ST. REGIS MOHAWK TRIBAL COURT

Desiree White,	)	
Plaintiff	)	
	)	**Case No.: 10-LND-00009**
v.	)	
	)	
Allen White,	)	
Defendant	)	

DECISION AND ORDER

Today the Court is called upon to address a historic "troublesome and vexatious"[1] issue for members of the St. Regis Mohawk Tribe: Land disputes on the Saint Regis Mohawk Indian Reservation (SRMIR). In addressing this case, as well as other cases now pending in front of the Court, it would be simple and expedient to simply utilize U.S. legal principles in disposing these cases in what some would deem to be an efficient manner.

On behalf of the Tribal Court, I have chosen not to pursue that efficient manner, and instead have chosen to follow the Saint Regis Mohawk Tribe (SRMT) Laws given to the Court, and to do what is 'just' over what is 'expedient'. Although this has added considerable time in deliberating upon these cases, something we apologize to the parties for, it does not change the requirement that an exacting review of land holding patterns on the SRMIR reservation was necessary in order to properly deliberate and decide the cases now before the SRMT Court.

Although lengthy, it is clear that this exacting review will assist the SRMT Court in deliberating upon these cases and cases that may come for review in front of the SRMT Court in the future.

LAND HOLDING ORIGINS

The civil code of the St. Regis Mohawk Tribe, under the section titled "Applicable Law", provides for the following:

> "[3.] Unwritten Mohawk laws, and written and unwritten Mohawk customs, traditions, and practices."[2]

The SRMT Court finds that the following is meant within the language used within the SRMT Civ, Code, as it relates to land disputes.

Clearly the community of Akwesasne has the word Mohawk inserted into many of its current locations and institutions, and this facet clearly references the historical

[1] *See* NY Assembly Document No. 131 February 9, 1841.
[2] See Saint Regis Mohawk Tribal Court TCR-2008-19, Civil Code, (hereinafter SRMT Civ. Code) at § V(a)(3).

origins of some SRMT members and residents to the Mohawk Nation, which is one of the 'founding' Nations of the Iroquois Confederacy[3]. Yet, it is also clear that not all members and residents of Akwesasne trace their historical origin to the Mohawks, and subsequently, the Iroquois Confederacy. The confusion this can cause is compounded by the fact that the primary aboriginal language spoken in Akwesasne is Mohawk. Yet, this only helps explain the rise in the use of the term Mohawk in Akwesasne.

Some of this confusion originates from the establishment of certain Tribal Nation/ Communities on the shores of the St. Lawrence River. One particular Tribal Nation community was that of Caughnawaga/Kahnawake which was established across from Montreal (PQ) Canada in the mid to late 17th Century. In this community were not just Mohawks, but also other member Nations of the Iroquois Confederacy (namely Oneida), as well as Algonquin, Huron (/Wyandot), and Abenaki Nations. As noted, this community would become known as Caughnawaga/Kahnawke, and when the Iroquois became the more dominant group located there, it became known as the Iroquois of the Sault.[4] Although this village quickly came into alliance with France, it would also be a 'founding member' of its own alliance known as the Seven Nations of Canada. This 'other' alliance would, to the chagrin of both British and French monarchy officials, maintain alliance with other Tribal Nations to its East, North, and with the Iroquois to the South.[5] The military importance of this Community/Nation became very apparent during the many wars of the 18th Century, and even more so during the period of what is commonly called the French & Indian War, or the Seven Years War.

This history is included because it is from here that we can gather some crucial and relevant information with respect to what life 'resembled' within the Caughnawga/ Kahnawake community during this time period. This includes the native 'land holding' patterns internal to the Caughnawaga/Kahnawake community. Louis Antoinne de Bougainville, who served as aide-de-camp to the French General Montcalm during the French & Indian War (1756-1760), leaves what is perhaps the best glimpse of the issues which are of concern to us here. In Bougainville's journal he recorded the following observation on July 9th 1757 with respect to Caughnawaga/Kahnawake:

> The village at the Sault is attractive, *laid out in regular form* with a parade ground which divides it and serves as a riding field, for they have many horses and exercise them continually. The church is pretty and well decorated. The Indians have, as do those at the Lake, fields cultivated by their women, fowl and cattle,

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[3] The other Iroquois Nations being: The Seneca, Cayuga, Onondaga, Oneida, Mohawk, and later joined by the Tuscarora.

[4] Which is in reference to the Lake St. Louis rapids, that were, in the St. Lawrence River directly in front of the Community.

[5] The Seven Nations, or Fires, as they are referenced, would include the Huron/Wyandot of Lorette, Abenaki of St. Francis, and the Iroquois of the Sault-Caughnawaga/Kahnawaka, the Missassauga-Algonquin-Iroquois of the Lake of Two Mountains (Kanasatake), and the Iroquois at LaPresentation. To the East were Micmacs and Penobscots of the 14 Fires, to the North the Odawa. See Hough *supra* note 22, and PETER MACLEOD. THE CANADIAN IROQUOIS AND SEVEN YEAR'S WAR. Dundurn Press. (1996).

all individually owned. They sell, buy, and Trade just like Frenchmen.[6] [emphasis added].

This passage becomes extremely relevant when one recognizes that it was from the 'Iroquois of the Sault' that a majority of the 'founding families' of Akwesasne originated from.[7] And from all appearances, the land holding pattern then in use in Caughnawaga/Kahnawake was emulated and/or transferred to Akwesasne.

Customary Land Holding in AKWESASNE

There is not readily available[8] any documented first hand observations made during the period of 1760 to 1780 with respect to land holding patterns in what is called Akwesasne, and later on, synonymously the St. Regis Mohawk Indian Reservation.[9] Yet, other proofs show that the land holding pattern which existed in Caughnawaga/ Kahnawake was duplicated in Akwesasne.

In the post revolution period (June 1786) an ensign with the British Military was traveling through the St. Lawrence River Valley and noted the following observations:

> On the Opposite side of the River is an *Indian Village called St. Regis*. I do not know to what Nation this village properly belongs but believe the most part of its inhabitants were originally a Branch of the Hurons. It is now a considerable Village, can produce Warriors which are esteemed as good ones. The Last House in this Village is exactly on the 45th Parallel of Latitude. Of course this is by treaty the last Settlement of the English. On the South Side the River as the boundary from hence runs up the center of the Lakes and Rivers go I only know where as to islands. *They are all the property of the Indians who will not part with them.*[10] [emphasis added].

Later in the same journal another entry records the following:

> "On these Islands all the way up the River and even above Cataruque *the Indians grow* all the corn the[y] make use of as well as Pumpkins Squashes and even a few Mellons. [Sic]"[11]

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[6] *See,* ADVENTURE IN WILDERNESS. THE AMERICAN JOURNALS OF LOUIS ANTOINE DE BOUGAINVILLE, *1756-176*" 124-125 (Edward P. Hamilton trans. ed., Univ. of Oklahoma Press 1964).
[7] These include the Tales of those Captured during the intermittent wars, the more famous being the families of Williams, Tarbell and Rice. Said surnames still exist in both Kahnawake and Akwesasne. *See,* John Demos, THE UNREDEEMED CAPTIVE: A FAMILY STORY FROM EARLY AMERICA. Alfred A. Knopf. 1994. (discussing Kateri's Kin).
[8] To date.
[9] The term Mohawk was added only later, and is a rather recent phenomenon.
[10] *See,* THE AMERICAN JOURNALS OF LT. JOHN ENYS 96 (Elizabeth Cometti ed., Syracuse University Press 1976).
[11] *Id.* At 96.

These observances indicate that clearly those Indians of the village of St. Regis, who in large part had emigrated from Caughnawaga/Kahnawake, brought with them the notions of property ownership, and began agricultural pursuits utilizing their property. Further evidence of this 'land use' knowledge can be discovered in the following:

> Araguente was a Caughnawaga Indian and a trader, which is indicated by a series of leases for land and a mill-site near Fort Covington, New York. Two of these leases are recorded in the County Clerk's office at Plattsburgh, New York; the first of these, dated December 15, 1798, is between 'William Gray, of St. Regis, trader of the one part, and Thomas Arakouante of the Village of Caughnawaga of the 2d part, and [several] Chiefs of the Indians of St. Regis of the 3rd part.' In which Gray assigns to Araguente his lease from the Indians. The second lease, dated December 29, 1798, is 'between Thomas Arakuente of Caughnawaga, Trader, and James Robertson of Montreal, Merchant,' in which Araguente in turn assigns the lease to Robertson.[12]

Therefore, in combination these observances clearly show some sense of property control, for both agricultural and commercial purposes, by the Indians of St. Regis. This leaves a separate question though, was there any sense of an individual Indian possessing property ownership rights. The following from 1804 sheds some light on this issue, and seems to answer that inquiry in the affirmative:

> Crossed from Cornwall to St. Regis an Indian Village of about 200 warriors....*They have tolerable log houses*, iron stoves-chimneys-glass windows etc.... *many of their houses are of squared log & shingled* but more of rough log covered with Elm bark. ...The Indns [Sic]. Have contributed for building a Mill, the revenue of which they allow the priest....[13] [emphasis added].

Although demonstrative of the early history of Akwesasne, it appears that a more exacting description is needed. For that, we turn to other sources.

Following the War of 1812 both Britain (British Canada) and the United States agreed to form a 'joint-commission' to set the international boundary between the two countries. Both countries subsequently appointed their own commissioners and provided support staff which largely consisted of commissioners, surveyors, and lay workmen. The work was commenced in earnest around 1817, and at that time due to the nature of the work, the language contained in treaties entered into between the two countries, and the location of 'St. Regis', the joint-Commission arrived at St. Regis in 1817. Most telling for current purposes is the journal maintained by Major Joseph Delafield which contained his

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[12] *See,* McLellan , H. and Charles McLellan. Eds."A Quarterly Magazine of American History." *The Moorsfield Antiquarian,* 1.2 (1937): 195.

[13] *See, Lord SELKIRK'S DIARY,1803-1804; A JOURNAL OF HIS TRAVELS IN BRITISH NORTH AMERICA AND THE NORTHEASTERN UNITED STATES* 196 (Selkirk, T. D., & White., P. C. eds.,(1958). Further, it is noted in other sources that the Indians of St. Regis built their own church at a cost of 800*l*.

observations made during that time.[14] The following passages from that diary provide a description of St. Regis.

> Arrived at the village of St. Regis in the afternoon, having first stopped at Col. Ogilvy's camp a little north of the village on the Isle de St. Regis. St. Regis contains but one or two English or American residents. A Catholic priest is the tribunal to which the natives on all occasions refer.[15]

With respect to agriculture Delafield notes the following:

> Observed some squaws planting seeds which had previously covered in the earth, and permitted to remain til germinating-having found their place of deposit they carried off only such seeds as had sprouted, to plant, thus securing a crop without any wasteland. The seeds were corn, cucumbers, peas & beans. *The Indians of St. Regis cultivate considerable land & much of this island....*[16]

In further description of some of the islands possessed and cultivated by 'the Indians,' Delafield notes that they are: "Considerable cultivated by Indians. Could not learn that they could grant satisfactory titles. An apple orchard was then in full bloom. Strawberry, blackberry & gooseberry vines are found."[17] Furthermore, during this period Delafield had an opportunity to observe the 'Corpus Christi' in St. Regis and he describes: "*The village* has been prepared for the occasion, by sweeping the lanes which are in green sod, & *very regular*, and planting rows of poplar & hemlock, on either side giving it quite a fanciful appearance."[18]

When the joint-commission needed storage space, Delafield notes that "*The Chiefs of the village* assemble at our lodgings to *execute a lease* of a store lot to Judge Atwater for 10 dlls., yearly rent, the delivery of which I witness."[19] As a collective whole, these observations clearly begin to show a sense of property ownership was already in existence on the St. Regis Mohawk Indian Reservation/Akwesasne. Perhaps the best description of 'reservation life' and Reservation Land Holding patterns from that time is discovered in the diary entry for July 13, 1817:

> There are some good looking fields of grain on this island, which are cultivated almost exclusively by the women. Corn, wheat, peas, and potatoes & beans chiefly. ***He who first cultivated a plot of ground becomes the possessor, and by this use gains a right to sell his privilege.*** The Chief Loran, an industrious sober

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[14] *See,* Major Joseph Delafield. *The Unfortified Boundary. A diary of the first survey of the Canadian Boundary Line from St. Regis to the Lake of the Woods by Major Joseph Delafield an American Agent under Articles VI and VI of the Treaty of Ghent.* (1943).
[15] *Id.* at 139(day of May 20, 1817).
[16] *Id.* at 140 (day of May 29, 1817).
[17] *Id.* at 142 (day of June 5, 1817).
[18] *Id.* at 143 (day of June 8, 1817).
[19] *Id.* at 145 (day of June 19, 1817).

> & prudent old man, is the greatest farmer and has the most cleared land by purchase of privilege in part. [emphasis added].[20]

This clearly provides early evidence of some sense of the privilege and/or right associated with property control on the St. Regis Indian Reservation by an individual St. Regis Indian: Those who first cultivated become the possessor. In addition, the passage clearly shows that 'property transfers' were occurring by and between St. Regis Indians.

Proof of the security of an individual St. Regis Indian in their land can be gleamed from other sources by 1847, and this information originates from the so-called northern (Canadian) portion of the territory of Akwesasne:

> When an Indian is once in possession of a piece of land, is he secure from the intrusion of other Indians; also, has he power by usage, of Transmitting it to his heirs or conveying his interest in the property to other members of the tribe, or other parties?
>
> Any Indian, whether man or woman, once in possession, by purchase or otherwise, of a piece of land within the tract held and owned by the tribe in common, ***is, by usage, protected against intrusion of any other person or party, and has the right of transmitting his or her interest therein to their heirs, or of conveying it to any other Indian of the tribe, but to no other persons.***[21] [emphasis added].

This observation is confirmed later in the same report by another answer given to the same style question:

> Their cultivated and uncultivated lands are not divided into regular portions; each Indian makes choice of a piece of land according to his taste. The chiefs do not choose.

Similarly:

> ***When an Indian is in possession of a piece of land he holds it as proprietor; no other Indian can take it from him. He may by custom transfer it to his heirs, or sell it to any number of the Tribe, but not to the whites.*** [emphasis added].

One would be prone to say that this is only pertinent to the so-called northern portion of Akwesasne. Yet, other historical observations from the same time period confirm the individual St. Regis Indian right to hold their lands. In 1852, the noted New York State

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[20] *Id.* at 151.

[21] *See,* Appendix to the sixth volume of the journal of the legislative assembly of the province of Canada, from the 2nd day of June to the 28th day of July, 1847, both days inclusive, and in the tenth and eleventh years of the reign of our Sovereign Lady Queen Victoria being the third session of the second Provincial Parliament of Canada session; Appendix(T.), Appendix No. 5, Answers from the Resident Superintendent of the Indian Department at St. Regis.

Historian Franklin B. Hough would also travel through the so-called 'American portion' of the St. Regis Indian Reservation and recorded his observations at that time:

> The surrounding fields, are an open common, without separate enclosure, and are used as a public pasture by the inhabitants. Around the cabin of the villagers are usually small enclosures, devoted to the cultivation of corn, and culinary vegetables, ***which by the right of occupancy have come to be considered the private property of individuals, and as such are bought and sold among the natives****, although the law recognizes no such private ownership, and holds them all as tenants in common, denying them the right of buying or selling land, except to the government.*[22] [emphasis added].

For clarification it is apparent that Hough's statement "although the law recognizes no such private ownership" is NOT in reference to the laws or customs internal to the St. Regis Indian Reservation, but rather to the neighboring Anglo-American legal system.[23] Confirming this is the observation that the customary land holding mechanism at St. Regis, by the end of the 19th Century, had evolved to the point where written documents were used. This can be seen in the following extracts from records in the SRMT Clerk's Office:

November 19th 1898,

Moe's Na So Ta Ko washios Wentsianinon ne tsi nar ne tekaronla ke
[*Sold land, Two Blue Skies (name)*]
niho ninon ne watio ta on
[*he bought it from*]
She Te ni ha on wen tsia kenha
[*Land that used to be his*]
Ken na hiion $80.00
[*Good hide or leather*]
Tionhonskwaron enska
[*One cow*]
Ta Hiion
[*I gave him*]
Ken nia ha tkene $30.00
[*He took hold, grabbed or accepted the deal*]
Owistha $40.00
[*Money*]
Tanon rikaro tani ne $10.00
[*And I lent him*]
Tho nenka wa o ti teh

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[22] *See*, FRANKLIN B. HOUGH. A HISTORY OF ST. LAWRENCE AND FRANKLIN COUNTIES, NEW YORK, FROM THE EARLIEST PERIOD TO THE PRESENT TIME. 110,113. Little. (1853). (Identifying June 1852 as the time of Hough's visit).

[23] In all likelihood Hough was referencing New York Property law in this regard, and the minimal Federal Indian Law then in existence.

[*Now it is finished $80.00*][24]

Following this transaction, another is noted in the SRMT Records:

November 5th 1900

So Se Sho Tien Tonh
[*Reverts back or goes back to (Sose, owned it first)*]
Wahiio wentsianinon netetia Tekha
[*I gave, bought or sold land, the land goes up against (setting a boundary mark)*]
Ne Mose (?) Raonwentsiakenha
[*It was Mose's land*]
Tanon tekeniiashe tsiohonskwaron
[*And a pair of cows*]
Kon nia hatkeneh $130.00
[*It convinced him or sealed the deal (wa'thokoni- he couldn't resist the price)*]
Oksaok akwekon Wak kariake
[*Right away I paid it off*]
Owista
[*Money*]

I:I John Garrow
[*Me John Garrow*] [25]

Therefore, the foregoing makes clear that St. Regis already had developed a 'customary' land holding system which recognized an individual Indians land rights.

