dr. Grossman, the State's economist. Cayuga XVI, SPA254.

of Defendants' showing of laches, compelled a much smaller interest award based upon a significantly later accrual date especially where, as here, New York would not have been subject to any interest award at the time of the Treaties; 2) the State's good faith throughout its dealings with the Cayugas and in its defense of the lawsuit also required a much smaller award; and 3) the court was obliged to adjust the jury's FRV damages award before computing interest since the award was already expressed in year 2000 dollars and included infrastructure improvements which the State was entitled to offset. Finally, the court had no authority to award interest—interest should have been determined by the jury.

The court's findings of fact are reviewed for clear error and its order awarding interest is reviewed for abuse of discretion. See SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1476 (2d Cir. 1996); Cullen v. Fleigner, 18 F.3d 96, 104 (2d Cir. 1994). The court's interest rulings were also in error as a matter of law and misapplied the facts to the proper legal standards set forth by the Supreme Court and by this Court. In each of those instances, this Court's review is de novo. See, e.g., Baker v. Health Sys. Mgmt., Inc., 264 F.3d 144, 149 (2d Cir. 2001); White v. White Rose Food, 237 F.3d 174, 178 (2d Cir. 2001); LoPresti v. Terwilliger, 126 F.3d 34, 39 (2d Cir. 1997). The State respectfully requests that, in the event this Court does not reverse the court's interest award and direct that interest begin

accruing at or near the time this lawsuit was filed but instead decides to remand for a new trial, it should provide specific instructions to guide the jury in its determination of the applicable equitable factors to consider in an award of interest.

A. The District Court Erred As A Matter of Law And Abused Its Discretion By Awarding Approximately $211 Million In Prejudgment Interest.

1. The Legal Standards For A Discretionary Award Of Interest.

In Wickham Contracting Co., v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 955 F.2d 831, 835 (2d Cir. 1992), this Court set out the framework for determining discretionary awards of interest where there is a violation of a federal law that is silent on the award of interest. In those circumstances, such an award is a function of "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." Id. at 834 (citations omitted). As this Court stated in Wickham:

> [t]he relative equities may make prejudgment interest inappropriate when the defendant acted innocently and had no reason to know of the wrongfulness of his actions . . . ; when there is a good faith dispute between the parties as to the existence of any liability . . . ; or

> when the plaintiff himself is responsible for the delay in recovery, ...

Id. at 834-35 (citations omitted).

2. The District Court Failed To Give Proper Weight To The Effect Of Plaintiffs' Delay On An Award Of Interest When It Selected July 27, 1795 As The Accrual Date And Compounded Interest From That Date.

The Supreme Court has recognized that delay in suing a governmental entity is a sufficient reason for denying or substantially reducing interest in a complex case where the nature and scope of Plaintiffs' remedy is unclear. In Kansas v. Colorado, 533 U.S. 1 (2002), the Court held that a thirty-five year delay in suing, by itself, justified awarding interest only from the date of filing the complaint, not the date of injury or some intermediate date, considering, inter alia, "the uncertainty over the scope of damages that prevailed during the period." Id. at 16. See also Lodges 743 and 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 422, 447 (2d Cir. 1975) ("such factors as inordinate delay in prosecution of a suit . . . could well give a district court pause before awarding [interest]").

The equities in this case are even more pronounced than the equities at issue in Kansas. Here, the Tribal Plaintiffs and the United States delayed suing for 185 and 197 years, respectively. Because of the complex nature of the litigation, a verdict was not rendered until 22 years after the case was filed. Furthermore, even

assuming that the State's liability was clear, which it is not, the law remains unsettled as to the nature and scope of remedies for an alleged violation of the NIA. Consequently, the State could not have been aware, until the court's rulings in this case, that its conduct in 1795 and 1807 could result in a judgment for damages and interest covering the entire 205-year period.[67] The fact that the United States also delayed suing for 197 years despite its knowledge of the State's conduct in 1795 and 1807 and its public positions supporting the lawfulness of New York's conduct, should have weighed more heavily in the court's determination to reduce the interest.

The court's award of interest should also have taken into account the interplay between Plaintiffs' delay in suing and state sovereign interests. The Supreme Court in Bd. of Comm'rs of Jackson County v. United States, 308 U.S. 343, 349-52 (1939), instructed courts to consider state and local sovereign interests in its determination of interest, including whether an award against a governmental

[67] Both State experts testified that a later accrual date would be appropriate where there has been an inordinate delay in suing to the financial detriment of the Defendants. Accordingly, both of the State's experts used accrual dates provided by the State that were based upon the date of filing of the complaints (1980 and 1992, respectively) and six years prior to that date (1974 and 1986, respectively) as provided for under New York law, RPAPL § 601, and interest rates of 3, 4, and 5 percent that are consistent with the rate of return for long-term investment in real estate, thereby taking into account the Cayugas' unreasonable delay in seeking damages. T6155, 6159-61, 6372-75; S-721, exhs. 6-14; S-766, tables 5-18.

entity would place the Plaintiffs, who were suing under federal law, "in a better position than [similarly situated persons] whose rights arose under state law." Id. at 352. See also West Virginia v. United States, 479 U.S. 305, 309-10 (1987) (Jackson County analysis applies where United States sues a State).

A significant State interest that renders the award of compound interest from July 27, 1795 improper in this case is that, at the time the State entered into the Treaties in alleged violation of the Cayugas' federal common law possessory rights, the State was not subject to interest. As this Court has recognized, "[t]he Supreme Court initially embraced the strict common law view that interest may not be recovered where damages are unliquidated, or difficult to ascertain with precision at the time of the alleged wrongdoing. . . . Accordingly, [interest] originally was available only in contract actions, if at all." Wickham, 955 F.2d at 835 (citation omitted). In addition, even if interest was available against the State at the time of its alleged wrongful conduct, at common law, interest, when available, was not compounded. See Restatement (Second) of Contracts § 354, cmt. a (1981); 1 Dan B. Dobbs, Dobbs Law of Remedies: Damages, Equity, Restitution, § 3.6(4), at 353 & n.7 (2d ed. 1993). Thus, by waiting 185 years to sue, Plaintiffs are able to obtain an interest award that they could not have received if they timely sued.

In Jackson County, the Supreme Court upheld the denial of the United States' request for interest against a County defendant that had acted innocently and was sued by the United States eight years after it knew that the County had violated the law by wrongfully collecting taxes from an Indian. 308 U.S. at 352. If interest can be denied after an eight year delay, clearly in this case where there was a 197 year delay by the United States and the State had substantial good reason to believe that its conduct did not violate federal law, interest should be denied or, at the very least, not accrue until the filing of the complaints. Cf. Brooks v. Nez Perce, 670 F.2d 835, 837 (9th Cir. 1982) (54-year delay between the events giving rise to a lawsuit to reclaim Indian land and the federal government's joining the action as a trustee for Indians "may be weighed by the district court in calculating damages").

Another factor to consider under the Jackson County analysis is that a private person suing the State for an analogous cause of action of trespass in the New York Court of Claims could not obtain interest prior to 1980. Section 19(1) of the New York Court of Claims Act (McKinney's 1989), provides that "if a claim [against the state] which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the

expiration of six months from the time of such accrual and the time of the filing of such claim."

3. The District Court Abused Its Discretion In Awarding Interest Prior To 1980 Because Plaintiffs Are Guilty Of Laches.

In this case, Plaintiffs are not only guilty of an unreasonable and inexcusable delay, but they are also responsible for causing severe prejudice to Defendants. See discussion at Point V supra. The fact that Plaintiffs are guilty of laches should have resulted in a much more dramatic reduction in the interest award. For example, until this lawsuit the United States publicly supported the State's conduct at the Treaties and argued in court that federal law did not apply to the Treaties. The United States also allowed the State and Counties to assert jurisdiction over the subject land and, together with the private landowners, to purchase and improve the property. Where, as here, a delay is unreasonable and prejudicial to defendants, it warrants a denial or significant reduction of interest. See West Virginia, 479 U.S. at 311, n.3 ("[A]n equitable consideration such as laches can[ ] bar an otherwise valid claim for interest, . . . ") (citing Jackson County, 308 U.S. at 352-53).

4. The District Court Abused Its Discretion By Awarding Plaintiffs Compound Interest From 1795 To The Present.

The court determined that using 1980, 1974 or one of the other dates contained in the State's experts' reports as the starting point for the accrual of interest, would result in an insufficient award. Although the court stated that the

purpose of interest was not to augment an insufficient award of damages (see Cayuga XVI, SPA103-04),[68] compounding interest over 205 years accomplishes exactly that result.

The Supreme Court in Kansas v. Colorado noted with approval that the Special Master had selected an intermediate accrual date that reduced "the dramatic impact of compounding interest over many years." 533 U.S. at 14. Here, the court ignored the extraordinary impact of compounding interest over 205 years. For example, even though both of Plaintiffs' economists used the same damages award to calculate interest, their numbers differed by $1.23 billion because of a slight (on average .64% per year) difference in the interest rate over 205 years. See S-762; T5874.[69]

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[68] An indication that the Court nevertheless considered the jury award to be insufficient was its April 18, 2000 prejudgment interest pre-hearing ruling where it took note of the size of the jury verdict and decided that the State could not present evidence at the Phase II hearing to reduce the size of the damages award based upon laches or the benefit attributable to infrastructure improvements. Cayuga XIV, SPA274-79.

[69] For example, the State pointed out in its post-hearing brief that by selecting July 27, 1918, a date that left 40% of the period between 1795 and 2000, the prejudgment interest award (using the exact same interest rates testified to by the United States expert and the exact same amount of FRV damages awarded by the jury) would have been closer to $40 million because of the more limited effect of compounding. A114 (Dkt. 896, Brief at 22, n.12).

Furthermore, it was arbitrary to compound interest from 1795 where the availability of interest over that period of time was theoretical.[70] Plaintiffs' economists acknowledged that they ignored market and real world conditions in their calculations, such as the risks of investment, the costs of investing money, lack of access to financial markets and the likelihood that the presumed rent payments would not have been invested but instead would have been used to purchase land, machinery, livestock and buildings. T5802-10, 5816-17, 5834. Defendants' economists emphasized that, in light of these and other factors, it made no economic sense to compound interest over 205 years. T6080, 6083-89, 6145-52; S-765, pp.11, 13.

5. Because The State Acted In Good Faith In Its Dealings With The Cayugas, It Was An Abuse Of Discretion To Award Interest Prior To 1980.

The court identified numerous areas where the State had conducted itself properly in its dealings with the Cayugas and did not find any evidence that the State willfully violated the NIA with respect to the 1795 Treaty. Cayuga XVI,

[70] According to State expert Dorchester's calculations, the amount of simple interest at 5% from the date of filing the complaint would be $1,839,733 and the amount of compound interest from that date would be $2,970,949. See S-766, Tables 8 and 5. The amount of simple interest at 5% from 1974, which is six years prior to the filing of the complaint and the period for which mesne profits would have been available under New York law, see RPAPL § 601, would be $2,444,385 and the amount of compound interest from that date would be $4,703,855. See S-766, Tables 8 and 5.

