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January 25, 1984

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JAN 30 1984

ONEIDA LAW OFFICE

The Honorable Mario M. Cuomo  
Governor of the State of New York  
The Capitol  
Albany, New York 12224

Re: Oneida Indian Land Claims

Dear Governor Cuomo:

This office is acting as special counsel to the counties of Broome, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence and Tioga, and certain private landowners, both individually and as class representatives, in the cases of Oneida Indian Nation of Wisconsin v. State of New York (79-CV-798, N.D.N.Y.) and Oneida Indian Nation of New York v. State of New York (78-CV-104, N.D.N.Y.). We also are special counsel to the counties of Madison and Oneida in the case of Oneida Indian Nation of New York v. County of Oneida, which is presently pending in the Supreme Court of the United States awaiting decision on a petition by the counties for a writ of certiorari. We have received a copy of the January 20, 1984, letter from Attorney Arlinda Locklear to yourself and William H. Coldiron, Solicitor of the Department of the Interior, proposing the establishment of a negotiating task force or committee on the Oneida Indian land claims. Because of our capacity as special counsel to the affected counties and private landowners in the cases noted above, it seems appropriate to advise you and Mr. Coldiron of our position regarding Ms. Locklear's proposal.

As you may be aware, one of the most significant difficulties in dealing with the Oneida Indian land claims has been the fac-

## GOODWIN, PROCTER & HOAR

The Honorable Mario M. Cuomo  
January 25, 1984  
Page Two

tionalization of the Oneida Indians and their consequent inability to agree among themselves on a common position or goal. In addition to the Oneidas from Wisconsin and the Oneidas from Canada, there are at least three, and possibly more, groups of Oneidas in the State of New York. These various groups and factions are represented by different counsel and, more often than not, are antagonistic to each other. Thus, if any effort is to be successful in resolving these claims out of court, the Indians themselves must first be made to come together and participate in a cooperative and unified way.

Although we have considerable skepticism as to the possibility for success of a negotiated settlement in these immensely complicated cases, we do believe that an effort to explore the possibilities of an out-of-court resolution is worthwhile. In that connection, the following points are of great importance to the non-State defendants who are affected by the Oneida claims.

1. Under no circumstances should any private landowner or governmental entity, other than the State of New York itself, be subjected to an involuntary taking of his, her or its land.

2. No settlement discussions or negotiations should be conducted without providing for the full and complete opportunity for all parties, including the private landowners, to participate at all steps.

3. Under no circumstances should the ordinary progress of any of the pending litigation be delayed while negotiations are being conducted unless all parties to the particular litigation agree.

4. Any settlement that results must include appropriate federal legislation clearing the title to all land claimed or which could be claimed in any of the pending cases by the plaintiffs and any intervenors and by any other Indian tribe, group, confederation or other entity to land in the areas which are or could be the subject of any of the pending litigation.

I am willing to make myself available to meet with you or representatives of your office at any time to discuss at greater length the possibilities outlined in Ms. Locklear's letter.

Sincerely,

  
Allan van Gestel

AvG:djd  
cc: William H. Coldiron, Solicitor

Attorneys  
Richard Dauphinais  
Arlinda F. Locklear  
Henry J. Sockbeson

# Native American Rights Fund

1712 N Street, N.W. • Washington, D.C. 20036-2976 • (202) 785-4166

Executive Director  
John E. Echohawk

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Main Office  
1506 Broadway  
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January 19, 1984

Daan Bravemann  
Gary Kelder  
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Syracuse University  
College of Law  
Syracuse, New York 13210

Robert Coulter  
Indian Law Resource Center  
601 E Street, S.E.  
Washington, D.C. 20003

Bertram Hirsch  
81-33 258th Street  
Floral Park, New York 11004

Gentlemen:

The Oneida Indian Nation of Wisconsin recently directed me to make an attempt to initiate settlement discussions of the Oneida land claims. After considerable investigation, I have recommended to them that I write on their behalf to the Governor of New York and the Solicitor of the Department of the Interior for that purpose. I have drafted and the Business Committee has approved a letter to Governor Cuomo and the Solicitor and it will be mailed in the next few days. You will all receive copies.

The letter simply asks that representatives of the United States and New York State meet with me and interested counsel representing other parties in the Oneida litigation to discuss establishment of a negotiating team. I have reason to hope that the addressees as well as counsel for the defendants will respond favorably. I urge that each of you also register your support (if, indeed, that is the case) for negotiations. If a negotiating committee is established, the actual negotiations will be done by duly authorized members of the tribe with my participation and advice. But I would expect that the Oneida attorneys' litigation practice of communicating with the Oneida parties through their counsel will continue.

Because efforts in the past to coordinate a common front among the Oneida attorneys in the litigation proved futile, I have not consulted with you on these preliminary steps. In any event, I suspect that our clients will have differences in any negotiations which will necessitate the maintenance of attorney-client confidentiality. If negotiations do take place, however, I will cooperate with you to the extent I can without impairing the interests of the Oneida Indian Nation of Wisconsin.