Distinguishing the St. Regis Leases

First, as noted herein it is clear that as early as 1798 there is proof that certain lands of the St. Regis Indian Reservation were already 'under lease'.[26] This though has to be coupled with other related observations. For instance, and returning to the 1817 joint commission, as the Commission continued their survey work up the St. Lawrence River, Delafield's diary notes the following:

> *The St. Regis Indians claim title & give leases.* The Chiefs having divided, however, part among the British & part among the Americans, throws their concerns into confusion and, as neither can agree, the rent is neither demanded by or paid to either."[27]

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[24] This is the earliest SRMT Recorded transaction given in the Traditional language at St. Regis. The reader must be cautioned that other records do exist that may be outside of the SRMT Clerk's Office.
[25] *Id.*
[26] *See, supra* note 12.
[27] Delafield at 159, *supra* note 14. (Date of July 28, 1817).

This is further enlightened by the following in the Delafield Diary:

> Louch has a lease from the St. Regis Chiefs in 1806 when they were united, and another lease of 1817 from the British Chiefs who have seceded, but is uneasy about his right of property or title.[28]

These instances make clear that there was a discernable distinction made with respect to lands under the control of the St. Regis Indians. First, although individual St. Regis Indians could easily acquire control over a certain parcel by simply clearing, cultivating, and occupying a land parcel; 'another' aspect indicates that lands NOT under the control of individual St. Regis Indians were free to be 'leased'. In regards to this 'leasing' mechanism it is noted by Hough that:

> On the approach of the war [of 1812], the situation of St. Regis, on the national boundary, placed these people in a peculiar and delicate position. Up to this period, although residing in both governments, they had been as one, and in their internal affairs, were governed by twelve chiefs, who were elected by the tribe, and held their offices for life.
>
> The *annuities and presents of both governments were equally divided among them, and in cultivation of their lands, and the division of the rents and profits arising from leases, they knew no distinction of party.*[29] [emphasis added].

This reference is again repeated in Hough, wherein he records much of the same, but also adds:

> Before the war, the *St. Regis Indians* were allowed to *hold, in common* with their brethren in Canada, *all the Indian lands*, and also to receive the rents and profits of them. Since the war, the British government refused them the privilege of even occupying the lands on the St. Lawrence River, in common with their brethren in Canada.[30] [emphasis added].

These observations clearly provide another unique twist to the Akwesasne land holding pattern: Prior to the war of 1812 there was one (1) Council in Akwesasne receiving and distributing the lease payments to ALL St. Regis Indians. As indicated, it appears that only war and the fluctuations of non-St. Regis governmental policy altered this fact.[31]

Yet, it would be the leases, and the lease payments, that would cause St. Regis much trouble in ensuing years.[32] Included in these troubles was a subtle, but very important, distinction with respect to lands in the St. Regis Indian Reservation: Was it an

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[28] *Id.* at 171 (Book Two date of September 15, 1817).
[29] HOUGHS at 154-159.
[30] *See, Id.* at 168.
[31] Clearly, through the operation of government and the passage of time would inure to the benefit of the person on St. Regis lands and not to the St. Regis Indians themselves.
[32] *See,* HOUGH at 159-164.

individual St. Regis Indian who was making the lease to those portions of land which had come within their possessory interest, OR, was it the Tribe (via the Tribal Chiefs) that was in fact leasing the remaining 'common' and/or 'unoccupied' lands of the Reservation which had NOT been chosen and occupied by a St. Regis Indian? This trouble clearly persisted for some time for as Hough observed in 1852:

> By an act passed April 27, 1841, the trustees of the St. Regis tribe duly elected, at a regular meeting, were authorized with the advice and consent of the agent for the payment of annuities, to execute leases to white persons for *any part of their unoccupied lands*, for any term not exceeding twenty one years, for such rents as may be agreed.[33][emphasis added].

Even with such dubious 'state granted' authority, it is clear that the only lands that would be covered were those for "unoccupied lands". Clearly meaning those lands not cleared and under the control of an Individual St. Regis Indian. This did little to quell issues surrounding these leases though, as Hough further observed:

> The question of the propriety of this measure [land leases], has ever been a subject of contention and party strife among them, at their annual election of trustees. For several years, the party opposed to leasing land, has been in the ascendancy, and the measure has been discontinued.[34]

In the post Hough period (1867) other reports made clear, and confirmed, that there existed on the St. Regis Indian Reservation a customary land holding pattern, inclusive of individual parcels and 'common lands'. Wherein:

> This reservation includes, or presents, originated in the war of 1812-'15, and according as they or their ancestors declared their preference at that time. The distinction is kept up by inheritance from mother to child, according to the Indian custom. Each party is governed by a separate class of trustees or chiefs, and their domestic affairs are generally managed harmoniously. Although tenants in common, *it is customary for them to buy and sell improvements among themselves, and the conventional titles thus acquired are respected by common consent.*[35] [emphasis added].

Even in light of the 'customary consent' it appeared that the lease issue was not very far away, and that no easy solution was at hand as the topic appeared again in 1879 and 1888. First, in 1879 at the annual meeting of the Religious Society of Friends, noted the following with respect to St. Regis lands:

> Portions of the lands belonging to the tribe are leased to white people by virtue of an act of the State of New York passed in 1841....They hold the land in common.... These elections are often conducted with much spirit, the Indians

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[33] *Id.* at 171.
[34] *Id.* at 172.
[35] *See,* NY Office of the Secretary of State, June 25, 1867, Report on Indian Tribes in the State.

> being divided chiefly of the propriety of leasing their lands.... Although the law recognizes no individual rights in the land, ***custom has sanctioned***, in this as well as in the other New York Tribes, ***the holding of lands for the exclusive benefit of families, and these rights are bought and sold among themselves***. Any Indian may consequently appropriate for cultivation so much of the wood-land as he chooses, provide he clears and occupies it, and the improvements on the land he thus takes up he may rent to others of the tribe. Indians may pasture upon the unenclosed land as many cattle as they please, there being no limitation as to number: *it is said white people frequently hire the privilege of pasturage on the common, paying the chiefs or trustees a small compensation for it*. Every Indian of the tribe may cut as much wood on the Reservation as he wants for his own use, or desires to sell, and within a few years large quantities have been disposed of.[36] [emphasis added].

These same occurrences were recorded just nine years later (1888):

> They hold it in common [land] and seem to have no method of dividing in amongst themselves, but ***each Indian takes as much as he wants, and in any locality he likes, occupies and cultivates, and it is his without further requirements.*** They sometimes purchase of each other improved land...that *not actually occupied or cultivated [land] by the Indians is termed common land and is used as pasturage. Some of it is used for pasturage by white people, who pay the trustees of the nation rent therefor* [Sic]....[37] [emphasis added].

The foregoing clearly shows that there existed both a customary 'land holding pattern' by individual St. Regis Indians on the St. Regis Mohawk Indian Reservation AND a mechanism by which leases were entered into for certain St. Regis Indian Reservation lands. Those leased lands would be those which were not cultivated and/or occupied by an individual or family of St. Regis Indians. Most often described as common lands. This custom of individual St. Regis Indian allotments versus leases is clearly contrary to the last report (1888) alleging that there did not appear to be a method of land division. Yet, even in light of this, these customs were under constant attack by the state of New York during the 19th Century.

NEW YORK STATE LEGISLATION
Respecting St. Regis Land Holdings

The civil code of the St. Regis Mohawk Tribe, under the section titled "Applicable Law", provides for the following:

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[36] *See,* A BRIEF SKETCH OF THE EFFORTS OF PHILADELPHIA YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS TO PROMOTE THE CIVILIVATION AND IMPROVEMENT OF THE INDIANS ALSO OF THE PRESENT CONDITIONS OF THE TRIBIES IN THE STATE OF NEW YORK. 39-43. (Friends Book Store 1879)(1866).

[37] *See,* NYS Legislature, Assembly "Report of Special Committee to investigate the Indian problem of the State of New York, Appointed by the Assembly of 1888" Troy Press Co. 1889, at pages 56-58.

> [B] Principles of New York State law for resolving private civil disputes *are not automatically applied* in Mohawk Courts. Principles of New York State law for resolving a private civil dispute may be applied in Mohawk Courts for the purpose of resolving a private civil dispute over which the Mohawk Court has jurisdiction if (but only if) the Mohawk Court finds: (i) there is no other controlling principle of Mohawk law;(ii) application of the New York State law is consistent with principles of Tribal sovereignty, self-government, and self-determination; and (iii) application of the New York State law is in the overall interest of justice and fairness to the parties.[38]. [emphasis added].

The SRMT Court finds that the following is intended with respect to the language used within the SRMT TCR 2008-19, Civil Code, [hereinafter SRMT Civ. Code] with respect to land disputes on the SRMIR.

In 1777 New York State made as part of their State Constitution that no one[39] could purchase 'Indian Lands' without the consent of the State legislature. This is NOT what we are concerned with here. For our review we are concerned with issues affecting the land holding pattern of the Indians on the St. Regis Indian Reservation. As such, the earliest NY State legislation effecting St. Regis can be seen in 1802, wherein:

> And be it further enacted, That it shall and may be lawful for said tribe, at any such meeting aforesaid, to make such rules, orders and regulations, respecting the improvement of any of their lands in the said reservation, as they shall judge necessary, and to choose trustees for carrying the same into execution, if they shall judge such trustees to be necessary.[40]

This 'pattern' of state legislation, while ignoring established customs on the St. Regis Indian reservation, would continue into modern times. In fact, much of the same language used in the 1802 Act would reappear in an 1813 act. The 1813 Act purportedly authorized the St. Regis Indians to have a Town Hall meeting on the first Tuesday of May, to choose a Clerk, to choose Trustees, to pass rules, orders and regulations respecting the improvement of their lands, and for the District Attorney of Washington County to bring suits on their behalf.[41] The role of 'bringing actions' by a District Attorney was subsequently transferred to Franklin County in 1818.[42] And this appeared to be in large part to assist the St. Regis Indians in collecting rents or removing trespassers.[43] Nonetheless, it is difficult to determine as to how this state legislation would attempt to alter what was already being described as certain customary practices of the Indians of the St. Regis Indian Reservation with respect to land holding.

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[38] *See*, SRMT Civ. Code] §V (B).

[39] Really meaning a white male freeholder of property.

[40] *See,* NYS Act passed March 26, 1802, cited in Hough *supra* note 22 at 154. It can also be further noted that similar legislation was passed by NY with respect to Oneida, Brothertown, and Stockbridge Indians. *See,* "Laws of the Colonial and State Governments, Relating to Indians and Indian Affairs, from 1633 to 1831 inclusive". Washington City, Thompson and Homans 1832.

[41] *See,* Laws of New York, 1813, Ch. 29 §§ 13, 14, 16.

[42] *See,* Laws of New York1818 Chap. 283 §2.

[43] There is no indication if 'self-help' was occurring at this point.

This 'bringing of actions' clause appears to be at a tipping point during this period for in 1821 there was State legislation which made it unlawful for any non-St. Regis Indian to reside on the lands of the St. Regis Indians, and by the same act, nullified all leases which permitted non-Indians to reside on the lands of the St. Regis Indians.[44] It can be noted that in the same year there was one of the first reported Court cases with respect to the St. Regis Indians attempt to remove a non-native who apparently held lands under a lease.[45] They were unsuccessful in this regards, and this probably helped fuel the long vexing problem that we are forced to address today.

Throughout the 19th Century there continued to be numerous forays of New York state legislation with respect to land holdings on the St. Regis Reservation. By 1841 there was the aforementioned state legislation 'permitting' the trustees of the St. Regis Tribe to execute leases for the 'unoccupied portions' of the territory, for a duration of 21 years, and only with the consent of the state appointed Agent or the Franklin County District Attorney.[46] What is ironic, and as the history herein shows, the St. Regis Indians were already engaging in entering leases, and had collected the rents from these leases, which were subsequently equally distributed.

The foregoing would be followed by a more general law in 1849, which purportedly permitted all "nations, tribes or bands" within the State to divide their "common lands into tracts or lots". These 'now' divided lots would be given to the Tribal Nation members to be held in severalty and in fee simple[47], thereby it could be freely alienated by those Tribal Nation members, and hence no longer be considered 'reservation/treaty/Indian' lands.[48] This also ignored the fact that at St. Regis there already was an allotment process in place, and that a prohibition against alienation (sale) to non-natives was also in place. Had St. Regis engaged in the State created system it is probable that the St. Regis Indian Reservation could have ceased to exist.

The next State legislative effort originated in 1858 in a rather inconspicuous manner.[49] This act, in rather simple terms, permitted the Governor to appoint a Commissioner for the St. Regis Indians, who would then receive the annuity paid by the State, and then distribute the same to the "heads of families" at St. Regis. As this function (collection/distribution of the annuities) had already been addressed in other New York legislation prior to 1858, it is odd that it appears again. It would be one year later in 1859 that more legislation was added to the 1858 Commissioners role, and the motivation behind the 1858 Act becomes clearer.[50]

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[44] *See,* Laws of New York1821(The actual workings allegedly permitted the Judge of the Court of Common Pleas to issue a warrant that was to be executed by the County Sheriff).

[45] *See,* The *St. Regis Indians v. Drum,* 19 Johns. 127 (N.Y. Sup. 1821) (holding that ALL agreements with Indians with respect to land are void and unenforceable pursuant to the State Constitution).

[46] *See,* Laws of New York 1841 § 1, and as noted infra.

[47] Fee Simple is the most common term used in the United States signifying an estate in land without any limitations on it which gives the owner the absolute power of disposition.

[48] *See,* Laws of New York 1849 Chap. 420 §7.

[49] *See,* Laws of New York 1858 Chap. 368 § 1-3.

[50] *See,* Laws of New York 1859 Chap. 364 §4, 19.

As before, the Commissioner was not only to collect and distribute the annuities but added to this was the collection of lease rents for St. Regis. In addition, the Commissioner was to collect these rent monies "until the said lands shall be divided or apportioned". Next, the Commissioner was also to survey all lands of the reservation "held as common property of the said tribe, including all lands ...leased by said tribe...." Following this survey the Commissioner was to:

> Divide such lands into tracts or lots and distribute the same to and among said Indians according to the best judgment of the Commissioner...."[51]

After this allotment by the State appointed Commissioner, the St. Regis reservation lands were allegedly "to be held by the persons to whom they shall be set apart or apportioned, *in severalty and in fee simple* according to the laws of this state." When this was completed, the NYS Commissioner's next role was to provide a certificate to each St. Regis Indian "describing the land"[52] and that the person is "to have and to hold in severalty and fee simple". This process;

> When so executed, acknowledged, approved and recorded, shall have the effect to convey all the interest of said tribe, and the people of this state, in the lands therein described....[53]

Other relevant provisions included § 10 which provided that "in all other respects the said lands shall descend and be inherited according to the general laws of this state." The next section then provided that any St. Regis Indian receiving such land shall also "be entitled to all the civil remedies as between each other, and as against persons not members of the tribe, for trespass upon, and injuries to their lands and other property...." Perhaps most interesting to note is one of the last sections that provides:

> All statutes now in force authorizing the appointment or election of trustees for the said tribe, and all acts, and rules and regulations inconsistent with this act are hereby abolished.[54]

Finally, § 19 of the act provided that:

> No Indian shall be obliged to accept under the provision of this act the land allotted to him, and all Indians declining to receive certificates for such allotment shall continue as now, to hold their lands in common.

It appears this legislation went nowhere and by 1865 the State re-ratified most of the prior provisions of laws allegedly applicable to St. Regis and their lands.[55] For instance:

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[51] *Id.* at §5.
[52] There is no definitive proof that this may have created the current SRMT Use and Occupancy Deed system on the SRMIR.
[53] *Id.* at §8.
[54] *Id.* at §18.

Conducting an annual meeting and selecting one clerk and three trustees to hold office for one year. With respect to land, the Trustees were to have power to issue leases but only with the consent of the agent of the state, and only to one or more Indians of said Tribe for "any part or parts of unoccupied lands", the leases could only be for 10 years, and the rents at this point were to be for "the general benefit of the tribe."[56] For current discussions it is interesting to note that whereas on prior occasions the money was distributed among the families, in this instance, it was to now be retained by the Tribal Trustees.

Next in this New York legislative history is the Act of 1889, which seems to legislatively adopt the animosities developed from the War of 1812 at St. Regis. Wherein, "It shall be unlawful for any member of the St. Regis tribe of Indians residing in the Dominion of Canada to settle or trespass upon the reservation of the St. Regis Indians situated in the State of New York...."[57] For whatever reason, this piece of legislation was accepted on the St. Regis Indian reservation and continued to persist well into the 20th century.[58]

The next significant New York legislative event is what is commonly referred to as the "Whipple Report", which produced the "Report of the Special Committee to Investigate the Indian Problem of the State of New York."[59] The Committee pursued this as an investigation into the social, moral, and industrial conditions of the Tribes in which to ascertain the perceived best policy to be pursued by New York with respect to its 'Indian Problem'. In no big surprise, the New York Legislative Committee advocated the abolishment of the Indian Reservations and the allotting of Tribal Lands to individual Indians in fee-simple.[60]

Contemporaneously with the foregoing were efforts at the federal level to also allot and devise the lands of Indian Reservations to individual Indians. This is often referred to as the Dawes Act (1887).[61] The unique facet of this effort was that it was never made applicable to those Tribal Nations located in New York. Therefore, St. Regis like the other 'so-called' New York Tribal Nations, were 'exempted out' of its application. As is clear from the foregoing though, was that New York was already making numerous attempts to do what was envisioned in the Federal 1887 Dawes Act.