SPA220. According to the court, the record does not establish that Jay, Clinton, or any other high-ranking State official was aware of a specific statutory duty imposed upon the State by the NIA, especially with respect to the 1795 land cession. Id. Furthermore, the court found that the State was not motivated by a deliberate intent to cheat or defraud the Cayugas in relation to the 1795 and 1807 Treaties. Id. It also concluded that the record does not support a finding that the State displayed a lack of good faith during the 1795 negotiation process itself. SPA221. In addition, the court specifically rejected each of Plaintiffs' assertions that the State took advantage of the Cayugas through 1) the availability of alcohol; 2) the payment of purported "bribes"; or 3) alleged cultural misunderstandings. Likewise, the court concluded that there was no merit to Plaintiffs' claim that the State did not exercise good faith in the 1795 negotiations because it negotiated with the Cayuga majority, as opposed to the Cayuga Lake faction. SPA221-22.

Nevertheless, the court concluded that the State did not act in good faith in six instances. The court, however, improperly allocated the burden of proof with respect to the issue of good faith and its specific findings are not supported by the record. Therefore, the court's conclusion that the State did not act in good faith should be rejected.

a. Plaintiffs Should Have Borne The Burden Of Proof Of Establishing That The State Did Not Act In Good Faith.

The court determined that the State, not the Plaintiffs, had the burden of establishing that it acted in good faith under the Wickham factors because good faith was more akin to an affirmative defense. Cayuga XVI, SPA 123-25 (citations omitted). The State had to prove that it "'acted innocently and had no reason to know of the wrongfulness of [its] actions,' . . . in terms of all its dealings with the Cayuga as chronicled in the vast historical proof before the court." SPA125 (citations omitted). The fact that the State did not act in bad faith, e.g., it did not purposefully violate the NIA because it believed the statute did not apply to it or that its conduct complied with the statute because of the presence of United States officials at the Treaties, was insufficient to satisfy its burden. Id.

That ruling was in error and had the effect of forcing the State to prove it acted innocently over the 205 years in order to show its good faith. Interest is a form of damages. See, e.g., Coastal Power Int'l, Ltd. v. Transcontinental Capital Corp., 182 F.3d 163, 165 (2d Cir. 1999) (affirming court's finding that "prejudgment interest was to be included in the damage award"). Logically, then, a plaintiff should bear the burden of proof on the issue of good faith. To place the burden on the State after a 200-year delay is unfair given the difficulties in constructing a record as to what transpired in the late eighteenth century. To

require the State to prove that it acted innocently and had no reason to know of the wrongfulness of its actions after a delay of 200 years is especially harsh.

b. The State Acted In Good Faith In Connection With The February 1789 Treaty.

The court concluded that "the State did not act innocently when it proceeded to negotiate [the February 1789] Treaty with the Cayuga[s] after it had ratified the U.S. Constitution which prohibited such conduct." Cayuga XVI, SPA164; SPA221. This particular ruling was surprising since the 1789 Treaty is not being challenged in this lawsuit and preceded the Treaties that are challenged by more than six years.

There is no evidence in the record that the State knew or should have known that the 1789 Treaty might violate the United States Constitution. The Constitution did not become effective until March 4, 1789, see Owings v. Speed, 18 U.S. (5 Wheat.) 420, 423 (1820), and the first NIA was not enacted until July 1790. Under the Articles of Confederation, New York had full authority to extinguish aboriginal title unilaterally to lands within its bounds and to enter into treaties with its native tribes without federal participation and approval. Oneida Indian Nation of New York v. State of New York, 649 F. Supp. 420, 435 (N.D.N.Y. 1986), aff'd, 860 F.2d 1145 (2d Cir. 1988).

Furthermore, there was disagreement in February 1789 as to whether the treaty-making provisions of the soon-to-be-effective Constitution would apply to treaties with Indian Tribes especially where, as here, the Treaty with the Cayugas involved its aboriginal land located entirely within New York. Indeed, the New York Court of Appeals has written that those who negotiated New York's treaties in the latter part of the eighteenth and the early part of the nineteenth centuries reasonably believed that the treaty-making provisions of the Constitution did not prevent New York from entering into a Treaty with one of its native tribes for the purchase of aboriginal land. See Seneca Nation, 27 N.E. at 279.

c. The State Acted In Good Faith When It Enacted Chapter 70 Of The Laws Of 1795.

The court found that the enactment of Chapter 70 of the Laws of 1795, with its discrepancy between the maximum price for the purchase of the Cayugas' reservation land and the minimum price for the subsequent resale of the individual lots at auction, showed that the State placed its own profit motives ahead of the better support of the Indians even if it never actually realized a profit. Cayuga XVI, SPA186, 216-17, 222; see also T5064-65, 5067.

In 1795, the State purchased only the State-created right of occupancy to a single, 60,000+ acre undeveloped tract of forest land. It sold at auction small 250-acre plots of surveyed land at fee simple absolute to settlers and speculators who

were willing to pay a higher price largely financed by the State, in many cases, at nearly 100% of the purchase price. There is a legitimate basis for a significantly higher price per acre for subdivided small parcels of land than for a single parcel in bulk. See United States v. Iriarte, 166 F.2d 800, 804 (1st Cir. 1948). See also Point XIII infra (Hale's methodology ignored the differences between valuing the lands as a single parcel and aggregating the value of individual parcels). Therefore, it was reasonable for the Legislature to provide that the subject land be purchased at up to 50 cents per acre and sold at no less than $2.00 per acre, after the land was surveyed and subdivided into smaller lots.[71]

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[71] The court also pointed out that the State had enacted Chapter 70 after receiving the objections of the Council of Revision and then overriding those objections in passing the bill. Cayuga XVI, SPA223. However, the State did not lack good faith by enacting Chapter 70 after receiving the objections of the Council of Revision. The Council's objections were not based upon any evidence that the Cayugas were being cheated or defrauded by the State under the terms of the statute, but rather that the State was going to profit from the purchase and resale of the land. See Journal of the Senate of the State of New York at their Eighteenth Session (New York: Francis Childs, 1795), p. 89. In this case, consideration of the views of the Council of Revision would be particularly inappropriate where, after a 185-year delay in suing, we do not have the benefit of the views of the Legislature that overrode the Council's objections. It is also noteworthy that nine months after the 1795 Treaty was entered into, it was submitted to the Legislature for ratification. At that time, the Council of Revision apparently did not raise any objections to the proposed bill ratifying the Treaty that had been entered into in accordance with Chapter 70. See SPA692.

d. The State Was Denied A Meaningful Opportunity To Prove That It Paid The Cayugas Fair And Adequate Consideration For The Subject Land.

The court found that the Cayugas received inadequate consideration for the sale of the subject land. It relied upon the higher resale value of the surveyed and subdivided 250-acre parcels and the fact that the State had later acknowledged that it profited during the resale of the Cayugas' former lands. Cayuga XVI, SPA217.

It was error for the court to make this finding without allowing the State an opportunity to present evidence at Phases I and/or II that the Cayugas received fair consideration in connection with the sale of the subject land. According to the court's decision of April 15, 1999, whether the Cayugas were damaged by the price paid at the time of the Treaties or whether they received fair consideration was the first issue to be presented to the jury for determination. Cayuga VIII, SPA504. Nevertheless, on the eve of the jury trial, the court decided, sua sponte, that the jury would not hear evidence and would make no findings with respect to the adequacy of the consideration paid in 1795 because the court had recently decided that the Cayugas could receive the CFMV of their former reservation lands as additional damages and the Cayugas were not entitled to be paid twice for selling their reservation lands. Tr 1/18/00 at 5.

Prior to the Phase II hearing, the court agreed that the fairness of the consideration paid at the time of the Treaties was an equitable factor to be considered in the determination of interest. See Cayuga XV, SPA265 ("the State will be allowed to proffer evidence [at Phase II] as to the fairness of the consideration paid in the original transactions, . . ."). However, when the State's expert appraisal witness attempted to testify about that subject at the Phase II hearing, the court prohibited the testimony and related evidence because "there has already been testimony on same. . . ." T6127.[72]

The court's finding was clearly erroneous because there was no evidence in the record from the jury trial to show that the Cayugas received fair consideration at the time of the Treaties. See United States v. Lumpkin, 192 F.3d 280, 287 (2d Cir. 1999) (exclusion of evidence may abuse discretion where arbitrary or irrational). The court also cited no support from the jury trial to support its conclusion. See Rudenko v. Costello, 286 F.3d 51, 65 (2d Cir. 2002).[73] The court also erred when it excluded evidence that would have shown that the consideration

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[72] The State made an offer of proof of Dorchester's Report from Phase I, S-697, and the first two sections of his Supplemental Report, S-698, which offer of proof was accepted. T6130-31.

[73] There was some evidence in the record from the jury trial suggesting that the Cayugas received fair consideration but this evidence was presented for the limited purpose of establishing the FRV of the lands in 1795 and not its market value in 1795. See T1745-46, 1749-50, 1781-83, 6206-08.

paid by the United States to tribes at that time was substantially less (an average price, according to State expert Anderson, of one cent per acre) than the amount per acre paid by the State. Anderson's testimony was clearly relevant to the issue of the fairness of the consideration paid by the State in 1795 and 1807, and his findings were sufficiently reliable because they were based on treaty documents. T5458-59.

With respect to the State's subsequent acknowledgement that it profited from these Treaties, the Supreme Court has noted that, "[i]n evaluating the weight to be attached to [subsequent legislative] statements, we begin with the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'. . ." Consumer Prod. Safety Comm'n v. Sylvania, Inc., 447 U.S. 102, 117 (1980) (citations and fn. omitted); see also T5087. The court relied upon only two post-Treaty written statements to support its finding. One of the documents, G-464 (see Cayuga XVI, SPA217), was prepared by the New York State Senate Indian Affairs Committee in 1861 and contained no evidence that the Committee had reviewed the historical record or engaged in any appraisal of the land based upon the market value in 1795 and 1807. The other document, G-375, pp.130, 141-43, was a position paper presented

by attorneys for the Nation in April 1910 that simply referred to the discrepancy in prices contained in Chapter 70.

e. The State Acted In Good Faith Considering The Totality Of The Circumstances With Respect To The 1795 Treaty.

The court found a lack of good faith based upon "the totality of the circumstances" with respect to the 1795 Treaty. It determined that the State acted in calculated disregard of the NIA, especially considering its overt profit motive. Cayuga XVI, SPA223-24. This finding is not supported by the record and is inconsistent with the court's previous finding that no high-ranking State official was aware of a specific statutory duty imposed upon the State by the NIA with respect to this 1795 land cession. See SPA220.

To be sure, Governor Jay did not intervene to stop the July 1795 Cayuga Treaty despite receiving Pickering's July 3, 1795 letter attaching Bradford's opinion. However, this alone does not prove that Jay acted in calculated disregard of the NIA. Governor Jay raised legitimate questions regarding whether the NIA could be applied to override New York's authority to enter into a Treaty for lands that had been ceded to the State and then set aside under a limited use and occupancy. G-238, p.1. In response, Washington told Pickering to let the matter rest. See A1372-73; G-388. The United States thereafter allowed the Treaties to

be ratified by the New York Legislature and never again questioned their validity until intervening in this lawsuit almost 200 years later.

f. The State Acted In Good Faith In Connection With The 1807 Treaty.