I think we can best maximize cooperation in this effort by agreeing that whatever exchanges take place among us shall be done in writing and that the recipients of such correspondence will not divulge the contents to anyone other than his client without the writer's prior consent. I will assume that the Indian Law Resource Center will share any correspondence addressed to it with the Six Nations Confederacy. Finally, I will notify you in advance of steps or positions we intend to take publicly in the negotiations if I can get a similar written commitment from you.

Hopefully these safeguards (and any others you might suggest) will help avoid unnecessary differences among Oneida parties should negotiations take place. Please advise me of your willingness to abide by them in writing so we'll all know where we stand.

Sincerely,

Arlinda Locklear

AL/mb

Attorneys  
Richard Dauphinais  
Arinda F. Locklear  
Henry J. Sockbeson

# Native American Rights Fund

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Executive Director  
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January 20, 1984

Mario M. Cuomo, Governor  
State of New York  
The Capitol  
Albany, New York 12224

William H. Coldiron, Solicitor  
Department of Interior  
18th & C Streets, N.W.  
Washington, D.C. 20240

Gentlemen:

As you are no doubt aware, the Oneida Indian Nation of Wisconsin, along with other Oneida plaintiffs, is pursuing litigation in federal court to reclaim its aboriginal territory in upstate New York. There are three separate suits presently pending which together involve approximately five and one-half million acres of land. The lawsuits are at different stages in the legal process, but the Oneida plaintiffs have prevailed at every crucial juncture in all the suits thus far. Should the suits proceed to unappealable final judgment, we expect to establish Oneida title to the entire area.

The Oneida Indian Nation of Wisconsin has repeatedly expressed its view that the issues in the suits should be resolved through negotiations among the governments involved, i.e., the United States, the State of New York, and the Oneida governments, rather than through litigation against individual non-Indians. Other Oneida plaintiffs have publicly expressed a similar sentiment. However, there appeared to be little or no prospect of such negotiations when the suits were filed. It now appears that both the United States and New York State are willing to engage in good faith negotiations with Indian governments to resolve long-standing claims. As a result, the Oneida Indian Nation of Wisconsin has determined to attempt a negotiated settlement of its land claims.

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JAN 23 1984

**ONEIDA LAW OFFICE**

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Governor Mario M. Cuomo  
Solicitor William H. Coldiron  
January 20, 1984  
Page 2

Accordingly, I propose that we meet to discuss the establishment of a negotiating task force or committee on the Oneida land claims. The meeting should also be arranged to accommodate the schedules of interested counsel representing other parties in the litigation. Of course, this proposal should not be taken as any lessening of resolve on the part of the Oneida Indian Nation of Wisconsin to vigorously pursue the Oneida land claims. Rather, the proposal reflects its belief that the time is right to explore alternatives to litigation. We look forward to your response.

Sincerely,



Arlinda Locklear

AL/mb  
cc: Counsel of Record

THE STATUS OF ACTIVE ONEIDA LAND CLAIMS

FEBRUARY 1, 1984

I. ONEIDA INDIAN NATION -vs- COUNTY OF ONEIDA

This is the suit filed by George Shattuck for the Oneidas in 1970. It challenges the purchase of Oneida land by New York State in 1795 and is based on the 1794 Treaty of Canandaigua, the Indian Trade and Intercourse Act of 1790, and federal common law. About 870 acres of Oneida land claimed by Oneida and Madison counties are involved in the suit. It was filed as a test case to establish the legal principles that New York State could not extinguish Oneida title. As a result, it seeks only two years tresspass damages from the defendants, not eviction. However, once this law suit is over, it will have established the Oneidas' legal right to reclaim the entire 252 thousand acre Oneida reservation in New York.

The Oneidas won this suit in the Trial Court and on appeal the Second Circuit Court of Appeals ruled that the Trial Court correctly found in the Oneidas favor. The Second Circuit decision was announced in October 1983 and the defendants immediately asked the Supreme Court to take the case. Our brief opposing Supreme Court review is due February 27, 1984. This review by the Supreme Court is the Defendant's last opportunity to overturn the decision favorable to the Oneidas.

II. ONEIDA INDIAN NATION -vs- STATE OF NEW YORK

This is the five million acre suit filed in December 1979 against sixty thousand (60,000) property owners. It challenges two purchases of Oneida land in 1785 and 1788 and is based on the 1784 Treaty of Fort Stanwix and the Articles of Confederation. The suit was dismissed two and a half years ago by the Trial Court which ruled that the Oneidas had no legal claim to recover land lost before the adoption of the U.S. Constitution and the passage of the Indian Trade and Intercourse Act. On appeal, the Second Circuit Court of Appeals reversed and directed the Trial Court to allow the Oneidas to try to prove their case. The hearing on that case is scheduled for May 29, 1984.



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION OF  
WISCONSIN, et al.,

Plaintiffs,

v.

