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# Native American Rights Fund

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November 12, 1986

cc: KATHY  
LOIS  
Sonny

Rick Hill  
Gordon McLester  
Francis Skenandore

Dear People,

Enclosed is a copy of Allan van Gestel's response to our proposal on a stay in the Oneida litigation. Suffice to say, it was not well received here. I don't think you'll like it either. When I received the letter this morning, I called Lew Millenbach (N.Y. Attorney General's office). He confirmed that they would agree to a stay, and said they preferred an immediate stay on all the Oneida litigation. He also said that he'd talked to other defense counsel who agree with the state. He's to get out a letter by the end of this week. When we receive the letter, I'll notify Judge McCurn's law clerk to expect a motion to stay (so that he won't issue any rulings before the motion is filed). If we can isolate van Gestel, we still might be able to get a stay. We need to discuss our response in the event we fail to obtain the stay. Perhaps we can discuss that at our November 18 meeting.

As far as van Gestel is concerned, I think he needs to pay a price for his obstructionist attitude. He's involved in these negotiations as an active participant largely because we involved him. The private landowners were not involved in any other tribal land claims negotiations. But I always thought Allan could be helpful and have included him. If he is not helpful, I think we should cut him out. And if he is cut out, then issues of particular interest to his clients (e.g. defining the boundaries of the claim area) will not be addressed. Allan needs to understand that that is the situation. After I get the letter from the state on the stay, I'll write Allan for that purpose. (We can't burn one bridge until we get another one built.)

One final note. I asked Lew Millenbach about the statement of principles that was due from the state on Oct. 15. He said

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Batson had given him a draft a few days ago and he'll get the final out this week.

See you next week,

  
Arlinda Locklear

Gordie, I'll arrive Nov. 17 on United flight #2933 at 6:25 p.m.

cc: Jack Campisi  
Norman Dorsen

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ALLAN VAN GESTEL

(617) 570-1330

November 10, 1986

Arlinda Locklear, Esquire  
Native American Rights Fund  
1712 N Street, N.W.  
Washington, D.C. 20036

Dear Arlinda:

This letter responds to yours of November 3, 1986. On the issue of determining boundaries of the claim area, subject to last-minute burdens imposed by the need for my appearance in court engagements, I would be happy to attend a meeting in New York; however, I cannot come on November 14. On the subject of a stay of litigation, I really wish that you had not presented me with a written argument which provoked and called for a response. However, you have and here is my initial reaction.

You suggest that litigation of the Oneida claims was necessary in the first instance only because the federal and state governments refused to negotiate. I don't represent either the federal or the state government, and neither I nor my clients are willing to accept any blame or responsibility for their actions.

You suggest that the Oneidas have borne the cost of these claims. Quite candidly, I rather doubt if the Oneidas have paid anything for the litigation at all. Has the Native American Rights Fund received -- or even asked for -- any payment whatsoever for its services? I doubt it. Quite to the contrary, I think that, to the extent that federal money has been provided to the Native American Rights Fund to prosecute these cases, it is, perversely, the private landowner defendants' own tax dollars that are being used to fund the cases against them. At the same time, those private landowners, through their representative local governments and other sources, have paid substantial amounts to defend against the claims. Neither I nor my firm, nor the expert witnesses we

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have been forced to engage, are charitable institutions, nor are we at all ashamed to say that we ask to be compensated for our services.

You suggest that the private landowners are in a weak position to insist that the claims remain in active litigation. Your reasoning is that, on the one hand, the private landowners expect the federal and state governments to "bail them out" in a settlement while, at the same time, they wish to continue the litigation in hopes of defeating the claims. Very respectfully, to the extent the Oneida litigation seeks to bankrupt private landowners, born almost two centuries after the events which form the basis of the claim, and in the face of the clear suggestion by the Supreme Court of the United States that equitable considerations ought to apply to the litigation if the federal Congress fails to act, the claims really become a form of legal blackmail. The Oneida governments can certainly litigate with the federal and New York governments -- or stay that litigation -- over the issue of whether there is any liability arising from the 1785 and 1788 land sales and, if so, which government is to blame. To suggest, however, that wholly innocent private landowners are asking too much by seeking to be freed of the cloud of the litigation makes a point that I wholly fail to comprehend.

You mentioned that the federal and state governments are at the bargaining table primarily because of the Oneidas' success in the litigation. In the 1970 case, the Supreme Court has suggested that, although a cause of action exists and no statute of limitations applies, equitable considerations must be considered when fashioning relief if Congress does not settle the claims. With regard to the six-million-acre case, which is now seven or eight years old, the defendants have yet to file an answer, there has been no discovery at all and the case has already been dismissed once by the trial court on a preliminary motion. Is that really success?

I rather feel that the State of New York is willing to bargain for reasons different and much more laudable than the pressure of Oneida litigation success. As for the federal government, although it has in a limited way appeared at the bargaining table, it has been and continues to be the single most effective bar to a resolution of these claims. I hardly think it is Oneida litigation success that prompts the Department of the Interior to continue to mouth the limitations of the Mashantucket Pequot Veto as the federal response to negotiation.

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I have yet to hear a reasoned and sensible argument why those defendants, other than perhaps the State of New York, ought to give up any rights or ability to defend the cases while the three governments jockey for bargaining position in a process that even you concede will take years to conclude, if it can be concluded at all. The spectacle of infighting among the New York Oneidas hardly provides encouragement that even years of negotiation will be successful.

In short, the defendants did not bring these lawsuits but their very pendency causes harm to them. It is not in their interest, nor should it be asked of them, to readily agree to remain in the position of hostages or bargaining chips while the federal, state and Indian governments negotiate. If you find the position of these defendants to be a burden and an impediment, then I suggest that you give serious consideration to dropping, in an absolutely binding way, any litigation which seeks land or monetary damages from anyone other than the federal and state governments.

For the clients that I represent, private landowners and county and municipal governments, as well as the defendant class as a whole, I cannot recommend seeking a stay of any litigation at this time. Perhaps after Judge McCurn has made his decision on the motion to dismiss, and after the Oneidas have put on the table their demands for money and land and the New York Oneidas have reached accord as to who speaks for them, the issue can be revisited. At present, however, I will not agree to a stay. Incidentally, in that regard, I have heard from other defense counsel in the case whose views are consistent with mine.

Sincerely,



Allan van Gestel

AvG:djd  
cc: Daan Braveman, Esquire  
Prof. Jack Campisi  
Bertram E. Hirsch, Esquire  
Lew Millenbach, Esquire

SVS-6089/I