

MS. CRISTINA DANFORTH
HONORABLE CHAIRWOMAN
ONEIDA TRIBE OF INDIANS OF WISCONSIN

Testimony
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Hearing on the Status of Settling Recognized Tribes' Land Claims
in the State of New York
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TESTIMONY OF THE ONEIDA TRIBE OF INDIANS OF WISCONSIN
PRESENTED BY THE HONORABLE CHAIRWOMAN CRISTINA DANFORTH BEFORE THE
U.S. HOUSE RESOURCES COMMITTEE
AT HEARING IN WASHINGTON, D.C.
JULY 14, 2005

Mr. Chairman, I appreciate the opportunity to appear this morning to present the story of the Oneida land claim. The timing of this hearing is appropriate, coming as it does ten days after the United States' celebration of the Declaration of Independence. Our land claim traces its history back to the United States' founding as well - a time when the Oneida and the United States were allies, a time when the Oneida were in possession of millions of acres of land, a time when the United States gave its word by treaty to protect the Oneida in the continued possession of their land. I will speak to you today of that time, the time that gave rise to special federal protection of Oneida land by the United States.

Later events resulted in the loss by the Oneida of virtually every acre of our aboriginal territory. This occurred at the hands of New York State, in violation of federal law protections of Oneida territory, and with full knowledge by the State that its actions did not conform to federal law. I will speak to you today of these events, events that gave rise to the Oneida land claim.

From the very beginning, we complained of the loss of our lands and, for the last fifty years, we have asserted the claim to our lands in court. In 1951, the Oneida asserted a claim in the Indian Claims Commission against the United States for the United States' failure to protect the Oneida in the possession of their territory. Since 1970, we have asserted a claim against local counties and New York State in federal district court, seeking a declaration that Oneida title to our lands has not been validly extinguished. I will speak to you today of the Oneidas' success in court in general and the acknowledged right of the Oneida Tribe of Indians of Wisconsin [Tribe] in particular to assert the Oneida land claim.

Now, and for the last twenty years, we have dedicated ourselves to finding an honorable and final resolution of the Oneida land claim, through informal negotiations and court ordered mediation. It is the firmly held belief of the Tribe that a permanent and just resolution can come only through a negotiated settlement, not a court ordered judgment. I am pleased to advise the Committee that on December 7, 2004, I executed a settlement agreement of the Oneida land claim with Governor Pataki of New York. At the signing ceremony, Governor Pataki explicitly recognized the Tribe as the major stakeholder in the Oneida land claim and welcomed the Tribe back to its homeland in New York. This was a truly historic event, being the final and comprehensive resolution of the largest and oldest reservation land claim in the United States. Since then, events have required some adjustments to the settlement, but the Tribe remains committed to that process and that agreement. I will speak to you last today about that settlement - how it came about, the fairness of its terms for all affected parties, and the Tribe's hope that the New York Legislature will soon ratify the settlement. At that point, the Tribe will urge this Committee to join it and New York State through federal legislation to ratify the settlement. Then, the United States' honor, originally pledged to the Oneida after the Revolutionary War, will have been restored and our historic alliance renewed.

FEDERAL PROTECTION OF ONEIDA TERRITORY

Oneida believe that the Creator placed us on our land in modern day New York State. This is forever our homeland. Archeologists support that Oneidas resided on this land for at least 11,000 years. We assert that with thousands of generations of our ancestors buried beneath this soil, the land is much more than real estate - it is our home.

When Europeans first arrived on these shores, they acknowledged Oneida possession of more than 5.5 million acres running from the St. Lawrence River to the now Pennsylvania border. Early on we established treaty relations and military alliances with Great Britain. We supported Britain in the French and Indian War against France and helped preserve the northern boundary of what became the United States.

During the American Revolutionary War and at the urgent request of the Colonies, the Oneida Nation was one of only two Confederacy members to openly side with the Colonies. Serving as officers, soldiers, and allies in the war on the side of the Colonists, we had a significant impact. During the winter of 1777, when General Washington criticized the ambivalent Continental Congress as having little feeling for the starving and under-supplied soldiers at Valley Forge, the Oneida ensured their survival by supplying them with food. As we had done in the French and Indian War, the Oneida preserved the boundaries of New York State by thwarting a British attempt to divide and conquer the State.

