BEFORE THE INDIAN CLAIMS COMMISSION

THE ONEIDA NATION OF NEW YORK, THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, THE ONEIDA NATION BY JULIUS DANFORTH, OSCAR ARCHIQUETTE, SHERMAN SKENANDORE, MAMIE SMITH, MILTON BABCOCK, BERYL SMITH, AND AMANDA PIERCE, Plaintiffs,	)	
v.	)	Docket No. 301 (Claims 1 and 2)
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: March 19, 1976

Appearances:

Marvin S. Chapman, Attorney for Plaintiffs. Dean A. Dickie and Aaron Aaron, Schemberg & Hess were on the briefs.

M. Edward Bander, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

These claims are brought under Clause (5) of Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1970), and seek additional compensation for lands acquired from the plaintiffs by the State of New York in 1785 and 1788. The plaintiffs claim that they did not receive adequate compensation for their lands, and that the defendant is liable

for the difference between the fair market value of their lands and the compensation the plaintiffs received from New York. For the reasons discussed below, we hold that the United States failed to fulfill its special obligation to the Oneida Nation of Indians. The defendant will be liable under the Indian Claims Commission Act if the plaintiffs did not receive conscionable consideration for their lands.

On January 18, 1968, the defendant filed a motion for partial summary judgment in Docket 301, requesting that claims 1 and 2 be dismissed. The Commission denied that motion, holding that there was a substantial issue of fact as to whether the United States owed the Oneidas any duty to protect them in transactions involving their land. Oneida Nation v. United States, 20 Ind. Cl. Comm. 337 (1969). After a trial on that issue, the Commission decided that the United States, under Article II of the Treaty of Fort Stanwix of October 22, 1784, 7 Stat. 15, undertook a special relationship or obligation to the Oneida Nation to protect it in the possession of its lands. Oneida Nation v. United States, 26 Ind. Cl. Comm. 583 (1971). We held that that relationship required the United States to protect the Oneidas in whatever legal way it could in connection with the tribe's retention or disposition of its lands in New York State. Id. at 589. We ordered the case to proceed to a trial on the circumstances of the 1785 and 1788 acquisitions of Oneida land by the State of New York. Id. at 624.

CIRCUMSTANCES OF THE TREATIES

Although in its 1971 decision the Commission did not define the exact nature of the special relationship, the obligation which the United States assumed with regard to Oneida lands required at least that the United States protect the Oneidas from being compelled to sell their land against their true wishes, or under coercive circumstances, or where fraud, deceit or duress was practiced, or in a situation in which the Oneidas did not have full equality of bargaining power with the party with which they dealt. The evidence in this case clearly establishes that both in 1785 and in 1788 the Oneidas were forced to part with their lands against their true wishes, under inherently coercive circumstances, and in transactions in which they surely did not have equality of bargaining power with the State of New York. Moreover, it is clear that in 1788 the Commissioners for the State of New York deceived the Oneidas into agreeing to the cession of their lands.

The 1785 Transaction

In findings 54 and 55 entered today the Commission has described the events leading up to the 1785 Fort Herkimer Treaty and the negotiations at the treaty council. In inviting the Oneidas to the treaty, the New York Indian Commissioners informed them that the treaty was made necessary by the illegal attempts of land speculators to purchase Oneida lands. The Commissioners further informed the Oneidas that if they wished to sell any of their lands they could do so at the treaty. When the message was

translated to the Oneidas, however, they did not understand the latter part of the message and were unaware that New York wished to buy their lands.

When the treaty council commenced, Governor Clinton informed the Oneidas that he had come to purchase their lands. Our findings indicate that the Oneidas were unwilling to sell any of their lands, but to satisfy the Governor they offered, at private conferences, to sell a tract of land between the Delaware and Susquehanna rivers. The Governor, however, indicated that the state wanted a far larger tract of land at the southern end of Oneida territory.

Our findings indicate that on June 25, 1785, Petrus the Minister, the primary spokesman for the Oneidas, informed the Governor that the Oneidas could not sell the tract desired by New York because it was important hunting land. Petrus also reminded the Governor that the United States had indicated that the Oneidas owned their land, and requested that the Governor restrain New Yorkers from entering Oneida lands.

On June 26, 1785, Governor Clinton abruptly changed his attitude toward the Oneidas. He accused them of acting in bad faith and warned them that the century-long friendship between New York and the Oneidas would end unless the Oneidas began to deal openly and candidly with him. He then threatened that unless the Oneidas agreed to sell the land which he requested New York would refuse to protect them from the incursions of white settlers.

In reply to Clinton's speech. Petrus the Minister again stated that the land which New York wanted was principal Oneida hunting land and that the Oneidas could not part with it.

Our findings further indicate that during the evening of June 26, 1785, the New York Indian Commissioners engaged in private conversations with various Oneidas. The record does not disclose precisely what occurred at these conferences, but they resulted in a sudden change in the Oneidas.

On the following day, June 27, 1785, Petrus the Minister stated that because Governor Clinton did not trust him he would no longer participate in the council. Peter the Quarter Master, who replaced Petrus as the spokesman for the Oneida, then announced that the Oneidas had changed their mind and would sell to New York part of the land requested by Governor Clinton. When Clinton informed Peter that New York would not pay the full price for only part of the land, Peter replied that the Oneidas were not selling their land for money, but only because it was necessary in order to preserve their friendship with New York.

This brief recitation of the facts makes it clear that the Oneidas did not voluntarily part with their land at the Fort Herkimer Treaty. They sold their land only in the face of unwarranted accusations and threats by Governor Clinton. These threats were voiced openly at the June 26 treaty session, and the inference is strong, almost overwhelming, that they continued at the private conferences in the evening. Under these circumstances the Oneidas had no choice but to sell the land which New York desired.

The Fort Herkimer Treaty was not an arms-length transaction between two parties having equal bargaining power. The evidence indicates that Governor Clinton imposed the terms of the treaty on the Oneidas.

The 1788 Transaction

In findings of fact 65, 69, 70, and 74, entered today, we have described the circumstances leading up to the 1788 Fort Schuyler Treaty and the negotiations at the treaty council. Our findings indicate that in late 1787 and early 1788 private land speculators attempted to obtain the lands of the Oneidas and other New York tribes by entering into long term leases. The New York legislature, learning of these leases, declared them to be sales and therefore void because they violated the New York State Constitution. In March 1788 when the New York Indian Commissioners invited the Oneidas and the other tribes of the Six Nations to the Fort Schuyler Treaty they stated that the purpose of the treaty was to discuss and solve the problems which had arisen because of the leases.