A cursory review of New York laws will show that by 1909 nearly all prior enacted NY Legislation were reinstated. Many of which can still be found in Article 8 of

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[55] *See,* Laws of New York 1865 Chap. 346 § 1- §10. Another interesting facet of the law was §10 which provided: "The power vested in said trustees by this act, may be exercised by them or any two of them."
[56] *Id.* at §5.
[57] *See,* Laws of New York 1889 Chap. 554 § 1.
[58] This may be related to simple arithmetic. As indicated, since lease money was distributed between all members, limiting membership would ensure a bigger payment. Irrespective that during a prior period all was shared by all members.
[59] *See,* New York Assembly Doc. 51, Feb. 1, 1889.
[60] *Id.*
[61] *See,* General Allotment Act of 1887, Dawes Act 24 Stat. 338.

the New York Indian Law.[62] It is clear that the legislative forays by New York into the land holding patterns on the St. Regis Indian reservation not only ignored the existing customs and habits of the St. Regis Indians, but it also attempted to change the underlying title to those lands. It did this by attempting to 'allot' said lands, 'devise' the 'allotted' lands among the St. Regis Indians, and to declare that the said lands were to be now held in 'fee simple', thereby freely alienable to native and non-native alike, and where New York state law was to be applied.

As a cautionary tale, one should also not be lulled into believing that it was just the New York Legislature that was concerned with the land holding pattern on the St. Regis Reservation. As the next section will make clear, forays made via a New York Courthouse were also made, and have assisted in the 'troublesome and vexatious' land issues on the St. Regis Reservation.

State Litigation Involving the Land Holding Pattern on the St. Regis Reservation

As noted herein, as early as 1821 there was what is known in legal parlance a reported Court case with respect to the St. Regis Indians attempt to remove a non-native who apparently held lands under a lease.[63] They were unsuccessful in this regards, and this probably helped fuel the long vexing problem that we are forced to address today. Such an effort would be reversed 80 years later, when in 1901 a local press report indicated:

> A law suit has been in progress for some time between an Indian, Peter Cook, and his mother, regarding possession and title to a small house and lot. Friday Constable Gratton and half a dozen Indians swooped down upon the place and drove Cook and his wife out of doors, likewise removed their furniture and provisions. Then they battered down the doors and windows, tore out the chamber floor and committed other unlawful acts. Cook and his wife were compelled to seek shelter at a neighbor's.[64]

There does not appear to be any reported Court decision regarding this event, yet it does not appear that the foregoing was an isolated event. For example in 1877 another case was reported in the press involving two St. Regis Indians and the produce generated from lands on the St. Regis Reservation.[65] Similarly, the aforementioned leases also lead to

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[62] *See,* New York Laws of 1861 Chap. 368, section 6, for reinstatement see New York Laws of 1909 Chap. 31, §125.

[63] *See,* The St. Regis Indians v. Drum 19 Johns. 127 (N.Y. Sup. 1821) (holding that ALL agreements with Indians with respect to land are void and unenforceable pursuant to the State Constitution).

[64] *See,* ST. LAWRENCE REPUBLICAN, January 9, 1901. The article also notes that Constable Gratton had been in multiple scraps among the Indians, and on this incident an arrest warrant had been issued for him.

[65] *See,* FRANKLIN GAZETTE, December 14, 1877 (Case of Jake Williams v. Charles White, which was referred to the Indian Attorney).

litigation.[66] It should also be noted that these New York Courthouse experiences were conducted at a time when all Indians were not citizens of the United States.[67]

Perhaps the most interesting of the St. Regis 'reported cases' can be highlighted by the 1909 case of *Terrance v. Crowley* and the 1916 case of *Terrance v. Gray.*[68] In order to appropriately understand these cases, one has to go back to an earlier time period.

It was reported that on Christmas Day 1906 three St. Regis Indians, Thomas Gray and his son Peter Gray, along with Louis Bero, traveled to Hogansburg. During their trip they consumed alcohol, and upon their return to the Gray Farm, an argument between the two Grays ensued and Peter murdered his father Thomas. There was an apparent dispute about the family farm.[69] Peter was charged with murder, pled to a manslaughter charge, and was subsequently sent to prison.[70] During this period, or shortly thereafter, Peter Gray deeded the farm to Hattie White who eventually deeded it to George Terrance. All are St. Regis Indians.

After receiving these 'deeds', George Terrance attempted to use this property as security for certain transaction involving Michael J. Crowley and another St. Regis Indian, Alex White whom it is presumed was the husband of Hattie White. When certain payments were not made, litigation ensued.[71] Eventually George Terrance would be put back into possession of the farm. Hence, the 1909 decision was filed. Matters did not stay calm for very long though.

Upon his release from prison Peter Gray sought to have the 'family' farm returned to him by 'terrorizing' Mr. Terrance.[72] This would lead to litigation, and the reported 1915 case cited above. For current discussions, one of the interesting facts of the case is the Court recognizing that:

> There is *nothing in the record to indicate that the St. Regis Indians in the state have divided their common property among the members of the tribe in severalty*, and the court will take judicial notice of the fact that the tribe continues to hold its lands in common, and that the partition permitted by this section has not taken place.[73] [emphasis added].

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[66] *See*, CANTON COMMERICAL ADVERTISER, April-June 1907 (case involving Mitchell Laughing, Sidney Grow, and Albert Brennan).
[67] Something that would not occur until 1924.
[68] *See, Terrance v. Crowley,* 62 Misc. 2d. 138 (1909); *See, Terrance* v. *Gray*, 171 A.D. 11, 156 N.Y.S. 918 (1916).
[69] *See,* JOURNAL and REPUBLICAN, January 3 1907; NORWOOD NEWS, May 28, 1901.
[70] *Id.* Unique in this regard was that all proceedings were in state court.
[71] *See, Terrance v. Crowley,* at 138.
[72] *See,* ESSEX COUNTY REPUBLICAN, August 20, 1915.
[73] *See, Terrance* v. *Gray*, at 918. For current discussions it can be noted that Peter's sister Hattie sold the property to the Plaintiff George Terrance, who had also paid Thomas Gray's widow and Peter Gray's wife for the estate.

Therefore, the foregoing confirms that for all of the legislative and judicial forays into the land holding of the St. Regis Tribe, none were ever implemented to the point where they transplanted those customs and usages of the St. Regis Indians with respect to land holding. Furthermore, it is interesting to note that for all of the litigation that occurred, at the end of the *Terrance* case, the Court simply relied upon the allotment made by the "Chiefs of the tribe to the plaintiff [George Terrance]".

Next, although the foregoing cases appear to be the relative few 'reported cases' of the New York Courts, it was not the only cases to be reported. By 1928 the issue of the purported Canadian Indians would be the next issue. The Courts would appear to routinely authorize actions where what they believed to be non- 'American' St. Regis Indians could be forced to leave the St. Regis Reservation, even if they were members of the 'British' St. Regis Indians.[74] Similarly, the Court also has in it possession what appears to be a copy of a 1954 filing by the Franklin County District Attorney for the removal of William Hanson as an intruder on the St. Regis Indian Reservation.[75] These show that some New York judicial actions were requested and implemented at St. Regis, with some of these even at the request of the St. Regis Mohawk Tribe itself.

To this point it can be noted that New York has attempted legislative and judicial forays into the land holding on the St. Regis Reservation. For instance: In 1821 when the St. Regis Indians attempted to remove a leaseholder the New York Courts refused to entertain the action, and yet throughout the 1800's the State attempted to pass their own legislation with respect to St. Regis Lands, and by the 1900's New York Courts were now entertaining land dispute suits from the St. Regis Reservation and utilizing 'some' state laws to do so!

New York State Hybrid Approach: The Indian Attorney

As indicated herein, it was reported in the local media on December 14, 1877, that a land dispute case involving Jake Williams and Charles White was referred to the "Indian Attorney"[76]. This report shows the hybrid approach employed by the state from the 19th Century to the middle of the 20th Century. What this hybrid approach consisted of was a State appointed official allegedly acting in the role of agent or attorney on behalf of the St. Regis Indians. This agent/attorney would then purportedly be responsible to ensure that the St. Regis Indians received their lease payment[s]. This was deemed necessary as Indians were not citizens and therefore could not litigate in state Courts, and also the restriction stemming from the 1821 *Drum* case, which said that all Indian land contracts were null and void.

The 'role' played by this position is easily discernable in some of the early legislation cited herein, whereby in 1812 the District Attorney for Washington County had the responsibilities of initiating actions against trespassers on Indian lands. This

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[74] *See,* In. Re Herne, 133 Misc. 286 (1928) (Initiated for the removal of Mary Lazore).
[75] Dated July 16, 1954 complaint made by Henry A. Fisher.
[76] *See, supra* note 64.

responsibility was subsequently transferred to the Franklin County District Attorney in 1818. By 1861 New York Legislation was enacted to create the actual position of 'Indian Attorney' who had similar responsibilities contained in the District Attorney provisions as noted above.[77] Under the State legislation the Indian Attorney was also given an annual salary and was to be selected by the New York Governor for three year terms of office. Therefore, very often New York spending legislation contained provision for the salary expenditures associated with the 'Attorney for the St. Regis Indians'.[78] This 'Indian Attorney' position also survived New York's great 'Indian Law' revisions of 1890-1895, and of 1909, so that the position remained intact up to the 1950's.

The persons who have filled this role of agent/attorney have been notable for a number of reasons, least of which is the geographic locations involved in the SRMT Land Claims litigation which bear their names. For instance, the mile square in Massena is actually the Hascall/Haskell mile square for Asa Hascall. Fulton's Woods is in the Hogansburg Triangle, and is for A. Fulton one time agent/ attorney for the St. Regis Indians. In 1920 Maurice Lantry of Bombay was appointed to the position, and was in all likelihood related to the Lantry who had business/trading interests within the Hogansburg Triangle. Perhaps the most famous of these was the person who was appointed on March 28, 1848: W.A. Wheeler. Mr. Wheeler at the time was District Attorney for Franklin County, and by March of 1877, was Vice President of the United States. Along this trajectory, Mr. Wheeler was also President of the New York Northern Railroad. There is some suggestion that this is the reason the railroad goes around the St. Regis Reservation. How effective these individuals were in performing their duties can be a matter of great debate, but in any event, it is clear that they played a role in the land holding history of the St. Regis Reservation.[79]

What can be noted at this point is that it would not be until 1942 that these New York State forays would be questioned in Federal Court, upon which the Federal Courts rejected these New York forays.

FORNESS

The civil code of the St. Regis Mohawk Tribe, under the section titled "Applicable Law", provides for the following:

> Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country (with great weight given at all times to principles of the United States Constitution and federal Indian law which recognize Indian sovereignty, self-determination, and self-government, which render many federal and state laws inapplicable to federal Indian Country, which

[77] *See*, Laws of New York, 1861, Chap. 325.
[78] E.g. 1841, 1858, 1859, 1861, 1871, 1873, etc.
[79] Adding to this debate would be the recognition that early land case litigation initiated by the St. Regis Indians never seemed to be initiated by these state appointed Indian Attorneys. E.g. Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929).

> provide for a federal trust responsibility to Indian tribes, and which provide rules of legal interpretation favorable to Indian tribes);[80]

The SRMT Court finds that the following is intended with respect to the language used within the SRMT Civil Code with respect to land holding and land disputes.

On March 4, 1939 the Seneca Nation of Indians of New York, in response to the chronic non-payment of land leases, canceled all leases that were in arrears. Thereafter, the United States government on behalf of the Seneca Nation of Indians commenced proceedings to enforce the cancellation of the leases. These proceedings were initially opposed by the non-native leaseholders, one of whom was Frank Forness. After a decision at the Federal District Court an appeal was taken to the Second Circuit Court of Appeals, where another decision was rendered which was favorable to the Seneca Nation of Indians, and therefore, un-favorable to Frank Forness and the other lease holders. An attempt was then made to take appeal to the United States Supreme Court, which was denied, and thereby making the Second Circuit's *Forness* decision the 'law of the land' within the Second Circuits geographic jurisdiction, which includes New York. For current discussions the relevant language of the *Forness* decision is as follows:

> But state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent.[81]

It was not long thereafter that the reach and effects of this decision were of a going concern to the state of New York. As a subsequent NYS legislative committee chair opined:

> In that decision [*Forness*] it was stated that the laws of the state of New York have no force whatsoever upon Indians except as the United States Government has approved or consented or whatever term or words are used.[82]

For current discussions though, it is only important to recognize the import that decision would have on St. Regis lands, or in more particular, what had occurred up to that point. As the foregoing makes clear, there had already been numerous New York state legislative, judicial, and executive forays into the internal affairs at St. Regis regarding the lands of the SRMIR. And, based upon the *Forness* decision these were without authority, including those with respect to the land holding system on the St. Regis Indian Reservation.

In response to the *Forness* decision New York very quickly, and simply, began the process of attempting to have the federal government grant jurisdiction over the Tribal Nations located in New York. These efforts begin in earnest as early as 1943 with the formation of a Joint Legislative Committee on Indian Affairs, which subsequently

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[80] *See*, SRMT Civil Code §V(a)(1).
[81] *See, United States v. Forness et.al.*, 125 F.2d 928 (C.C.A.2d, 1942).
[82] *See*, 1945 Legislative Hearing at note 65.

conducted hearings at the various Tribal Nations.[83] On September 8th, 1943 one such hearing was conducted at the Thomas Indian School on the Cattaraugus Reservation.[84] Although these discussions were primarily geared toward the Thomas Indian School, the Committee did not take long to bring up "the subject of this conflict of Federal and state jurisdiction" [85], which included a perception by the New York Committee of lawlessness, lack of education, and the bemoaning by state officials that everything has been thrown into disarray. In 1944 the following was included in the Committees report:

> And the limited civil jurisdiction of Federal Courts ... renders the latter practically unavailable for determination of controversies between individual Indians, and at the suit of Indians, against white men. Of necessity, therefore, Indians have litigated most of their civil disputes in State courts. An extreme application of the *Forness* case doctrine would deprive State courts of jurisdiction over many of these matters.[86]

Similar language, if not simply self fulfilling, was included in the Committees 1945 report:

> Many Indians as well as other students of their condition, have long believed that the moving force to accomplish these reform must come from without. A substantial number of Indians, including residents and non-residents of reservations, recognize the need and desire that laws confirming broad State jurisdiction be enacted promptly.[87]

Up to this point there had been no discussions with respect to the land holding patterns on the Tribal Nation territories inclusive of St. Regis. In fact, it can be noted that at times the reports of the Joint Committee would be 'at odds' with people who testified in front of the Committee, or from presentations made to the Committee, on that very issue. For instance, at a January 4th, 1945 Committee hearing held at the Ten Eyck Hotel in Albany, the following portion of a letter was submitted from the U.S. Department of the Interior on the land issue and was read into the record:

> But we believe that any such transfer of jurisdiction must be qualified so as to preserve the capacity of the Federal Government to take appropriate action for the protection of restricted Indian property and for the discharge of all treaty obligations.[88]

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[83] August 4,5 at Salamanca, September 7,8 Cattaraugus, September 9,10 at Lewiston and Newstead, September 30 at Nedrow, October 1 at St. Regis, October 14 at Southampton and Mastic. See Report of the Joint Legislative Committee on Indian Affairs February 25, 1944. (Legislative Document No. 51).

[84] *See,* Joint Legislative Committee on Indian Affairs Public Hearing had at Thomas Indian School Cattaraugus Reservation, N.Y. Wednesday, September 8, 1945. Fred J. Koester Court Reporter.

[85] *Id.* at page 44, questions posed to Robert P. Galloway.

[86] *Id.* See 1944 Joint Legislative Cmte. Report at 4.

[87] *See,* 1945 Joint Legislative Cmte. On Indian Affairs March 15, 1945 (Legislative Document 1945, No. 51).

[88] *See,* Hearing before Joint Legislative Committee on Indian Affairs on Thursday January 4, 1945 at ten Eyck Hotel Albany New York, at p. 8, reading letter January 2, 1945 letter by Mr. Abe Fortas, Office of the Secretary of the Interior.

Perhaps most telling was the opinion offered by a St. Regis Chief at the same hearing:

> But coming to the civil affairs, according to this paper, it says that New York State will take over the jurisdiction in regard to civil affairs. *When we let the state have the jurisdiction of civil affairs, at that time ends all Indian government*, because the state will have both criminal and civil,-therefore why should we have that? I think we are going to have little difficulty in ironing out the civil affairs. One of the things is, if we let the state have jurisdiction, sometimes it costs us more money than the property is worth. In the past we have had to go to courts, and it cost us a lot of money. I am afraid you will have trouble in trying to get that through as far as getting the consent of the Indians to permit jurisdiction in civil affairs, because in that case if I have a dispute with one of my neighbors, we have nothing to say about it. The state courts handle it.[89]

After proclamation by NY Assemblyman Wade that there would be no interference upon the Tribal Nation governments, Chief Joseph Solomon continued:

> You come to the limit of our jurisdiction where the state begins. *We try to handle all civil affairs like land disputes on the reservation.*[90][emphasis added].

When NY Assemblyman Wade made further comment that "There is no intention to change the government."[91] Chief Solomon further added with respect to land disputes going off the reservation:

> In most cases they will not let it go out of the reservation into the state courts. That is where I think you will have trouble. My ideal is to make a better form of government on the reservation and work in harmony with the state and federal governments.[92]

Nonetheless, the state persisted in their request to the Federal Government to get both civil and criminal jurisdiction. The first successful jurisdiction transference was the criminal piece that was passed on July 2, 1948. [93] With this transference the New York Legislative Committee continued to push for the civil jurisdiction piece. In this effort the 'prose' of the NY Committee Chairman Wade took a sudden right turn, as the 1950 Committee Report indicates:

> Enactment [civil jurisdiction to NY] would end their long isolation and inevitably work towards complete assimilation with the main body of citizens.[94]

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[89] *Id.* at 51, Statement of Chief Joseph Solomon, Mohawk.
[90] *Id.* at 52.
[91] *Id.* at 53.
[92] *Id.* at 53-54.
[93] *See,* Public Law 881, 80th Congress, codified at 25 USC § 232.
[94] *See,* 1950 Report of the Joint Legislative Committee on Indian Affairs, Legislative Document No. 57, (1950), pg 3.