Oneida warriors fought and died alongside the Colonists. Oneida leaders were commissioned as officers in the American Revolution. And Oneida territory became a battlefield - our crops and villages were burned by the British and their allies. Our territory became uninhabitable for the duration of the war and, at its end, our people were anxious to return to their homeland.

The Congress acknowledged and expressed its appreciation for the Oneidas' steadfast friendship in the war. In the instructions to its treaty commissioners in 1784 for the purpose of making peace with tribal participants in the war, the Congress observed that the Oneida had adhered to the cause of America and joined her arms in the course of the war. As a result, the final treaty assured us that our lands would be secured to us. Treaty of Fort Stanwix, Oct. 22, 1784. The United States repeated this assurance in later treaties with the Oneida, most significantly in the 1794 Treaty of Canandaigua, which specifically confirmed the then remaining Oneida territory to the Oneida. 7 Stat. 44, Nov. 11, 1794.

In 1790, the Congress enacted the Indian Trade and Intercourse Act (continuously re-enacted ever since), which extended an additional federal protection to all tribal lands. It prohibited the acquisition of tribal land by any entity, unless done by formal treaty - a power reserved exclusively to the United States. President Washington, who was familiar with the growing pressure from New York State to dispossess the Iroquois tribes, specifically assured the Iroquois leaders that this new federal statute would protect their lands:

I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate states, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the Federal Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding. Here, then, is the security for the remainder of our lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States.

We believed the assurance of our friend and ally, but the assurance proved to be hollow.

THE ONEIDA DISPOSSESSION AND DIASPORA

By the time of the Indian Trade and Intercourse Act and President Washington's assurance, the Oneida had already lost most of our aboriginal territory. New York State took the bulk of our land in two early transactions: 300,000 acres in 1785 and nearly five million acres in 1788. The State took these lands over the expressed objection of federal agents and in spite of the federal guarantee of Oneida lands in the 1784 Treaty of Fort Stanwix. And the transactions themselves were obtained only by duress and outright fraud - the Indian Claims Commission expressly so held. The second of these transactions, the 1788 Treaty of Fort Schuyler, though, left us with the Oneida Reservation in modern day Madison and Oneida Counties - the same reservation that was confirmed in the 1794 federal Treaty of Canandaigua.

Even though federal law had clearly changed with the adoption of the Constitution and the passage of the Indian Trade and Intercourse Act, the State of New York persisted in its aggressive plans to take tribal land. In 1795, the State of New York negotiated the first of a series of transactions with the Oneida Nation acquiring portions of the Oneida Reservation without first gaining the approval (or later ratification) of the United States. This particular transaction was an important one. It was the largest out of the series of 26 transactions that left the Oneidas homeless, involving approximately 100,000 acres. It also left the Oneida so impoverished and defenseless that the loss of the rest of the reservation became inevitable. And it was also the subject of repeated warning and admonitions from federal officials that such transactions violated federal law - including a formal opinion by the Attorney General of the United States that year. These warnings, including the Attorney General's opinion, were communicated directly to Governor Clinton of New York, who nonetheless proceeded with the 1795 transactions and later ones. The last transaction occurred in 1846, which left only 350 acres of the Oneida Reservation, which were then divided up among the handful of Oneida left in the area. Eventually, even those few acres were lost through mortgage and tax foreclosures.

Some try to make distinctions among Oneidas based on whether they received payment from the State for these illegal transactions. History does not support any such distinction. To the contrary, history proves that all Oneida suffered equally at the hands of the State. From 1795 until 1805, the State poorly paid all Oneidas for all lands ceded under the guise of

a treaty transaction. These transactions included the largest one, that in 1795, by which Oneida lost possession of 100,000 acres of the reservation. In total, the Oneida had lost two-thirds of the reservation by 1805.