The message of the Commissioners was delivered to the Oneidas by one John Taylor. Taylor told the Oneidas that if the lease was permitted to remain in effect they would lose all their land. He also told them that by entering into this lease they had jeopardized their continued friendship with New York. Taylor informed the Oneidas that only the Governor and Indian Commissioners could rescue them and thus it was important that they attend the Fort Schuyler Treaty.

Our findings further indicate that when the Oneidas arrived at Fort Schuyler on September 16, 1788, they learned that New York had already entered into a treaty with the Onondagas under which the Onondagas were able to reserve part of their lands.

The major negotiations at Fort Schuyler began on September 20. Governor Clinton began by stating to the Oneidas,

> Brothers! Be not deceived in supposing that it was our Intention to Kindle a Council Fire at this Time in Order to Purchase Lands from you for our People. We have already more lands then we have People to settle on them. If we had wanted Lands for our People to settle on, we would have told you so and requested you to have sold us some and would have paid you a reasonable Price for them. [Finding 74(e), infra.]

Clinton then went on to explain the agreement which had been reached with the Onondagas whereby they ceded their lands to New York, reserving to themselves a tract of land which whites would not be allowed to enter. Clinton recommended that the Oneidas enter into a similar agreement. Clinton warned the Oneidas that unless they accepted this proposal the state would be powerless to help them and they would inevitably be forced off their lands.

Good Peter spoke on behalf of the Oneidas. He expressed his understanding that New York had not called the treaty to purchase more Oneida land, but rather to preserve the lands the Oneida owned. He stated that he understood that the attempts of land speculators to obtain Oneida land had forced New York "to take our landed Affairs under your Care and us under Your immediate Protection." Finding 74(e), infra.

Peter also expressed his knowledge that if New York did not rescue the Oneidas from the lease they had entered they would inevitably lose their land and New York would not be able to protect them.

The Oneidas appointed two men to negotiate further with the Commissioners on the exact boundaries of the tract which the Oneidas would reserve under the proposed agreement. Twice during these negotiations the Commissioners rejected proposals by the Oneidas because the reservation they desired was too large. The Commissioners proposed a much smaller reservation which the Oneidas accepted.

Our findings further indicate that on September 22, 1788, prior to executing the deed of cession, Good Peter addressed Governor Clinton as follows:

> We now return you our Thanks, Brother Chief, that you have brought to a happy Close the Business of this Treaty. My Nation are now restored to a Possession of their Property which they were in danger of having lost. Had not my Father the French Gentleman [Peter Penet] discovered it we should have been drowned; had it not come to your Ears, we with all our Property would have been buried very deep in Ruin; therefore we do heartily congratulate you this Day upon having accomplished the Treaty and thereby secured to us so much of our Property which would otherwise have been lost. [Finding 74(g), infra.]

These facts indicate that the Oneidas did not voluntarily sell their lands at the Fort Schuyler treaty. In fact, it is clear from the evidence that the Oneidas did not even realize they were selling anything. The Oneidas were of the belief that the Fort Schuyler Treaty had been called by New York for the purpose of protecting the Indians from the repeated attempts of land speculators to obtain their land. The Oneidas believed that the agreement they entered at Fort Schuyler restored to them lands which they otherwise would have lost under the long term leases.

The facts also show the deception practiced by the New York Commissioners. First, the Commissioners withheld from the Oneidas the fact that the New York legislature had already invalidated the long term lease into which they had entered. They led the Oneidas to believe that the lease was still in force, that under the lease they would lose all their land, and that only by agreeing to the New York proposal could they rescue their land. Second, Governor Clinton lied to the Oneidas about the purpose of the treaty council. Although the March 1, 1788, New York legislation which authorized the treaty specifically stated that one of the purposes of the treaty was to purchase Indian land, Governor Clinton told the Oneidas that the treaty had not been called to purchase their land. Third, the Commissioners allowed the Oneidas to believe that New York was assuming a trust relationship with regard to their land, although this was clearly not the state's intention. The deceit practiced by the New York Commissioners was so effective that at the end of the treaty council the Oneidas thanked them for rescuing the Oneidas from a terrible calamity—the loss of their land.

The Fort Schuyler Treaty also was not a transaction in which the parties bargained as equals. New York dictated the terms of the agreement and the Oneidas had no choice but to accept them.

Both the 1785 and 1788 treaties were the type of transaction against which the United States had promised to protect the Oneidas. The evidence shows clearly, however, that the United States took no action to protect the Oneidas with regard to either of the treaties.

SCIENTER

In their petition, plaintiffs also presented claims (claims 3-8) based on 25 land transactions between the Oneidas and the State of New York after 1790. The plaintiffs requested additional compensation for the lands they ceded in those transactions. The Commission held that under the Indian Trade and Intercourse Act, 1 Stat. 137 and subsequent enactments, the United States undertook a fiduciary duty to the plaintiffs with respect to their lands, and that the defendant would be liable for breach of that duty if the plaintiffs received unconscionable consideration for their land. Oneida Nation v. United States, 26 Ind. Cl. Comm. 138 (1971). On appeal, the Court of Claims agreed with the Commission that the United States undertook a fiduciary duty to the plaintiffs, and that the duty applied to land transactions between the plaintiffs and the State of New York. The court held, however, that the United States could not be liable unless it participated in the treaties with New York, or had actual or constructive knowledge of the treaties and yet failed to protect the rights of the plaintiffs. United States v. Oneida Nation, 201 Ct. Cl. 546, 554 (1973).

Although the obligation to the Oneidas which the United States assumed under the Fort Stanwix Treaty was not identical to the obligation it later assumed under the Trade and Intercourse Act, in a determination of whether the United States can be held liable under plaintiff's treaties with New York, the obligations are sufficiently similar for us to apply the same scienter standard applied by the Court of Claims in its 1973 Oneida

decision. Therefore, if the United States had actual or constructive knowledge of the 1785 and 1788 treaties, and failed to take action to protect the plaintiffs (as we have already found above) it will have breached its obligation to the plaintiffs.

The 1785 Transaction

In our findings of fact, entered today, we have found that in 1785 the seat of the federal government was moved to New York City. While in New York, the Congress ordered and received on each publication day sufficient copies of the New York City newspapers for each delegate.