> Except in respect to nationality, inheritance and *land ownership,* New York Indians are conspicuously lacking in rules or customs to regulate ordinary civil relationships. Yet even in these three categories, existing governments are incapable of compelling respect for these traditions without assistance from State courts.[95][emphasis added].
>
> The only significant changes to be expected from passage of the bills would be the positive ones of extending orderly processes of government to the reservations and of ending the power of individual Indians to avoid ordinary civil responsibilities.[96]
>
> How much longer New York Indians will be condemned to the stagnating and stifling effects of segregation depends upon how soon Congress will recognize the futility as treating them as independent, self-governing units which they long since ceased to be.[97]

Clearly these comments are in stark contrast to the assurances made by the exact same Committee Member (NY Assemblyman Wade) to our Chief Solomon. In fact, Chairman Wade's comments reinforce the concerns of Chef Solomon uttered just 5 years earlier to the Committee; The destruction of the existing Tribal Government. Nonetheless, by September 13, 1950 the state was successful in acquiring the civil jurisdiction transfer.[98] The Joint Legislative Committee in their 1951 report announced the 'successful' legislative transfer, and from the report one can quickly ascertain that there was a new Chairman of the Committee.[99]

For current discussions it is important to note that land disputes on Tribal Nation territories were NOT included within the civil jurisdictional transfer to New York:

> The only apparent effect of this provision may be the unfortunate one of *barring State courts from handling private land disputes in which event most Indians will have no forum for the disposal of such cases.*[100] [emphasis added].

Nonetheless, other ulterior goals of the Committee would be noted in the report:

> On a small scale New York is now faced with the same general problem of Indian assimilation that has never been satisfactorily solved by the Federal government.[101]

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[95] *Id.* at 4.
[96] *Id.* at 5.
[97] *Id.* at 6.
[98] *See,* Public Law 785, 81st Congress, Chap. 947, 2nd Session. Codified at 25 USC § 233, Jurisdiction of New York State courts in civil actions.
[99] *See,* Report of the Joint Legislative Committee on Indian Affairs, Legislative Document (1951) No. 66., submitted February 28, 1951 by Chairman William H. MacKenzie.
[100] *Id.* at 3.
[101] *Id.* at 5.

With respect to land, the Committee's other motives can be gleaned from the following:

> Eventually, therefore, it is greatly to be *hoped that Indians will reach the point of desiring to hold their lands in severalty* as do western tribes, *and to abandon present restrictions against ownership by non-Indians, even at the cost of having all such lands bear a fair proportion of the tax burden.* Not until then will Indians complete the transition from hermit hood to the vigorous and responsible citizenship assured by their intelligence, independence and courage.[102] [emphasis added].

The Committee nonetheless would make intermittent 'requests' to acquire this unattained piece of jurisdiction with respect to land disputes.[103] Even with the 'civil jurisdiction' transfer, there still existed an unique 'carve out' in the law.

That provision provided that:

> The governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve....[104]

Similarly, although this act permitted transference of civil jurisdiction, Courts were still free in "recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts."[105] It appears that only one Tribal Nation made any such filing to the Federal Government with respect to their laws and customs.[106] It is interesting to note that this provision has echoed through history to modern times where one Court recently held that:

> While the federal statute shall not be construed 'to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts.'[107]

In that case the Court recognized that:

> Defendants [Harts] have not proffered any St. Regis Mohawk Tribal Law concerning liability for injured workers. Thus, we apply the civil laws of New York to this action.[108]

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[102] *Id.* at 5.
[103] *See,* Report of the Joint Legislative Committee on Indian Affairs, Legislative Document (1959) No. 15, same in 1960.
[104] *See,* 25 USC § 233.
[105] *Id.*
[106] *See,* 1953 Report of the Joint Legislative Committee on Indian Affairs, Legislative Document (1953) No. 74. (The lone exception was the Seneca Nation of Indians which proffered its constitution).
[107] *See,* Alexander v. Hart 884 N.Y.S.2d. 181 (2009) (concerning worker's compensation case originating from the SRMIR).
[108] *Id.* at 183,184.

For current discussions, where exactly on-reservation land disputes fit in to the overall legislative framework appears to be murky at best. What is ascertainable is that the land holding pattern on the St. Regis Mohawk Indian Reservation continued to exist, and that 'Tribal Council' remained very much the arbitrator of land disputes, and that the SRMT Clerk performed many of the administrative tasks associated with land holding on the reservation. Nonetheless, land dispute litigation originating from the St. Regis Indian Reservation was NOT included in the civil jurisdictional transfer to New York. Therefore, and pursuant to *Forness*, no state legislation prior to 1942 would be applicable to St. Regis. This though, can leave many issues unanswered.

In more recent times on the 'Rez' it is somewhat fashionable to blame just the St. Regis Mohawk Tribe for the perceived deplorable status of the land holding mechanism in place. It is hoped that the foregoing adequately shows that such blame can be spread out over a much broader base. Clearly there was a number of contributing factors over a sustained period of time: In the 19th Century New York's legislative efforts were an attempt to divest the lands of the St. Regis Indian Tribe, and if those had been successful, it would have resulted in divesting individual St. Regis Indians with the customary use of the lands in the St. Regis Mohawk Indian Reservation. Couple that with sporadic lawsuits resulting in mixed findings, and 'wild-cat' law enforcement efforts (e.g. Gratton), and the deplorable state that SRMT land holdings may best described as the by-product of New York State efforts. Finally, the *Forness* decision clearly rejected these efforts, and the State thereby doubled its efforts to acquire jurisdiction through federal legislation. But clearly exempted out from this legislation were land disputes on the St. Regis Indian Reservation.

Nonetheless, it can be stated to this point that any observation and/or description of both the land holding patterns and land dispute mechanisms on the St. Regis Indian Reservation, engenders much controversy and hard feelings by members and residents of the St. Regis Mohawk Indian Reservation. Considering the history up to this point, should anyone be surprised that such a "troublesome and vexatious" history of these issues has surely led to such a result. Clearly it is reaping what has been sowed. Similarly, complaints and accusations have also been made against the land holding and land holding dispute mechanism on the 'Rez.' Accusations of favoritism, nepotism, fraud, and theft, are not uncommon and persist to today. How much of this is rooted in fact versus either a failure to properly execute decisions, or to have such decisions politically respected and executed, is unknown. Nonetheless, as described herein, there exists on the St. Regis Indian Reservation a customary land holding mechanism by and between individual St. Regis Indians.

Change has occurred though, and based upon the rather unique history noted so far, it may be surprising to discover that this change has originated from within the St. Regis Indian Reservation itself and not from outside the St. Regis Mohawk Indian Reservation.

AMENDING ST. REGIS MOHAWK TRIBAL LAND DISPUTE RESOLUTION PROCESS

The civil code of the St. Regis Mohawk Tribe, under the section titled "Applicable Law", provides for the following:

> Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe....[109]

The SRMT Court finds that the following is intended with respect to the language used within the SRMT Civil Code as it relates to land disputes.

As indicated herein, there has been a multitude of New York State legislation with respect to land holding on the St. Regis Indian reservation. By the time the Federal transference of jurisdiction was completed (1947-1952) though, the basic parameters of the SRMT system still remained in tact. This can be summarily described as such: SRMT members for some time now occupy certain land parcels which they are free to devise of in whatever manner they see fit, over time they are issued 'use and occupancy' deeds which are endorsed by the Chiefs of the SRMT, and the use and occupancy deeds also have affixed to them the SRMT Clerk's signature, and these use and occupancy deeds are recorded at the SRMT Clerks office. Disputes between SRMT members and residents were decided by the Chiefs of the SRMT. Where all of this originated from is unclear, but it is certain that aspects of it originate in the history and customs of the St. Regis Indians. Nonetheless, there has been sufficient criticism of that system that change was called for, and perhaps a movement towards Chief Solomon's 1945 position: "My ideal is to make a better form of government on the reservation and work in harmony with the state and federal governments."[110] This change has resulted in the implementation of a SRMT Court, creation of a Land Dispute Tribunal, and the passage of a SRMT Land Dispute Ordinance.

Some change was begun in 1987 and again in 1995 when the Saint Regis Mohawk Tribe went through a period of attempted political structural changes.[111] During this time there was an attempt to establish and implement an SRMT Court. This was unsuccessful though. Nonetheless a SRMT Tribal Court Program has come a long way since 1987 when committees were first formed to plan, draft laws, and seek funding.[112] By 2005 community referendums were conducted and the community approved the

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[109] *See,* SRMT Civil Code §V (a)(2).

[110] *See,* Hearing before Joint Legislative Committee on Indian Affairs on Thursday January 4,1945 at ten Eyck Hotel Albany New York, at p. 8, reading letter January 2, 1945 letter by Mr. Abe Fortas, Office of the Secretary of the Interior at 53-54.

[111] This included the attempted passage of a SRMT Constitution that resulted in numerous lawsuits and the end of which was a subsequent roll back of those efforts, which resulted in a return to the pre 1994 structure which resembles in large part that established via New York legislation.

[112] *See generally*, SRMT TCR-87-8, Judicial Committee to Draft Legal Codes; SRMT TCR 1989-16 Akwesasne Funding Committee BIA Funding Request; SRMT TCR 90-32 Grants for Law Enforcement and Tribal Court; TCR 91-14 Grant for Start of Tribal Court; SRMT TCR 92-122 -92-123 Tribal Courts Contract.

creation of a SRMT Court system. By 2007, all the members of Tribal Council, as per the 2005 community referendums, signed a resolution recognizing "the Tribal Court system as an independent decision-making entity with independent judicial authorities".[113] This has resulted in the establishment of the current existing Court which is addressing this case, and is the rare instance of a government institution actually being created and approved by the St. Regis community itself, versus that initiated by New York legislation.

In conjunction with the effort to establish a Tribal Court there has been attempts to amend and reform the land holding and land dispute resolution system on the St. Regis Indian reservation. Part of this attempted change included the enactment of SRMT Tribal Council Resolution[114] 95-11, titled the Lands and Real Property Act of 1994 [hereinafter cited SRMT TCR 95-11]. The purpose of this act was to provide SRMT requirements for the control, allotment, use, transfer and disposition of all lands subject to the jurisdiction of the SRMT. Under this ordinance, a panel of three land examiners, consisting of the Tribal Clerk, Tribal Council, and the Tribal Court, heard land disputes and made a recommended decision, which was sent to the Chief Judge for endorsement as a proposed final order, or for further hearing. [115]A final order was not effective until countersigned by 3 or more members of Tribal Council who could for good cause adopt, modify or reject the Court's final order. Pursuant to TCR 95-11, the decision of the Tribal Council was final and future Tribal Councils were not to re-hear previously decided cases absent a showing of fraud, violation of the Elder Care Act, or an affirmative finding of manifest injustice.[116] As indicated, the application of this act is subject to much questioning, and by and large matters have returned to the pre-1995 system described above. This is particularly true in light of the 2005 and 2009 referendums.

Another subject area of much discussion has been the occurrence of land disputes settled by prior SRMT Councils being brought anew to a currently sitting SRMT Council, who sometimes overturned, overruled, or altered a previous decision[s]. That factor, coupled with much of what has been described so far, caused the initiation of an effort to de-politicize and finalize land disputes. At which point the SRMT Council consulted with the St. Regis Mohawk community to determine a way to improve how land disputes could be resolved within the Saint Regis Mohawk Indian Reservation.

In addressing this issue, the Saint Regis Mohawk Tribe (SRMT) conducted several public meetings that shaped the development of what would become the current Land Dispute Resolution Ordinance and lead to another referendum on who should decide tribal land disputes. The first of these public meetings was held on March 11, 2009, and by June 6th, 2009 another referendum was conducted. On June 6th, 2009, the SRMT held its annual election, and in addition to the election of new Tribal Chiefs, community members voted on the following referendum question:

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[113] *See,* SRMT TCR 2007-01, Authority of the Tribal Courts System; *see also,* SRMT TCR 2005-35 Tribal Referendum on Tribal Courts; SRMT TCR 2005-64 Referendum on the Tribal Family Tribal Court.
[114] Often referred to as TCR's.
[115] *See,* SRMT TCR 95-11 at § 20-21.
[116] *Id.*

"Do you want tribal land disputes to be decided by the tribal court?"

If the issue passes, that will mean the Tribal Court will make the **final decision on land disputes** and an **ordinance will be developed and adopted accordingly**. If the issue does not pass, that will mean the Tribal Council will continue to make the final decisions on land disputes. [117]

Community members participating in the referendum approved the Tribal Court as the entity to issue final decisions on land disputes; and, they approved the development and adoption of a land dispute ordinance by a margin of 388 to 151.[118]

On December 3rd, 2009 the Council enacted SRMT TCR 2009-69, Land Dispute Resolution Ordinance (Amended by SRMT TCR 2011-20 Land Dispute Resolution Ordinance)[119], [hereinafter SRMT LDRO], which created a Land Dispute Tribunal, composed of community members, and delegated to it authority to resolve land disputes to the Land Dispute Tribunal and the Tribal Court. Wherein, the SRMT LDRO provides:

The Tribal Council is vested with the authority to control the use of lands on behalf of the tribe and has customarily been responsible for resolving land disputes and the Reservation. Pursuant to the referendum held June 6, 2009, this authority is hereby delegated to a Land Dispute Tribunal and the Tribal Court, which shall have the authority to render final decisions. (SRMT LDRO §II).

The 2009 SRMT LDRO also established a Land Dispute Tribunal, defined criteria for Tribunal members, and the length of each member's appointment. [120] It is also important to note that the SRMT Land Ordinance not only provides delegated authority to the Land Dispute Tribunal, it also lays out the procedure for resolving land disputes,[121] and provides the Land Dispute Tribunal with the applicable law to be used in resolving all disputes that come before them.

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[117] *See,* "Saint Regis Mohawk Tribe | News." *Tribe Schedules Referendum Vote and Public Meetings*, 6 May 2009. Web. 22 Nov. 2011. <http://srmt-nsn.gov/news/archived/2009> [emphasis added].

[118] *See,* "Saint Regis Mohawk Tribe | News." *St. Regis Mohawk Tribal Election Board Announces Official Election Results | Home.* SRMT, 12 June 2009. Web. 22 Nov. 2011. <http://srmt-nsn.gov/news/archived/2009>.

[119] SRMT TCR 2011-19, Land Dispute Resolution Ordinance (Amends SRMT TCR 2009-69). After the Tribunal completed its first full year in existence, Council enacted the following amendments to improve the Ordinance: Amendments included such things as adding alternatives, procedures to allow for Tribunal members whose terms have expired to serve until reappointed or replaced, and providing clarification on who may remove a Tribunal member. (*See,* §§VII(D)(1);(D6);(D10)) In addition, the Amendment clarified the duties and expectations of the Tribal Clerk in fully researching and providing information filed in the Tribal Clerk's Office. (*See,* §VIII(B)(5))-(6)). Responsibility is on the Complainant to provide valid address for the respondent (*See,* §VIII(D)). Service of Notice was clarified and added was that if the Tribal Clerk could not effectuate service within 30 days, a notice in a newspaper would effectuate service. (*See,* §VIII.F). Service of Process was extended from 10 to 30 days public notice period. (*See,* §X(A)). Issuance of deeds was clarified in that deeds shall only be issued when all judicial remedies have been exhausted. (*See,* XIII.D.6H).

[120] *See,* SRMT LDRO § VII.

[121] See, SRMT LDRO§ III.

Pursuant to the SRMT Land Ordinance the SRMT Court may hear land dispute cases on appeal from either: A Tribunal decision or a Council decision.[122] In each of these, the standard of review to be used by the Tribal Court is different:

> The Tribal Court will review the [Tribunal Decision] appeal *based upon the record developed before the Tribunal.* The Tribal Court may affirm the decision or may vacate the decision and substitute its own decision, which shall be final and not subject to appeal.[123] [emphasis added].

With respect to Council decisions:

> The Tribal Court shall *take a fresh look at* land dispute decisions rendered by Tribal Council and may request evidence or testimony as necessary to develop a full and complete record of information upon which to base its final decision, which shall not be subject to appeal.[124] [emphasis added].

The SRMT Tribal Court, pursuant to the Land Dispute Ordinance, acts as a court of last resort in that there is no appeal to the Tribal Court of Appeals.[125] As a Court of last resort, the Court must be diligent in addressing errors and insuring that the possessory interests of all parties are equally heard and protected.

The passage of the Land Dispute Ordinance would mark the second instance in which the land holding pattern on the St. Regis Indian Reservation was implemented not from sources external to the reservation, but rather, from the community itself. With the SRMT Court being the other part developed by the St. Regis Indian reservation Community. The creation of the SRMT Court and the passage of the SRMT Land Dispute Ordinance are not the only matters which the Court must address in deciding land disputes on the St. Regis Indian Reservation.

Other SRMT Laws Relevant to Land Issues

In 2008, the SRMT Court, as part of its development, requested from the SRMT Tribal Council that a certified copy of the laws the SRMT Court is to utilize be sent to the Court. The Court received a bundle of certified laws, which included the following:

SRMT TCR 2008-16 Rules of Civil Appellate Procedure;
SRMT TCR 2008-17 Rules of Evidence;
SRMT TCR 2008-18 Attorney Practice Requirements;
SRMT TCR 2008-19 Civil Code;
SRMT TCR 2008-20 Rules of Civil Procedure;
SRMT TCR 2008-21 Court Filing Fees [Amended 2010-40]; and

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[122] *See*, SRMT Land Ordinance XV (B)-(C).
[123] *See*, SRMT Land Ordinance §XV (B).
[124] *See*, SRMT Land Ordinance §XV (C).
[125] *Id.* §XV (D).

