Litigation Committee

March 30, 1978

TO: Oneida Business Committee and General Tribal Council
FROM: Jerry Hill, Oneida Law Dept.
RE: N.C.A.I. Recognition and Oliphant-Wheeler Decisions

This is to report the events that occurred at the National Congress of American Indians conference on recognition of non-federally-recognized Indian Tribes. This conference was orginally planned to deal exclusively with the recognition issue. However, the recent U.S. Supreme Court decision in the case of Oliphant V. Suquamish Tribe hand down March 6, 1978 was felt to be so vital to Indian Tribes that the agenda was revised to include one whole day of discussion In addition, last week on March 22, 1978, the Supreme Court handed down another decision which further defined the area of Tribal criminal jurisdiction.

U.S. v. Wheeler. I have included the interpretations of two of the large Washington, D.C. Law firms who represent many Indian Tribes regarding both cases. Briefly stated; Oliphant says Tribes may not exercise criminal jurisdiction over non-Indians on the Reservation, Wheeler states that tribes have inherent criminal jurisdiction over Tribal members. Although neither case deals specifically with civil jurisdiction, it must be assumed that the consequences of asserting other sovereign powers such as land use planning, taxation and hunting and fishing regulation will be the subject of an Indian case in that area sooner or later. The result of such a hypothetical case could be further reduction of Tribal Jurisdiction by the U.S. Supreme Court.

Since almost all assertions of Tribal sovereignty relate directly to land, i.e. taxation, zoning, resource conservation or indirectly through people living or working the land through domestic relations, business regulation, licensing etc,. it is apparent that these cases are really attempts by the U.S. through its Supreme Court to its Congress in passing laws restricting Tribal jurisdiction or permitting states to infringe [illegible].

The entire presentations on the first day, Tuesday March 28, 1978, dealt with the above cases and the issues they raised.

Tuesday March 28, 1978

The morning session started with the showing of a film titled Jurisdiction prepared by the Institute for the Development of Indian Law.

N.C.A.I. President Virginia Murdock spoke on the need for Indian Tribes to collectively address the issues raised by the Oliphant and Wheeler cases, such as who now has the responsibility to deal with non-Indian law breakers on the Reservation.

The attorney who represented the Suquamish Tribe gave the factual background and intentions of the Tribe in prosecting Mr. Oliphant. He also gave his analysis of the basis of the Supreme Courts decision. He finally concluded that the issue of apprehension was not addressed but it is assumed that Tribal police can still arrest and detain non-Indian law breakers to turn over to local or authorities for prosecution

At that point a representative from the Menominees brought up the fact that prosecution by the Federal U.S. Attorney while theoretically possible was often not followed up. Other persons suggested that without the assistant of the Federal authorities in prosection the Reservations could become havens for non-Indian criminals.

The discussion the turned to the Wheeler case which was started by attorney Charles Hobbs of Wilkenson, Cragun and Barker. The case he said was good news and bad news. The good news was that it affirms the Tribes' inherent sovereignty of its members in criminal jurisdiction. The bad news is what is restated again from the Oliphant case; i.e. that non-tribal members are not subject to the Tribes criminal laws, and it further repeated the vague language of Oliphant which could be interpreted to do away with Tribal civil jurisdiction as well. Remembering the bias of the Supreme court in the Rosebud and Dicoteau cases this is a real possibility in future cases which are sure to arise.

The morning discussion ended with the question of whether or not Tribal law enforcement was weakened and various persons gave their opinions and it was generally agreed that all is not lost but that it behooves Tribes to be very precise in drafting codes and procedures to prevent the kind of attacks the occurred in cases like Oliphant. Also, each Tribe seeking to enforce its criminal codes should carefully examine their own treaties to determine whether the authority argued against the Suquamish would be applicable in their situations.

Finally, the issue of consent of non-tribal members to jurisdiction, for example, in the granting of hunting or fishing licenses was discussed but there were no conclu ions at this time.