We have further found that on April 11, 1785, the legislature of New York State passed an act instructing its Indian commissioners to obtain cessions from Indian tribes residing within New York. The same act appointed land commissioners and instructed them to advertise and dispose of the land obtained from the Indians. This legislation was published in its entirety on the front page of the New York Packet on April 18, 1785.

Our findings also indicate that a delegate to Congress from Massachusetts read the New York legislation passed April 11, 1785, and notified his state legislature so it could take action to protect the interest of Massachusetts in lands in western New York.

We have also found that on July 9, 1785, the Independent Journal reported that the State of New York had obtained a land cession at Fort Herkimer from the Oneidas and Tuscaroras. It was later reported that these lands were open to white settlement.

These findings force us to the inevitable conclusion that the United States had at least constructive knowledge of the intention of New York

to purchase lands from its resident Indians, and of the actual purchase of lands from the Oneidas and Tuscaroras at Fort Herkimer. Each delegate to Congress had access to the April 18, 1785, edition of the New York Packet, which contained, on its front page, New York's act requiring its Indian Commissioners to obtain cessions of Indian land. Each delegate also had access to the July 9, 1785, edition of the Independent Journal, which reported that New York had actually purchased Oneida lands. Coupled with the fiduciary duty the United States owed to the Oneidas with respect to their lands, which required the United States to be particularly attentive to any matter which might affect those lands, this access to information constituted constructive knowledge of both New York's intention and the carrying out of that intention.

We conclude that with respect to the 1785 treaty the United States failed to fulfill its special obligation to the Oneidas with respect to protecting their peaceful possession of lands in New York State.

The 1788 Transaction

In our findings of fact we have found that in 1786 Congress reorganized the Indian Department into two districts. The Northern District was to include all tribes in the United States north of the Ohio River and west of the Hudson River. Congress directed that a superintendent be appointed for each district to administer Indian Affairs and that the Secretary for War should receive all communications to Congress concerning Indian Affairs.

We have further found that on March 1, 1788, the New York legislature appointed commissioners to treat with the Indian tribes within the state to preserve their friendship and to obtain cessions of their land. Two of the appointed commissioners were delegates to Congress. The act appointing these commissioners was reported in the New York City newspapers, to which Congress still maintained multiple subscriptions.

We have also found that on June 20, 1788, Richard Butler, Superintendent for Indian Affairs in the Northern District, wrote to Henry Knox, Secretary for War, that he had been informed by the Six Nations that New York had called them to a treaty at Fort Schuyler. Butler stated that the Indians would not attend the New York treaty, but would instead attend a treaty called by the United States. Secretary Knox presented Butler's letter to Congress on July 7, 1788. During the remainder of the summer of 1788, Secretary Knox continued to present to Congress repeated reports from Superintendent Butler and Arthur St. Clair, Governor of the Northwest Territory, concerning the delay of the planned federal treaty because of the Six Nation negotiations with New York.

Our findings also indicate that during August 1788 it was known in New York City that New York expected to treat with its Indians at Fort Schuyler. Alexander Hamilton, a delegate to Congress, wrote to Philip Schuyler that the French Ambassador would visit Albany and then leave to attend the treaty at Fort Schuyler. On August 21, 1788, William Knox, Acting Secretary for War, wrote to his brother Henry Knox

that the French Ambassador had gone to Albany on his way to the treaty. William added that the general feeling in New York was that the treaty would not take place because of the federal treaty.

We have also found that on October 2, 1788, the New York Journal and Weekly Register, which Congress received in multiple copies, reported that the State Indian commissioners had returned from Fort Schuyler having obtained cessions from the Oneidas and the Onondagas.

Based on these findings we conclude that the United States had both constructive and actual knowledge of the intention of New York to purchase lands from its resident Indians in 1788, and constructive knowledge of the actual purchase of lands from the Oneidas at Fort Schuyler. As in the case of the 1785 treaty, constructive knowledge arises from the combination of the fiduciary obligation to the Oneidas and congressional access to newspapers reporting New York's intention to obtain cessions and the actual cessions themselves. Actual knowledge of New York's intention is established by communications within the Indian Department. Superintendent Richard Butler had actual knowledge no later than June 20, 1788, when he wrote to Secretary Knox. Secretary Knox and the Congress had actual knowledge no later than July 7, 1788, when Knox delivered Butler's letter to Congress.

We conclude that with respect to the 1788 treaty the United States failed to fulfill its special obligation to the Oneidas with respect to protecting their peaceful possession of lands in New York State.

DEFENDANT'S CONTENTIONS

The defendant has presented several contentions which we shall now address. Initially, defendant asserts that the Commission's earlier decision that the United States undertook a special relationship to the Oneidas is erroneous, and requests that the Commission reverse it. It is the defendant's position that under the Articles of Confederation the United States did not have the authority to enter into a special relationship with the Oneidas. Defendant's position is based on an erroneous interpretation of the Articles of Confederation and is therefore without merit.

The provision concerning Indian affairs is contained in Article IX of the Articles of Confederation. There it is stated,

> The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; . . . [1 Stat. 4, 7] 1/

1/ In its brief defendant quotes Article IX from page XXXV of the first volume of the United States Code. There is a minor difference in punctuation between the versions of the Articles printed in Statutes at Large and United States Code. They both differ from the version first adopted by the Continental Congress on November 15, 1777 (see finding 82, infra). The Commission is of the opinion that these punctuation differences do not affect the meaning of the provision. We adopt the language in Statutes at Large as definitive.

Defendant contends that under this provision the Federal Government had authority only over those Indians who resided outside the borders of any of the States. Defendant further argues that under the Articles New York retained the right to legislate with respect to the Indians within its borders, and that the United States had no authority to interfere in New York's dealings with its Indians. We cannot agree with defendant's contentions.

The Indian affairs provision of Article IX of the Articles of Confederation is ambiguous on its face. First it grants to the Federal Government "the sole and exclusive right and power" to regulate trade and manage affairs with the Indians. This sole and exclusive power is then limited to those Indians "not members of any of the States." It is not at all clear what is meant by "member" of a state. Finally, a proviso is added, which if read literally would totally deprive the United States of its "sole and exclusive right and power."