The court found, in connection with the 1807 Treaty, that the State knew or should have known by that time that it must comply with the NIA but still ignored the statute. The court also found that it was bad faith for the State to have paid the Cayugas less per acre for the remaining 4800 acres than what it received when it resold the lands as smaller parcels.[74] Cayuga XVI, SPA228-29.

There is nothing in the record to establish that between 1795 and 1807 New York knew that its Indian Treaties required approval pursuant to Article II of the Constitution. Indeed, the federal government played a substantial role in the subsequent treaty and raised no objection to it based upon the 1802 version of the NIA. See supra pp. 31-32. Further, the fact that the State received more per acre for the remaining parcels than it paid the Cayugas is not, for the reasons previously advanced, evidence of bad faith.

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[74] Records from the resale of the 4800 acres of subject land in 1807 that might explain further the basis for the differential in price are no longer available. Since the Tribal Plaintiffs elected not to sue until 1980 and the United States did not sue until 1992, the State should not be held responsible for any negative inferences that flow from the price differential because of Plaintiffs' delay.

g. The State Acted In Good Faith After The Challenged Treaties.

The court found that the State did not respond in a reasonably prompt manner to the Cayugas' claims seeking additional compensation. Cayuga XVI, SPA229-32. It is true that the State did not pay the Cayugas the additional compensation they sought in the 1853 and 1861 Memorials. However, the record contains no evidence that the Legislature's inaction was due to any ill will or animosity toward the Cayugas.

In response to the 1906 Memorial, the State settled with the Nation and the Tribe in 1913 and then again settled with the Nation in 1930, and paid substantial additional compensation.[75] The delay that occurred between 1919 and 1930 had to do, in large part, with internal disagreements among tribe members and not to any purposeful delay by the State. See supra pp. 40-42.

h. The State Acted In Good Faith In Its Defense Of This Lawsuit.

In Wickham, this Court explained that "a good faith dispute between the parties as to the existence of any liability" is an equitable factor that may make

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[75] The court found that the Cayugas' efforts to obtain additional compensation were not finally settled until 1958 when the State passed an act authorizing settlement with the Cayugas. Cayuga XVI, SPA230-31. However, the 1958 Act allowed the payment of additional interest because the Cayugas and the Senecas could not reach agreement on the use of the monies to purchase or lease lands on the Seneca reservation.

interest inappropriate. 955 F.2d at 834-35. The court did not address this factor in its interest decision even though the court had addressed many novel and complex issues of liability and defenses during the liability stage of the lawsuit. Many of those issues are again raised in this appeal and show the State's good faith basis for its defenses on the merits. The court should have found that there was a good faith dispute as to the State's liability and, on that basis, at least not awarded interest prior to the filing of the complaint.

6. The District Court Abused Its Discretion By Failing, In Its Decision On Interest, To Take Account Of Errors In The Jury's Verdict.

As described in Point X, the jury mistakenly computed rent using FRV damages in year 2000 dollars (contrary to the court's instructions) and awarded equal amounts for each full year of dispossession (contrary to the evidence). The State urged the court to take account of the faulty manner in which the jury likely calculated and reported these amounts. Instead, the court discounted the evidence it heard from the State's experts on this issue and refused to hear other evidence as to how any errors might be taken into account, and relied directly on the jury's erroneous allocation in setting an award thus exponentially magnifying the impact of these errors. This was an abuse of discretion. See United States v. Lumpkin, 192 F.3d at 287.

First, the court abused its discretion by refusing to consider much of state economist Grossman's evidence, which was premised on the errors in the jury's allocation of rental damages. Cayuga XVI, SPA241. The court's opinion reflects a fundamental misreading of the purpose and meaning of this evidence. The State proffered Grossman's adjusted figures, through Grossman's testimony and his report (S-721), not to demonstrate that it was owed any money, but rather to show that the value of its payments over the 205 years of dispossession exceeded the value of the rental amounts assigned by the jury and that, therefore, the Cayugas had already been fully compensated for lost rental income—a key Wickham factor.[76] The fact that the jury awarded rent damages in later years that was less than the amounts propounded by both sides' experts is an equitable factor that the court could have taken into account in its adjustment of the FRV damages award.

Second, the court abused its discretion by precluding Dorchester from testifying about interest to the extent his testimony would "look behind the verdict

[76] Grossman explained that it is not economically sound to compare the dollars of one year to the dollars of another year without making an adjustment for inflation. T6342-56. Therefore, it was incorrect for the jury to deduct the State's payments, which were in the dollars of the year that the payments were made, from rent damages that were based, according to Grossman, on year 2000 dollars. T6364-66. Grossman used the price index that was in Temin's report and concluded that when the rental payments are expressed in the year in which they were due, and inflation is taken into account, the State's payments from 1796 through 2000 fully compensated the plaintiffs with respect to the FRV damages that were found to be owed to them. T6365-71; S-721, exh. 4.

and . . . ask the Court to reconsider it." T6127-28. Dorchester used the jury's total award of $3.5 million rent and then reallocated that award to comport with his testimony at the Phase I trial that rent increased each year as the value of the property appreciated 3.5% annually. S-766, Table 3.[77] A trial court plainly has the authority to "look behind" a jury verdict in fashioning equitable relief. See Sharkey v. Lasmo (AUL Ltd.), 214 F.3d 371, 375 (2d Cir. 2000); Malarkey v. Texaco, Inc., 983 F.2d 1204, 1211 (2d Cir. 1993).

Despite admitting that the jury likely took a rough short-cut in calculating annual rental values, leaving it to the court to make the necessary adjustments, see Cayuga XVI, SPA95 ("the jury recognized that it would be possible for the court to amend those rent figures and rectify that discrepancy through its award of prejudgment interest"), the court nevertheless refused to make those adjustments. Instead, it calculated interest based on the jury's flawed allocation, with extraordinarily inequitable results. The jury's allocation of a total rent figure over a 205-year period in which the value of the dollar has been declining has the effect

[77] For example, under Dorchester's formulation that assumed an accrual date of 1974 and compounded interest at 5% annually, the first year in which the individual FRV damages would have exceeded the State's payments would have been 1878 and the first year in which the cumulative FRV damages would have exceeded the cumulative State payments was 1930. Interest would then have accrued compounded on the cumulative principal starting in 1974, resulting in interest of $2,001,114. S-766, tables 3, 6.

of overstating the compensation in the early years and understating it in the later years. Because of the effect of compounding interest over many years, overstating the rent in the early years exponentially inflates the interest calculation and fundamentally distorts the measure of damages to which Plaintiffs are entitled. According to Professor Temin, the Tribal Plaintiffs' economist, compensation of $1 in 1795 would be worth $5,866.33 by 2000 due to the effects of compounding interest. T5892-23; see also T6080-82.[78]

7. The District Court Erred As A Matter Of Law And Abused Its Discretion By Refusing To Allow An Offset For Infrastructure Improvements Before Determining Interest.

Assuming that the subject land could be valued with public infrastructure (see Point XII(D), infra), the court erred when it refused to allow the State to present evidence of its good faith to offset the value or benefit attributable to infrastructure. At Phase I, the court ruled that all evidence that dealt with

[78] If the jury's award is not adjusted but remains based upon year 2000 dollars, then Plaintiffs' interest award should be reduced on that basis as well. See Stinnett v. Damson Oil Corp., 813 F.2d 1394, 1398 (9th Cir. 1987) (since damages awarded reflected current value of plaintiff's claim, interest would constitute a double recovery and could not be awarded); Diesel Tanker Ira S. Bushey, Inc. v. Tug Bruce, A.M., No. 92 Civ. 5559, 1994 U.S. Dist. LEXIS 8788 (S.D.N.Y. 1994) (Katz, M.J.) (since award of lost earnings includes element of return on investment capital, to "award interest on top of that would constitute a double recovery"). See generally Hamil Am., Inc. v. GFI, 193 F.3d 92, 108 n.7 (2d Cir. 1999) (recovery of both plaintiff's lost profits and defendant's actual profits "would constitute a forbidden double recovery" (citation omitted)).

infrastructure as an offset to reduce Plaintiffs' damages would be considered, if relevant, at Phase II (Tr. 1/18/00 at 5-11; 974-75). Prior to the Phase II hearing, the court decided that evidence of good faith could not be used to reduce the portion of the jury verdict attributable to infrastructure because, inter alia, the size of the jury verdict proved that the jury did not consider infrastructure in its valuation, the experts had not included it in their testimony and the State's proposed offset could exceed the jury's FRV damages award. Cayuga XIV, SPA275-77.

The jury was instructed to value rent with infrastructure in place. T2767-68. The appraisal experts included public infrastructure in their testimony of FRV damages.[79] A3591-2; T40-41, 973; T753, 776, 780-81 (D); S-524, S-543; S-546. It is well-settled that a good faith purchaser of land is entitled to set-off from an award of rental damages the value of improvements made to the property, and that this can include infrastructure improvements made by a governmental entity.

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[79] In his expert report, and at the Daubert hearing and at trial, Dorchester testified that his valuation "assume[d] that the claim[ ] area was benefit[t]ed by all the roadways and highways." S-538a, Vol. I, p.1-13; T1140-41 (D); T2135. In fact, Dorchester was asked whether his "valuation opinion presumes or assumes all the public improvements and infrastructure which benefit the claim area, ..." and he answered that question as correct. T2136. To the extent the court recognized that the jury followed Dorchester's appraisal (Cayuga XIV, SPA276-77), the jury would have had to award damages that included the benefit attributable to public infrastructure.

Oneida V, 719 F.2d at 541. By failing to give the State an opportunity to reduce the damages award and thereby also reduce the interest award, the court erred.

Contrary to the court's assumption, the size of the jury award does not prove that the jury excluded public infrastructure. The jury could have concluded that the value or benefit attributable to infrastructure was difficult to quantify, thereby justifying a fixed amount each year. See Ciraolo v. City of New York, 216 F.3d 236, 246 n.7 (2d Cir. 2000). The court could have then reduced the damages award by a specified amount or percentage and thereby valued the land as unimproved. "It is not very difficult to agree that the recovery against the good faith improver for the value of the land during his occupancy is to be limited to its value before he improved it; he is not required to pay for the added value of his own improvements." D.B. Dobbs, Handbook of the Law of Remedies at 368 (1973).

B. The District Court Erred By Removing The Determination Of Interest From The Province Of The Jury.

In the event this Court agrees with the State that any award of interest prior to 1980 would be an abuse of discretion, this Court should equitably adjust the jury award of FRV damages and then determine interest from no earlier than the filing of the complaint. However, if there is to be a remand to the district court for a new hearing, the State maintains that it is the jury, not the court, that should determine

interest using the Wickham factors and the other equitable considerations that have been presented herein.

The court erred as a matter of law when it ruled, sua sponte, that the court and not the jury would determine interest. See Cayuga VIII, SPA512, n.35. The general rule under federal common law is that interest is decided by the same jury that determines damages. See, e.g., Eddy v. Lafayette, 163 U.S. 456, 467 (1896) ("Undoubtedly the rule, in cases of tort, is to leave the question of interest as damages to the discretion of the jury."). In two cases decided in 1955 and 1961, this Court applied the federal common law rule and held that the jury, not the trial judge, is authorized to exercise its discretion and determine whether and how much prejudgment interest to award. See Newburgh Land & Dock Co. v. Texas Co., 227 F.2d 732, 735 (2d Cir. 1955); Hertz v. Graham, 292 F.2d 443, 449 (2d Cir. 1961); see also Stanley v. Bertram-Trojan, Inc., 868 F.Supp. 541, 545 (S.D.N.Y. 1994).