The afternoon session was a continuation of the above. However, it is clear that if a Tribal Court system is established in Oneida the issues raised by these two cases will have to be carefully considered.

Wednesday March 29, 1978

The meeting was started by two other movies by the Institute for the Development of Indian Laws. The first dealt with Sovereignty narrated by Kirke Kickbird and the second was about Treaties narrated by Oren Lyons. These and the other movie on Tuesday were all under 10 minutes each and would be good to have shown here in Oneida to the General Tribal Council.

The meeting then moved into the scheduled agenda which was promptly changed and the proposed statement of N.C.A.I. was read so that discussions could begin immediately and consideration could be given before its adoption which was to be the last item of business on Wednesday.

The recognition of non-federally recognized Indian Tribes has become an extremely emotional issue. It would appear that this does not apply to recognized Tribes, however, that was quickly dispelled by the discussion. It may or may not be significant that almost 2/3 of the voting member Tribes (most of whom are recognized) did not attend this conference and there was barely a quorum for business.

There is a bill now in the U.S. Senate dealing with proposed criteria (S.B. 2375) and regulations for implementing the law, if passed. It was pointed out by opponents and others that there was language in the bill which would or could affect the status of existing federally recognized Indian Tribes and since the "status" of Indian Tribes was discussed in the recent decisions in the Supreme Courts that was something to considered.

There was intense discussion both for and against which lasted all day and after the representatives of the non-recognized Tribes gave their presentations the N.C.A.I. declarations were adopted after amendments.

CONCLUSION

This meeting was interesting and informative in many respects. It also is apparent that Tribes are being attacked directly and indirectly by the U.S. Congress and Supreme Court who in turn are being pressured by lobbying interests of private non-Indian organizations and persons. It is also apparent that jurisdictional attacks are aimed at the land and that for all practical purposes land = jurisdiction, they cannot exist independently.

Respectfully Submitted,

Jerry Hill

CONTENTS OF THIS INFORMATION PACKET ON TRIBAL RECOGNITION

AND

THE OPIPHANT SUPREME COURT DECISION

RECOGNITION

OLIPHANT

WILKINSON, CRAGUN & BARKER
LAW OFFICES
1735 NEW YORK AVENUE, N. W.
WASHINGTON, D. C. 20006
(202) 833-9800
CABLE ADDRESS
"WILCBAR"

ERNEST L. WILKINSON
JOHN W. CRAGUN (1906-1969)
GLEN A. WILKINSON
ROBERT W. BARKER
CHARLES A. HOBBS
ANGELO A. IADAROLA
PAUL S. QUINN
LEON T. KNAUER
RICHARD A. BAENEN
JERRY C. STRAUS
HERBERT E. MARKS
PIERRE J. LaFORCE
FRANCES L. HORN
GORDON C. COFFMAN
PATRICIA L. BROWN
STEPHEN R. BELL
R. ANTHONY ROGERS
FOSTER De REITZES

ROSEL H. HYDE
Counsel

ALAN I. RUBINSTEIN
JOHN M. FACCIOLA
PHILIP A. NACKE
THOMAS E. WILSON
JERRY R. GOLDSTEIN
EDWARD M. FOGARTY
ROBIN A. FRIEDMAN
JAMES E. MAGEE
ROBERT B. McKENNA, JR.
JOSEPH P. MARKOSKI
STEVEN C. LAMBERT
STEPHEN A. HILDEBRANDT
CHARLES I. APPLER
RICHARD P. CARR
BARBARA S. WOODALL
TOBEY B. MARZOUK
STEVEN A. LAUER *
LAUREL BERGOLD
VALERIE K. SCHURMAN
BRUCE T. REESE *
F. THOMAS MORAN