Since the Commission is unable to determine the meaning of this provision by reading its language alone, it is necessary to resort to other sources. In findings of fact 77 through 82, we have set out the legislative history of the Indian affairs provision of the Articles. In findings of fact 83 through 85, we have quoted some contemporary views of the meaning of this provision.

The first official draft of the Articles of Confederation was prepared by John Dickinson of Pennsylvania, and was presented to the Continental Congress on July 12, 1776. This draft contained two major

provisions concerning Indians. First, in Article XIV, it was stated that all purchases of Indian lands by a colony or by a private person prior to the time that the boundaries of the colonies were ascertained was to be void.[2/] All purchases of land outside the established boundaries of the colonies were to be made only by the United States. Second, in Article XVIII, the United States was granted "the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians . . ." Finding 78, infra.

These provisions in Dickinson's draft were unacceptable to the landed states. If they became part of the Articles of Confederation they would force the landed states to surrender both their claim to western lands and their right of preemption over Indian lands.[3/] Article XIV would pressure the state to surrender its western lands by invalidating

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2/ In the early years of the American Revolution, a major dispute existed between the so-called landed states, i.e., those states which claimed that under their colonial charters their territory extended westward to the westernmost limits of the United States, and the landless states, i.e., those states which had a definite western limit under their charters. The landless states adhered to the view that a limited western boundary should be drawn for the landed states and that the remaining western lands should be owned in common by the United States. The landed states opposed this view. In his draft, Dickinson incorporated the view of the landless states. Thus Article XIV, in effect, prohibited private or state purchase of Indian lands in the landed states until a definite, and limited, western boundary was established for these states.

3/ The preemption right, which originated in the English Crown under the European doctrine of discovery, and passed to the states with the Declaration of Independence, gave the state the exclusive right to purchase Indian lands within its boundaries.

purchases of Indian land until the boundaries of the state "were ascertained." Article XVIII would defeat the state's preemption right by granting to the United States the exclusive right to manage all Indian affairs, which would have included the right to purchase land.

The Indian provisions in Dickinson's draft were debated by the Congress on July 25 and 26, 1776. On July 25 Thomas Jefferson, on behalf of the landed states, proposed an amended Article XIV. Jefferson's amendment would have invalidated only those purchases by states or private persons of Indian land outside the boundaries of the states. Apparently, no action was taken on Jefferson's amendment.

On July 26 Article XVIII was debated. The delegates from South Carolina and Virginia were the primary spokesman for the view of the landed states. Carter Braxton of Virginia suggested that the Indian tribes that were "tributary" to a state be excepted from the exclusive management by the Federal Government. Thomas Jefferson stated that this exception should extend to all Indians who lived within the boundaries of a state. Samuel Chase of Maryland, speaking on behalf of the landless states, argued that if the western boundary claims of the landed states prevailed, and if Indians residing within states were excepted from federal control, then the United States would have no authority over Indians and the power to regulate the Indian trade and manage Indian affairs would lie exclusively with the landed states.

The result of the July 25 and 26 debate was revealed in the second draft of the Articles, presented to Congress on August 20, 1776. In this draft, Article XIV of Dickinson's draft was no longer present. In

addition, the provision relating to federal control over Indian affairs, now contained in newly numbered Article XIV, was amended to give the United States "the sole and exclusive right and power of . . . regulating the trade, and managing all affairs with the Indians, not members of any of the States . . ." Finding 80, infra. These changes undoubtedly resulted from a compromise between the landed and landless states. Under the second draft the pressure on the landed states to part with their western lands was removed, and the power of the United States was limited to those Indians "not members of any of the States."

The Indian provision in the Articles did not come before the Congress again until October 27, 1777, when the final form of the articles was being debated. On that day two amendments to the provision were proposed. The first amendment would have deleted the words "not members of any of the States," and substituted instead the words "not residing within the limits of any of the United States." The second amendment would have rephrased the provision entirely to grant the United States "the sole and exclusive power of . . . managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits wherein a particular State claims, and actually exercises jurisdiction." Finding 81, infra. Neither of these amendments was adopted by the Congress.

On October 28, 1777, a third amendment was proposed. This amendment retained the language already contained in the second draft, but added to it the phrase "provided that the legislative right of any State within

its own limits be not infringed or violated." Finding 82, infra. This third amendment was approved by Congress and became part of Article IX of the final draft of the Articles of Confederation. Arising after a long debate on October 27 and 28, the final form undoubtedly resulted from a compromise between the landed and landless states.

The legislative history of the Indian provision in the Articles of Confederation makes it clear that the construction urged by the defendant--that the term "not members of any of the States" is synonymous with not residing within the boundaries of any state--is erroneous. Twice during the drafting of the Articles the landed states attempted to except from federal control those Indians residing within the boundaries of any of the states. Thomas Jefferson suggested this change on July 26, 1776, and an amendment to this effect was proposed on October 27, 1777. Both times the landless states were unwilling to agree to this language. In fact, as pointed out by Samuel Chase in the July 1776 debate, once the landed states prevailed on the question of western boundaries,[4/] limiting the federal power to Indians residing outside the states would have divested the United States of all authority over Indians and granted it instead to the landed states.[5/] This the landless states would not agree to. Moreover, the use of both the terms "members" of a state and "resident

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4/ The Articles of Confederation contains no provision requiring the landed states to give up their western land claims. It was only the refusal of Maryland to ratify the Articles which forced the landed states to agree in 1781 to cede their western lands to the United States.

5/ In 1777, when the Articles were agreed upon, all the territory of the United States was within the boundaries of the thirteen states. See Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 524, 526 (1827). To have limited the federal power to Indians residing outside the boundaries of any state would have meant that the federal government would have no power over Indians, because there was no land outside the boundaries of any state.

within" the borders of a state in the second amendment proposed on October 27, 1777, makes it certain that these two terms were not considered identical by the delegates to the Continental Congress.

The Commission is of the opinion that the term "members" of a state had a very definite meaning to the Continental Congress and referred to the political status of the Indians. "Indians not members of any of the States" were those Indians who maintained their tribal organization, asserted their independence, and were not subject to the domestic laws of any of the states.[6] Indians "members" of a state were those Indians who had abandoned their tribal affiliation, no longer asserted their independence, and made themselves subject to the laws of a state.