Those decisions have never been overruled. More recent cases from this Court have seemingly approved of the discretionary determination of prejudgment interest by the trial judge. See, e.g., Wickham, 955 F.2d 831; Sharkey, 214 F.3d at 375-76; Jones v. UNUM Life Ins. Co. of Am., 223 F.3d 130, 139 (2d Cir. 2000); Gierlinger v. Gleason, 160 F.3d 858, 873 (2d Cir. 1998); Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063, 1071-72 (2d Cir. 1995). However, it

does not appear that in any case decided by this Court that the question of whether the district court had the authority, on its own motion and without the consent of the parties, to determine interest as opposed to the jury that is determining Plaintiffs' claims for damages, was decided. See Thomas v. City of Mount Vernon, 1992 U.S. Dist. LEXIS 4784, *7-10 (S.D.N.Y. Apr. 10, 1992) (Katz, M.J.) ("Although it is true that in Wickham the district court exercised its discretion in awarding interest after a jury verdict on liability and damages, the district and circuit court decisions provide no evidence that the issue of whether the court, as opposed to the jury, may award prejudgment interest was ever raised; clearly, it was not specifically addressed."); but see Silvanich v. Celebrity Cruises, Inc., No. 95-Civ.-0374, 2000 U.S. Dist. LEXIS 12155 (S.D.N.Y. Aug. 23, 2000) (district court has some authority to award interest); Frank v. Relin, 851 F.Supp. 87, 90 (W.D.N.Y. 1994) (same); River Oaks Marine Inc. v. Town of Grand Island, No. 89-CV-1016S, 1992 U.S. Dist. LEXIS 18974 (W.D.N.Y. 1992) (same).

This Court's earlier decisions holding that the determination of interest is to be made by the jury deciding damages is also the law of the First Circuit which continues to follow the federal common law rule. See, e.g., Cordero v. De Jesus-Mendez, 922 F.2d 11, 13 (1st Cir. 1990); Hall v. Ochs, 817 F.2d 920, 926

(1st Cir. 1987); Segal v. Gilbert Color Sys., Inc., 746 F.2d 78, 83-84 (1st Cir. 1984).

State Defendants maintain that as a matter of federal common law, the jury should have been charged with the discretion to determine whether, and how much, interest to award using the equitable standards set forth in Wickham and the other equitable considerations discussed above. The court, however, determined that all "equitable" issues, including interest, would be considered by it at Phase II and not the jury. See Cayuga XII, SPA347-49; see also Tr. 1/18/00 at 5-10. Since this was error, in the event there is to be a remand for a new interest hearing, that proceeding should be conducted before a jury.

POINT X

THE EVIDENCE WAS NOT LEGALLY SUFFICIENT TO SUPPORT THE JURY VERDICT FOR FAIR RENTAL VALUE DAMAGES

The jury made two critical mistakes when it awarded fair rental value ("FRV") damages of $17,156.86 in each of the years from 1795 through 1999. These two errors dramatically overstated the FRV in the early years and thereby substantially and erroneously increased the court's award of two centuries of compound interest on the annual FRV amounts.

First, no evidence supported the jury's award of the same amount of FRV damages in each year. If the jury was correct, property that presumably would have rented for $17,000 annually in 1999 also presumably would have rented for the same amount in 1795. That conclusion defies logic and the record evidence. Rents were clearly lower in the early years and increased as the value of the property increased.

Second, the jury erroneously failed to take into account the economic fact that inflation during the 20th century eroded the value of money. Thus, a dollar in a later year was worth less than a dollar in an earlier year. The jury made this mistake two different ways. First, the jury's verdict essentially allocated inflated year 2000 dollars to all prior years, thus also dramatically overstating the FRV damages in the earlier years. Second, when it subtracted the State's payments to the Cayugas in each year (made in that year's dollars) from the FRV damages for that year stated in inflated year 2000 dollars, the jury improperly subtracted dollars of different years which also had the effect of overstating the net FRV damages in each year. The cumulative effect of these overstatements was dramatically magnified by the court's later award of 200 years of compound interest on the annual FRV damages awarded by the jury. This Court should set aside the jury's allocation and order a new trial for determination for an appropriate allocation.

See De Falco v. Bernas, 244 F.3d 286, 325-28 (2d Cir. 2001) (jury award may be set aside for legal insufficiency); Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 132-33 (2d Cir. 1986).

The jury verdict for FRV damages was legally incorrect because there was no evidence to support an award of $17,156.86 in each of the 205 years between 1795 and 1999. See A4758-67. Because both sides' experts calculated rent as a percentage of the claim area's annual fair market value ("FMV") during the years 1795-1899, there were virtually no years where either of them estimated that rental damages would be the same as the prior year. Rather, the experts opined that the FMV of the single tract generally increased each year over the 205 years. S-322, 323. Both Dorchester[80](the state's expert) and Hale (the United States' expert) testified that, given the effects of inflation and other market forces, the FRV of the tract would have been much less than $17,156.86 in 1795, and much greater than

[80] Dorchester's calculations resulted in rents that were much lower in the early years and considerably higher in the later years because the annual FMV of the subject land appreciated over time from a value of $32,000 in 1795 to a current fair market value ("CFMV") in 1999 of either $25 or $40 million, the different amounts being based upon the lands' configuration in 1795 versus its configuration in 1999. T1801, 1834-35; S-322, S-323. Dorchester determined the subject land's annual FMV by determining its FMV in 1795 and charting its appreciation in a way that reflected the annual growth of real estate in central New York. He then referred to the Consumer Price Index ("CPI") to validate his annual CFMV figures. T1733-34. In Cayuga VIII, the court had suggested a methodology for determining rent almost exactly like the one Dorchester employed. SPA505.

$17,156.86 by the time the verdict was rendered. Although there were substantial differences between the two appraisal experts as to the actual FRV in any given year,[81] both witnesses testified and provided tables listing year-by-year rents to show that the economic trend over two centuries—the appreciation in the value of the subject land and, beginning in the twentieth century, the decrease in the value of the dollar as a result of inflation—dictated a rising fair rental value over time. T1801, 1834-35; S-322, S-323; G-497, G-498, G-499.

The jury did not follow the court's instruction to provide a rent award in each year from 1795 to 2000 based upon what the Cayugas were purportedly owed in rent that year. As the court found: "the jury calculated lost rent by taking $3.5 million, or 10% of what it deemed to be the current value of the property ($35 million) and dividing it by each of the 204 years at issue." Cayuga XVI, SPA95; see also T5970. In contrast, the expert's evidence included tables of rents that were purportedly owed to the Cayugas in each year between 1795 and 2000 without any adjustment for inflation or current value. See G-497-99, S-322-23. The jury was then instructed to "award damages in dollars for the year the injury was sustained." T2773; Cayuga XVI, SPA76.

[81] For example, Hale's report shows a fair rental value in 1795 in the amount of $7,918, which grew to $1,161,243 in 1999. G-505. Dorchester's report shows a fair rental value in 1795 of $640, which grew to at least $500,592 (S-323) or, at most, $799,996 in 1999 (S-322).

If, as the lower court determined, the jury's rental values were, in fact, expressed in year-of-accrual dollars, the verdict would make little sense. Because the value of money has decreased since 1795, the verdict would imply that the value of the land has essentially decreased significantly over time, which is counter-intuitive and unsupported by the evidence.

The jury's error was compounded by the fact that while its rental damages were based on year 2000 dollars, it credited the annuity payments made each year by the State to the Cayugas in the dollars of that year. See S-612. From an economic standpoint it is improper to add and subtract dollars paid in different years without first adjusting them to a common baseline. T6343-59. The jury was also specifically instructed not to adjust those payments to year 2000 dollars. A4758-67; T2373.

The court refused to set aside the jury's award of FRV damages in response to the State's motion for a new trial following its interest decision, Cayuga XVI. See Cayuga XVII, SPA49-51. In Cayuga XVI, the court determined that it can be assumed that the jury followed the court's instructions not to adjust rental damages. SPA92-95. However, the court never explained how the jury verdict could possibly comport with its instructions or with the proof and it is perfectly clear that the allocation of rental damages is not based on any record evidence.

The court also erred when it stated in its interest decision, in dicta, that the State waived any argument concerning the mistake in the jury verdict by not raising it prior to discharge of the jury. SPA84-86. Since the jury made a mistake and the verdict is based on legally insufficient evidence, there is no basis for a waiver. Although it was not unexpected that the jury might encounter some difficulty in completing the rent portion of the Special Verdict Form which required it to fill in amounts for 205 years, it is not reasonable to expect counsel to have determined that the jury used current 2000 year dollars in calculating the FRV damages in the time between the announcement of the verdict and the discharge of the jury.

Even if a waiver had occurred, this Court still has the power to review a judgment based upon inconsistent findings. Lavoie v. Pac. Press & Shear Co., 975 F.2d 48, 55 (2d Cir. 1992). Here, 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. See Gibeau v. Nellis, 18 F.3d 107, 109 (2d Cir. 1994).

POINT XI

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FAILING TO LIMIT PLAINTIFFS TO THE DAMAGES, IF ANY, THEY INCURRED AT THE TIME OF THE ORIGINAL CONVEYANCES

In Cayuga VIII, the court failed to limit Plaintiffs' recovery to the damages, if any, the Cayugas incurred at the time of the original conveyances. Instead, the court opined that the award of fair market value ("FMV") as of the date of cession would "border on the inequitable" because such method would not compensate the Cayugas for the "many years they were deprived of use and occupancy of their land." SPA500. That ruling, which is subject to de novo review by this Court, see Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 267 (2d Cir. 2002); Connecticut v. Physician Health Servs. of Conn., Inc., 287 F.3d 110, 114 (2d Cir. 2002), was in error.

A. Fair Market Value At The Date Of The Alleged Taking Is The Proper Measure Of Damages.

The transfers at issue constituted a permanent loss of the land, a fact that is confirmed by the court's decision to deny ejectment. As a result of that decision, it is clear that the Plaintiffs cannot regain possession of the land through judicial relief or otherwise exercise any possessory rights they claim to have; they can gain

possession only by purchasing the land from willing sellers, just as any third party would.

Where, as here, there has been a total deprivation of property, the proper recovery is "the value of the subject matter or of [the] interest in it at the time and place of the conversion, destruction or impairment." Restatement (Second) of Torts § 927 (1979). In these circumstances, the compensation for loss of the property is measured by the FMV of the property at the time of the loss. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473 (1973) ("'[J]ust compensation' means the full monetary equivalent of the property taken."); see also United States v. Miller, 317 U.S. 369, 374-75 (1943) (monetary equivalence is to be determined by calculating the FMV of the property at the time of the taking).

The Supreme Court has specifically found this measure of damages applicable to a claim by an Indian tribe for the loss of its right of occupation. Shoshone Tribe v. United States, 299 U.S. 476 (1937). In that case, Congress passed an act in 1927 that granted the Shoshone the right to sue for the value of the property appropriated in 1878 in violation of a federal treaty and provided that the decision in such case "shall be in full settlement of all damages." Id. at 493. The Shoshone then sued and sought to recover as damages both the FMV of the land as

of 1927 (the date of the jurisdictional act) and compensation for use and occupation from 1878 to 1927.