In 1805, the State purported to divide the remaining Oneida Reservation between two Oneida factions. From that time on, the State entered into separate transactions with the two parties of Oneidas with respect to the portion of the reservation allotted to each. None of these early payments was restricted to only emigrating Oneidas - again, all members of each party participated equally in the paltry payments made by the State. Even after the land loss began to force Oneidas to emigrate from the State, most of the illegal state transactions continued to require payment to all Oneidas, those who stayed in the State as well as those who emigrated. These transactions include those concluded in 1830, 1834 and 1837. Only the last few illegal State transactions restricted payments to emigrating Oneidas, i.e., those concluded in 1840, 1841, and 1842; those transactions involved only small parcels - less than 5% of the total land claim, as shown on the attached map. Significantly, the last illegal State transaction, that in 1846 involving the Missionary Tract, required payment to all Oneidas equally without regard to their residence. Thus, it is baseless and false history to suggest that the majority of Oneidas who emigrated were paid for their loss, while the minority of Oneidas who remained in the State were not paid.

Eventually, a reservation was created in Wisconsin and two-thirds of the Oneida people relocated there out of desperation, including most of the Oneida chiefs. Ever since, the Tribe has continuously asserted its title to the Oneida territory in New York, along with our brothers in New York. Ever since, the Tribe has continuously received annuity payments under the Treaty of Canandaigua from the United States, along with our brothers in New York. Of the annuity payments made to Oneidas under the treaty, the Tribe receives approximately 90 percent and the Oneida Indian Nation of New York receives the remaining 10 percent - right up to this day. This annuity payment represents our historic and legal tie to the Oneida Reservation in New York. This annuity payment is also powerful evidence that the Tribe is by far the majority stakeholder in the Oneida land claim arising out of the Treaty of Canandaigua.

THE ONEIDA LAND CLAIM AND THE COURTS

For generations after we lost our land, Oneida leaders filed petitions and made other demands for justice to both the United States and the State of New York. Reports were written and investigations were done - but no justice was given the Oneida people. Finally, we began to seek relief through court action.

Shortly after the passage of the Indian Claims Commission Act in 1946, the Tribe and its New York brothers organized to assert a claim against the United States for breach of its treaty and trust responsibility to protect the Oneida in the possession of our New York land. At that time, the Commissioner of Indian Affairs wrote the New York Superintendent, asking whether the Oneida in Wisconsin or New York constituted an identifiable Indian group within the meaning of the Indian Claims Commission Act. In his response, the Superintendent specifically indicated that the Tribe is the principal stakeholder in the Oneida land claim:

The United States, through this agency, has treated the Oneida Indians in New York as a separate distinct group...There seems to be no question but that the Oneida Indians in New York have been regarded as a segment or band of the Oneida tribe proper which is in Wisconsin and which has organized under the IRA and has adopted a constitution. Any claims arising from ownership of land in New York by the Oneida tribe would have to be based on such ownership by the tribe prior to its division and removal to Wisconsin as the Oneida title was extinguished prior thereto. The Oneida tribe of Wisconsin would not be the sole beneficiary of any such claims because the identity of that band of Oneidas remaining in New York has been maintained and that band would be entitled to share in any such claims. The New York group of Oneidas, of course, could not be the sole beneficiary of any such claims because they are only a segment of the Oneida tribe proper.

Letter of Superintendent Lange to Commission of Indian Affairs, Exh. 55, *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527 (N.D.N.Y.), *aff'd* 470 U.S. 226 (1985).

When we filed our petition before the Indian Claims Commission in 1951, we included an allegation that title had not been extinguished to our New York lands, that we asserted a claim against the United States only for failure to protect us in possession of those lands, not for a taking. This, of course, has been our continuous and historical position and, as far as we know, our petition is the only one filed before the Indian Claims Commission taking this position. We continued this claim against the United States until the mid-1970's when it was dismissed out of concern that it might eventually prejudice our claim to actual ownership of the land.