This interpretation by the Commission is corroborated by contemporary comments on Article IX of the Articles of Confederation. For example, in the summer of 1784, James Duane, a New York delegate to Congress, expressed to Governor Clinton his views on the plans of New York to treat with the Six Nations. Duane noted that under Article IX Congress claimed the exclusive right to treat with the Six Nations. He continued, "If the tribes are to be considered as independent nations, detached from the State, and absolutely unconnected with it, the Claim of Congress would be uncontrovertable." Finding 85, infra. Duane then advised Governor Clinton that the Six Nations must be considered and treated as ancient dependents of New York. "On this ground," he continued, "the tribes in question may fall under the character

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6/ These tribal Indians were, of course, subject to state rights of pre-emption. This exclusive right to purchase their lands was the only legislative right over the tribes which the states inherited from the British Crown. See our discussion below. For examples of the types of domestic legislation that did not apply to these independent tribes, see the quote from Chancellor Kent on page 547, infra.

of Members of the State, with the management of whom Congress have no concern." Id.

A second contemporary commentary is found in the November 1784 correspondence between James Monroe and James Madison. In his letter of November 15, 1784, Monroe asked Madison whether the Six Nations were properly the subject of federal or state concern. Monroe phrased his question as follows:

> Whether these Indians are to be considered as members of the State of New York, or whether the living simply within the bounds of a State, in the exclusion only of an European power, while they acknowledged no obedience to its laws but hold a country over which they do not extend, nor enjoy the protection nor any of the rights of citizenship within it, is a situation w'h will even in the most qualified sense, admit their being held as members of a State. [Finding 83, infra.]

In reply to Monroe's question, Madison stated, in his letter of November 27, 1784, "By Indians not members of a State, must be meant those, I conceive, who do not live within the body of the Society, or whose person or property form no objects of its laws." Id.

Our interpretation is also supported by contemporary action of the Congress. By means of the Ordinance of August 7, 1786, Congress reorganized its Indian Department. See finding 63, infra. Under this reorganization the department was divided into two districts. The Northern District included, among others, those Indians residing within the territory of New York west of the Hudson River. This ordinance clearly indicates that Congress did not believe that its Indian jurisdiction ended at the state boundaries.

The legislative history also reveals the meaning of the proviso in the Indian provision of Article IX. As we noted above, the landed states objected to the Dickinson draft of the Articles because it would have defeated their

preemption right by giving Congress the exclusive right to manage all affairs with the Indians. The second draft of the Articles was a partial answer to their objection in that it limited Congress' power to those Indians not members of a state. The second draft, however, still left the Federal Government with the exclusive power to manage the affairs with the independent tribes or nations, most of which resided within the then boundaries of the landed states. Thus the preemption right of the landed states was still threatened.

During the debate on October 27 and 28, 1777, the landed states again attempted to amend the draft to preserve their preemption rights. The first proposal would have limited the power of Congress to those Indians residing outside the boundaries of any state. This proposal was unacceptable to the landless states. The second proposed amendment would have granted different powers to the Federal Government depending on whether questions of war or peace or trade with the Indians were involved. This proposal was unacceptable to one or both of the factions. Finally a third amendment was proposed which was acceptable to both the landed and landless states. The Federal Government retained its exclusive control over the affairs of the independent tribes, with the proviso that a state's legislative rights not be infringed or violated. To have been acceptable to the landed states, this proviso must have protected their preemption rights.

The Commission concludes that the proviso in the Indian provision in Article IX of the Articles of Confederation was designed primarily to protect the states' preemption rights. The legislative right which the Federal Government was prohibited from infringing was the exclusive right of the state to purchase Indian lands within its boundaries.

Our view is supported by a brief examination of the history of European settlement in North America, which shows that the right of preemption was the only legislative right asserted by the English Crown with respect to the Indians, and thus the only right which the states inherited at their independence. As pointed out by Chief Justice Marshall, in Worcester v. Georgia, 31 U.S. (6 Peters) 515 (1832), the rights of the European sovereigns in North America were based on the principle of first discovery.

> This principle . . . gave to the nation making the discovery as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession . . . . It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. [Id. at 544.]

When the sovereign granted charters to settlers or colonization companies it gave no more than the exclusive right to purchase the Indian's lands. As stated by Marshall,

> The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood. [Id. at 544-45.]

The policy of the British Crown to the Indians did not change during the period of colonial history. As stated by Marshall,

> Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances . . . . [The king] never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only. [Id. at 547.]

Thus the only legislative right which the states had with respect to the Indians was the exclusive right to purchase their lands.[7/]

The Commission concludes that under Article IX of the Articles of Confederation the United States was granted the exclusive right to manage Indian affairs with those Indians which maintained a tribal existence independent of any state, so long as the United States did not purchase from any of these tribes land located within the boundaries of any state. The Commission is of the opinion that under this provision the United States had the authority to enter into a special relationship with any tribe which maintained its independence.[8/]

7/ Our conclusion on the meaning of the proviso is also supported by the contemporary views expressed by James Madison in his November 27, 1784, letter to James Monroe. See Finding 83, infra

8/ The Commission's view is supported by the report of a committee on Indian affairs, which was delivered to Congress on August 3, 1787. See Finding 84, infra. Referring to the proviso in the Articles of Confederation the report stated, ". . . therefore the union may make stipulations with any such tribe, secure it in the enjoyment of all or part of its lands, without infringing on the legislative right in question."

The only question which remains unanswered is whether the Oneidas in 1784 maintained an independent tribal existence, or had become members of New York State and thus beyond the scope of federal authority. This question was effectively answered by Chancellor Kent in his opinion in Goodell v. Jackson, 20 Johnson 486 (N.Y. Common Law 1823). Kent stated:

> The Oneidas, and the other tribes composing the six nations of Indians, were, originally, free and independent nations. It is for the counsel, who contend that they have now ceased to be a distinct people, and become completely incorporated with us, and clothed with all the rights, and bound to all the duties of citizens, to point out the precise time when that event took place. I have not been able to designate the period, or to discover the requisite evidence of such an entire and total revolution. Do our laws, even at this day, allow these Indians to participate equally with us, in our civil and political privileges? Do they vote at our elections, or are they represented in our legislature, or have they any concern, as jurors or magistrates, in the administration of justice? Are they, on the other hand, charged with the duties and burthens of citizens? Do they pay taxes, or serve in the militia, or are they required to take a share in any of the details of our local institutions? Do we interfere with the disposition, or descent, or tenure of their property, as between themselves? Do we prove their wills, or grant letters of administration upon their intestate's estates? Do our Sunday laws, our school laws, our poor laws, our laws concerning infants and apprentices, or concerning idiots, lunatics, or habitual drunkards, apply to them? Are they subject to our laws, or the laws of the United States, against high treason; and do we treat and punish them as traitors, instead of public enemies, when they make war upon us? Are they subject to our laws of marriage and divorce, and would we sustain a criminal prosecution for bigamy, if they should change their wives or husbands, at their own pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend, that every one of these questions must be answered in the negative, and that, on all these points, they are regarded as dependent allies and alien communities. It was, therefore, with some degree of surprise that I observed the Supreme Court laying down the doctrine in this case, that these Indians of the six nations were "as completely the subjects of our laws as any of our own citizens." In my view of the subject, they have never been regarded as citizens or members of our body politic, within the contemplation of the constitution. [Id. at 497-98.]

