



United States Department of the Interior

OFFICE OF THE SOLICITOR

AUG 12 2002

Honorable Tom Sansonetti
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
950 Pennsylvania Avenue, NW, Room 2141
Washington, DC 20530

Attn: Craig Alexander, Chief, Indian Resources Section

Re: Stockbridge-Munsee Indian Community v. State of New York, et al
No. 86-CV-1140 (N.D.N.Y.)

Dear Mr. Sansonetti

I am writing to clarify our position and to amend the Department of Interior's ("DOI") litigation report dated August 25, 1997, requesting intervention on behalf of the Stockbridge-Munsee Indian Community ("Stockbridge") in the above-referenced claim. The Department's original litigation request recommends intervention by the United States on behalf of the Stockbridge for the purpose of quieting title in their favor to a six-mile square located within the exterior boundaries of the Oneida claim area. The Oneida Indian Nation of New York ("Oneida") is also a party to the Stockbridge action, and it asserts a competing claim that it alleges to be superior to that of the Stockbridge.

Since submitting the subject litigation request to DOJ, this office has engaged in numerous detailed discussions with your office and with counsel representing the Stockbridge concerning the nature of the Stockbridge claim and the role of the United States in the matter. During the course of those discussions, we have further refined our views with respect to the basis for the Stockbridge claim, and suggested different strategies for pursuing the claim, as discussed below, but we have always maintained our position that the Stockbridge are the proper claimants to the six-mile square tract at issue.

Notwithstanding that position, in a letter dated January 2001, we indicated that, under the circumstances, the interests of both the Stockbridge and the Oneida, and the interests of the United States, as trustee for both tribes, would best be served by intervention of the United States on its own behalf for the purpose of enforcing the Indian Non-Intercourse Act as opposed to intervention on behalf of the Stockbridge. We also recommended that DOJ defer any action to intervene in the case until such time as the court determined which tribe had the superior claim to the lands at issue, or at such time and to the extent necessary to address any motions to dismiss on 11th Amendment grounds made by the State of New York.

More recently, on April 2, 2002, we wrote to you expressing our view that the Stockbridge claim is meritorious, and urging the Department of Justice to encourage the State of New York to commence settlement discussions with the Stockbridge as the State pursues settlement discussions with the various Oneida Tribes, given the nature of the competing claims of the Stockbridge and Oneida to the same lands.

Since our April letter, Judge Kahn has referred the Oneida land claim to mediation, a process which is now underway. On May 11, 2002, Stockbridge filed a motion before Judge Kahn requesting that its land claim also be referred to the same mediator. The State of New York filed a response to that request, reasserting arguments made in its motion to dismiss that the Stockbridge are unable to pursue their claims in light of the 11th Amendment, and noting the United States' failure to intervene in the case. We also understand that representatives of Stockbridge met with you on June 13th to request that the United States support the Stockbridge motion for order of referral to mediation, but were informed that you wanted clarification of the Department's views regarding which tribe, Stockbridge or Oneida, is the proper claimant to the six-mile square tract. Currently, the Stockbridge motion remains under advisement, the court having canceled the hearing on the motion that was originally scheduled for June 21, 2002.

In light of this somewhat tortured history, we want to make clear that it is DOJ's position that Stockbridge is the *only* proper tribal claimant to the six-mile square tract in question. We base this conclusion on our analysis of the provisions of the 1788 Treaty of Fort Schuyler and the 1789 New York statute that implemented the 1788 Treaty ("1789 Act"). Pursuant to the Second Circuit's opinion in *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2^d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989) ("*Oneida III*"), the Articles of Confederation empowered states to extinguish Indian title so long as the war powers of the central government were not interfered with. *Oneida III* holds that the 1788 Treaty of Fort Schuyler was a lawful exercise of that power by the State of New York that resulted in the extinguishment of Oneida Indian title to approximately six million acres.

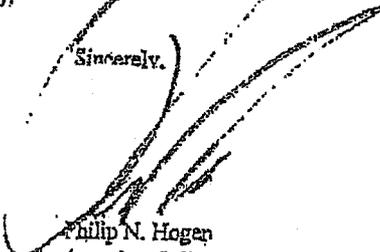
An examination of the 1788 Treaty and the 1789 Act demonstrates that they extinguished any remaining Oneida Indian title to the six-mile-square tract. After extinguishing all Oneida Indian title in the State of New York in the first article, the second article of the 1788 Treaty expressly excludes the six-mile-square Stockbridge tract from the lands that are to be reserved by the State for the Oneida as their reservation, noting that the six-mile square is to be permanently held by the Stockbridge Tribe. The 1789 Act then establishes the six-mile-square as a permanent reservation for the Stockbridge. The minutes of the 1788 Treaty negotiations reveal that this result was accomplished at the request of the Oneida Nation.

Accordingly, all title and interest of the Oneida Nation in the lands of the subject tract ended with the 1788 Treaty of Fort Schuyler and the 1789 Act. All subsequent actions of the United States, including the 1794 Treaty of Canandaigua, which confirms the interests of the Stockbridge in the six-mile square as "Indian friends," must be construed accordingly. Please consider the foregoing discussion to be a supplement to the analysis contained in our litigation report.

In addition to clarifying our merits position, please consider this letter to also amend our litigation report to recommend intervention by the United States at this juncture of the case, to the extent necessary to address the recent arguments in support of dismissal on 11th Amendment grounds made by the State of New York in its opposition to the Stockbridge motion for mediation. In this regard, we recommend that the United States, following intervention, petition the court to determine which tribe has the superior claim to the lands at issue. We also request that our litigation report be amended to clarify that DOJ recommends intervention only as against the State of New York and any instrumentalities of the State which are defendant parties. We reiterate our position that the United States should not pursue a remedy against any individual defendants in the case or look to individual defendants for satisfaction of any remedy that may be granted by the court.

Given recent developments, we would appreciate a response to our request for intervention as soon as possible. Even if DOJ is unwilling to proceed with intervention, we believe that the United States should encourage the State of New York to include Stockbridge in any mediation or settlement discussions through whatever means you may deem appropriate. We continue to support any approach that would reach a resolution of all Onondaga and Stockbridge claims to lands within the State of New York. Thank you in advance for your consideration and cooperation in this matter. In the interim, if you have any questions or need additional information, please contact David Moran at 202/208 4361

Sincerely,


Philip N. Hogen
Associate Solicitor
Division of Indian Affairs