* NOT ADMITTED IN DISTRICT OF COLUMBIA

March 6, 1978

GENERAL MEMORANDUM NO. 78-18

Re: Supreme Court Rules Against Indian Criminal Jurisdiction in Oliphant Case

On March 6, 1978, the U.S. Supreme Court held in Oliphant v. Suquamish Indian Tribe that Indian tribal courts do not have inherent criminal jurisdiction to prosecute and punish non-Indians for offenses committed on a reservation. The case arose on the Port Madison Reservation near Seattle, Washington, and involved two individuals who were arrested by Suquamish tribal authorities for assault, injury to tribal property, and resisting arrest. See General Memoranda 77-46, 78-3. The Supreme Court, in a 6-2 opinion written by Justice Rehnquist, reversed the lower court, finding that no specific, affirmative statute or treaty provision authorized the Suquamish tribal court to exercise power over non-Indians.

The Supreme Court's holding relies upon a variety of principles, authorities, and presumptions:

(1) "From the earliest treaties with [Indian] tribes, it was apparently presumed [by the U.S. Government and the tribes] that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect." Opinion, p. 6.

(2) "While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight." Opinion, p. 14.

Is this now law?

(3) In the 1855 treaty at issue, the Suquamish "acknowledge their dependence on the Government of the United States," and "agree not to shelter or conceal offenders against the laws of the United States, but to deliver

them up to the authorities for trial." Opinion, pp. 16-17.

(4) "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government. But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments . . . . Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.' Opinion, p. 17. } Dicta

(5) "The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' It should be no less obvious today, even though present day Indian tribal courts embody dramatic advances over their historical antecedents." Opinion, p. 18.

(6) "We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts; . . . that with the passage of the Indian Civil Rights Act of 1968 . . . many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared; . . . and that there is a prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and punish non-Indians." Opinion, p. 20.

Q. Does this change the rule of construction that there is authority absent express congressional legislation to the contrary?

In dissent, Chief Justice Burger and Justice Marshall argued that the power to preserve order on the reservation was an essential part of the Suquamish tribe's original sovereignty. Since Congress had not affirmatively withdrawn this power by treaty or statute, Indian tribes still retained authority to try and punish non-Indian offenders.

Conclusion

The Oliphant decision is disappointing both in its result and in the legal reasoning that underlies the decision. All presumptions and probabilities appear to be resolved against the Indians -- in contrast with the age-old doctrine that ambiguities and presumptions are to be decided in the Indians' favor. The Oliphant decision also appears to resolve the criminal jurisdiction issue against all Indian tribes (i.e., the 45 tribes currently exercising or proposing such jurisdiction); it notes that only one treaty has ever explicitly accorded a tribe criminal jurisdiction over non-Indians.

If there is any solace to be taken from the Oliphant case, it is that the matter of civil jurisdiction is left undecided, in fact unmentioned. Civil jurisdiction may be decided in a subsequent case with more favorable facts and legal precedents.

Sincerely,

Wilkinson, Cragun & Barker

WILKINSON, CRAGUN & BARKER

TELEPHONE
(202) 331-7780

[illegible] tribes possess "in- [illegible] powers

[illegible] important decision in the case of Oliphant v. [illegible] Tribe (see [illegible] Bulletin No. 7-78, March 6, 1978) [illegible] held that Indian tribes possess inherent tribal sovereignty over their members. The Court concluded that tribes [illegible] from this inherent [illegible] upon them by the [illegible]

[illegible] United States v. Wheeler, involved a some- [illegible] whether a person convicted [illegible] federal court for [illegible] that he could, because the [illegible] sovereign entity separate and [illegible]

[illegible] has both good and bad points. Its chief [illegible] inherent or [illegible] because [illegible] Indians for crimes [illegible]

Good

[illegible] the Court stated that "Indian tribes [illegible] sovereignty not with- [illegible] necessary [illegible] of an implied [illegible] course--comes [illegible]

Bad

[illegible] means that an [illegible] tribal court can be [illegible] limit the

[illegible] crime with finality. However,
[illegible] tried in state court--he
[illegible] States for the same offense.
[illegible] there are no more restricted

[illegible] the status of courts
[illegible] are formally operated
[illegible] they could be regarded
[illegible] so, persons tried in
[illegible] in federal courts.