The Supreme Court unanimously rejected the Shoshone's proposed damage measure, instead ruling that the Shoshone were entitled to the FMV of the land as of 1878, the date that the United States allowed another tribe, the Arapahoes, to enter its land illegally. Id. at 494. The Court noted that the government officers who first lodged the Arapahoes on the Shoshone reservation did not have authority to appropriate the Shoshone's land and that the Arapahoes' occupation was "tortious in its origin." Id. at 495. Nevertheless, the Arapahoes' occupation "ha[d] been permanent in fact" and consequently a "de facto appropriation" had occurred "as of the date of its beginning." Id. Since the Shoshone's right was one of occupancy, rather than "title" in the strict sense, the "division of the right [of occupancy] with strangers is an appropriation of the land pro tanto, in substance, if not in form." Id. at 496.

That conclusion applies with equal force here. If, in fact, the Cayugas' interest was transferred in violation of the NIA, that possessory interest was taken "in substance" at the time of the transfers. Under Shoshone, damages for the allegedly wrongful deprivation are not calculated as of the date of the

determination that an unlawful taking had occurred at some time in the past, but as of the time the tribe was first displaced—namely in 1795 and 1807.

The use of the date of the alleged loss as the measure of damages is supported by claims brought by tribes under the ICCA. Although the nature of the legal theory giving rise to those claims (i.e., violation of fiduciary duty by the United States) is different from the theory in this case (violation of the NIA and federal common law of trespass), those claims sought to recover compensation from the federal government for precisely the same types of transactions at issue here. Those cases hold that the measure of recovery for that injury must be based on FMV at the time of loss. See, e.g., Miami Tribe of Okla. v. United States, 614 F.2d 1273, 1275 & n.4 (Ct. Cl. 1980); Pillager Bands of Chippewa Indians in State of Minn. v. United States, 428 F.2d 1274, 1277 (Ct. Cl. 1970); Oneida Indian Nation of N.Y. v. United States, 43 Ind. Cl. Comm. 373, 407 (1978).

The court incorrectly concluded that the ICC cases were distinguishable because the ICCA specified the measure of damages. See Cayuga VIII, SPA498-9. The statute did not contain any damages measures applicable to such cases. See 25 U.S.C. §§ 70 et seq. (repealed). The ICCA was not limited to claims for "takings" by the federal government as is evidenced by its finding of liability against the government to the Cayugas (and other New York tribes) based upon breach of the

United States' fiduciary duty to ensure the Cayugas received "conscionable consideration" for this land. See Cayugas ICC II at 80; A2486. Moreover, even if the ICCA had prescribed a damages measure, it is unclear why that same damages measure would be inappropriate in the context of this case

B. The Cayugas' Damages In 1795 And 1807, If Any, Are Measured By The Difference Between What The Cayugas Were Paid And The Value Of The Lands They Sold Based Upon The Market At The Date Of Transaction.

Fair market value ("FMV") is normally to be ascertained from "what a willing buyer would pay in cash to a willing seller." Restatement (Second) of Torts § 927. The award of FMV at the time of the loss of property is full and fair compensation for such loss of the land, the improvements thereon, and the value of any potential future uses to which the plaintiffs might have put the land. United States v. Imperial Irrigation Dist., 799 F.Supp. 1052, 1069 (S.D. Cal. 1992) (FMV "compensate[s] the band for all future damages"). See also Diocese of Buffalo v. State, 248 N.E.2d. 155, 156 (N.Y. 1969) (FMV "is equivalent to the present worth of future net income").

The court's stated concern that the award of FMV as of the date of cession would "border on the inequitable" (Cayuga VIII, SPA500) rested on a misapprehension of the concept of FMV. Once a plaintiff recovers the FMV of the lost property, the plaintiff "recovers what he lost. To award . . . additional

compensation for lost profits or increased costs of development would be to award double recovery." Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987). Here, Plaintiffs caused any inequity that may arise from calculating their damages based upon the date of the transaction by delaying bringing this lawsuit until 1980.

Finally, nothing in the Court's decision in Oneida V mandated the measure of damages used by the court. Plaintiffs in that case only sought damages measured by the FRV of the land for the years 1968 and 1969. 719 F.2d at 541. The defendant Counties in that action were not parties to the original purchase of land from the tribes and therefore were sued only as current occupants of the land (presumably the only theory available against the Counties). Here, the State is sued as the party that improperly purchased the land from the Cayugas.

POINT XII

ASSUMING THE DISTRICT COURT'S QUASI-EJECTMENT REMEDIAL SCHEME WAS APPROPRIATE, IT MADE ERRONEOUS RULINGS PRIOR TO AND DURING THE COURSE OF THE PHASE I JURY TRIAL THAT WERE PREJUDICIAL TO THE STATE

A. The District Court Improperly Rejected Well-Established Limitations On The Remedies Granted In Ejectment Cases.

The damages measure used by the court was expressly modeled on the remedy of ejectment, which allows an owner of property to recover the land from someone wrongfully in possession of the land and to recover, as damages, mesne profits, see supra n.29, typically, rental value. See Cayuga VIII, SPA503-05. Even if it had been proper for the court to allow damages based upon an ejectment theory, the court erred in failing to limit plaintiffs' recovery as contemplated by New York and common law rules. This Court's review of that legal error is de novo. See, e.g., Winter Storm, 310 F.3d at 267; Bonnanzio, 91 F.3d at 301.

The fact that federal law applies does not automatically require resort to a uniform federal rule of decision in preference to state law. See, e.g., United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979). Absent a clear need for a uniform standard, or a finding that state law would frustrate specific federal objectives, the federal courts normally look to state law to supply the content of

federal law. Id.; O'Melveny & Myers v. FDIC, 512 U.S. 79, 87-88 (1994); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97-98 (1991); Strougo v. Bassini, 282 F.3d 162, 168-69 (2d Cir. 2002). The presumption that state-law rules apply should be particularly strong in disputes involving claims to real property where "private parties have entered into legal relationships with the expectation that their rights and obligations would be governed by state-law standards." See Strougo, 282 F.3d at 168 (quoting Kamen, 500 U.S. at 98). In fact, the courts have applied state law in the context of land claims brought by, or on behalf of, Indian tribes. See, e.g., Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671-72 (1979); Jackson County, 308 U.S. at 351-52; United States v. Hess, 194 F.3d 1164, 1173 (10th Cir. 1999).

In Wilson, the Court determined that state law (rather than federal rules applicable in interstate boundary disputes) would determine the respective rights of an Indian tribe and non-Indian residents to land along the Missouri River that had been altered by changes in the course of the river. In doing so, the Court emphasized that the "reasonable expectation" of private landowners militated in favor of applying state laws. Wilson, 442 U.S. at 674. The Court found "no need for a uniform national rule" to determine the dispute, and "little reason why federal

interests should not be treated under the same rules of property that apply to private persons holding property in the same area . . . ." Id. at 673.

In rejecting state law, the court did not identify any need for uniformity or any federal policy that application of state law would frustrate. See, e.g., Cayuga VIII, SPA510 (interest governed by federal law because claims are federal). The fact that plaintiffs' claims are federal in nature does not justify ignoring state law. See Jackson County, 308 U.S. at 352 ("[T]he beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions."). An award of FRV damages from 1795 to 2000, plus CFMV damages, is fundamentally inconsistent with well-established remedial principles.

The long-standing New York rule in actions to recover possession of real property is that recovery for rental value of the land is limited to a period commencing six years before the action is commenced. See RPAPL § 601. See also Willis v. McKinnon, 70 N.E. 962, 963 (N.Y. 1904). This limit is by no means unique. Indeed, English courts applied a six-year limit on rental value nearly two hundred years ago. See Green v. Biddle, 21 U.S. 1, 78 (1823) ("equity allows an account of rents and profits in all cases, from the time the title [of plaintiff] accrued, provided that do not exceed six years") (emphasis added)).

The limit on the period of recovery embodied in these rules is entirely consistent with the nature of a common law action for mesne profits, which "allowed of every kind of equitable defense." N.Y. Ont. & W. Ry. Co. v. Livingston, 201 N.Y.S. 629, 634 (3d Dep't 1923), modified, 144 N.E. 589 (N.Y. 1924). Plaintiffs' delay in seeking recovery should have limited the number of years for which FRV damages, i.e., mesne profits, are recoverable. See D.B. Dobbs, Handbook on the Law of Remedies at 329 (1973) ("delay may have some bearing on the proper measure of damages through equitable doctrines, associated with estoppel and laches"); Brooks v. Nez Perce County, 670 F.2d at 836-37 (damages may be denied due to federal government's 54-year delay in suing on behalf of tribe); Jackson County, 308 U.S. at 352-53.

Finally, the serious practical difficulties in ascertaining rental value over a 200-year period with any degree of certainty, which the court recognized would be a "horrendous task" (Cayuga VIII, SPA505), militate strongly in favor of imposing a temporal limit on such damages. There was no historical evidence of rental value for most of the 200-year period at issue. Indeed, there was unrebutted testimony by a State witness that there was no rental market in the area until 1949. T1019. Putting aside the question of whether the speculative quality of the evidence by itself precludes recovery of damages, the real and significant limits on the

availability and reliability of evidence as to rental value in this case strongly support adopting a damages measure containing the type of limit that exists under the New York statute. The United States recognized the appropriateness of such a limit in this action by its proposal that the court apply the New York rule in the absence of a governing federal rule. A3589-90. It only changed course when the court stated that it would follow the mesne damages methodology proposed by the tribes which was to seek mesne profits from 1795 to 1999. A4082, 4065-66, 4076; T582; T617-18 (D).

B. The District Court Erred In Finding That The State Could Be Held Liable For All Damages As The Original Tortfeasor.

The court ruled that "as the party responsible for the initial [NIA] violation . . . the State could be deemed an original or primary tortfeasor" and "responsible for all [of Plaintiffs'] damages on the theory that by originally violating the [NIA], it provided the means through which many, if not all, of the non-State defendants, derived title and have thus continued to hold the subject property in derogation of the Cayugas' rights to the same." Cayuga XI, SPA358. The court's theory of liability was wrong as a matter of law.

At common law, an owner dispossessed of his property was entitled to bring a trespass action for the ouster but the party that caused the dispossession, i.e., the "disseising" party, was liable only for damages arising immediately from the

ouster and not for damages subsequently suffered by way of adverse possession or otherwise. See, e.g., W.P. Keaton, et al., Prosser and Keaton on The Law of Torts § 13, at 78 (5th ed. 1984); Restatement (Second) of Torts § 162 cmt. c (1965). In City of New Orleans v. Gaines's Admin'r., 131 U.S. 191 (1889), the Supreme Court recognized this common law rule.

In New Orleans, the City had purchased a tract of land that at the time had no apparent deficiencies in the title. The City subsequently sold the land to various purchasers. Years later, it was determined that the title the City had received was invalid, resulting in the ouster of the City's grantees (i.e., the occupants of the land at the time). The true title-holder then brought an action against the City for mesne profits, claiming that the City, as an unlawful possessor and vender of the property, was primarily liable for all rents and revenues of the property actually received by the City and its grantees. Id. at 208. Addressing that claim, the Court stated:

> [t]he common law, certainly, does not recognize any such rule as that contended for. . . . . the modern action for mesne profits only lies against the tenant in possession who is cast in an action of ejectment. . . .