SRMT TCR 2008-22 Tribal Court and Judiciary Code [Amended 2012-15].
In 2009, the Court received a certified copy of

SRMT TCR 2009-51 Animal Control Ordinance [Amended 2011-19], and
SRMT TCR 2009-69 Land Dispute Ordinance [Amended Apr. 14, 2011]. [126]

Most noteworthy for current discussions, and as we have cited herein, is that SRMT TCR 2008-19 Civil Code (hereinafter SRMT Civ. Code) specifically lays out, in a hierarchal fashion, the choice of law to be applied by the SRMT Court. In the words of the SRMT Civ. Code:

> Civil disputes over which the Tribal Court has jurisdiction shall be decided by the Court in accordance and by applying the following principles of law in the priority and precedence in which the principles of law are first identified below higher priority and precedence being accorded those identified earliest in the list, so that in the event of inconsistency or conflict between principles of law, the principle of law identified earlier in the list shall be relied upon as the controlling principle for deciding the dispute.... [127]

The SRMT Civ. Code then gives precedence to those first appearing in the list and the Court must first determine by examining §V(A)(1)-(6) of the SRMT Civ. Code, in sequence, which law is controlling in any case which comes before the court.[128] This provides:

> [1.] Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country (with great weight given at all times to principles of the United States Constitution and federal Indian law which recognize Indian sovereignty, self-determination, and self-government, which render many federal and state laws inapplicable to federal Indian Country, which provide for a federal trust responsibility to Indian tribes, and which provide rules of legal interpretation favorable to Indian tribes);
> [2.] Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe;
> [3.] Unwritten Mohawk laws, and (*written and unwritten Mohawk customs)*, traditions and practices; [emphasis added]
> [4.] Generally recognized principles of the law of contracts as reflected by the most recent Restatement of Contracts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine;
> [5.] Generally recognized principles of the law of torts, as reflected by the most recent Restatement of Torts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine;

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[126] SRMT laws can be found at the Court's webpage. *See,* http://www.srmt-nsn.gov/divisions/justice/tribal_court.
[127] *See,* SRMT Civ. Code §V, Applicable Law.
[128] *See,* SRMT Civ. Code § V (A) (1)-(6).

> [6.] New York State law (but only if) consistent with principles of Tribal sovereignty, self-government, and self-determination and it is consistent with the aforementioned. (*See,* SRMT Civ. Code at § V (A) (1)-(6)).

Therefore, as the foregoing makes clear, it is not a single law that must guide this Courts approach to any case, including land disputes, it could be a combination of the foregoing that must guide the Court. This approach, as required by the laws given to the Court, must be the one that is used. The SRMT Court, created by referendum vote on the St. Regis Reservation, does not have the option to ignore the laws given to it by the Nation which created it.

Next, within the SRMT Civ. Code it is clear that there is NO automatic application of New York Law. As provided:

> Principles of New York State law for resolving private civil disputes *are not automatically applied* in Mohawk Courts. Principles of New York State law for resolving a private civil dispute may be applied in Mohawk Courts for the purpose of resolving a private civil dispute over which the Mohawk Court has jurisdiction if (but only if) the Mohawk Court finds: (i) there is no other controlling principle of Mohawk law;(ii) application of the New York State law is consistent with principles of Tribal sovereignty, self-government, and self-determination; and (iii) application of the New York State law is in the overall interest of justice and fairness to the parties.[129]

This process provided in the SRMT Civ. Code can lead to conflict with cases already decided by Courts external to the St. Regis Reservation. By way of example, one can consider the aforementioned case of *Terrance v. Crowley*.[130] The Court deciding Crowley included the following:

> The lands of the St. Regis are in a reservation and still belong to the state of New York.[131]

This language has been often repeated in numerous pieces of New York legislation, New York Legislative reports, and New York Court decisions. It has been uttered so often that even newspaper articles and historical works repeat it. There is one problem though, it is in all likelihood not true, and is contrary to stated positions of the St. Regis Indians, Federal Indian Law, and some findings made by federal courts.

As the St. Regis Mohawk Tribe finds itself in the midst of its own protracted land dispute litigation involving New York, it is interesting to note that a United States District Court addressing those issues had this to say with respect to the St. Regis lands:

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[129] *See*, SRMT Civ. Code, V (B).
[130] *See, supra* note 68.
[131] *See*, Strong v. Waterman, 5 Sarat. Ch. Sent. 13 (Sup. Ct. 1845), rev'd, 11 Paige Ch. 607 (Ch. Ct. 1845);

> In deciding whether the tribal plaintiffs had abandoned their homeland so as to preclude recovery, this court in Cayuga Indian Nation of New York v. Cuomo ...distinguished between aboriginal and recognized title. 'Aboriginal title' connotes rights deriving from ancestral use. Thus, 'an Indian tribe obtains aboriginal title in land when it continually uses and occupies said property to the exclusion of other Indian tribes or persons... On the other hand, 'where Congress has, by treaty or statute conferred upon the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has variously been referred to ...as 'treaty title', 'reservation title', 'recognized title', and 'acknowledged title.'" [citations omitted][132]

Nowhere in the foregoing does the Court make any allusion to New York having the underlying title to the lands of the St. Regis Indian Reservation, thereby depriving the St. Regis Indians of aboriginal/ treaty/ reservation/ recognized/ or acknowledged title to the St. Regis Indian Reservation. If New York in fact had title this would also deprive the individual members and residents of the St. Regis Mohawk Indian Reservation the customary use of their territory as has been historically enjoyed. Whereby, the New York laws determined to be inapplicable under *Forness* would now be applicable.

In fact, the aforementioned United States District Court was not addressing anything new as another Federal Court in 1927 had this to say with respect to a land dispute incident involving a St. Regis Indian:

> The source of title here is not letters patent or other form of grant by the federal government. Here the Indians claim immemorial rights, arising prior to white occupation, and recognized and protected by treaties between Great Britain and the United States and between the United States and the Indians.[133]

In addition to these cases, we remain mindful of the missing jurisdictional piece that was not granted to New York State under federal law, land disputes on the reservation.[134] Therefore, as the foregoing makes clear, although the State of New York may feel it has the underlying title to the lands of the St. Regis Reservation, they are the only sovereign with such a feeling. Both St. Regis and the United States government have found otherwise.[135] This is not the end of our inquiry though, and the purpose in which to address this issue.

As provided above, the inquiry the Court must undertake does not cease at a recitation of case law decided by other sovereigns. The steps which this Court must follow are provided for in the laws given to the Court, the SRMT Civ. Code. That is

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[132] *See,* Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York, 278 F. Supp.2d 313, 43, 344 (N.D. N.Y. 2003).
[133] *See,* Deere v. New York, 22 F.2d. 851 (2d Circ. 1927).
[134] *See,* 25 USC § 233, and *supra* note 78-106.
[135] *See,* also letter from Interior/BIA to NY Indian Commission confirming the restricted status of St. Regis lands as provided *supra* NOTE 86 herein.

what must govern, and therefore is what this Court must follow. As such, this Court must first look at the SRMT Civ. Code which provides:

> [1.] Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country (with great weight given at all times to principles of the United States Constitution and federal Indian law which recognize Indian sovereignty, self-determination, and self-government, which render many federal and state laws inapplicable to federal Indian Country, which provide for a federal trust responsibility to Indian tribes, and which provide rules of legal interpretation favorable to Indian tribes);

A careful reading of this provision is in order. As provided, only "Such portions" of the U.S. Constitution and Federal Laws apply when it is clear that they are to apply. Given the U.S. Constitution's general applicability it is uncertain as to which portions of it would be 'clearly applicable' to Mohawk Indian Country. Particularly with respect to land disputes.[136] What can be noted is that by its plain terms the U.S. Constitution addresses 'Indians' in only three instances: Twice in what is known as the apportionment clauses, and once in the commerce clause.[137] In each of those clauses the terms do not specifically identify Mohawk Indian Country, but Indians in the general sense of the word. This is not to say that all of the other provisions of the U.S. Constitution will never apply in Mohawk Indian Country, for such a determination can only be made when such a controversy is before this Court, and when a party before this Court wishes to invoke such provisions. This simply means there is no automatic application of such provisions in SRMT Court with respect to land disputes. To do so would ignore the "clearly applicable" requirement contained in the SRMT Civ. Code. Therefore, any party before the Court seeking to have the U.S. Constitution or Federal laws applied would have to request such application, as provided for in the SRMT Civ. Code.

In either event, this Court is given further guidance in the SRMT Civ. Code and the inquiry that must be made in determining whether to approve the application of either the U.S. Constitution or Federal Laws to Mohawk Indian Country. Wherein the SRMT Law provides that:

> With great weight given at all times to principles of the United States Constitution and federal Indian law *which recognize Indian sovereignty, self-determination, and self-government,* which render many federal and state laws inapplicable to federal Indian Country, which provide for a federal trust responsibility to Indian tribes, and *which provide rules of legal interpretation favorable to Indian tribes.* [emphasis added] [138]

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[136] And furthermore, as indicated herein, land disputes are not subject to NY Jurisdiction pursuant to federal law.

[137] The apportionment clause is with reference to how (and if) Indians are to be counted for enumeration of population, and therefore, inclusion or exclusion for counting of the number of Representatives in Congress. As originally ratified, Indians were NOT counted as citizens, and therefore were NOT to be counted. The Commerce clause reserves to the Federal Government ONLY the power to trade and deal with foreign countries, which Tribal Nations were to be considered.

[138] *See,* SRMT Civ. Code § (A)(1).

Therefore, even if a party wishes to invoke either a portion of U.S. Constitution or Federal Indian Law[s], such request then must be compared to, and be in furtherance of, *Indian sovereignty, self-determination, and self-government, and only those sections can be applied that provide rules of legal interpretation favorable to Indian tribes* may be applied here in 'Mohawk Indian Country', via the approval of the SRMT Court to cases before it. This, as provided for in the SRMT Civ. Code, is what the SRMT Court must follow.

Next, it must also be noted that nowhere in the foregoing provision is the SRMT Court mandated and/or required to simply follow federal case-law.[139] In its simplest definition, such decisions are just reflections of those Courts interpretation of either the U.S. Constitution or Federal Laws that were in controversy before those Courts. Nowhere in the SRMT Law is that issue addressed, and this Court in light of the foregoing, cannot make 'automatic application' of such decisions. The SRMT Law leaves the SRMT Court no such authority to do so. This though, does not mean that such decisions can never be raised in SRMT Court, as any party wishing to rely on such decisions can request that SRMT Court consider and apply those decisions in Mohawk Indian Country. Say for example, by requesting that a certain Federal law be made applicable, but also that this case interpreting that Federal Law should be the one to be applied in 'Mohawk Indian Country' by the SRMT Court. But again, in deciding such a request the SRMT would have to follow the process and requirements described above.[140]

Therefore, in the example we began with, should a party before the Court request that the *Crowley* case be made applicable in a land dispute case on the St. Regis Indian Reservation, we would: First, see that *Crowley* is a New York State Court decision which is not even identified as being 'applicable' in the SRMT Civ. Code. Next, any reading of the decision shows that it is contrary to *Indian sovereignty, self-determination, and self-government,* and it does not *provide rules of legal interpretation favorable to Indian tribes* because of its holding that New York has title to the lands of the St. Regis Indian Reservation. This would not lead to furtherance of Tribal Sovereignty, but in all likelihood lead to a diminishment of Tribal Sovereignty. Next, as indicated herein, *Forness* in 1942 provided that New York laws could not apply on the Tribal Nations. Since *Crowley* was decided in 1909 it would violate the holdings of *Forness*. Finally, although 25 USC §233 'granted' civil jurisdiction to New York, it is clear that reservation land disputes are not included in that jurisdictional transfer, thereby *Crowley* would be of no precedent in an action involving a 'Reservation' land dispute. *Infra*

Contrary to *Crowley*, would be the decisions of *Canadian St. Regis Band of Mohawk Indians ex. rel.* and *Deere*. An interpretation of these could potentially be favorable to *Indian sovereignty, self-determination, and self-government,* and it does *provide rules of legal interpretation favorable to Indian tribes.* Therefore, they could be

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[139] Which are the reported decisions rendered by Federal Courts.

[140] Meaning would following such decisions *recognize Indian sovereignty, self-determination, and self-government,* and *provide rules of legal interpretation favorable to Indian tribes.*

potentially applicable to Mohawk Indian Country if requested by a party and as provided for in the SRMT Civ. Code which the SRMT Court must follow.

This provision though, is not the end of the inquiry that the Court must make. As indicated, the next couple of provisions in the SRMT Civil Code provided guidance to us in the instant matter. The next two provisions in the SRMT Civ. Code provide that the following should be applied:

> [2.] Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe;
>
> [3.] Unwritten Mohawk laws, and written and unwritten Mohawk *customs*, traditions and practices;"[141]

Clearly, with respect to the pending issues, this is where the inquiry of the SRMT Court can begin. Again, this is buttressed by the fact that no party currently before the Court on the present matter has requested that the Court apply either a U.S. Constitutional provision[s] or Federal Law[s].[142] And, it is clear that the land dispute case currently before the Court is subject to both of these SRMT Civ. Code provisions.

As indicated, there is a SRMT law directly on point covering the subject matter of the dispute between the parties: the SRMT Land Dispute Resolution Ordinance.[143] For current discussions it can be noted that various provisions of the Land Dispute Ordinance include a prohibition that a non-member cannot buy or hold lands on the St. Regis Reservation.[144] Clearly, this is simply codifying what is, or was, the recognizable custom of the St. Regis Indian Reservation prior to the enactment of the Land Dispute Ordinance. In addition, there is a provision with respect to 'intestate distribution' of lands on the St. Regis Reservation. [145] In reviewing the Land Dispute Ordinance though, it is still clear that not every legal issue is addressed, and in fact it may be impossible to address every issue that can arise in a land dispute on the St. Regis Reservation. Nonetheless, it is clear that there is an adopted law of the SRMT addressing the issue at bar.

Next, as is also clear, in this decision it has been reviewed at great length what exactly can be included, to date, with respect to the "Unwritten Mohawk laws, and written and unwritten Mohawk customs, traditions and practices" involving the land holding pattern and land disputes on the St. Regis Indian Reservation.[146] As provided herein, it is clear that custom and "unwritten laws" on the St. Regis Mohawk Indian Reservation recognizes that: *"He who first cultivated a plot of ground becomes the possessor, and by this use gains a right to sell his privilege."*[147], once in possession

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[141] *See,* SRMT Civ. Code §V(A)(2)-(3).
[142] Due to the nature of the action, a land dispute on the St. Regis Reservation, it may be difficult to find such law that is on point.
[143] SRMT TCR 2009-69 Land Dispute Ordinance [as Amended Apr. 14, 2011].
[144] *See,* SRMT Land Ordinance §V(C), General Provisions.
[145] *See,* SRMT Land Ordinance §V(E), General Provisions of Land Dispute Ordinance.
[146] *See*, SRMT Civ. Code §V(A)(3).
[147] *See*, Major Joseph Delafield supra note 18 at 151.

custom also recognizes that "*When an Indian is in possession of a piece of land he holds it as proprietor; no other Indian can take it from him. He may by custom transfer it to his heirs, or sell it to any number of the Tribe, but not to the whites.*"[148], and this custom, although contrary to 'outside law', is our custom provided for in SRMT Law. As summarized reservation lands are those: "*which by the right of occupancy have come to be considered the private property of individuals, and as such are bought and sold among the natives, although the law recognizes no such private ownership, and holds them all as tenants in common, denying them the right of buying or selling land, except to the government*"[149] Therefore, the SRMT Court must look first to the SRMT Land Dispute Resolution Ordinance in conjunction with the SRMT Civ. Code. When those laws direct the Court to use unwritten Mohawk laws, and written and unwritten Mohawk customs, traditions and practices that is what the Court must do. Therefore, in this context custom does not require the sanction of another sovereign.

It must be further noted that the history included herein is not exhaustive. Clearly any party may wish to raise, invoke, or otherwise utilize, anything they believe to be a custom, tradition, or practice on the St. Regis Indian Reservation. This may include those more specifically associated with the facts involved in their specific case. Meaning, those customs, traditions, or practices involved in their own 'private' land dispute[s]. Nonetheless, it is hoped that the foregoing adequately provides to the respective parties involved in the case at bar the reasoning that the SRMT Court will follow, and to provide the applicable laws that the SRMT Court must first look to and apply.

PROCEDURAL HISTORY

Plaintiff, Desiree White, filed an appeal in the St. Regis Mohawk Tribal Court, on April 18th, 2010, against Allen White, from a Tribal Council Land dispute decision. Ms. White seeks to have the Court reverse the Tribal Council decision dated July 22, 2008 and go back to an SRMT Council's decision dated September 21, 2007. (*See*, Plaintiff's Brief) The Tribal Council's 2008 decision held that a November, 20th, 2000 deed between Reginald Whites (both Parties father) and Allen White (Respondent) was the controlling document because it was entered into to settle the dispute between the parties; and, not the Desiree White's (Plaintiff) 1987 deed, which was the controlling deed in the 2007 Council decision.

In 2010 Ms. Desiree White (Plaintiff) attempted to deliver to Mr. Alan White (Respondent), by certified return receipt mail, her civil Complaint and 20-day summons. This was returned to her on September 7th, 2010. Thereafter, Ms. Desiree White caused to be served on September 13th 2010 the civil complaint on the Defendant by a process server, who filed a Proof of Service with the SRMT Court on the same day. Mr. Alan White (Defendant) filed a timely Answer on September 20th, 2010. The first pre-trial conference was scheduled for October 14th, 2010.

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[148] *Id.* at Appendix No. 6 Evidence of the Rev. J.X. Marcoux, Missionary, having reference to the Iroquois of St. Regis.
[149] *See.* HOUGHS *supra* note 22 at pg. 110,113.

On March 9th, 2011, after several pre-trial conferences, Ms. Desiree White phoned the Court Clerk, Jennifer Brown, saying she felt the Chief Judge has a conflict of interest because his wife is related to Mr. Allan White's wife. During an April 20th pre-trial conference Ms. Desiree White motioned the SRMT Court that she believed that the Chief Judge has a conflict of interest.