In 1970, the Tribe, along with its New York brothers, filed a claim in federal district court in Utica asserting our claim for continuing title to our land. This suit, known as the test case, was a challenge to the 1795 state transaction and asked only for two years worth of trespass damages for those lands occupied by Madison and Oneida Counties. In 1974, the Tribe and its New York brothers filed a second suit where we challenge all the other state transactions that dispossessed the Oneida. The test case reached the Supreme Court in 1974, which held unanimously that federal district courts have to authority to hear

such tribal land claims. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

On remand and after a trial by Judge Port, the district court held that the 1795 state transaction had violated the Indian Trade and Intercourse Act and, as a result, the counties were liable to the Oneida for trespass damages. The test case reached the Supreme Court a second time in 1985 and the Supreme Court again upheld the Oneida claim to our New York territory. 470 U.S. 226. The Court specifically held that there had been a violation of federal law, that trespass damages were an appropriate remedy for the violation, and that defenses based on the passage of time did not apply. This effectively resolved the test case, leaving the 1974 suit in court. The 1974 suit is now stayed by the court while we attempt to finalize our settlement.

Most recently, the Supreme Court considered the sovereignty implications of the Oneida land claim. In *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005), the Supreme Court held that the Oneidas have lost sovereign authority over land in the Oneida claim area, once they repurchase the land and take possession of it again. The Court held that so much time had passed and, in the meantime, expectations regarding jurisdiction over the land had become settled, that it would be inequitable to allow the Oneida to reassert governing authority on repurchased land. Instead, the Court advised that the land into trust administrative process was available to the Oneida to re-establish governing authority over repurchased land in the claim area. See 25 C.F.R. Part 151. In its decision, the Supreme Court specifically affirmed its holding in the Oneida II case. 125 S. Ct. at 1494.

The United States Court of Appeals for the Second Circuit has recently interpreted the Supreme Court's decision in the *City of Sherrill* to mean that all remedies in tribal land claims, including money damages, have been barred by the passage of time. *Cayuga Indian Nation of New York v. Pataki*, Docket No. 02-6111(L) (June 28, 2005). We believe this decision is clearly wrong - it is an extreme over-reading of the *City of Sherrill* case that results in gross injustice to the tribes - leaving them with substantial wrongs without any remedy. The Cayugas have announced that they will ask the Court of Appeals to rehear the case and the Tribe will do everything it can to assist in that effort.

Throughout the last fifty years of court action on the Oneida land claim, the Tribe has consistently maintained its preference for an out of court settlement of the claim. After all, these are claims of morality as much as they are claims of law. If the State of New York is to ever establish respectful government to government relations with the Oneida, it can only do so by correcting the long-standing injustice to the Oneida people. If the United States is to reclaim its honor with the Oneida people, it can only do so by finally standing with the Oneida people in a fair settlement of the land claim. If there is ever to be stability and certainty in the Oneida claim area for all its residents, Indian and non-Indian, it can only be achieved through a comprehensive and fair land claim settlement.

There is one final point to be made from the history of the Oneida land claim litigation. Throughout all these court battles, the Tribe and its New York brothers stood side by side in court. We were represented on the same claim and by the same lawyer for more than twenty-five years before the Indian Claims Commission. We were represented on the same claim and by the same lawyer for ten years before the federal district court. Until recently, no Oneida government ever challenged the right of other Oneidas to share in the claim. The Tribe honors this history of Oneida single-mindedness and regrets that its New York brothers have recently embarked on a different path.

The federal courts, though, have said clearly that our New York brothers are on the wrong path in this regard. As early as 1977, Judge Port ruled that the Tribe is one of the direct descendants of the Oneida Indian Nation which inhabited Central New York prior to the Revolutionary War and that, as such, was entitled to assert the Oneida land claim. 434 F.Supp. 527, 538 (N.D.N.Y. 1977). The Supreme Court also described the Tribe, along with the other Oneida plaintiffs, as a direct descendant of the Oneida Indian Nation. 470 U.S. 226, 230. In 1998, the United States intervened in the Oneida land claim in its trust capacity for the Tribe as well as the Oneida Indian Nation of New York. The United States filed an affidavit in court stating that the Tribe is recognized by it as a successor in interest to the Oneida Nation and that the Tribe continues to this day to receive annuity payments under the Treaty of Canandaigua - the same treaty that confirmed the Oneida territory that is the subject of the Oneida land claim.

