

# Native American Rights Fund

## MEMORANDUM

To : The Files  
From: Arlinda Locklear  
Re : Oneida - Status Report of Land Claims  
Date: 20 October 1978

The purpose of this memorandum is to advise our Oneida clients -- the Thames Band Council and the Wisconsin Oneidas -- of the status of the various Oneida cases and our immediate plans with respect to those claims.

### Post-1790 Claims

There are now pending three court cases challenging the legality of cession treaties signed by the Oneida Nation and New York State after 1790. NARF is now attorney of record for the Thames Band and the Wisconsin Band in two of the cases. The first such case is generally referred to as the "test case," "Judge Port's Case" and was filed in 1970 by George Shattuck. The complaint challenges the validity of only one of the post-1790 state treaties -- the treaty of 1795 -- and seeks as relief trespass damages for two years from Oneida and Madison Counties. The second case, filed in 1974 by George Shattuck, challenges the validity of 22 other post-1790 treaties. The third, filed by NARF and known as the Abraham Williams case, was filed solely on behalf of the Oneida Nation of New York and challenges the loss through tax foreclosure and otherwise of some 750 acres of land reserved for the Oneidas who remained in New York after the Wisconsin and Thames Oneida had emigrated.

Because all three post-1790 cases involve many of the same legal issues, the 1974 case and the Abraham Williams case were held in abeyance while the 1970 test case was tried. The test case has been tried and Judge Port ruled in favor of the tribe on the liability issue, i.e. the state treaty did in fact violate the Non-Intercourse Act. The damages issue, i.e. what we are entitled to recover by virtue of the violation, has yet to go to trial. We are now in the discovery stage of the damages issue. Both sides are developing their facts and legal theories in preparation for trial. Once discovery has ended, a trial date will be set and the damages issue will be tried. At that point, the losing party will have the right to appeal the final decision to the Second Circuit Court of Appeals and possibly the Supreme Court. Under the present agreement between the Court and the parties, both the 1774 and Abraham Williams cases will continue to be held in abeyance until all appeals have been taken in the 1970 test case, at which time these two cases will also be brought to trial. In the meantime, NARF is preparing to amend the complaint in the 1974 cases to add the Thames Band as a plaintiff, to sue people and entities such as corporations now in possession of the land in addition to the two counties, to add the two post-1790 treaties which we omitted from the original Complaint, and to seek recovery of the land as well as trespass damages for the entire period that the tribe has been out of possession.

The federal government has declared that the post-1790 Oneida land claims are meritorious. Both the federal government and New York

State have expressed a strong desire to settle the claim. Negotiations cannot begin, however, until the recognition problem in New York is resolved. The Bureau has devised a procedure for resolving that issue and hopes to do so by the first of the year. By that time, both the Thames Band and the Wisconsin Band should have some preliminary ideas on settlement terms so that serious settlement talks can begin.

#### Pre-1790 Claims

In November 1977, NARF filed on behalf of the Thames Band and the Wisconsin Oneidas a litigation request asking the United States to file suit to recover Oneida lands lost before 1790. Because the 1785 and 1788 state treaties were signed before passage of the Non-Intercourse Act, we have developed new theories to recover those lands. Those legal theories are based on the fraudulent actions of New York State in those treaties and certain protections for Indian land arising from the Articles of Confederation. Further research provided additional support for those theories and in August, 1978, we submitted a supplemental litigation request to the Department of Interior.

Thus far, the United States has not formally responded to our litigation request on the pre-1790 claims. We have been told informally, however, that the Department's tentative view is that the tribe would have a good claim to recover the pre-1790 land but for a provision in the 1794 federal treaty signed at Canandaigua between the United States and the Oneida Nations. According to Interior's interpretation of the 1794 treaty, the Oneida Nation agreed never to claim any other land except those it retained in the state treaties. Under the construction, the Oneidas are barred from recovering land lost before 1790 but would nonetheless be entitled to recover money damages. The Department of Interior has agreed to consider any additional arguments we submit as to the meaning of the 1794 treaty. We will shortly submit additional support for our construction of the treaty and meet with officials from the Department in an attempt to change their view of the 1794 treaty. If we are successful, the Department of Interior will support us in negotiations with respect to our pre-1790 as well as our post-1790 claims and will recommend that the Department of Justice file suit on our behalf to recover the pre-1790 lands.

Regardless of the decision made by the federal government, however, we will be filing a lawsuit on the pre-1790 claims no later than December 31, 1978. The New York Oneidas filed a lawsuit in March this year based on both the pre- and post-1790 state treaties. The only defendant in that case is the New York Thorough-fare Authority, so that if successful, that suit would recover only lands used as highways by New York State. The New York Oneidas plan to amend their complaint to include land in possession of some others as well. In addition, the New York Oneidas have given the State until December 31, 1978, to respond to their complaint. New York State has said that it will, at that time, file a motion to dismiss the case on the ground that the State is immune from suit. We are now preparing a complaint for the pre-1790 claims that

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will be filed and consolidated with the pending New York complaint. Our complaint must be filed by December 31 so that we can respond to the State's promised motion to dismiss.

Summary

There are presently four active areas in the Oneida land claims -- first, preparation for trial on the damages issue in the 1970 test case; second, efforts to enlist the federal government's assistance on the pre-1790 claims; third, preparation of a complaint to be filed before December 31 on the pre-1790 claims; and fourth, preparation of an Amended Complaint to cover all post-1790 treaties, etc., in the 1974 case. Thus far, the Oneidas have prevailed in all legal proceedings in these cases. As a practical matter, however, Congress will not allow the Oneida claims to proceed to completion through the court system. The claims are too large and the political pressure too great. At some point, Congress will step in to settle the Oneida claims. We must nonetheless, continue to prevail in all legal proceedings so that, when Congress does step in we will be bargaining from a position of strength. We cannot now predict when negotiations will commence. It may be as early as January or February of next year if the Bureau resolves the New York recognition issue by then. In the meantime, we must proceed with the court cases and the Thames Band and Wisconsin Tribe should continue to develop preliminary ideas on settlement terms in order to be prepared when bargaining begins.