[illegible] decision with each

[illegible] fully submitted,

[illegible], CHAMBERS & SACHSE

LAW OFFICES
SONOSKY, CHAMBERS & SACHSE
2030 M STREET, N.W.
WASHINGTON, D.C. 20036

MARVIN J. SONOSKY
HARRY R. SACHSE
REID PEYTON CHAMBERS

TELEPHONE
(202) 331-9780

February 15, 1978

GENERAL BULLETIN NO. 3 - 78

To: General Counsel Clients

From: Sonosky, Chambers & Sachse

Subject: S.2375, a bill to provide for "recognition" of presently "unrecognized" Indian tribes

As you know, historically federal services and benefits have been provided only to "recognized" Indian tribes.

In recent years, there has been controversy about recognition of Indian tribes. Over forty groups have filed petitions, or other requests, with the Interior Department claiming that they are Indian tribes and are entitled to be recognized. The courts have held: (1) in the Passamaquoddy case that the land claims of two tribes in Maine, the Passamaquoddies and Penobscots, not "recognized" by Interior, are protected by the federal trust responsibility, and (2) in the Washington fishing rights cases, that certain "unrecognized" tribes possess fishing rights protected by federal treaties. These decisions indicate that a tribe need not be "recognized" for the federal trust responsibility to protect tribal property. Finally, some agencies, CETA, for example, have extended Indian programs more broadly than BIA to cover unrecognized tribes and even urban Indians.

Senator Abourezk of South Dakota has recently introduced S.2375, a bill that would establish an administrative procedure and standards within the Interior Department whereby Indian tribes that are not currently entitled to federal recognition could be "recognized." (The bill does not use the term "recognition." Instead, it speaks of "acknowledging the existence of certain Indian tribes.") Our views have been sought on the recognition issue. You may wish to consider the alternatives suggested in this memorandum.

1. Tribes may not need to take any action. There is doubt as to whether S.2375 will become law. In that event there may be no occasion for tribes to express their views. Or, even if the act becomes law, the tribes may not want to comment on the criteria. In any event, we shall keep in touch with the situation and keep you informed so that you may convey your views to Congress should you choose to do so.

2. Tribes could oppose enlarging the number of federally recognized tribes. For an Indian tribe to oppose a bona fide tribe from receiving recognition may appear unseemly. We recognize that there may be concern that expanding the number of "recognized" tribes may reduce the services and funding available to presently recognized tribes. This assumes that the total federal dollars for Indian programs would remain the same, while more tribes would seek to share in those funds. While this is possible, we doubt that it would happen if recognition was extended on a sound basis. Generally, appropriations are designed to fit the needs. There never is enough, but if the need is greater, usually the appropriation is larger.

Indeed, increasing the number of tribes may enlarge the congressional base supporting larger Indian appropriations. The "tribes" that have filed various kinds of "recognition petitions" with the Interior Department are mostly small tribes. Many of them are from the eastern part of the country. It may be that if some of these "tribes" are found to be entitled to federal services and protections, eastern Senators and Congressmen would become more interested in securing and funding federal programs for all Indians.

3. Tribes could support extending tribal recognition to additional Indian groups. If the number of federally recognized tribes is to be expanded, either Congress or the Interior Department should set standards for deciding whether or not a tribe is entitled to recognition.