This newly adopted position by the Oneida Nation of New York, though, does not mean that a just resolution of the claim is beyond reach. It means only that no one tribe should be allowed to stand in the way of a settlement, that objective and fair standards must be employed to determine the fairness of a proposed settlement, and that compromise is necessary to accomplish a settlement. The settlement agreement executed by the Tribe with the State, as revised recently by the counties and the State, meets these standards.

THE ONEIDA LAND CLAIM SETTLEMENT

Almost immediately after the 1985 Oneida Supreme Court decision, representatives of the State of New York approached the Oneidas about negotiating an out of court settlement of the claim. We have been in negotiations or court ordered mediation of the Oneida land claim almost continuously ever since. Throughout this time, the Tribe has consistently held to these settlement principles: there must be land upon which the Oneida people could continue for all time; there must be money for

the loss of the use of our lands for the past two hundred years; and there must be a proportional division of settlement value among the modern day Oneida communities.

In 2000, we came close to a settlement on both the land and money terms. Our New York brothers demanded that theirs must be the only Oneida government with jurisdictional authority over the land recovered in the Oneida claim area. This was a difficult issue since the Tribe has always demanded a homeland in New York State for all Oneidas as part of a land claim settlement. But the Tribe compromised in the interest of advancing the cause of all Oneidas: the Tribe agreed that the Oneida Indian Nation of New York would govern the Oneida territory in the claim area; in exchange, the Tribe demanded its own homeland parcel in New York State - a parcel located outside the Oneida territory but in Oneida aboriginal boundaries that would be inalienable and non-taxable for homeland uses such as the performance of ceremonies, but not sovereign land and not available for gaming - and the acquisition of trust title to land owned by the Tribe in its Wisconsin reservation. This compromise on the Tribe's part was the essential element that allowed the negotiations to go forward. Without this compromise, a settlement was not possible.

In addition, we tentatively agreed in 2000 upon terms to resolve the trespass damages portion of the claim. The State of New York and the United States each offered \$250 million toward settlement of the claim. Again, in the spirit of compromise, the Tribe agreed to accept 50% of this portion of the settlement, even though its numbers as compared to other communities justified a higher percentage. The Tribe, with approximately 16,000 members, represents roughly two-thirds of all Oneida [Oneida Indian Nation of New York with approximately 1,000 members and the Oneida of the Thames with approximately 3,500 members] and more than 90% of Oneidas in the United States.

Despite our progress in 2000, that mediation failed because the Oneida Indian Nation of New York and the local counties were unable to resolve their differences. The Oneida Nation of New York demanded more territory subject to its sole governance than the counties were prepared to accept and the mediator declared an impasse.

In 2002, the court ordered another mediation, believing that progress had in the meantime been made on the differences between the Oneida Indian Nation of New York and the local counties. However, the Department of the Interior advised the parties that it had in the meantime changed its policy regarding tribal land claim settlements. Although nearly every land claim settlement in the past had included federal funds, the Department announced that henceforth it will not support the contribution of federal appropriated funds to land claim settlements and the Department withdrew its earlier offer of \$250 million toward an Oneida settlement. Then, the State of New York withdrew its offer of matching funds, leaving the parties with a major, open issue in the potential settlement, even though the previously divisive issues had been resolved.

In the meantime and unrelated to the Oneida land claim negotiations, the State of New York had passed legislation authorizing the Governor to sign up to three compacts for Indian casinos in the Catskills. Governor's Bill 70 (2001). This was done shortly after the terrorist attack on New York City in 2001, as a means of possibly generating development funds for the State. Shortly after the federal and state appropriated funds were withdrawn from the potential Oneida settlement, the State of New York offered two of those three casinos to the Oneidas as a substitute for the withdrawn funds. After considerable discussion, the Tribe accepted the State's offer and agreed to develop a casino in the Catskills as a means of generating an income stream to settle the money damages portion of the claim. Soon afterwards, the Tribe and the State resolved other issues, enabling us to execute the settlement agreement on December 7, 2004.