After reviewing the history of the relationship between the Oneidas and New York Colony, New York State, and the United States, Chancellor Kent concluded as follows:

> We are now prepared again to put the question where is the evidence of the fact, or where is the ground for the assertion, that, at the death of John Sagoharase, as early as March, 1783, the Oneida tribe of Indians had ceased to be a nation, and had become an integral part of the people of this state, in whose name and by whose authority the constitution was ordained? No proposition would seem to me to be more utterly fallacious, and more entirely destitute of any real foundation in historical truth. It is repugnant to all the treaties, and to all the public documents, to the declared sense and practice of the colonial governments, and of the government of the United States, and of this state. [Id. at 502.]

The Commission concludes that under the Articles of Confederation the United States had the authority to enter into a special relationship with the Oneida Nation to protect it in the possession of its lands. To the extent that language in the 1971 decision in this docket, 26 Ind. Cl. Comm. 583, 588, or in the Commission's decision in Six Nations v. United States, Docket 344, 12 Ind. Cl. Comm. 86, 118 (1963), is inconsistent with this opinion, that language is overruled.[9/]

9/ In the Six Nations case the Commission decided that the United States could not be held liable for the 1784 sale of Six Nations lands to the State of Pennsylvania. In its opinion the Commission ruled, among other things, that under the Articles of Confederation the United States had no authority to intervene in negotiations between Pennsylvania and the Indians residing within its borders. It is this language which we are overruling.

The Six Nations case was affirmed on appeal by the Court of Claims, 173 Ct. Cl. 899 (1965). The basis for the court's affirmance was that in 1784 the United States owed no general or special obligation to the Six Nations with respect to their lands. The court did not in its opinion express any approval of the Commission's ruling on the authority of the United States under the Articles. In fact, the court expressed its doubt on this matter by twice referring to the Indian affairs provision in the

(continued)

The defendant next argues that it did all it was required to do under the circumstances of the 1785 and 1788 treaties and therefore did not violate the standards of fair and honorable dealings. In support of its contention, the defendant initially sets out the "aggressive program" which it alleges the United States undertook to deter the consummation of the 1785 and 1788 treaties. These include the inauguration of a federal Indian policy in 1775 (see Finding 6), the 1783 resolution promising to protect the lands of the Oneidas and Tuscaroras (see finding 38), the 1787 decision of Congress to hold a treaty with the Indians in the northern department (see finding 62), a promise in 1776 to protect the lands of the Delaware Indians (see finding 9), the advice of federal commissioners to New York Governor Clinton, in August 1784, that if he wished to deal with the Indians he do it as part of the federal treaty (see finding 30), and statements made by federal commissioners to the Six Nations at Fort Stanwix that only Congress had the authority to treat with them.

The mere recitation of these actions refutes defendant's contention that these were steps taken by the United States to prevent the 1785 and 1788 treaties. All of these actions were taken by the United States either

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9/ (Footnote continued)
Articles in conditional terms. ("Indeed, the portion of the Articles of Confederation dealing with Indian affairs . . . may have deprived the Congress of the power to oversee the Six Nation's dealings with Pennsylvania with respect to lands within its boundaries." 173 Ct. Cl. at 905 (emphasis added). "For the federal delegates to have agreed to protect the Indian's lands (within state boundaries) as against the states might well have contravened Article IX of the Articles of Confederation . . . ." Id. at 906 (emphasis added)). There is then nothing in the court's decision which precludes us from ruling as we have in this docket.

prior to its assumption of fiduciary duties to the Oneidas, or prior to its receiving knowledge of New York's intention to purchase Oneida lands in 1785 or 1788. Two of the actions were implementations of general Indian policies; one was directed specifically at another tribe; two were taken to prevent New York from interfering with the 1784 Fort Stanwix negotiations; and one was merely a promise to the Oneidas and Tuscaroras. Certainly none of these actions fulfilled the defendant's duty to the plaintiffs in connection with the 1785 and 1788 treaties with New York. However, they are consistent with the Federal Government's expressed intention of protecting all Indians residing both within and outside state boundaries, and, in the case of the 1783 resolution, of giving special consideration to the friendly Oneidas and Tuscaroras.

In further support of its contentions that it did all it was required to do under the circumstances, the defendant postulates three possible actions that the United States might have taken to protect the Oneidas, and then shows why each was impossible or impractical. The three possibilities, which the defendant borrowed from the decision of the Court of Claims in Oneida Tribe v. United States, 165 Ct. Cl. 487, cert. denied, 379 U.S. 946 (1946) (aff'g Docket 159, 12 Ind. Cl. Comm. 1 (1962)), were (1) legal action in federal courts, (2) military intervention and (3) federal criminal sanctions. This argument of defendant is also without merit.

While the Commission agrees that the United States probably could not have used legal actions, military intervention or criminal sanctions in 1785 or 1788, it is not convinced that these were the only options available to the Federal Government. Certainly, in the Oneida case, supra,

the court did not suggest that these are the only actions available to the Federal Government in fulfilling its fiduciary obligation to an Indian tribe. In its opinion the court described other actions that the United States took, although unsuccessfully, to protect the Wisconsin Oneidas.

In this case we believe there were several other options available to the United States in both 1785 and 1788 when it learned of New York's intention to purchase lands from resident Indians. It could have notified the Oneidas, as it did in 1784 when it was attempting to prevent New York from treating separately with any of the Six Nations, just prior to the holding of the Treaty of Fort Stanwix, that New York was not authorized by Congress to treat with them. It could have sent a representative to the treaty negotiations to protect the interests of the Oneidas. It could have exerted pressures on New York, both prior to and subsequent to the treaties, to treat the Oneidas fairly.