The standards are critical. Standards could be so broad that they would qualify virtually any group of Native Americans, or so narrow that no group would meet the test.

a. Narrow standards. The Interior Department proposed regulations in 1977 setting out the standards by which the Department would decide whether a tribe is, or is not, "recognized." The standards proposed by the Interior Department were relatively narrow. Under those standards tribal recognition would be denied unless the group had dealings with the United States as by treaty, by executive order, or statute. This is subject to criticism as a "Catch 22" approach, because it suggests that if a tribe hasn't been "recognized" in the past, it can't be now.

b. Broad standards. There seem to be some groups, particularly in the east and in the western coastal states, that are culturally and politically Indian tribes. But historically, they were not treated as such--largely by coincidence or accident. If they are factually similar to "recognized" tribes, a persuasive argument can be made that they should be similarly treated.

If standards are desired broader than those proposed by Interior, consideration might be given to the following: to be recognized as an Indian tribe, a candidate for recognition must be (1) a group of American Indians none of whom are Indians of a presently recognized tribe, or a tribe that has been terminated; (2) with a common political organization that has a historical background and was not created simply for the purpose of seeking recognition, and (3) with a common land holding or a historical territory (which it may not still possess).

These criteria are generally similar to the ones in the Abourezk bill. If you decide to support this approach, we could suggest clarifying language in the bill itself.

4. Instead of "recognition," Tribes could support a compromise calling for determination whether a tribe is entitled to particular services or benefits. Recognition suggests an "all-or-nothing" approach. The concept suggests that if a tribe is "recognized," it becomes entitled to all federal services; if not, it is entitled to none.

Some of the recent cases, such as Passamaquoddy and the Boldt decision on northwest fishing rights, suggest that "recognition" is not a desirable concept. In those cases the courts have asked whether a particular tribe is entitled--under the relevant treaties and statutes--to a particular right or service. For example, the Klamath Tribe in Oregon was terminated in 1954. But the courts have ruled that the tribal treaty hunting and fishing rights survived the termination act. There is, accordingly, a federal trust responsibility for Klamath tribal hunting and fishing rights, but not for any other activities of the Klamath Tribe or its members.

This approach may be considered a compromise that takes in account differences among tribes. Certainly, the relationships between the United States and tribes may differ depending on the provisions of the treaties, agreements and statutes affecting each tribe. Rights and federal obligations can and do vary from tribe to tribe. If tribes hold differing rights, the trust responsibility of the United States to them

may be correspondingly different. Under this alternative, the question is not whether a tribe is "recognized," but whether it is entitled to a particular federal service, or program, or treaty right, or the protection of a particular aspect of the federal trust responsibility.

If this compromise approach were followed, the Interior Department would consider each of the tribes that has applied for "recognition" on a case by case basis and decide which statutes, treaties, or other rights apply to it. Interior has already done this for some tribes, such as the Passamaquoddies, Penobscots and the Stillaguamish Tribe of Washington.

Conclusion

The decision is one of policy for each Tribe. Any one of the approaches could be adopted, namely:

1. Take no action

2. Oppose any expanded recognition

3. Support expanded recognition, either

   a. with narrow standards such as Interior's proposed regulations; or

   b. with broader standards such as those in the Abourezk bill; or

4. Support a case by case determination of whether a tribe is entitled to particular benefits or services

We shall continue to keep you informed, and advise you, should the need arise to communicate your views to Congress or the Department of the Interior.

Respectfully submitted,

SONOSKY, CHAMBERS & SACHSE

By: Reid Peyton Chambers

RPC/cmt

cc: Tribal Chairmen
Tribal Secretaries
Area Directors
Superintendents

WILKINSON, CRAGUN & BARKER
LAW OFFICES
1735 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20006
(202) 833-9800
CABLE ADDRESS
"WILCBAR"

ERNEST L. WILKINSON
JOHN W. CRAGUN (1906-1969)
GLEN A. WILKINSON
ROBERT W. BARKER
CHARLES A. HOBBS
ANGELO A. IADAROLA
PAUL S. QUINN
LEON T. KNAUER
RICHARD A. BAENEN
JERRY C. STRAUS
HERBERT E. MARKS
PIERRE J. LaFORCE
FRANCES L. HORN
GORDON C. COFFMAN
PATRICIA L. BROWN
STEPHEN R. BELL
R. ANTHONY ROGERS
FOSTER De REITZES