The Court adjourned to research the conflict of interest matter. On May 18th, the Court rendered a decision, in part, holding that there was no conflict of interest, concerning the Judge's wife being within the 4th degree of relationship, to any of the parties.[150] However, a hearing was set for June 15th, 2011 to hear arguments to determine whether there is showing by clear and convincing evidence that the impartiality of the Court can be reasonably questioned. On June 15th, the parties appeared before the Court and acknowledge receiving the May 18th Order and Decision. The Parties did not have any further arguments regarding the conflict of interest issue, and as such, the Court set a trial date for July 28th, 2011.

On July 28, 2011, the day of Trial, Ms. Desiree White raised an eleventh-hour issue stating that she has power of attorney over her father (Reginald White), and as such, is revoking his signature on the 2000 deed signed between Alan White (Petitioner's brother/ Respondent) and Reginald White. Again, this is the Petitioner and Respondent's father whom Ms. Desiree White (Plaintiff) has a power of attorney over.

While the request was late, the Court allowed the *pro se* litigant to bring in the request. The Court adjourned to write a decision and order as to whether it is possible for a SRMT Tribal Member to revoke a signature on a deed. This decision and order addresses the question of whether it is possible for a SRMT Tribal Member to revoke a signature on a deed and if the Petitioner may do so in this case.

Factual Background

All parties, Ms. Desiree White, Mr. Alan White, and Mr. Reginald White, are members of the St. Regis Mohawk Tribe. *See,* SRMT Land Ordinance §V(B). Therefore, all are entitled to possess a use and occupancy deed or to occupy land on the St. Regis Indian Reservation. *Id.* Furthermore, as the record indicates this is a 'private' land dispute between, potentially, three St. Regis Mohawk Indians; Ms. Desiree White, Mr. Alan White, and Mr. Reginald White. A fourth St. Regis Mohawk Indian name associated with the dispute is Mr. Albert Herne. Mr. Albert Herne is deceased but he

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[150] See, *White v White*, S.R.M.T. Ct. 5 (May 18, 2010). (Pursuant to applicable SRMT Law there is no automatic disqualification based upon a perceived conflict of interest. There is in fact two applicable 'tests.' First, is the sitting Judge within 3 degrees of relationship to any of the parties. In the case at bar this is not the case. Here the closest relationship is the Judge's wife who is within a fourth degree of relationship with the defendant's wife. Second, the next test would be to determine if the Judges impartiality might reasonably be questioned. Although it is questionable if Plaintiff's motion was timely, the Court permitted the motion to go forward. In this regard the Plaintiff declined to show by Clear and Convincing evidence that the Court has a conflict of interest by a showing that may be reasonably cause to question the impartiality of the Court.

'transferred' land to two of the three parties whose names are involved in the case at bar; Mr. Alan White and Mr. Reginald White.

Next, what must also be addressed is the use of the term *acre,* and the implications of using that term. The historical meaning of the term *acre* is more of a reference, as it was originally in reference to what 'a man could plow in a day'. Plowing here would be with a team of horses and manual labor intensive plow. Later in time the term *acre* became associated with surveying, and in particular, boundary surveys. Yet, surveying in its history is better associated with one of its early tools: Gunther's Chain. This was literally a chain held between two wooden poles. The chain itself though was 100 links in length, and each link was 0.666 of a foot, or 7.92 inches. Therefore, the entire chain was 66 feet in length. This in the United States became the near universal measuring tool, and subsequently the use of Gunther's Chain became the 'measuring stick' of all property transactions. Therefore by 1973 the 'Manual of Instructions for the Survey of Public Lands of the United States' included the following conversion charts for Gunther's Chain: 1 Chain = 100 links, 1 Chain= 66 feet, 1 Mile = 80 Chains, 1 mile= 5,280 feet. For current discussions, and therefore more important, for area measurements:

1 Acre	= 10 Square Chains
	= 43,560 square feet
1 Sq. Mile	= 640 acres

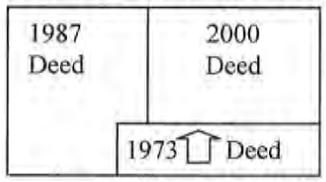
Thus, the simplest means in which to lay out an acre would be to have one chain width (66 feet) by 10 Chains (660 feet) in length. And width multiplied by length will yield the 43,560 sq. feet. Although convenient, rarely is this the manner in which property is 'laid-out'. Therefore, the more commonly used method to determine area measurements, or acreage, is to use the total square footage. In that context, each acre is to have at least 43,560 square feet.[151] Therefore, rather than relying solely upon the assertion that a person owns an acre, the focus is upon how many square feet are represented. By doing so, the shape of the property parcel can vary widely so long as the square footage meets the 43,560 square feet mark to make an acre. What is also noteworthy about Gunther's Chain, and the acre measurement, is its near universal acceptance and usage. Wherefore, when we discuss area or acreage, it will be this measurement which we will be referencing.

Next, and in order to put the case at bar into proper perspective, the following can be noted: In 1973 Alan White purchased 2 acres of land from Albert Herne. This land transaction sets the borders as follows: "On the North by Tom Herne on the East by Beaver Meadow Road, on the west and South by Albert Herne. (*See*, SRMT Tribal Book #5 on pg. 17).[152] There is no definition as to how Mr. Alan White's original 2 acres were 'laid-out', *e.g.,* North to South or East to West. However, the positioning of Mr. White's

[151] This is the preferred in Black's Law Dictionary, as an *acre* is defined as an area of land measuring 43,560 sq. feet.

[152] There is no SRMT Deed for this parcel, but as indicated the transaction is recorded the SRMT Clerk's office.

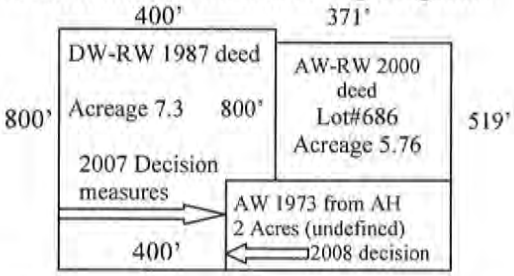
home, which is located more toward the South border, one can clearly ascertain that the 2 acres were laid out North to South rather than East to West.[153] Subsequent to 1973, Mr. Albert Herne apparently sold or devised the rest of his property to Mr. Reginald White. We say apparent because the record of this case is devoid of any SRMT Use and Occupancy deed. Mr. Reginald White then sold a portion of the land acquired from Mr. Albert Herne to his daughter Desiree White in 1987. The northern border of this property was to touch along Mr. Alan White's 'southern' border and span in a southern direction along Beaver Meadow Rd. Then in 2000, Mr. Reginald White deeded to Mr. Alan White 5.76 acres of land. (*See*, 2000 Deed for Lot#686 on record with the Court).



Beaver Meadow Rd.

Subsequent to these transactions a property dispute emerged between Mr. Alan White and Ms. Desiree White. Complicating these matters was that two different SRMT Council decisions were rendered, one in 2007 and another in 2008. The 2007 decision found that Ms. Desi White's 1987 deed is controlling on where the border between her and Alan White's 1973 purchase of 2 acres from Albert Herne is. Under this decision the Beaver Meadow Road border is measured as being 400 ft in length and extends it to Alan White's 1973 purchase of 2 acres from Albert Herne. This 2007 decision measures the Beaver Meadow border by utilizing Ms. Desiree White's 1987 SRMT Use and Occupancy deed as the controlling document. In other words, the measurement is from left to right (see diagram below) This decision is faulty as it never discloses in the decision what was used to determine Mr. Alan White's original 2 acres of land which was purchased from Albert Herne in 1973, thereby preceding any markers set for the 1987 deed.

The 2008 decision uses the footage from Alan White's 2000 SRMT Use and Occupancy Deed for Lot #686 (between Reginald and Alan White) to define the north and south border between Desiree White and Alan White at 371'. Using this footage the 2008 decision set the Beaver Meadow undefined border of Alan White's original 1973 purchase of 2 acres to match Alan White's 2000 SRMT Use and Occupancy deed. Whereby, it measures Alan White's property 371' in a direction to 'simply' meet at Ms. Desi White's property demarcation point of 400' on the Beaver Meadow Road border. The foregoing is contained in the following diagram:



[153] *See*, SRMT GPS Map (dated 3-28-2011)(on record with the Court)(Map depicts where Mr. Alan White's home is located within the 2 acres).

Neither party is happy with these decisions. Plaintiff, Desiree White, asserts that the 2007 Decision should be the controlling decision, and respondent Alan White asserts that the 2 acres purchased from Albert Herne should span (418') along Beaver Meadow Road and be 208 ft from west to east.

Next, as if that was not confusing enough, taking each of the foregoing transactions and applying 'the math' with respect to what an acre contains in 'square feet' yields conflicting results that is not mentioned in either the 2007 or 2008 decisions. First, with respect to the 1987 property transaction between Desiree White and Reginald White the dimensions are provided as such:

400'

800' | Desi White **1987 Deed** **Lot # 687-A** 400' | 800'

Measurements: Lot #687-A

800' x 400'= 320,000 sq. feet
7.3 acres x 43,560 (sq. ft. in an acre) = 317,988 sq. feet
a surplus of 2,012 sq. feet

Under the 1987 SRMT Use and Occupancy Deed Ms. Desiree White received 2,012 sq. feet more then what she should have for a lot measuring 800' by 400'. Therefore, she has a 'surplus' under this transaction and the issued SRMT Use and Occupancy Deed for Lot # 687-A.

Next under the 2000 SRMT deed between Reginald White and Alan White, which the SRMT 2008 decision refers to as the deed to remedy the boundary between the brother and sister, measurements are as follows:

371'

519' | Alan White **2000 deed** **Lot # 686** 371' | 519'

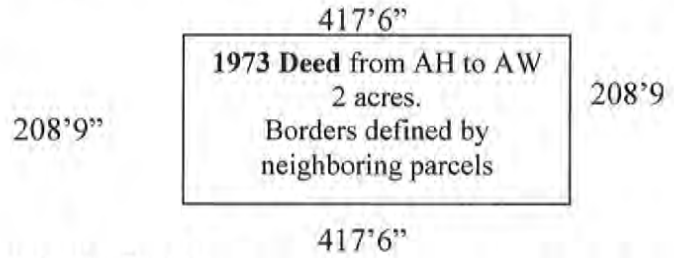
Measurements: Lot#686

519' x 371'= 192,549 sq. feet
5.76 acres x 43,560 (sq. ft. in an acre) = 250,905.6 sq. feet
A deficit of 58,356.6

Under the 2000 SRMT Use and Occupancy Deed, which again is the property that was located west (behind) Alan White's 1973 purchase of two acres, as laid out (519' x 371'),

consists of only 192,549 sq feet. Whereas, the 2000 SRMT Use and Occupancy Deed states that the parcel is supposed to be made up of 5.76 acres, and therefore should contain 250,905.6 sq. feet. Meaning there is a deficit of 58,356.6 sq. feet.

Next, there is no SRMT Use and Occupancy Deed for the 1973 purchase by Alan White of 2 acres from Albert Herne. This is recorded in the SRMT records book, which was a customary way for the SRMT to record land transactions. While borders are given for the 2 acre property in the form of neighbors, there are no numerical measurements given for the boundaries. Yet, utilizing the dimensions provided in subsequent land transactions indicate the following:

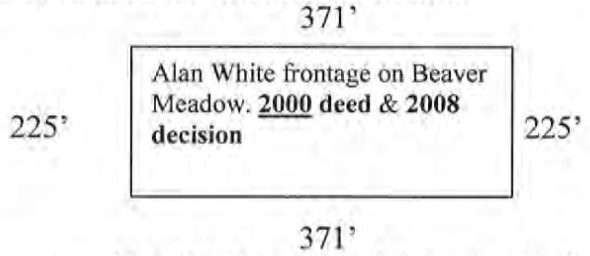


Measurements: 2 acres

2 acres = 87,120 (1973 deed from AH to AW states it is equal to 2 acres)
A deficit of 592 sq. feet.

Alan White's Answer states that his original purchase from Albert Herne was for 2 acres of land and that the 2 acres were laid out as shown above with 417'6" along the western border (Beaver Meadow Rd). Alan White's Answer mistakenly asserts the dimensions as 208' x 416 sq. ft., which totals 86, 528 sq. feet, when the actual square footage of 2 acres is 87,120 square feet (208.9 x 417.6), which yields a deficit of 592 sq. feet.

Finally, the 2008 SRMT decision appears to use the 2000 Use and Occupancy deed for lot # 686, between Alan White and his father Reginald White, to define Alan White's original 1973 deed for two acres as follows:



Measurement: Alan White's original 2 acres after 2008 decision.

225' x 371'= 83,475'
2 acres x 43,560 (sq. ft. in an Acre) = 87,120
A deficit of 3,645

The 2008 decision results in Alan White having a deficit of 3,825 sq. feet on his original 2 acres of land he purchased in 1973 from Albert Herne. This becomes a bigger deficit for Alan White when one calculates the deficit of the 2008 decision with the deficit of

58,356.6 sq. feet in the 2000 deed, which totals 62,181.6 square feet or 1.42 acres that Alan White would be shorted based upon the 1973 transaction, 2000 deed; and the 2008 SRMT Council decision.

Plaintiff's Arguments

The Plaintiff's arguments can best be summed up in the following manner: Desiree White alleges that the 2008 Tribal Council decision was obtained through Alan White acting in concert with certain Chiefs of the SRMT. This 'defrauding' has allegedly deprived Ms. White out of some portions of her property. Next, in a somewhat related argument, Ms. White alleges that as the Power of Attorney for her father (Reginald White), she wishes to revoke the 2000 Use and Occupancy deed, for lot #686, executed by her father and Alan White on a prior date, and to have matters returned to the status as they were when said revocation should take effect. This, according to Ms. White, is because the current status of affairs is, 'not the way her father wanted them.' Finally, as a colloquy to the foregoing, should the revocation and/ or rescission of the signature be permitted, the status of the lands in question should 'revert' to the status that they were when the revocations/rescissions should take effect.

Initially the Court has been mindful of two guiding principles with respect to the case at bar. First, neither of the parties has retained legal Counsel to proceed on these matters. As such the Court has afforded the parties wide discretion in pursuing, and defending, the respective claims and actions before the SRMT Court. Next, as indicated herein, with the passage of the SRMT Land Dispute Resolution Ordinance the SRMT Court is going to be the last tribunal which the parties can turn to with respect to this matter. Since there is no more appeal post SRMT Court Decision, it is clear that the SRMT Court owes the parties an unwavering duty to ensure that they have been given ample opportunity to present their positions to the SRMT Court. This is particularly true with respect to *pro se* litigants.

Analysis:
Plaintiff's Power of Attorney Argument

Initially it should be noted that a 'Power of Attorney' (POA) is synonymous with a delegation of authority from one person (the principal) to another person or persons (agent[s]). Therefore, the 'agent' can act on the principals behalf with respect to the authorities given to them by the principal. Very often this delegation, usually evidenced in a document, touches upon property or monetary matters. As such, the law of the jurisdiction where the property is located is what is generally applied. In New York this would be covered under the New York General Obligations Law [hereinafter NY GOL].[154] The NY GOL provisions cover nearly the full gambit of what is associated with a New York 'durable power of attorney': typeset, enumeration of authority, the duration of the power of attorney, and the rescission of the power of attorney. These authorities can vary, but can include "real estate transactions...."[155] Under the current

[154] *See,* NY GOL Article 5, Title 15, § 5- 1501 et. al. (2010).
[155] *See,* New York Statutory Short Form Power of Attorney, available at NYS Bar Association.

New York statutory scheme a 'Power of Attorney' given by a principal can remain effective through a principal's disability or incompetence, but not the principal's death unless the power of attorney provides otherwise.[156] Clearly the thinking here is that upon the principal's death New York's other statutory requirements with respect to wills, estates, and Surrogate Court could be used if necessary. In addition to receiving authority to act on a principal's behalf, an agent can also be held financially liable for the decisions made pursuant to a Power of Attorney.[157]

Revocation of a Power of Attorney is yet another matter; generally the death of the principal will cause a revocation, as will death of the agent. Other events ending the agent's authority include termination of the agent, the purpose behind the Power of Attorney has been accomplished, or simply, the principal provided the necessary notices revoking the issued 'Power of Attorney. All of the aforementioned may lead to a finding of a revocation.[158]

In the case at bar there is what appears to be a SRMT document titled "Power of Attorney in the Matters & Estate of Mr. Reginald White." This document is signed by Mr. Reginald White, Ms. Desiree White, and Ms. Patricia Thomas as Tribal Clerk and witness; and, it was signed on February 3, 2003. It also has the SRMT seal affixed to it. The document in pertinent part identifies Mr. Reginald White as the principal, whereby in "the matters of a personal and financial nature," he appoints his daughter Desiree White as "agent" which she is "vested with all authorities to act as the power of attorney." A fair reading of the document though reveals that those authorities are not clearly defined. The document then provides that Mr. Reginald White is putting Ms. Desiree White in this "trust responsibility" to oversee all of his "personal, financial and estate affairs." Further, this apparently was done as a precautionary measure should anything happen to incapacitate Mr. Reginald White in an approaching hospital stay.[159]

First, we recognize that New York law is not 'automatically' applied to cases and controversies before the SRMT Court. As provided in the SRMT Civ. Code: "Principles of New York State law for resolving private civil disputes *are not automatically applied* in Mohawk Courts.[160] Next, we have also recognized that state jurisdiction over reservation lands was NOT included in the jurisdictional transfer to New York.[161] In fact, if the Court were to 'simply' apply New York Statutory provisions, like the New York General Obligations Law, this would be contrary to a federal law (25 USC §233) which provides that reservation lands are NOT subject to state jurisdiction. Even in light of these provisions, we must also be mindful that with respect to individual St. Regis Indians: "*it is customary for them to buy and sell improvements among themselves, and the conventional titles thus acquired are respected by common consent.*"[162], and "Although the law recognizes no individual rights in the land, *custom has sanctioned...*

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[156] *See,* Practice Insight associated with NY CLS Gen. Oblig. § 5-1511, Lexis pub.
[157] *See, generally,* NY GOL § 5-1505.
[158] *See, generally,* NY GOL §5-1511.
[159] *See,* SRMT document dated February 3, 2003 part of record.
[160] See, SRMT Civ. Code §V(B).
[161] *See generally,* 25 USC§ 233.
[162] *See,* NY Office of the Secretary of State, June 25, 1867, Report on Indian Tribes in the State.

the holding of lands for the exclusive benefit of families, and these rights are bought and sold among themselves."[163]. Furthermore, "*each Indian takes as much as he wants, and in any locality he likes, occupies and cultivates, and it is his without further requirements.*"[164] Wherefore, even in light of the apparent prohibition of applying New York law to the case at bar, the intention of the parties to the above noted transaction must be addressed, as they are free to craft and sanction their land transactions as they see fit by and between themselves.