We do not know whether these or other possible actions would have succeeded. However, unlike the court in the Oneida case, we are not faced with deciding whether the United States would be liable if it had taken actions to protect the Oneidas but was unsuccessful. In this case the United States took no ation at all. Under these circumstances we must reject the defendant's contention that it did all it was required to do under the circumstances.

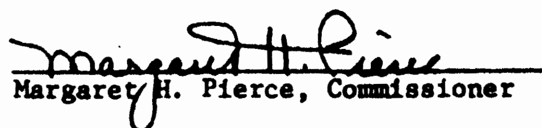
The defendant also contends that the plaintiffs have failed to sustain their burden of proving that the United States had either actual or

constructive knowledge of the 1785 and 1788 treaties. Defendant claims that to sustain their burden plaintiffs must prove either (1) that the defendant had reliable information of the imminent execution of the 1785 and 1788 treaties, and was guilty of a turning away from such information; or (2) that the defendant was guilty of gross negligence in not acquiring knowledge of the treaties, and had sufficient time in which to obtain the information and act before the treaties took place. Defendant claims that the plaintiffs have not met either of these burdens. We do not agree.

Although the Commission does not necessarily agree with the standards of proof suggested by the defendant, it is of the opinion that the evidence establishes that the United States did have reliable information both in 1785 and 1788 that New York intended to purchase Indian lands, and that in both instances the United States, by failing to take any action, was guilty of a turning away from such information. Defendant's contention is therefore without merit.

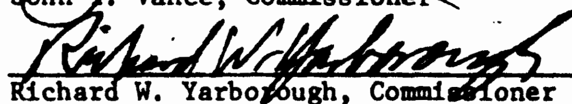
In sum, it is our conclusion that in both 1785 and 1788 the United States failed to fulfill its special obligation to the Oneidas in relation to protecting their possession of lands in New York State. The defendant will be liable to the plaintiffs under Section 2, Clause (5), of the Indian Claims Commission Act, 25 U.S.C. § 70a (1970), if the Oneida Nation did not receive conscionable consideration for the land it ceded to New York under the 1785 and 1788 treaties.

This case shall now proceed to a determination of the extent of the defendant's liability to the plaintiffs, if any, under the 1785 and 1788 treaties.


Margaret H. Pierce, Commissioner

We concur:

John T. Vance, Commissioner


Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner

Kuykendall, Chairman, dissenting:

I dissent from this latest effort of the Commission to perpetuate these two claims, both of which, in my opinion, should have been dismissed seven years ago. At that time, February 26, 1969, the majority of the Commission saw fit to deny the defendant's motion for dismissal, which was based on the ground that, as a matter of law, the United States owed no fiduciary obligation to the Oneidas relative to the 1785 and 1788 Oneida land cessions to the State of New York. In denying this motion the majority found and concluded,

> . . . . that a substantial issue of fact exists with respect to the Government's intention to enter into a special relationship, possibly a fiduciary relationship with the friendly Oneidas under Article II of the treaty [Fort Stanwix Treaty of October 22, 1784, 7 Stat. 15]. 1/

In my dissent, 20 Ind. Cl. Comm. 337, 359, I pointed out that the weight of judicial expression on the subject at issue clearly indicated that, as a matter of law, the United States, under the Articles of Confederation never had either the power or the duty to undertake any fiduciary responsibilities on behalf of the Oneidas or any of the Six Nations with respect to Indian lands in New York State.

After a further hearing on this matter, the Commission proceeded to enter certain findings and to conclude as a matter of law,

> . . . that the United States in Article II of the Treaty of Fort Stanwix undertook a special responsibility or obligation to the Oneida Nation of Indians in relation to protecting their peaceful possession of their lands in New York State, ... 2/

1/ 20 Ind. Cl. Comm. 337, 349.
2/ 26 Ind. Cl. Comm. 583, 624.

Again I dissented, 26 Ind. Cl. Comm. 583, 591, pointing out that the Commission's conclusion upholding the defendant's fiduciary responsibilities to the Oneida Nation under the 1784 Fort Stanwix Treaty flies full force into the teeth of the decisions of the Court of Claims in Seneca Nation v. United States, 173 Ct. Cl. 919 (1965), affirming in part, reversing in part, Dockets 342-A, 368-A, 12 Ind. Cl. Comm. 755, and Six Nations v. United States, 173 Ct. Cl. 899 (1969), affirming Docket 344, 12 Ind. Cl. Comm. 86.

I have reread these two dissenting opinions and still believe that they apply the applicable law correctly. Therefore, I incorporate them by this reference into this opinion without repeating them herein verbatim.

The issue of federal fiduciary responsibility as it applies to the two Oneida claims centers upon the meaning of the language comprising that portion of Article IX of the Articles of Confederation which pertains to Indians, which language is as follows:

> The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . . regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated.3/

The Commission says that the language in Article IX is patently ambiguous in that, while granting the United States ". . . the sole and exclusive power" of regulating the Indian trade ". . . and managing all affairs with the Indians, not members of any of the States," it preserves and guarantees the legislative right of each state within its limits.

3/ 1 Stat. 4, 7.

In order to meld these apparent inconsistencies concerning sovereign authority to deal with the Indians, the Commission has created its own definition of ". . . Indians, not members of any of the States." According to the Commission, this phrase has reference to the political status of the Indians, not to their geographical location and therefore encompasses ". . . those Indians who maintained their tribal organizations, asserted their independence, and were not subject to the domestic laws of any of the states." 4/ These conclusions are too categorical, are not supported by the historical evidence of record, and have no judicial support. 5/

4/ P. 21 Commission opinion. Page 542, supra.
5/ The 1784 Monroe-Madison correspondence (finding of fact No. 83) is of dubious corroborative value on its face because in the last sentence of Madison's reply he clearly states that he is uncertain of "* * * the true boundary between the authority of Congress and that of New York." Furthermore, approximately three years later Madison wrote as follows:

> The regulation of commerce with the Indian tribes [in the then unratified Constitution] is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain. [Madison, "Powers Delegated to the General Government—II" No. 42 in The Federalist 306 (Benj. F. Wright ed. 1961).] [Emphasis added]