Since then, developments have required some modifications to the settlement agreement. After the City of Sherrill decision, the local counties demanded changes to the terms regarding the Oneida Indian Nation of New York. A series of meetings on this has taken place among the counties, the Department of the Interior, the State of New York, and the Tribe. Those changes have been essentially worked out and the revised settlement agreement will soon be ready for execution by the parties. Of course, the revised settlement agreement is a compromise of all parties' demands, but one that by any objective standard is fair and comprehensive, addressing all the necessary elements of settlement.

First and foremost is the land. As the Tribe's long-standing settlement demands have made clear, this is and has always been about the land. The revised settlement agreement provides for significant land for both the Tribe and the Oneida Indian Nation of New York. For the Tribe, the revised agreement provides for a 1,000 acre homeland to be conveyed by the State to the Tribe, located at least fifty miles from the Oneida Reservation or claim area, but inside Oneida aboriginal territory. This parcel will not be Indian country, but will be inalienable and non-taxable for homeland purposes such as the conduct of ceremonies, but expressly precluding gaming. In addition, the revised agreement provides for immediate trust acquisition of approximately 10,750 acres already owned by the Tribe in its Wisconsin reservation, with expedited trust acquisition for land purchased by the Tribe in the future in the Wisconsin reservation. For the Oneida Indian Nation of New York, the revised settlement agreement provides its long sought demand that it alone govern the Indian territory in the Oneida claim area. Further, it provides for up to 10,000 acres of Treaty land, or Indian country, for the Nation in the claim area, conditioned upon the payment by the Nation of past due ad valorem property taxes and the execution of service and sales tax agreements.

Second, the revised settlement agreement employs gaming to provide for monetary compensation for the Oneidas. For the Tribe, there shall be a class III gaming facility in the Catskills so that the Tribe itself can generate the necessary monetary component of the settlement. For the Nation, there shall be confirmation of the now doubtful gaming compact with the State for the Turning Stone Casino and the opportunity to install 1,000 class III slot machines. The revised settlement agreement provides for similar compact terms for the two facilities, including State revenue sharing in exchange for exclusivity in defined geographic areas. In this respect, the compacts are very similar to those in the now effective Seneca Nation compact with New York State.

Finally, because the Oneida Indian Nation of New York has declined to sign the agreement (even though it has been a participant all along in the mediation), the revised settlement agreement provides that the Nation can assert against the Tribe, along with the Stockbridge-Munsee Community, a claim for inadequate compensation based on any alleged taking. The revised settlement agreement expressly precludes any claims against the United States, the State of New York, or the property owners in the claim area, thus providing for a comprehensive and final resolution of the Oneida land claim.

The Tribe acknowledges that there is controversy over some tribes' initiatives to develop gaming facilities outside their reservations. We make no comment on those efforts other than to observe that the Oneida situation is unique, that the revised settlement agreement comes out of a decades long effort to resolve a legitimate, two hundred year old land claim, that the legitimacy of the land claim was established long before the advent of Indian gaming, that the settlement has the support of local and State officials, and that use of casinos as part of land claim settlements is expressly provided for in the Indian Gaming Regulatory Act. 25 U.S.C. §2719(b)(1)(B)(i). In other words, the Oneida land claim settlement drives the casinos, the casinos do not drive the land claim settlement.

Now, the parties to the revised Oneida land claim settlement are working hard on the final stages of the settlement process: the execution very soon of the revised settlement agreement and the ratification of the agreement by the New York State Legislature. At that point, the parties will seek the support of Congress, not to appropriate any funds for settlement, but to ratify the settlement agreement.

CONCLUSION

Under Iroquois tradition, every generation is obligated to look forward to protect the welfare of the next seven generations. Seven generations ago, our people were divested of our land but our leaders at the time had the wisdom to continuously assert and preserve the claim for future generations. Now, it is this generation's obligation to convert the claim into solid benefits that will provide for the welfare of Oneida people for the next seven generations. The Tribe believes the revised settlement agreement does this for the Oneida people. The revised settlement agreement also provides for the continued peaceable possession of their land by the property owners in the claim area. And it eliminates for all time the possibility of any future land claims or related claims against the United States, the State of New York, and the property owners by the Oneida.

I appreciate the opportunity to share our story with the Committee today and very much look forward to the day when the Tribe will appear again, seeking the Committee's support for legislation to ratify the Oneida land claim settlement.