ROSEL H. HYDE
Counsel

ALAN I. RUBINSTEIN
JOHN M. FACCIOLA
PHILIP A. NACKE
THOMAS E. WILSON
JERRY R. GOLDSTEIN
EDWARD M. FOGARTY
ROBIN A. FRIEDMAN
JAMES E. MAGEE
ROBERT B. McKENNA, JR.
JOSEPH P. MARKOSKI
STEVEN C. LAMBERT
STEPHEN A. HILDEBRANDT
CHARLES I. APPLER
RICHARD P. CARR
BARBARA S. WOODALL
STEVEN A. LAUER *
LAUREL BERGOLD
VALERIE K. SCHURMAN

* ADMITTED IN VIRGINIA ONLY

March 14, 1978

GENERAL MEMORANDUM NO. 78-21

Re: Legislation on Federal Recognition Procedures

Senator James Abourezk recently introduced a bill, S.2375, to establish administrative procedures and guidelines for achieving federal recognition for unrecognized Indian tribes and groups. The bill is patterned after, but not identical with, the recommendations of the American Indian Policy Review Commission on this subject. (See General Memoranda Nos. 77-14 and 77-29.)

The thrust of the proposed legislation is to establish a special investigative office within the Department of the Interior to actually seek out and assist unrecognized Indian groups in petitioning for federal recognition and, if they meet the standards for recognition, to assist them in developing membership roles.

The definition of "Indian," which is essentially the same as that recommended by the AIPRC for federal recognition purposes, is very broad -- "a member or descendant of any North American Indian tribal group or Alaska Native village." Since this definition is broader than the definition of "Indian" under the Indian Reorganization Act which presently is applied for recognition purposes, it would expand the number of groups eligible for federal recognition.

In order to achieve federal recognition under the bill an Indian group would have to satisfy the first two of the following seven tests plus at least one additional one:

1) The group has been identified as "Indian, Native American, or Aboriginal" consistently for at least 44 years;

2) The group exhibits evidence of a longstanding tribal governmental influence or authority over the members of the group;

3) The group utilizes an identified American Indian language or shows other clear indications of Indian cultural retention;

4) The group has held collective rights in tribal lands or funds, whether or not it was expressly designiated as a tribe;

5) The group has been treated as an Indian tribe by other Indian tribes or groups;

6) The group has had treaty relations with the United States, particular States, or preexisting colonial or territorial governments; and

7) The group has been identified or referred to as an Indian tribe or designated Indian by an Act of Congress or Executive order which provided for, or otherwise affected or identified the governmental structure, jurisdiction, or property of the tribal group in a special or unique relationship to the federal government.

As we reported to you in General Memorandum No. 77-48, the Interior Department has also proposed regulations setting forth procedures and guidelines for achieving federal recognition. The tests which the Interior Department would use to evaluate whether federal recognition is warranted closely parallel the tests in S.2375, but are perhaps slightly more restrictive. In addition, the Interior Department regulations retain the IRA definition of "Indian." The Interior regulations would also not go so far as to set up an office to assist Indian groups in petitioning for federal recognition. To date, the Interior Department has not promulgated any final regulations on this subject.

We are concerned that the passage of S.2375 may so increase the number of federally recognized tribes that limited funds and services available to Indians may be further diluted. The Senate Select Committee on Indian Affairs has scheduled hearings on S.2375 on April 18 and 20, 1978. We would welcome any comments you may have for purposes of testifying and/or submitting a statement on the bill.

You should also be aware that the National Congress of American Indians will be discussing this bill at its meeting in Nashville, Tennessee on March 28-30, 1978.

Sincerely,

Wilkinson, Cragun & Barker

WILKINSON, CRAGUN & BARKER