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Director
Thomas W. Fredericks

June 22, 1977

Mr. Gordon McLester
Box 353
Oneida, Wisconsin 54155

Dear Gordon:

Pursuant to your request, this letter will summarize our meeting on June 15, 1977, with Mr. A. Donald Mileur and Gregory Decker of the Indian Claims Section, Lands Division of the Department of Justice, in regard to the proposed settlement of Docket No. 301. Present, on behalf of the Oneidas were: Gordon McLester, Norbert Hill, Myron Smith, and attorneys Marvin Chapman and Lawrence A. Aschenbrenner, along with law clerk, Scott Daniels.

Mr. Chapman advised Mr. Mileur that the Oneida Nation of Wisconsin was not satisfied with either the amount of money offered or the terms of the proposed Stipulation of Judgment. Mr. Mileur stated that the $3,300,000 was the maximum amount he would agree to -- that he wouldn't go a penny higher.

Mr. Chapman then asked if Mr. Mileur would agree to redrafting the proposed Stipulation of Judgment, in order to ensure that it would not relieve the government of its obligation to bring suit on behalf of the Oneidas to recover possession of their 246,000-acre reservation, plus damages.

Mr. Chapman also requested Mr. Mileur to agree to the addition of a provision which would expressly disclaim that the release of the U. S. Government from future liability, would likewise constitute a release of the liability of New York or any other person.

In addition, Mr. Chapman asked if Mr. Mileur would agree to amend the proposed Stipulation by including a provision disclaiming that the settlement figure of $3,300,000 should be deemed a determination as to the value of the lands lost by the Oneidas in their treaties with New York in 1785 and 1788, or that the settlement constituted a determination as to the validity or invalidity of the New York State treaties with the Oneidas.

Mr. Mileur said that although he could agree to nothing in advance, if Mr. Chapman would submit a revised draft Stipulation which included the requested changes, Mr. Mileur would be happy to consider it, and if, in his judgment, it did not go beyond his understanding of what the present Stipulation already said, but merely restated the terms in more express and understandable language, he would have no objection to a revision.

It was then agreed that Mr. Chapman would redraft the Stipulation and send George Shattuck, Lawrence A. Aschenbrenner, and the Wisconsin Litigation Committee copies for their comments and thereafter forward it to Mr. Mileur for his consideration. At this point the meeting was concluded.

Pursuant to your request, I am also briefly setting forth my view of your options with respect to Docket No. 301, the consequences of selecting each option, and my recommendations. I want to emphasize, however, that I am not your attorney on this case, Mr. Chapman is. He is the expert on Claims Commission litigation, I am not. My recommendations, therefore, assume the validity of Mr. Chapman's estimate as to the value of your Docket No. 301 claims, and are directed primarily at avoiding the possible adverse effects that your decision in Docket No. 301 may have upon your case to recover the 246,000 acres, plus damages from New York and others.

As I see it, you have basically two options. 1/ You can take the $3,300,000 and settle the whole case, or you can reject the government's offer and proceed with the appeal on your pre-1790 claims and likewise proceed to trial on your post-1790 claims. If you refuse to settle and proceed with the appeal and win, and if you also win on the damage issues, the most you could hope to recover, according to Mr. Chapman, would be approximately $4,600,000 or $1,300,000 more than the Department of Justice is offering. If you reject settlement, you probably wouldn't receive any money for another five years, however, even if you

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1/ A third possible option, would be to go over Mr. Mileur's head to his boss, Jim Moorman, and try to convince him to make us a higher offer. I am extremely doubtful that this ploy would succeed but will defer to Mr. Chapman's long experience with the Indian Claims Section on the advisability of such an attempt.

eventually win, because it will probably take that long to finish the appeal and subsequent trial. If, on the other hand, you elected to accept the $3,300,000 settlement now, and invested it at seven percent interest for five years, you would earn $1,328,421.00, which would place you in a slightly better financial position than you would be if you took the risk of an appeal and eventually won five years from now. The only difference would be that if you settled and took the money now, there would be no risk of losing. In short, as I see it, you have nothing to gain financially by appealing, but much to lose as explained below. 2/

If you proceed with the appeal on your pre-1790 claims and lose, you would receive nothing from the United States for the lands you lost to New York in the 1785 and 1788 treaties. You still could, and I believe probably would, win on your post-1790 claims for the loss of the 246,000 acres. Mr. Chapman's expert appraiser has evaluated your post-1790 claims at some $900,000, at the most. The Justice Department appraised these claims at $300,000 plus. Therefore, if you refuse to settle and lose the appeal on the pre-1790 claims, you'd still, in all probability, get between $300,000 and $900,000 for the 246,000 acres.

Mr. Chapman thinks your chances of losing the appeal on the pre-1790 claims are at least 50 percent, an opinion which I share. I share this view, not because of any personal doubts as to the legal or moral strength of the claim. To the contrary, I think the Indian Claims Commission was 100 percent correct. However, I believe your chances of losing the appeal are substantial, because the Court of Claims has already ruled adversely on the same issue in the Six Nations case and it's always tough to convince a court, to in effect, reverse itself. Assuming then, that your chances on appeal are poor to fair at

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2/ In this connection it bears repeating that the Indian Claims Commission's powers are limited by law to awarding money damages based on the value of the land at the time of taking, that is, at the time of the treaties. Therefore, there is simply no realistic possibility of getting a judgment substantially larger than $4,600,000 from the Claims Commission. Although this is obviously unjust, it is nonetheless the law. We are not, however, limited to recovering the value of the land at the time of taking in our proposed suit against the State of New York and others for recovery of the 246,000-acre reservation and damages. There is no limit on the amount of damages in that case.

best, what would be the consequence of losing, beyond the immediate loss of $2.4 to $3 million dollars? In my judgment, by far the most disastrous result of losing the appeal is that you would lose the benefit of the very strong and favorable opinion of the Indian Claims Commission. This opinion will be extremely helpful, if not absolutely essential, to our securing a favorable Congressional Settlement Act, or, if we fail in that endeavor, to the success of our suit against New York and others to recover the 246,000 acres plus trespass damages. If you accept the $3,300,000 settlement for your pre-1790 claims and dismiss your post-1790 claims with prejudice as the proposed settlement provides, it would eliminate any argument by the state or members of Congress, that you are seeking to be paid twice for the loss of your 246,000-acre reservation. Although we could, and would if necessary, make plausible counter arguments, it will undoubtedly be difficult to convince the Congress or the courts, that we should be paid by the United States for the value of the 246,000 acres as of the time of the treaties in our Claims Commission case and also be entitled to get the same land back, plus millions of dollars in trespass damages from New York and other non-Indian land claimants. As mentioned above, settling Docket No. 301 will eliminate the necessity of making such an argument.

For the reasons set forth above, I recommend that, upon securing the needed amendments to the Stipulation of Judgment, you accept the proposed settlement without further delay.

Sincerely yours,

L. A. Aschenbrenner

Lawrence A. Aschenbrenner

LAA/tmws