In this light, the first unique twist that we must confront is that the 'Power of Attorney' at issue is not one that was issued pursuant to a SRMT Law, Federal Law, and by all appearances, it does not meet any of the New York Statutory requirements provided above. Furthermore, it also does not appear to be an official act of the SRMT Council as it is not a Tribal Council Resolution,[165] and the only Tribal official whose name appears on it is the SRMT Tribal Clerk who signed as "Witness-Tribal Clerk." Next, and as is evident, the St. Regis Mohawk Indian Reservation is not in New York. Although nearly geographically surrounded by New York, the St. Regis Mohawk Indian Reservation is still not part of New York. Therefore, since the property is not in New York the law of the property situs would not apply. Next, there is no SRMT law with respect to a 'Power of Attorney' to apply.[166] As indicated herein, New York Laws with respect to Indian land disputes was NOT part of the jurisdictional transfer to New York.[167] Additionally, it is clear that the SRMT 'Power of Attorney' in the case at bar fails to meet most if not all of the New York requirements as contained in the NY GOL. Even in light of these shortcomings, other issues involved in the case at bar supports the SRMT Court finding that Ms. Desi White is not permitted, upon her own initiative, to utilize the 2003 'Power of Attorney' to pursue claims against Mr. Alan White.

As indicated herein, there has been a string of property transfers between four (4) St. Regis Mohawk Indians. These include a 1973 transfer from Albert Herne to Alan White, a post-1973 undocumented but apparent transfer from Albert Herne to Reginald White, a 1987 transfer from Reginald White to Desiree White, and a 2000 transfer from Reginald White to Alan White. What is noteworthy about these transfers is that each pre-dates the 2003 'Power of Attorney' executed by Reginald White and given to Desiree White. The record does not indicate if there was in existence at that point any land disputes between Reginald White and Alan White. Therefore, did Ms. Desiree White upon being named/appointed "agent" under 2003 SRMT Power of Attorney 'step into the place' of Reginald White in a pending dispute, or was Desiree White as agent/power of attorney for Reginald White initiating a land dispute on behalf of Reginald White. What buttresses against a finding that would permit Ms. Desiree to initiate a land dispute under

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[163] *See, supra* note 36 at 39-43.

[164] *See,* NYS Legislature, Assembly "Report of Special Committee to investigate the Indian problem of the State of New York, Appointed by the Assembly of 1888" Troy Press Co. 1889, at pages 56-58

[165] Or 'TCR' as they are commonly referred to.

[166] A review of the SRMT Laws provided to the Court does not indicate any mention of a 'Power of Attorney' Provision.

[167] *See,* 25 USC§ 233, and as discussed herein *supra.*

the 2003 'Power of Attorney' is that unless provided otherwise, nearly all Power of Attorney delegations are 'forward looking.' Meaning that they generally have date certain upon which they shall commence. In the case at bar this would be February 3, 2003. Further, those Power of Attorney delegations which 'reach back' prior to their commencement usually contain clauses permitting their doing so. A fair reading of the 2003 'Power of Attorney' document appears to limit it to the date it was signed: February 3, 2003. It is clear that as envisioned, the document was envisioned as being applicable from the date signed and forward. Supporting such a reading can be found in the 'Power of Attorney' itself, wherein it provided that the principal (Mr. Reginald White) was taking such actions based upon an upcoming medical/hospital procedure, and not a past procedure.

Next, if Ms. Desiree White is permitted the reading of the 'Power of Attorney' she is requesting, she could potentially be initiating a land dispute against herself. As indicated above, in 1973 Alan White purchased from Albert Herne a two acre parcel of property located on the Beaver Meadow Road on the St. Regis Mohawk Indian Reservation. Subsequent to this Mr. Reginald White came into possession of the remaining Albert Herne parcel and made two subsequent transfers. He sold to Ms. Desiree White in 1987, and then another parcel to Mr. Alan White in 2000. Currently in the record it appears that Ms. Desiree White actually received a surplus of 2,012 sq. feet, and that the 2000 transfer to Mr. Alan White by Mr. Reginald White did not contain the correct amount of acreage, which may have shortened Alan White by 58,356.6 Sq. feet. In addition, the 2008 SRMT Council decision further shortens Alan White's 1973 parcel by an additional 3,645 sq. feet totaling a deficit for Alan White of 62,181.6 Sq. feet or 1.42 Acres.

Language contained in the SRMT Use and Occupancy Deeds at issue bring these 'short comings' to further light, and warrant against a reading of the 2003 'Power of Attorney' as requested by Ms. Desiree White. For instance, the 1987 deed contains the following:

> "THIRD, Reginald White, party of the first part does and will forever WARRANT the title of said premise to the fullest extent allowable under the use and occupancy procedure of land transactions carried out and administered by the SAINT REGIS MOHAWK TRIBAL COUNCIL, said premises being part thereof if the SAINT REGIS MOHAWK TRIBAL LANDS."[emphasis added].

Therefore, under this deed Reginald White (party of the first part) is warranting the title to Desiree White. Interestingly enough, the 2000 deed to Alan White contains the following

> THIRD, the party(s) of the FIRST PART does and will forever WARRANT the title of said premise to the fullest extent allowable under the use and occupancy procedure of land transactions carried out and administered by the SAINT REGIS MOHAWK TRIBAL COUNCIL, said premises being part thereof the SAINT REGIS MOHAWK TRIBAL LANDS. [emphasis added].

In this deed the party of the first part is Mr. Reginald White, who is warranting the title to Mr. Allan White.

By implication, 'warrant the title' also implies warranting the size, location, acreage, and quantity of the parcel. Basically, the property has to be the specific parcel and of the size that it has represented being. Therefore, if either Alan White or Desiree White were 'shorted' in any land transfer, or that the wrong property or borders were part of the transfer, or that they were receiving less then what they believed they purchased, they would have recourse against the party(s) they purchased from. This would be the person, who 'warranted' the said parcel, and in this case they have the same person whom they purchased from and who 'warranted' title to them; Mr. Reginald White, their father. Further, in no instance did Mr. Alan White or Desiree White "warrant" a deed to the other party, as there was no need to do so since they did NOT transfer property by and between themselves.

Permitting the reading Ms. Desiree White requests would create the interesting scenario whereby Ms. Desiree White, who has 'Power of Attorney' over her father Reginald White, can simply re-visit the 1987 Deed issued to her by way of the same person whom delegated the 2003 Power of Attorney to her: her father, Mr. Reginald White. Thereby, Ms. Desi White could void her own deed by alleging that the person who warranted the size of her 1987 parcel was wrong, as she now has Power of Attorney over that person who warranted her 1987 deed. If permitted to do so, she could then do the same to the adjoining parcel that was deeded to her brother Mr. Alan White by her father Mr. Reginald White. The exception here would not be a voiding because of acreage, but apparently with respect to the location and or boundaries of the parcel. Therefore, if the reading of the 'Power of Attorney' requested by Ms. Desiree White would be permitted, she would become the same person who warrants the title, and also be the same person who is seeking redress for a faulty warranty.

Finally, the 2003 'Power of Attorney' includes the term "estate" with nothing more. As indicated herein, there could be potentially over 90 different legal definitions of the term estate.[168] Therefore, without more it is difficult to determine what was to be implied by the use of the term "estate", and particularly in the instance where a party is seeking to have that take effect prior to the date that the Power of Attorney was entered into.

Based upon the foregoing, the Court finds that the reading of the 'Power of Attorney' as advocated by Ms. Desi White cannot be permitted.

Plaintiff's Revocation/Rescission of Signature Argument

Next, nowhere in the SRMT Land Ordinance is it required that the St. Regis Indians involved in the 'land transaction' are required to sign the SRMT Use and

[168] *See*, BLACK's LAW DICTIONARY 379-382 (West Pub. 1997)(1991).

Occupancy Deed.[169] This 'slight of authorship' can easily be allocated to numerous reasons, which are better left to the legislative functions of the SRMT. Nonetheless, as has been made clear in this decision, there is ample evidence of a historic custom on the St. Regis Reservation of St. Regis Indians occupying, possessing, cultivating, and improving lands on the St. Regis Mohawk Indian Reservation. In addition, there is also clearly included in that historic custom the sale, transfer, and/or bargaining by and between St. Regis Indians (individually or by families) of occupied land lots on the St. Regis Mohawk Indian Reservation. Therefore, it is presumed that these occurrences would have required some evidence tending to show the individual St. Regis Indians involved in such transaction also consented to the occurrence of these transactions. Thus, although the SRMT LDRO does not so state, there is ample proofs that the issuance of a deed required either the individual Indians signature, or some witnessed physical act by the Indian involved in the transaction evidencing their agreement to the transaction.[170]

Nonetheless, one of the first issues we are confronted with is the revocation of a St. Regis Indian's signature on a Use and Occupancy Deed. This is an issue of first impression for the SRMT Court. Because of the issue's importance, which could have far reaching implications impacting the certainty, reliance on, and the validity of 'Use and Occupancy deeds' issued by the SRMT Tribe[171], the Court sent a certified question to Tribal Council.[172] Wherein, the Court sent the following:

> Can a Tribal member rescind their signature on a SRMT Use and Occupancy deed?
>
> Has there ever been such an action by a Tribal member (rescinding their signature on a SRMT Use and Occupancy Deed) or revoking a new deed?
>
> > Did the SRMT issue a 'New" Use and Occupancy Deed when *this* occurred?
> > Has the SRMT Council, prior to the enactment of the Land Dispute Ordinance, issued a new Use and Occupancy deed based upon a Tribal member rescinding their signature on a previously issued deed? [173]

Although the response by the SRMT General Counsel was short, it offers some guidance for the Court to rely upon. As provided by the SRMT General Counsel's office there is built into the LDRO a presumption with respect to the validity of Use and Occupancy Deeds which have been issued by the SRMT. Further, there is also built into the Land

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[169] *See* SRMT Land Ordinance §V(F) which only requires the signature of "Tribal Council" and be certified by the "Tribal Clerk."

[170] The SRMT Court is aware that not all St. Regis Indians could read and write the English language, and the Court is aware of other land transactions whereby the parties consent is evidenced by a mark witnessed by another 'non-party' most often being either an SRMT Chief or the SRMT Clerk.

[171] And, the finality of a Tribal Court decision per SRMT Land Ordinance.

[172] *See,* Letter to Council dated August 5th 2011, (On record with the Court).

[173] *Id.* at 2.

Ordinance that the 'Use and Occupancy Deed' first filed is presumptively the valid one.[174]

In the case at bar these presumptions cause uncertainty and renders their use in the LDRO illusory. This is evidenced where there has been two [2] SRMT Use and Occupancy Deeds issued to the respective parties with regards to the same properties which are at issue in the case at bar. Further, although it is plain in the SRMT Land Dispute Ordinance that all issued deeds are presumptively valid, this does little to address the situation whereby two [2] sitting Tribal Councils have issued two 'Use & Occupancy Deeds' at different times with respect to the same parcel of property! Which of these is the 'valid' one does not quiet any of the litigation issues. In fact Ms. Desiree White has alleged the same in her arguments to the Court. As discussed herein, it is these transactions which perhaps motivated the changes implemented by the St. Regis Indian Reservation community through referendum with respect to land holdings and land dispute resolutions.

Next, it is clear that the SRMT LDRO also contains a 'first in time' presumption with respect to SRMT Use and Occupancy deeds. Whereby, with respect to the validity of a deed the presumption contained in the SRMT Land Ordinance provides that the SRMT Use and Occupancy Deed that was first filed (the oldest) is the presumptively valid one. This presumption also offers little guidance because that effectively says that the case at bar should have been filed at an earlier time. As provided herein, this was not feasible because during that earlier time (from 1973 to 2008) there was no SRMT LDRO, SRMT land Dispute Tribunal, or SRMT Court available to pursue such claims.

Also working against the 'presumption', and as indicated herein, there does exist two evidentiary standards in the SRMT LDRO. The first is in respect to SRMT Council decisions which requires a full establishment of a record, and a second with respect to Tribunal decisions under the SRMT LDRO, which only requires reviewing the record developed by the Tribunal.[175] This second one affords the parties an opportunity to develop a record at the Tribunal level. To adopt a reading of the LDRO which says the 'first in time' presumption with respect to Tribal Council decisions would deprive a party the right and opportunity to develop an appropriate record. Therefore, the parties appealing a Tribal Council decision would be denied an opportunity that is afforded to those appearing before the SRMT Land Dispute Tribunal. Instead, this Court must hold that the rights afforded to one party under the SRMT LDRO should be afforded to all parties under the SRMT LDRO, and this includes the opportunity to develop a record which either decision maker (Tribunal or Court) is going to rely upon.

This is not to find that the 'first in time' presumption contained in the SRMT LDRO is never going to be of any utility. As time progresses, and as the 'window' to challenging prior Tribal Council decisions closes, the utility of the first in time presumption contained in the SRMT LDRO will then be realized. Therefore, the first in time presumption will in all likelihood reach its highest effectiveness post enactment of

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[174] *See*, SRMT Land Ordinance §F(1).
[175] *See*, SRMT Land Ordinance §XV(B)-(C).

the SRMT LDRO and with the passage of time. For the current dispute though, the 'first in time' presumption offers little guidance and the Court will review this case under the presumption that Ms. Desiree White be afforded the opportunity to develop a full and complete record which to rely upon in rendering a decision.

Next, on its initial appearance the revocation and/or removal of a signature from a deed would sound counter intuitive and abhor ones normal senses of business transactions, money, and sales, even those involving land transactions. At its base, it would seem to violate a near universal belief that any 'sale' has a sense of finality to it, and that no one should be able to go back and re-visit a transaction or, to prohibit the controlling of property from 'beyond the grave' as it is sometimes described. This near universal belief is buttressed in the context of land by an ages old property rule in English Common Law, and made part of the Western legal tradition, of the Rule Against Perpetuities. This rule provides that no grant of land could be valid unless the interest must vest, if at all, not later than 21 years after the death of some person alive when the interest was created.[176] In the totality, this supports the ideal that all transactions, including land, should have a sense of finality. Meaning no-one at a later date can raise an issue to void these 'older' transactions.

Although the finality of land transactions may be a laudable goal of some jurisdictions, it is clear that what Ms. Desiree White is requesting is not 'unheard' of in the law of property.

Nearly all property law is subject to the laws of the jurisdiction where the property is located. This would mean under the 'American' system, the state where the property is located. By way of example, in New York State the plaintiffs claim would come under a couple of recognized causes of action under New York Property Law. First of which would be described as a '*Reversionary*' right to property. Under this reversion, property would revert back to the other person on the deed, and in the case at bar, that would be Mr. Reginald White whom Ms. Desiree White now has 'Power of Attorney' from. Yet, in New York this right of reversion generally has to be clearly identifiable in the document which is creating it so that the purchaser clearly knows of its existence. Next, the reversionary right is generally not left simply to the whim and caprice of the seller to invoke at their will. Generally certain 'conditions' must occur for it to be invoked by the person who has the reversionary right, which again is generally the seller of the property. New York has also mandated other requirements for this 'right of reversion' to be 'perfected', meaning that it is permitted to remain valid over the passage of time so long as certain statutory requirements are met. In New York this includes the proper recording of the 'right of reversion' and a periodic renewal of the 'right of reversion'. These are most often done where property transaction records are maintained. In New York this would be the County Clerks' Offices. Furthermore, if properly performed (perfected), this 'right of reversion' is actually descendible, devisable, and

[176] *See*, Black's Law Dictionary and many a weary law student who must learn the rule in the first year of their studies.

alienable.[177] Thereby, the 'right of reversion' can be given or sold by the person who has such right. Again this would usually be by the seller of the property who may give or bequeath this 'reversionary right' in a will, or simply sell it to someone.

This abstract and technical legal meaning is best exemplified by many charitable land donations. For instance, say a person desires to give 10 acres of land to a school *so long as the land is used for a school*, and when no longer used for a school, the property reverts to the person who made the original gift! Through the mechanism[s] provided under New York's Real Property Law, the person who has this 'reversionary right' could exercise that right when the property in question was no longer used as a school, OR, if the purpose which the grant was originally made (use as a school) is no longer apparent (used as something other than a school). In these events, the person who deeded the property (seller) could maintain (perfect) their reversion right and request the return of the property. Even with the passage of time, the person having this reversionary right could perfect it (file and renew) in the County Clerk's office thereby ensuring it's continued validity even in light of the rule against perpetuities (21 years). In addition, if properly perfected the person having this reversionary right could sell it or give it to an heir under their will.