Id. at 210.[82]

[82] It is ironic that in deciding this issue the court, which had refused to apply provisions of New York law that could have limited the Cayugas' recovery, elected to rely on dictum in a New York state case rather than a case that

The State maintained that Plaintiffs must prove proximate cause and the Plaintiffs, in turn, asserted that the issue of proximate cause could be decided as a matter of law by the court. Tr. 1/24/00 at 20; Dkt. Nos. 690, 699, 700. The court deferred ruling on those applications. T966, 973. Subsequently, the court rejected the State's proposed charges (A4597-99, 4618, 4631) that it should only be liable for damages that it proximately caused. T2352-53, 2358, 2363.[83] Further, when the court proposed asking the jury whether Plaintiffs were entitled to damages against the State, Plaintiffs argued that "your instructions effectively preclude the jury from concluding that the Plaintiffs are not entitled to recover damages from the State." A4753. The court agreed, removed the question from the Special Verdict Form and thereby in effect ruled that the State is responsible for all of the damages. See T2379-80, 2747.

In sum, the State should not have been held liable for subsequent, successive possessions of the land acquired from the Cayugas after 1795 and 1807.

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applies federal law. See Cayuga XI, SPA358, citing Zenith Bathing Pavilion v. Fair Oaks S.S. Corp., 148 N.E. 532 (N.Y. 1925).

[83] In accordance with their view that the State was responsible for all damages as a matter of law, Plaintiffs presented no facts at trial to prove that the State proximately caused their FRV and CFMV damages. The jury was informed that the State had been held liable to the Plaintiffs. See T18, 29, 31, 42, 45, 58-9 (1/20/00—opening remarks of the court and statements of counsel); G-494.

C. The District Court Erred In Not Allowing The State To Receive An Offset From The Jury's Damage Award For The Dollar Amount Paid By The United States In Settlement Of The Tribe's Claims Against It.

The court refused the State's request to allow the jury to offset from the award of rent damages the $70,000 payment made by the United States to the Tribe to settle the 1951 ICC proceeding. Tr. 1/24/00 at 4; A4634; T2363-4. That ruling was erroneous as a matter of law and is subject to de novo review by this Court. It was also prejudicial to the State since it would have both reduced the jury award of rental damages and the award of interest (since interest was based upon the rent award).

A tortfeasor is entitled to a credit for any payment made by a third party "who is . . . subject to the same tort liability." See Restatement (Second) of Torts § 920A(1) (1979). Accord North Atl. Fishing, Inc. v. Geremia, 153 B.R. 607, 610 (D.R.I. 1993); Yost v. Am. Oversees Marine Corp., 798 F.Supp. 313, 318 (E.D. Va. 1992). "A fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct to the person for whom he should act." Restatement (Second) of Torts § 874, cmt. b. As set forth below, the United States' breach of its fiduciary duty was a proximate cause of the Cayugas' claimed injury and the United States is jointly and severally liable for that injury. Consequently, the State is entitled to an offset.

It is beyond dispute that at the time of the transactions in question the United States owed a fiduciary duty to the Cayugas to protect and preserve their property interest. See, e.g., United States v. Cayuga Nation of Indians, 202 Ct. Cl. 1101 (Ct. Cl. June 29, 1973); United States v. Oneida Indian Nation, 477 F.2d 939, 940-42 (Ct. Cl. 1973); Felix S. Cohen, Handbook of Federal Indian Law, 220-28 (1982 ed.). Under well-established common law principles, to which the federal courts look by analogy in defining the extent of the federal government's duty to Indian tribes, at a minimum the federal government was obliged to try to prevent what it now claims were unlawful sales of the Cayugas' lands or to attempt promptly to remedy any such transactions after they occurred. See Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975); United States v. Univ. of N. M., 731 F.2d 703, 706 (10th Cir. 1984); United States v. Oneida Nation, 477 F.2d at 939, 943 (Ct. Cl. 1973).

It is equally clear that if the Treaties are improper, the federal government failed to fulfill those obligations. The federal government initiated the 1795 transaction by which the bulk of the Cayugas' land was conveyed, and it knew about both transactions at the time they occurred. Nonetheless, the United States

did nothing to prevent or set aside the transactions until it intervened in this action in 1992. See pp. 32-43.

The ICC has determined that the United States breached its fiduciary duty to the Tribe with respect to the 1795 and 1807 transactions. See A2485-86; Cayuga ICC II at 79-80. The Tribe and the United States then settled upon $70,000 in damages to remedy the claim that the Tribe received inadequate compensation at the Treaties. Cayuga ICC III at 324-25; A1001-04. Consequently, in the event the finding of liability is affirmed, it is clear that the federal government's breach of its fiduciary duties was a substantial factor in the Cayugas' loss of the use and occupancy of the land for which damages were awarded against the State. At least as to that injury which plaintiffs seek to remedy against the State, the United States is jointly liable with the State. See Restatement (Second) of Torts § 875 ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm"). The fact that the tortfeasors' liability rests on different theories is irrelevant. See Raquet v. Braun, 90 N.Y.2d 177, 183 (N.Y. 1997).

If a new trial is held, the State should also be entitled to have the jury determine the United States' equitable share of any jury award based upon the

federal government's proportionate responsibility for the Cayugas' damages.[84] See N.Y. Gen. Obl. Law §15-1081a (McKinney's 2001) (where one of two joint tortfeasors settles with the injured party, the remaining tortfeasor is entitled to a proportionate reduction in any award against him). von Gernet, the State's historical expert, was prepared to testify at Phase I, but was precluded from doing so (see subsection (E)) about the role of the United States. A4161-62; S-623, pp.42-45, 54-55, 60-61. Based upon von Gernet's testimony at Phase II and the historical record, the court found that:

> [i]t is patently obvious that had the U.S. carried out its fiduciary responsibilities to act on behalf of its ward, the Cayuga Native Americans, this court would not have been faced with the herculean task of righting the wrong which was perpetrated on the Cayuga centuries ago. In that regard, the State should not have to shoulder the blame for the U.S.'s wrongful conduct. . . .

[84] The State's proposed charges in support of holding the federal government responsible for its equitable share of damages (A4673-76) were rejected. T2371. That ruling was consistent with the fact that the jury heard no evidence that would have allowed it to determine the United States' equitable share of any damages because of the district court's previous rulings preventing von Gernet from testifying. The State's position at any new trial would be that the federal government's proportionate share of any award of damages is far greater than the $70,000 ICC settlement amount. As such, a full evidentiary hearing is required as to the United States' proportionate share of liability.

Cayuga XVI, SPA252. See also Seneca Nation, 206 F.Supp.2d at 540 ("If there was a party who acted unfairly toward the Senecas, it was the United States, not New York . . . .").

Thus, since the United States engaged in tortious conduct that was a proximate cause of the loss for which the State was held liable in this action, it was error not to reduce the amount of the award against the State.[85]

D. The District Court Erred In Finding That The Subject Land Could Be Valued With Public Infrastructure In Place When Determining The Historical Rental And Current Fair Market Value Of The Land.

The court erred as a matter of law in its ruling that the lands must be valued with public infrastructure in place. Compare A4065-66, 4076, 4082, 4513, 4017; Tr. 1/24/00 at 23 with Cayuga VIII, SPA505. This, of course, dramatically increased the value of the land.[86]

That ruling was also directly contrary to the New York law that the court should have used in fashioning its damages remedies. Section 601 of the New

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[85] As a related matter, prior to Phase II the State attempted to obtain leave to assert a counterclaim for contribution against the United States, but the application was rejected as untimely and the proposed amended answer and counterclaim were rejected for filing. A4983, 4985-5015.

[86] As demonstrated above at Point IX(A)(7), the court's post-verdict finding in Cayuga XIV, SPA276, that the jury did not take infrastructure into account in its verdict, is not supported by the evidence.

York RPAPL provides that in an ejectment action, mesne profits are to be based only on the unimproved value of the property:

> [T]he plaintiff may recover damages for . . . rents and profits . . . but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he claims. (emphasis added)

Section 601 "codifies the common-law rule that the party seeking damages for use and occupation is limited to the rental value of the property in its unimproved state." Diocese of Buffalo v. McCarthy, 458 N.Y.S.2d 764, 769 (4th Dep't 1983) (emphasis added). See Madrid v. Spears, 250 F.2d 51, 55 (10th Cir. 1957) ("[plaintiffs' theory] of recovery [for mesne profits] was limited to the 'rental value of the land in its raw state without its improvements,' and this is undoubtedly the prevailing rule"); 25 Am. Jur. 2d Ejectment § 55 (1996) ("[D]amages for detention of the property are measured by the rental value at the time defendant took possession, not the enhanced value").[87]

The common law rule therefore does not require the defendant to prove good faith to offset the increased value of the property due to his improvements, but rather limits plaintiffs' recovery of rental value in an ejectment action to the

[87] In Oneida V which involved improvements to County owned land, this Court did not address the method of determining rental value since neither party had questioned the district court's calculation of the rental value of the land. See Oneida V, 719 F.2d at 541.

unimproved value of the land. The same common law rule that governs rental value should also have been applied to determine the amount awarded as CFMV. Since the function of the damages award was to compensate the Tribal Plaintiffs for the value of the interest they had lost, not the current value of the land as it exists today, the land should have been valued without public infrastructure improvements made after the challenged transfers.[88]

E. The Court Erred As A Matter Of Law And Abused Its Discretion In Denying The State An Opportunity To Present To The Jury Equitable Testimony Relevant To Plaintiffs' Request For Damages.

If the subject land were to be valued with infrastructure improvements, then the State was entitled to an offset for the value or benefit of the improvements. Both at common law and by statute a defendant in an ejectment case is entitled to set off the value of permanent improvements made in good faith. Green v. Biddle, 21 U.S. at 74; RPAPL § 601. The theory is that a good faith improver who gives up possession is entitled to offset against any amount of rental damages the value of his or her improvements. This Court in Oneida V confirmed that the principle

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[88] It is true that where ejectment is the remedy, the plaintiff necessarily recovers the land in its improved form, and the defendant-improver is limited to recovering as an offset the value of the improvements. See RPAPL § 601; Green v. Biddle, 21 U.S. at 74. Here, however, Plaintiffs did not recover the land and apart from the practical difficulties that the appraisal experts might face in valuing the land without public infrastructure, there was no obstacle to awarding its unimproved value.

applies to public infrastructure that is included in damages sought in an Indian land claim seeking mesne profits. Oneida V, 719 F.2d at 565 (holding that Counties were entitled to "a set-off of the value of . . . improvements against . . . fair rental value damages" that included 809 acres used as highways; the 47.22 acre Champlain Battleground Park and 2.07 acre parcel used as a fire department radio tower).[89]

The court initially concluded that von Gernet's planned testimony with respect to the FMV of the lands in 1795[90] and the State's good faith was not relevant and, even if relevant, would prejudice the jury. With respect to von Gernet's testimony concerning damages after 1795, delay and any other related issues, the court viewed all of these matters as equitable issues that should be reserved for the court to consider at Phase II. Cayuga XII, SPA348-49. The only

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89 As the language of RPAPL § 601 suggests, the amount of the offset for permanent improvements is generally measured by "the enhancement of the value of the land, by reason of the improvements." 41 Am. Jur. 2d Improvements § 27 at 310. See Grosch v. Kessler, 177 N.E. 10, 11 (1931).