THE STATE OF NEW YORK,  
et al.,

Defendants

Civ. No. 79-CV-798

MEMORANDUM IN SUPPORT OF MOTION  
TO INTERVENE BY THE  
HOUDENOSAUNEE AND ITS CONSTITUENT NATIONS  
EXCEPT THE CAYUGA NATION

---

Robert T. Coulter  
Curtis G. Berkey  
INDIAN LAW RESOURCE CENTER  
601 E Street, S.E.  
Washington, D.C. 20003  
(202)547-2800

Attorneys for the Houdenosaunee

Neither the Oneida Indian Nation of Wisconsin nor the Oneida of the Thames Band Council, plaintiffs in this action, can adequately represent the interests of the Houdenosaunee.

There is an obvious divergence of interests between the Houdenosaunee and plaintiff Oneida Indian Nation of Wisconsin. Both claim interests in the same land. It is entirely unrealistic to expect an adverse claimant to present the arguments of the Houdenosaunee. The Oneida Indian Nation of Wisconsin has no incentive to make such arguments. In fact, it has made and can be expected to continue to make legal and historical arguments which undermine the claims of the Houdenosaunee. Although movants do not claim exclusive rights to the subject land except as against defendants, and although no relief is sought against any of the plaintiffs, there is a substantial divergence of interests which makes representation by the Oneida Indian Nation of Wisconsin and its counsel totally unacceptable.

Atlantis Development Corporation v. United States, supra, is strong authority for finding inadequacy of representation as regards the Oneida Indian Nation of Wisconsin. In Atlantis, all parties and the applicant for intervention asserted ownership and use rights in the

same coral reefs. Based on its reading of the pleadings alone, the court concluded that the interests of Atlantis were adverse to those of the other parties and that Atlantis was "without a friend in this litigation." 379 F.2d at 825. Likewise, the Oneida Indian Nation of Wisconsin is no friend of the Houdenosaunee in this litigation. It has completely ignored or denied the very existence of the Houdenosaunee and has denied the interest of the Houdenosaunee in the subject land.

The assertion of conflicting interests in the same property was also the basis for a finding of inadequacy of representation in Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970), cert. denied sub. nom. Trefina, A.G. v. United States, 400 U.S. 878 (1970). In Diaz, the United States was granted intervention in a suit by Trefina, a Swiss corporation, against Southern Drilling Corporation to recover commissions due on a drilling contract. The United States intervened in order to assert a tax lien on the proceeds of the contract, the same fund claimed by Trefina. Noting that ". . . no existing party to the suit views the Government's tax lien favorably," the court held that representation of the government's interest by Trefina was inadequate since "the supposed representative actually represents


an interest adverse to the intervener. . . ." 427 F.2d at 1125. The Oneida Indian Nation of Wisconsin cannot adequately represent the Houdenosaunee for the same reason.

Nor can the Oneida of the Thames Band Council adequately represent the interests of the Houdenosaunee. When this action was originally filed, the Oneida of the Thames Band Council and the Oneida Indian Nation of Wisconsin were represented by the same attorney. Both plaintiffs vigorously opposed intervention and asserted interests adverse to the Houdenosaunee. The Oneida of the Thames Band Council has now discharged its attorney. Counsel for the Houdenosaunee has been informed that the Oneida of the Thames Band Council can now be expected to support the intervention of the Houdenosaunee and that the Oneida of the Thames Band Council wishes to cooperate and join with movants the Oneida Nation and the Houdenosaunee in the prosecution of this action.

Despite the expected change in position of the Oneida of the Thames Band Council, it cannot adequately represent the interests of the Houdenosaunee. Its small size, great distance from the communities of the Houdenosaunee, and its legal status as a council government under Canadian law make it extremely doubtful that it could adequately represent the Houdenosaunee. Compared to the Houdenosaunee, whose constituent nations include a population of many thousands, the Oneida of the Thames Band Council represents a single, small community within one nation. Moreover, it is located in

Southwold, Ontario, a substantial distance from the location of most of the communities of the Houdenosaunee. As a result the concerns of the Oneida of the Thames Band Council differ greatly from those of the Houdenosaunee. It is obviously inappropriate for such a small community to represent the interests of a much larger Confederacy made up of six nations and comprising dozens of communities.

The Oneida of the Thames Band Council is not a recognized member government of the Houdenosaunee. Rather, it is organized under the laws of Canada. The constituent nations of the Houdenosaunee are organized under and function pursuant to the Great Law of Peace. The concerns of each are thus very different. The legal status of the Oneida of the Thames Band Council may impair its ability to adequately represent the government of the Confederacy and the separate nations.



Moreover, though the Oneida of the Thames Band Council is now friendly to the Houdenosaunee, there can be no assurance, of course, that it will not change its position at some point during the litigation. The Oneida of the Thames Band Council took a position adverse to the Houdenosaunee until only very recently and could, of course, do so in the future if a change in political leadership were to occur. This possibility of a divergence of interest at a future time is sufficient to satisfy the inadequacy of representation requirement. Natural Resources Defense Council v. United States Nuclear Regulatory Commission, 578 F.2d 1341 (10th