In the case at bar, the Plaintiff Desiree White is requesting that there should be a 'reversion' of the land contained in the 2000 SRMT Use and Occupancy Deed (that from Reginald White to Alan White) and that the property 'revert' back to her father Mr. Reginald White. Ms. Desi White's claim for the reversion is that things are not 'the way her father wanted them.' With respect to this issue it is best to again look at the SRMT use and occupancy 'deeds' exchanged by and between Mr. Alan White and Mr. Reginald White. In these 'deeds' there does not appear to be any language reserving to Mr. Reginald White a 'right of reversion' to the parcel of property that is subject to this litigation. In addition, there has been scant documentation with respect to the use of any language in these deeds which would tend to indicate that a 'right of reversion' was intended to be created by Mr. Reginald White when he deeded the property to Mr. Alan White. Furthermore, the lack of a reversionary right does not appear to be acknowledged by Mr. Alan White when he received the property even in reviewing a manner most favorable to Ms. Desiree White. In reviewing the documents involved in the case at bar, indicate that Mr. Reginald White became involved when a dispute arose between Desiree White and Alan White with respect to the land Mr. Reginald White had deeded to each of them in 1987, Desiree, and in 2000, Alan. Prior to such occasions there is no indication of Mr. Reginald White reserving to himself a 'reversionary right', contingent upon any condition[s] or duties placed upon Mr. Alan White, with respect to the property he ceded to Mr. Alan White in 2000.

Likewise, there is no apparent language contained in the 2000 Use and Occupancy Deed placing upon Mr. Alan White any conditions or duties which he must undertake in order to receive or maintain the property he received from Mr. Reginald White in 2000. Therefore, at this time the Court is unwilling to find that Ms. Desiree

[177] For an overview one simply has to research New York Real Property Law RPL § 345, EPTL § 6-4.6, and RPAPL.

White, as 'Power of Attorney' over Mr. Reginald White, can invoke a right of reversion on behalf of Mr. Reginald White because there is no language contained in the aforementioned SRMT Use and Occupancy Deeds supporting such a finding.

Plaintiff's Rescission Argument

The 'half-sibling' to the 'right of reversion,' is the 'right of rescission' and what each of these shares is the ability of a person to have a property transaction nullified. This may include the right to have property returned to them or to simply disallow a property transaction in its entirety.

The 'right of rescission' is distinguishable from a 'reversion right' by the fact that in this context it is not reliant upon the happening of a certain event. In the example that we discussed, 'should the land ever not be used for school purposes' could result in reversion of the property to the seller. In the right of rescission context no such condition is necessary to have a transaction canceled or rescinded. As such, many Courts in various jurisdictions view the right of rescission as one that is tied to contract law principles. Therefore, when a party wishes to nullify a land transaction it is often referenced by numerous courts as the Right of Rescission of the Contract involving land.

For these purposes, it is important to recognize that numerous courts permit the rescission when there is faulty title, a default by one of the parties to the contract, or a mistake is involved with the contract for the sale/transfer of land. Related to these themes, Courts have also permitted rescission where there is a failure with respect to land quantity. Such failure can then be brought as a 'mistake' claim to void the contract. Such mistakes that could result in rescission include mistakes as to the vendors (sellers) title, price, identity of the land, and boundaries. Some Courts will further require that the mistake must be to the degree that the contract would not have been made if the truth had been known to the parties.[178]

Like mistake, fraud has also been recognized as a means in which to permit rescission. This fraud can include where a seller fraudulently misrepresents acreage, which would entitle the buyer the option of rescinding the agreement. The buyer in such a context is often recognized as having the option of bringing an action for fraud OR for an action for breech in the covenants contained in a deed. Covenants contained in the deed can include boundaries, quantity, or location of land. If successful, each such action could result in rescinding the land transaction. As can be expected, this can raise related issues of trying to determine an actual misrepresentation of the parcel or an improper concealment of facts regarding the parcel. Interestingly related, is that for an actual rescission to be ordered, it must also be found by the court entertaining such requests, that there is no other relief which could be reasonable and just under the particular circumstances. Therefore, if money damages would be sufficient, that should be ordered before rescission is permitted.[179]

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[178] For a general discussion of the principles involved, see Thompson on Real Property. Ch. 96. Vendors and Purchasers, § 96.15 Termination of the agreement *et. al.*.
[179] *Id.*

Related to the actions in fraud and covenants, is the ideal that such information contained therein must be an actual misrepresentation of the property. Generally speaking, the ideal here is that general false representations by the seller of land regarding the quantity of land sold or its boundaries or location, made as an inducement to purchase and which are relied upon by the buyer, can constitute a fraud which entitles the buyer to some type of relief.[180] This will enviably result in an inquiry into the owner's knowledge with respect to their knowledge of the boundaries and quantity of land that is at issue. This is so, because there is a common presumption shared by many courts that a purchaser is justified in relying upon a seller's representations in pointing out boundaries and lot lines.[181]

Finally, the right of rescission has been held by many courts to only be available when no other legal remedy is available, and that the awarding of the right of rescission should only be exercised on what is deemed to be reasonable and just under the circumstances of the particular case.[182]

Before applying the facts of the current case to the rules with respect to the right of rescission, the Court is also mindful that contained in the SRMT Rules of Civil Procedure, at §VIII (A)(3), is a statute of limitation which limits those causes of action on written contracts to five (5) years from the time of the breach of contract.[183] Furthermore, under the SRMT Civ. Code the applicable law that is to be applied in SRMT Court include:

> "[4] Generally recognized principles of the law of contracts (including quasi-contracts or imperfectly formed invalid contracts), as reflected by the most recent Restatement of Contracts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine."

In the case at bar it is clear that there is a multitude of inconsistencies with respect to the land boundaries and quantity of land that is at issue. In this decision we have pointed out what the current record reflects with respect to boundaries and quantities of land that is at issue between Mr. Alan White and Ms. Desiree White. Clearly there are quantifiable and determinable issues with respect to the quantity of land in each of the transactions that we have described in this decision. Next, just as it is clear that there are issues with respect the quantities of land at issue, there is also legitimate issues with respect to the boundaries that are at issue in the case at bar. Clearly one has effected the other.

Next, there are issues with respect to who the appropriate parties are with respect to the quantity of land and boundaries issues. As indicated herein, neither Ms. Desiree White nor Mr. Alan White has sold property to one another. Therefore, it is clear that

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[180] *Id.* at § 96.15 (a)(4)(iv).
[181] *Id.*
[182] *Id.*
[183] *See*, SRMT Rules of Civil Procedure at Section VIII. [Rule 5] Limitations of Actions

neither Mr. Alan White nor Ms. Desiree White can invoke either the right of reversion or right of rescission against the other. As indicated here the only thing that each of them share for some of the parcels is that each 'purchased' from the same person, Mr. Reginald White their father.[184] Therefore, if the boundary or quantity is incorrect, that issue is between the 'buyer' and 'seller', and in this case it would be either Mr. Reginald White (seller) and Mr. Alan White (buyer), or, Mr. Reginald White (seller) and Ms. Desiree White (buyer). There is even the chance that if there is an issue with respect to the 1973 transaction, then that would be with Mr. Albert Herne (seller) and Mr. Alan White (buyer).

Adding to the peculiarities of this case is that when applying the applicable SRMT laws would result in both Ms. Desiree White and Mr. Alan White to potentially be without a remedy. As indicate herein, this Court must apply the laws provided to it in SRMT Laws. In making this application it is clear that both Mr. Alan White and Ms. Desiree White would be time barred by the applicable statute of limitations as prescribed by the St. Regis Mohawk Tribe in the SRMT Civil Code. There being a five (5) years limitation on bringing a contractual cause of action. This could lead to the unwieldy result where the parties end up in an eternal dispute with one another over land quantity and boundaries that 'someone else' sold them. This is clearly an instance where the equitable powers of the Court should be utilized.

It must also be discussed that there has been a couple of intervening events prior to this case coming before the Court. These clearly are the attempts by the SRMT to resolve this matter in 2007 and again in 2008. What is noteworthy about these attempts is that there is no indication in the record that during these attempts did anyone perform basic mathematic calculations to determine the acreage or square footage that was at issue. If this were done, it would have been easily ascertained that the actual square footage that was at issue was inconsistent with the covenant language contained in the SRMT Use and Occupancy deeds. This would have then disclosed the potential 'buyer' and 'seller' issues as to the quantity of land and boundaries that are at issue. Instead, the prior SRMT decisions with respect to the case at bar shuttled the boundary that Ms. Desiree White and Mr. Alan White share back and forth between one another. Even more particular is that when this was done, there was no corresponding correction[s] to adjoining properties. In simplest terms, when it comes to land property no one can move just one side of a simple square parcel of property without effecting the other three sides, or the adjoining/abutting parcels of property. Furthermore, it is only through these SRMT interventions that the Court has the authority to decide the case at bar. This is because under the SRMT LDRO, SRMT Council decisions can be brought to Tribal Court within ten (10) years of their rendering. Otherwise, as indicated herein, the parties could have been barred by the applicable SRMT statute of limitations noted above.

Finally, should the rescission be granted it is unclear as to which transaction this rescission should be applied to. Whether it be the '2 acres' purchased by Mr. Alan White from Mr. Albert Herne in 1973, or the 5.76 acres purchased by Mr. Alan White from Mr. Reginald White in 2000, or the 7.3 acres purchased by Ms. Desiree White From Mr. Reginald White in 1987. As we have indicated, it is clear that neither Ms. Desiree White

[184] The exception is Mr. Alan White's 1973 purchase from Mr. Albert Herne.

nor Mr. Alan White can invoke the right of rescission since neither ever purchased property from one another. Since neither was a buyer against the other party there is no right of rescission to attach to any property.[185] Furthermore, if there was a rescission ordered it is unclear as to which party this would benefit. For the Court to consider the rescission, as other Courts have done, would indicate that there is no other means that are reasonable and just to decide the issues between the parties. In this light, it is clear that an equitable rescission could not be invoked to the sole benefit of one party over the other since neither Alan nor Desiree ever purchased or sold to one another. Under the facts of the current case, should the rescission be ordered it would have to be ordered and applied to all parcels that could potentially be at issue between the parties. For as we have indicated herein, no parcel is of the correct size as indicated in the covenants which are part of the SRMT Use and Occupancy deeds which are at issue. That being the case, and since the parties are barred by the applicable SRMT statute of limitations, if rescission is to be done then all property that was once under the control of Mr. Albert Herne should be properly addressed. Clearly this may entail either the diminishment or expansion of the parcels that are at issue.

Nonetheless, as we have recognized herein: "*He who first cultivated a plot of ground becomes the possessor, and by this use gains a right to sell his privilege.*"[186], and "*When an Indian is in possession of a piece of land he holds it as proprietor; no other Indian can take it from him. He may by custom transfer it to his heirs, or sell it to any number of the Tribe, but not to the whites.*"[187]. Furthermore, "*... it is customary for them to buy and sell improvements among themselves, and the conventional titles thus acquired are respected by common consent.*"[188] And that, "*custom has sanctioned, in this as well as in the other New York Tribes, the holding of lands for the exclusive benefit of families, and these rights are bought and sold among themselves*"[189] Thus it should also be with the right of rescission, just as Ms. Desiree White and Mr. Alan White are SRMT members capable of holding land, and capable of transferring it, they to can decide for themselves if and how they may wish choose to pursue the right of rescission. Clearly such right does not belong to just one party.

The Court will schedule a pre-trial hearing to determine if either party wishes to raise and pursue a right of rescission. If so, that party shall also be required to identify which parcel or property and against which seller, and to answer why the Court should permit the right of rescission to proceed against only one parcel. Otherwise, in invoking the right of rescission the Court will consider all parcels that were at one time part of the Albert Herne property.

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[185] We have already declined to find that Ms. Desiree White's Power of Attorney over Mr. Reginald White is insufficient for this purpose.

[186] *See*, Major Joseph Delafield supra note 18 at 151.

[187] *Id.* at Appendix No. 6 Evidence of the Rev. J.X. Marcoux, Missionary, having reference to the Iroquois of St. Regis.

[188] *See*, NY Office of the Secretary of State, June 25, 1867, Report on Indian Tribes in the State.

[189] *See*, A BRIEF SKETCH OF THE EFFORTS OF PHILADELPHIA YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS TO PROMOTE THE CIVILIVATION AND IMPROVEMENT OF THE INDIANS ALSO OF THE PRESENT CONDITIONS OF THE TRIBIES IN THE STATE OF NEW YORK. 39-43. (Friends Book Store 1879).(1866).

In the absence of either party raising and pursuing a right of rescission, this Court will schedule to be conducted a final trial on the limited issue of determining the appropriate location of the boundary line between Ms. Desiree White's 1987 parcel and Mr. Alan White's 1973 Parcel, and after such determination has been made, to set appropriate boundaries around the remaining parcels that will be effected by the setting of the boundary between the 1973 and 1987 parcels, and immediately thereafter order that new SRMT Use and Occupancy deeds be issued that accurately reflect the boundaries of the parcels, and thereby appropriately setting the quantity in each of the parcels.

Conclusion

In summary, the SRMT Court finds that the following is intended with respect to land holding and land disputes. Firsthand historical accounts from 1760-1890 illustrate the firmly established customary land holding system in Caughnawaga/Kahnawake that was duplicated in Akwesasne. As such, this history clearly shows that there was, and still is, a well established 'customary' law for land holding in Akwesasne/St. Regis concerning land ownership, transfer, and use; as well as, recognized individual Indian land rights.

Throughout the decades of the 19th century New York State has made numerous attempts to subjugate Mohawk customary land holding patterns, which include both individual parcels and 'common lands.' Yet, they have not succeeded. The *Forness* decision case clearly rejected these efforts, and the State thereby doubled its efforts to acquire jurisdiction through federal legislation. But clearly exempted out from this legislation were land disputes on the St. Regis Indian Reservation. As such, this Court finds that there exists on the St. Regis Mohawk Indian Reservation (SRMIR) a customary land holding mechanism by and between individual St. Regis Indians and land dispute litigation originating from the St. Regis Indian Reservation was NOT included in the civil jurisdictional transfer to New York. Therefore, and pursuant to *Forness*, no state legislation on SRMIR lands prior to 1942 would be applicable to St. Regis and change the Mohawk customary law concerning land ownership, transfer, and use, which has originated from within the St. Regis Indian Reservation itself, and not from outside the St. Regis Mohawk Indian Reservation.

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The SRMT Court finds that the SRMT Civ. Code, as to the applicable law section, is not a single law that must guide this Court's approach to any case, including land disputes; as it could be a combination laws that must guide the Court; and, furthermore the parties must request the applicable laws to be used and the Court shall determine if they do apply within the context of each case and pursuant to SRMT law.

In the SRMT Civ. Code §V(1), which speaks of applicable U.S. Constitutional and federal laws, the Court finds that there is no automatic application of such provisions in SRMT Court with respect to land disputes. Therefore, any party before the Court

seeking to have the U.S. Constitution or Federal laws applied would have to request such application, as provided for in the SRMT Civ. Code. Even if a party wishes to invoke such law the request then must be compared to, and be in furtherance of, *Indian sovereignty, self-determination, and self-government, and only those sections can be applied that provide rules of legal interpretation favorable to Indian tribes.*

The Court finds that pursuant to SRMT Civ. Code §V (6) there is no automatic use of New York State law in the SRMT Court. In fact New York State law is listed last in the hierarchy and is only applicable if it is consistent with principles of Tribal sovereignty, self-government, self-determination; and, consistent with the applicable laws preceding it.

In determining land disputes the SRMT Court finds that one must look first to the SRMT Land Dispute Resolution Ordinance in conjunction with the SRMT Civ. Code. When those laws direct the Court to use unwritten Mohawk laws, and written and unwritten Mohawk customs, traditions and practices that is what the Court must do.

The Court finds that Ms. Desiree White's reading of the 2003 'Power of Attorney' does not permit her the right to rescind Mr. Reginald White's signature on a deed entered into between him and Mr. Alan White in 2000. This is because said document was not issued pursuant to a SRMT Law, SRMT TCR, Federal Law, nor does it meet any of the New York Statutory requirements, and there is inherent conflict present if this were permitted.

With respect to the validity of SRMT Use and Occupancy deeds the presumption contained in the SRMT LDRO provides that the SRMT Use and Occupancy Deed that was first filed (the oldest) is the presumptively valid one. To adopt a reading of the LDRO which holds that the 'first in time' presumption is valid would deprive a party the right and opportunity to develop an appropriate record. As such, the Court finds that the 'first in time' presumption with respect to SRMT Use and Occupancy deeds requires, as a preliminary step, an examination of evidence provided by the parties to determine validity the of deed and that parties before the Court either through a Tribunal appeal or Tribal Council decision appeal must be given opportunity to develop that record.

The Court finds that Ms. Desiree White, as 'Power of Attorney' over Mr. Reginald White, cannot invoke a right of reversion on behalf of her father in the case at bar because there is no language setting conditions for a right of reversion contained in the SRMT Use and Occupancy Deed between Mr. Alan White and Mr. Reginald White supporting such a finding.

The Court finds that neither Mr. Alan White nor Ms. Desiree White can invoke by law a right of rescission against the other because their parcels were purchased from their father, Mr. Reginald White, and not each other. Since the Statute of limitations, pursuant to SRMT Law has expired for the parties to pursue such a suit, the Court shall use its equitable powers to consider a 'resetting' of the boundary between the parties based on the 1973 and 1987 deed. The parties should be especially mindful that if rescission is

sought, all property once under the control of Mr. Albert Herne should be properly addressed.

IT IS SO ORDERED:

The Court shall set a Pre-trial Conference for August 28, 2012 at 10:30 am, at which time either party wishing to raise and pursue a right of rescission shall do so. If a party does wish to do so, the party must identify the seller and parcel(s) and submit to the Court, in writing, why the Court should allow such a rescission to proceed.

In the absence of either party raising and pursuing a right of rescission this Court shall schedule a final trial limited to determining the appropriate location of the boundary line between Ms. Desiree White's 1987 parcel and Mr. Alan White's 1973 parcel and to set appropriate boundaries for the remaining parcels effected by the setting of this boundary between the parcels; thereafter, the Court shall immediately order that new SRMT Use and Occupancy deeds be issued that accurately reflects the boundaries and acreage of each parcel effected.

Entered by my hand this the 25th day of July, 2012.

Peter J. Herne, Chief Judge