90 The court determined that von Gernet's planned testimony about the market value of the land in 1795 was, at best, only marginally relevant to the issue of damages because he opined that the "'lands had no fair market value' because the State held a right of preemption." Cayuga XII, SPA347. von Gernet's opinion that the subject land did not have an FMV was simply a reflection of the fact that the subject lands could not be placed on an open market until after they were sold to the State of New York. The crux of von Gernet's Report dealt with historical issues that affected the fairness of the original transaction, not economic issues.

issue that the court decided could be addressed at the jury trial was the State's good faith as an occupier, not purchaser, of the subject land because that issue was both relevant to any offset and factual in nature. SPA348. Nevertheless, on the eve of trial the court agreed with Plaintiffs that any evidence of the State's good faith was an equitable matter and would prejudice the jury and should also be reserved for Phase II. Tr 1/18/00 at 9-10. Those rulings were in error and are subject to de novo review by this Court. See, e.g., Winter Storm, 310 F.3d at 267.

1. Assuming That The Subject Land Could Be Valued With Public Infrastructure, The District Court Erred In Denying The State An Opportunity To Present To The Jury Its Good Faith Defense.

Assuming that the subject land could be valued with public infrastructure, the court articulated no reason for precluding evidence that the State was a good faith purchaser, and none is apparent. Good faith is determined at the time of purchase. In Searl v. Sch. Dist. No. 2, 133 U.S. 553 (1890), the defendant was found to be a good faith improver based upon its reasonable but mistaken belief, at the time it acquired the property at issue, that an adverse possessor had better title than an individual with a conflicting patent title. Id. at 562. See also Oneida V, 719 F.2d at 541-42 (counties' good faith for purposes of obtaining an offset for improvements should include evidence at the time of their possession in the 1800s).

The distinction drawn by the court between purchaser and occupier also makes no sense with respect to the State. The State almost immediately resold the land it bought from the Cayugas; it never "occupied" the vast majority of the land.

The court's subsequent decision to take the issue of good faith from the jury entirely is equally erroneous. In so ruling, the court cited two grounds. The first was that "plaintiff's damages for infrastructure improvements is an equitable consideration to be considered by the Court" and not by the jury (Tr. 1/18/00 at 9-10), evidently accepting the United States' argument that the right to an offset was an issue that, at the time the Seventh Amendment was adopted, could have been heard only in equity. A81 (Docket No. 614, pp.29-30) In fact, under the common law of England in 1789, the only remedy of a wrongful occupant "is to recoup [his] value against the claim of damages." Green v. Biddle, 21 U.S. at 75 (citation omitted); 41 Am. Jur. 2d Improvements § 5 at 297. Therefore, juries under the common law would decide questions of good faith as an offset to a claim for trespass damages or mesne profits based on the principle that the owner of land has no just claim to anything except the land itself and loss of rent where the claimant, acting under an erroneous, but honest and reasonable belief that he is the owner, makes valuable and permanent improvements. See Jackson v. Loomis, 4 Cow. 168 (N.Y. Sup. Ct. 1825). Indeed, the court had previously held that "factual issues,

such as good faith, [are issues] which the jury must consider." Cayuga XII, SPA348.

The second ground on which the court rejected von Gernet's testimony was that "if the jury is allowed to hear such testimony from von Gernet, the spillover effect of same would undoubtedly unduly affect the jury in its consideration of the amount of damages to award plaintiffs." The court further concluded that such prejudice would outweigh its relevance, citing Fed. R. Evid. 403. Tr. 1/18/00 at 9-10.

Rule 403 does not authorize the court to bar evidence on a central element of a party's claim or defense on the ground that such evidence could adversely affect the extent of plaintiffs' damages. To the contrary, it constitutes abuse of discretion to exclude such evidence. See Pitasi v. Stratton Corp., 968 F.2d 1558, 1561 (2d Cir. 1992); Breidor v. Sears, Roebuck & Co., 722 F.2d 1134, 1140-41 (3d Cir. 1983). There was also no showing that the jury would have been confused by such testimony of good faith. Here, the State's good faith was a central element of its defense to plaintiffs' FRV and CFMV damages since those damages included the increased benefit or value due to public infrastructure. T40-41, 973; S-543.

In analogous cases, the courts have refused to charge a public entity acquiring land with the value of improvements it had previously made on the land

in good faith. See N.Y. Ont. & W. Ry. v. Livingston, 144 N.E. 589, 590-91 (N.Y. 1924) (plaintiff railroad, which entered lawfully upon land and improves it in good faith, may exclude the value of the improvements in proceedings brought thereafter to condemn a hostile right); see also Consolidated Tpk. Co. v. Norfolk Ocean View R.R. & Co., 228 U.S. 596, 602 (1913); Searl, 133 U.S. at 565. The court's error was also not harmless since the State, as a good faith purchaser of the land, was entitled to a set-off for the increased value due to infrastructure.

In addition, since the State is being charged with damages for the entire period of the Cayugas' alleged dispossession, if a damage award for the period that the landowners were in occupation is sustained, the State is entitled to rely on the occupier's good faith to seek an offset from the damages and interest award based upon the benefit attributable to infrastructure improvements. The court rejected the State's proposed jury instructions (A4628, 33, 48-49, 52-53) that would have permitted the jury to value the subject land by considering only those infrastructure improvements attributable to the State and not those improvements made by subsequent possessors of the land. T2361, 2363, 2365-67. In a related ruling, the court denied the State's request to present witnesses at the Phase I damages trial to

testify about the extent to which third parties were responsible for infrastructure improvements. T974-75; see also T950-75.[91] Each of those rulings was in error.

2. The District Court Erred In Rejecting The State's Defense Of Mistake.

It was error for the court to refuse to allow von Gernet to testify about the underlying facts that would have supported the defense of mistake, and not to instruct the jury on mistake. A4635; T2364. von Gernet would have supported the State's assertion that it reasonably believed that its conduct did not violate federal law at the time of the Treaties and in the ensuing 200 years. As the State's expert wrote in his Report and was prepared to testify at the Phase I trial:

> [The Cayugas] pleaded with federal officials to put pressure on the State of New York and change the mind of a reluctant governor who had stood up for the minority faction at Cayuga Lake and had insisted that the reservation could not be disposed of . . . .

S-623, pp.69-70. Moreover, federal officials attended the treaties at which New York purchased the land and raised no objection to the transactions themselves or the procedure followed by New York. Although Secretary of War Pickering was

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[91] Dorchester, the State's appraisal expert, valued the subject land with public infrastructure in place because he found that it was not feasible to do otherwise given that he was required to determine the FRV of the land from 1795 to 2000 and its CFMV. See S-538a, Vol. I, p. 1-13. However, if the court had ruled that the lands must be valued as unimproved, i.e., without public infrastructure or private improvements, the appraisal experts could have been expected to take that into account in their valuations.

clearly of the view that the State's Treaties did not comply with federal law unless held under the authority of the United States and pursuant to Article II of the Constitution, Governor John Jay, a Federalist and the first Chief Justice of the Supreme Court, was not prepared to accept that interpretation in July 1795 and the United States did not press its case for 200 years. See supra pp. 28.

A defendant who acts reasonably under the circumstances will not be held liable for a mistake that was induced by plaintiff. See Prosser & Keaton § 17 at 112 ("The plaintiff will not be heard to complain of a mistake for which he is himself responsible"). A defendant's sole liability is limited to whatever unjust enrichment he received by his mistake. Id. Principles of equitable estoppel apply in the context of mistake to preclude plaintiffs from recovery when their conduct led to or contributed to the alleged wrong. See, e.g., Gunn v. Parsons, 104 So. 390, 393 (Ala. 1925); Tousley v. Bd. of Educ., 40 N.W. 509 (Minn. 1888); Hills v. Snell, 1870 WL 6822 (Mass. 1870). These are also jury issues. See Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 725 (2d Cir. 2001); Int'l Minerals & Res. v. Pappas, 96 F.3d 586, 594 (2d Cir. 1996).

3. The District Court Erred In Not Allowing The Jury To Consider Evidence Of Plaintiffs' Delay In Mitigation Of Defendants' Alleged Damages.

The court also erred in not allowing von Gernet to testify at Phase I about Plaintiffs' delay and in determining the effect of that delay on Plaintiffs' damages. Cayuga XII, SPA348-49. It is hornbook law that a plaintiff must use reasonable efforts to mitigate damages to prevent further loss after the wrongdoing is committed. Restatement (Second) of Torts § 918(1) ("[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort"); 87 C.J.S. Trespass § 111 at 106 ("A person claiming trespass is required to mitigate."). Thus, the Plaintiffs had a duty to minimize their damages.

However, Plaintiffs waited roughly 200 years to assert this possessory claim against the State. Such unreasonable delay is a patent violation of the duty to mitigate damages. See City Nat'l Bank v. Am. Commwealth Fin. Corp., 801 F.2d 714, 719 (4th Cir. 1986) (denying plaintiffs' rescissionary damages because of their undue delay and failure to mitigate). A plaintiff that unreasonably delays pursuing its claims can be barred in whole or in part from recovery of damages. See, e.g., A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1028-29 (Fed. Cir. 1992); Hermes Int'l v. Lederer de Paris Fifth Ave., Inc., 50 F.Supp.2d 212, 225 (S.D.N.Y. 1999). The rule has been applied to Indian tribes. See Brooks v. Nez Perce County, 670 F.2d at 836. In this case, there is compelling evidence of

laches that could have supported a denial or reduction of damages due to failure to mitigate. See discussion supra at pp. 159-62.

To be sure, whether a party has satisfied its duty to mitigate damages is a question of fact for the jury that involves an evaluation of the reasonableness of the party's conduct under the specific circumstances. Tri County Indus., Inc. v. Dist. of Columbia, 200 F.3d 836, 840 (D.C. Cir. 2000), cert. granted, 530 U.S. 1305, cert. dismissed, 531 U.S. 287 (2001). This is especially true where, as here, the evidence indicates that a party could have mitigated its damages. Hilord Chem. Corp. v. Ricoh Elec., Inc., 875 F.2d 32, 39 (2d Cir. 1989) (finding the "court's unexplained refusal to instruct the jury" on the issue of mitigation of damages was reversible error where defense relied on failure to mitigate damages).

By precluding the jury from considering this and other factors such as good faith and mistake, the court usurped a quintessential function of the jury. Accordingly, a new trial is necessary.

POINT XIII

THE DISTRICT COURT FAILED TO APPLY DAUBERT AND KUMHO TIRE PROPERLY IN ALLOWING THE UNITED STATES' APPRAISAL EXPERT TO TESTIFY TO THE JURY

The court's ruling that Hale, the United States' appraisal expert and plaintiffs' only Phase I trial witness, could testify because his planned testimony was both relevant and reliable, was manifestly erroneous. See Cayuga XVII, SPA46, citing Cayuga XIII, SPA289; T2329. Hale's methodology for calculating CFMV damages and FRV damages failed both the relevancy and reliability requirements of the Federal Rules of Evidence, as those tests have been interpreted with respect to expert testimony by the Supreme Court in Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993), and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).[92]

A. Relevancy.

Hale used sales of smaller sized parcels, beginning at 20 acres, to calculate the CFMV of the single tract of 64,000 acres. T585, 621 (D); T355, 576. Hale

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[92] The asserted failure of the trial judge to apply the Daubert standards properly is subject to review by this Court for abuse of discretion. See General Elec. Co. v. Joiner, 522 U.S. 136, 142-43 (1997); Kumho Tire, 526 U.S. at 152; Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 264 (2d Cir. 2002); McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995) ("decision to admit expert testimony . . . will be overturned only when manifestly erroneous"). If Hale's testimony were struck at trial in the context of the State's Rule 50 motion, Rule 50 requires the court to consider whether the remaining evidence, viewed in the light most favorable to plaintiff, supported the jury verdict. Weisgram v. Marley Co., 528 U.S. 440, 455-56 (2000); In re Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124, 1135 (2d Cir. 1995). That evidence was legally insufficient to support the verdict for FRV damages. See Point X infra.

"aggregate[d the] value of 5,647 tracts of land (64,160.67 acres) based upon the hypothetical condition that only the land and the contribution of public improvements are to be considered in the valuation." A4251-52; see also T722-23, 47, 53, 76, 80-81, 861(D); S-524; S-543; S-546. Aggregating the price of individual parcels to arrive at the value of the whole tract is contrary to well-established valuation principles. See United States v. Eastman, 528 F.Supp. 1184, 1186 (D. Ore. 1981); United States v. 8.41 Acres, 680 F.2d 388, 395 (5th Cir. 1982); United States v. 2,175.88 Acres, 687 F.Supp. 1079, 1085 (E.D. Tex. 1988).

Hale's testimony could not assist the jury because it could not determine the CFMV of a large tract of land based upon an aggregation of the per-acre value of small parcels without adjustment for size and other relevant factors. S501; S-525. Hale simply added up the sum of the values of each of his nine highest and best use categories to arrive at the total value, without making any adjustments. T722, 724-25, 740, 747, 768 (D). Even if such an adjustment were possible, Hale presented no evidence that would have allowed the jury to make that adjustment.

With respect to FRV damages, for the period from 1795 to 1899 Hale used sales data gleaned from 2419 deeds [T628 (D)] to arrive at an average price per-acre for each year. T623-27 (D); G-496. Hale used sales data for small sized parcels and made no further adjustment for the relative size of the parcels. See G-

496, T585, 629 (D); T536-37. He multiplied that average price by the 64,015 acres in the claim area to derive the FMV for that year. T451-52, 511-12. Hale then determined the FRV for each year by taking 6% of the FMV. T585, 629, 724-25, 740, 768 (D); S-546b; S-547. Because Hale's FRV amounts were derived from the FMV of the subject land, which in turn was based on sales of small-sized parcels, his figures could not assist the jury.

B. Reliability.

Hale's methodology also failed the reliability standard primarily because Hale used computer models that did not account for the actual characteristics of the properties. Hale classified each parcel without appraising any particular property. T552-63, 854 (D); T756-57, 809, 821-22. Since the records Hale relied upon did not designate properties within the "highest and best use" categories that Hale selected, Hale had to make certain judgment calls in order to determine the category within which to place a particular parcel. T540-1, 45-6, 55-6, 853-9 (D); T139-40. For example, Hale classified two parcels with a total of 132.2 acres as "business urban" property even though the parcels were identified by the County as "fairgrounds." T861 (D); T755, 1424; S-603. One of these two properties, a 14.2 acre field adjacent to the Union Springs Fire Dept., had recently sold for $18,000. T1426. However, Hale assigned it a value of $729,738 because he

designated these properties as "urban commercial property" and valued them using the average price he determined for such property, $51,390 per acre, the same way that an appraiser would value downtown prime urban commercial property. T861 (D). Hale was unfamiliar with any of the properties or the specific circumstances surrounding these "representative" sales that could have affected the sales price including whether the property could use municipal sewage and water lines or had its own well and septic system. T552-63, 870-01 (D); T47-48, 756-57, 799-812, 817-35.

Hale determined the price per acre for each of his nine categories of "highest and best use" based upon 153 recent sales, T570 (D), that were not shown to be sales of "comparable" properties. S-501. For example, Hale determined that all property that was "urban residential" should be valued at $26,193-per-acre based on just four "representative" sales, not one of which was a sale of property within the claim area and without ever looking at the properties. T882(D); T804-813, 817-19; G-84. He used just three sales to value all urban commercial property (including the two fairgrounds) at $51,390 per acre. T878-79 (D). Hale then calculated a price per-acre for each of his nine categories by averaging sales prices for his "comparable" properties (T553-54, 78, 83-84, G-491a, 492, 493) even though he acknowledged that it is not normal to average sales prices. T758 (D).

Hale simply assumed that the average price would be "representative" of all of the properties with the "highest and best use" designation he assigned to it. T580, 685; T882-83 (D).

Once Hale obtained an average price per acre for each "highest and best use" category, he multiplied that value by the total number of acres of all of the parcels that were designated within the particular category without adjustment for size and other relevant factors. T740; 768 (D). He then added up the total values for each of his nine "highest and best use" categories to obtain the CFMV. G-491a-G-493.

In determining rent for 1795 to 1899, Hale did not assure that the deeds that he utilized to determine sales price were a statistically significant and representative sample of the larger universe of deeds on file in the Seneca and Cayuga County Clerk's offices. Hale relied on only three sales (ranging in size from 100 to 250 acres) to draw the conclusion that the FMV of the entire claim area rose from $2.51 in 1796 to $3.57 per acre in 1797; three sales (ranging in size from 50 to 250 acres) to draw the conclusions that the FMV of the entire claim area rose to $3.71 per acre in 1798; and four sales (ranging in size from 30 to 346 acres) to draw the conclusion that the FMV of the entire claim area rose to $5.26 per acre in 1799. S-548, p.18. When he was presented with additional deeds from

those years on cross-examination, Hale stated that he would have included such deeds in his database had he or his assistants located them. T499.

In sum, Hale's methodology failed both the relevancy and reliability prongs of Daubert and Kumho Tire, and Hale should have been precluded from testifying or his testimony should have been stricken.

POINT XIV

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO DIRECT THAT THE FINAL JUDGMENT BE PAID ENTIRELY TO THE UNITED STATES AS TRUSTEE FOR THE HISTORIC CAYUGA INDIAN NATION

Any final judgment for damages and interest should run exclusively to the United States as trustee for any successors-in-interest of the historic Cayuga Indian Nation to ensure that Defendants are not exposed to multiple claims by other interested tribes, such as the Canadian Cayugas, that could result in further litigation. The court abused its discretion when it adopted a first and then a second amended final judgment that run jointly to the Tribal Plaintiffs and the United States, as trustee. SPA9, 2.[93]

The court rejected the State's motion to amend the judgment under Fed.R.Civ.P. 59(e) and agreed with the United States' position that any allocation

[93] The words "as trustee" were omitted from the first amended judgment and were inserted in the second amended judgment on application of the Cayuga plaintiffs under Fed.R.Civ.P. 60(a). A202, 5382. The State opposed the tribal plaintiffs' motion because the Cayuga plaintiffs had opposed any allocation of the final judgment that included other tribes, and the State wanted the Court to make clear that the judgment was available "for all successors-in-interest of the historic Cayuga Indian Nation." A5380. The court denied the State's request but noted that the addition of the words "as trustee" was a clerical amendment and did not effect any substantive change in the first amended judgment. A5393.

of the award should be deferred because distribution of any final judgment will involve consideration of important law and policy issues, including, inter alia, "'how the principal should be allocated between the New York Cayuga, the Seneca-Cayuga, and other potentially interested parties, ...'" Cayuga XVII, SPA44.[94] That decision was in error because it exposes the State to a final judgment that runs jointly to the Tribal Plaintiffs.

As trustee for the eligible tribes, the United States is responsible for ensuring that any award is properly invested and fairly allocated. The two Tribal Plaintiffs are not the appropriate parties to decide if any portion of the judgment should be paid to other affected tribes, especially since they have opposed distribution of the judgment to any other tribes.

Furthermore, Indian tribes are bound by the actions of the federal government whether or not they have participated in the lawsuit, based on the doctrine of privity. That doctrine provides that "one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation." Canadian

[94] The State moved in limine prior to the Phase I jury trial for similar relief, asking that the court apportion any damages awarded in this case among all tribes that derive from the historic Cayugas who are determined eligible under federal law to seek a remedy for violation of the NIA. That motion was opposed by the Tribal Plaintiffs and denied without prejudice to renew. See Cayuga XII, SPA350.

St. Regis Band of Mohawk Indians v. New York, 146 F.Supp.2d 170, 189 (N.D.N.Y. 2001). See also Heckman v. United States, 224 U.S. 413, 446 (1912) (once "the United States, on behalf of its wards, ha[s] invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress," those wards cannot "themselves be permitted to relitigate the question"); Nevada v. United States, 463 U.S. 110, 135 (1983) (holding that a tribe, though not a party to the earlier action, was bound by its result because the United States had represented the tribe's interests in that action); Seneca Nation of Indians v. State of New York, No. 85-CV-411C, slip op. at 14 (W.D.N.Y. Feb. 7, 2003) (Curtin, J.) (denying Oklahoma-Seneca Tribe's motion to intervene, finding, inter alia, that "in the unique context of enforcing restrictions on the alienation of Indian lands, the United States is best situated to provide complete representation of tribal interests, and no other party is necessary").

In this case, any tribes descended from the historic Cayuga Indian Nation are in privity with the United States if 1) a trust relationship exists between the federal government and such tribe, and 2) the tribe satisfied the standards to sue for a violation of the NIA. The district court has held in another tribal land claim lawsuit that the NIA creates such a trust relationship even with tribes that are now based in Canada. See Canadian St. Regis Band, 146 F.Supp.2d at 186. Although

the State disagrees with that ruling, if that decision is not overturned, the Cayuga Indian Nation of Canada, a potential descendant of the historic Cayuga Indian Nation (see A1504, 1698, 1879, 1907-09) and any other tribe with a potential claim to the subject land, could be entitled to share in any final judgment that is awarded in this case.

In sum, the State's requested modification of the final judgment would protect all of the Defendants by ensuring that they will not be subjected to multiple liability for the single alleged harm to the Cayuga Indian Nation that is at issue in this lawsuit and thereby prevent a future waste of judicial resources.

CONCLUSION

For all the above reasons, Defendants are entitled to Summary Judgment, or, alternatively, a remand to the district court on the liability phase of the case. On remedies, the State is entitled to a new trial on both damages and prejudgment interest. Alternatively, the State is entitled to a substantial reduction in the award of prejudgment interest.

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DATED: March 27, 2003

CERTIFICATE OF COMPLIANCE

The undersigned attorney, Gus P. Coldebella, hereby certifies that this brief complies with the type-volume limitations set forth in this Court's Civil Appeal Schedule Order No. 2, dated February 21, 2003, which states that appellants' brief(s) shall not exceed 63,000 words in aggregate. According to the word processing program used in this office, this brief, exclusive of title page, corporate disclosure statement, table of contents, table of authorities, table of abbreviations, and certificate of counsel, contains 61,357 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March 2003, two copies of the foregoing were served by Federal Express on each of the following:

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