The evidence indicates clearly that during the period of the American Revolution the Continental Congress was concerned with maintaining the neutrality of the Indian tribes rather than seeking active military alliance with the Indians against the British. Of the Six Nations, only a portion of the Oneida and Tuscarora nations remained neutral or actively supported the American cause. With the formal conclusion of hostilities in 1783 Congress focused on the problem of establishing a satisfactory peace with the hostile Indian tribes, particularly those tribes inhabiting the northern frontier. Of secondary importance was the quieting by negotiation of the Indian title to the "western lands", being those lands extending beyond the western limits of the states as far as the Mississippi River. 5/

It was in this "western territory" that the Continental Congress, under Article IX of the Articles of Confederation, exercised exclusive jurisdiction over all facets of Indian tribal life, including the extinguishment of the Indian title to land. The language quoted below in the proclamation of September 22, 1783, made in conjunction with congressional consideration of an ordinance prohibiting the settlement and purchase of certain lands "without the limits or jurisdiction of any particular State", confirms this:

> Whereas by the ninth of the Articles of Confederation it is among other things declared, that "the United States in Congress assembled have the sole and exclusive right and power of regulating the trade, and managing all affairs

5/ The "western lands" or "western country" is referred to in an early Congressional report as including those territories "which appertain to the United States." See Pl. Ex. 58: XXV Journals of the Continental Congress 681-82.

> with the Indians, not members of any of the states, provided that the legislative right of any State, within its own limits, be not infringed or violated." And whereas it is essential to the welfare and interest of the United States as well as necessary for the maintenance of harmony and friendship with the Indians, not members of any of the states, that all cause of quarrel or complaint between them and the United States, or any of them, should be removed and prevented: Therefore the United States in Congress assembled have thought proper to issue their proclamation, and they do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled.
>
> And it is moreover declared, that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession or settlement. 6/

In the new territory, the "western country," the Congress, under Article IX, was supreme. There was no conflict between federal and state authority and the applicable language in this Article did not give rise to any ambiguity. The phrase "Indians, not members of any of the States," leads to a territorial connotation.

At the same time, our government officials were well aware that any extension of federal authority over Indian affairs under Article IX into a state would ultimately conflict with a state's preemption rights, and, if this should occur, that the Federal Government must yield to the state's exclusive right to purchase Indian lands within its own limits. General Washington acknowledged state preemption rights, *vis a vis* federal authority,

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6/ Pl. Ex. 57: XXV Journals of Continental Congress 602 (emphasis added).

when he wrote the following in a letter to Congressman James Duane, dated September 27, 1783:

> No purchase under any pretense whatever should be made by any other authority than that of the sovereign power, or the legislature of the state in which such land happen to be. 7/

Accounts leading up to and including the 1784 Fort Stanwix Treaty negotiations amply demonstrate the "hands off" policy of the central government wherever state preemption rights were involved. The congressional report of October 14, 1783, which outlined pending plans for making peace with the hostile tribes (steps that led to the 1784 Fort Stanwix Treaty), was careful to include the following language:

> Resolved, that the preceding measures of Congress relative to Indian Affairs, shall not be construed to effect the territorial claims of any of the states, or their legislative rights within their respective limits. 8/

At the 1784 Fort Stanwix treaty proceedings, the participation of federal officials in the Pennsylvania land negotiations with the Six Nations was ceremonial, perfunctory, and strictly an accommodation to the State of Pennsylvania. 9/ General Butler, one of the federal treaty commissioners, was of the view that any attempt by the central government to fix boundaries between Indian tribes on lands situated within the state would undoubtedly be controversial and should be avoided. 10/

7/ Pl. Ex. 51: H. Manley, Treaty of Fort Stanwix - 1784, p. 47.

8/ Pl. Ex. 50: XXII Journals of Continental Congress, p. 693.

9/ See Six Nations v. United States, Docket 344, 12 Ind. Cl. Comm. 86, 92 (1963).

10/ Pl. Ex. 68: Richard Butler's Notes at Fort Stanwix, Oct. 18, 19, 21, 1784.

On August 7, 1786, Congress adopted an "Ordinance for the Regulation of Indian Affairs," the purpose being to reorganize the Indian Department into two districts each with a superintendent who would carry out his duties subject to the following:

> "And it be further resolved. That in all cases where transactions with any nation or tribe of Indians shall become necessary to the purposes of this ordinance, which cannot be done without interfering with the legislative rights of a State, the Superintendent in whose district the same shall happen, shall act in conjunction with the authority of such state." 11/

The above language represents one of the final expressions of our federal government under the Articles of Confederation concerning state prerogatives and preemption rights. Soon the adoption of our Constitution would bring about some sweeping changes.

On May 14, 1787, delegates from the several states assembled in Philadelphia, Pennsylvania, for the first session of a constitutional convention.

On September 17, 1787, the convention formally approved a draft of the new Constitution and forwarded it to the Congress. Congress thereafter, on September 27, 1787, ordered the Constitution to be sent to the legislatures of the several states for ratification. Ratification was accomplished in June of 1788. On June 24, 1789, the first Congress was called into session.

Section 8(3) of Article I of the Constitution delegates to the Congress the power ". . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Reacting swiftly under its new constitutional authority, Congress enacted the Trade and

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11/ American State Papers, Class II, Indian Affairs, p. 14.

Intercourse Act of July 27, 1790 (1 Stat. 137), Section 4 of which is a clear and unequivocal declaration of the primacy of Congress in the field of Indian affairs:

> That no sale of lands made by any Indians, or any nation or tribe of Indians, within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States. [Emphasis added.] 12/

President Washington in a communication addressed to the Seneca Indian chiefs shortly after the passage of the 1790 Trade and Intercourse Act provided an executive construction of the law as it was then and as it was under Article IX of the Articles of Confederation. I cited the same in my first dissent, but, since the Court of Claims has found the President's remarks equally persuasive in Seneca Nation v. United States, supra, I deem them to be worth repeating here.

> 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 your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. 13/

12/ 1 Stat. 137, 138.

13/ American State Papers, Class II, p. 142.

On January 15, 1791, the Secretary of War addressed a letter to President Washington concerning the purchase of Creek Indian lands in Georgia, as follows:

> That, although the right of Georgia to the pre-emption of said laws should be admitted in its full extent, yet it is conceived, that, should the said state, or any companies or persons, claiming under it, attempt to extinguish the Indian claims, unless authorized thereto by the United States, the measure would be repugnant to the aforesaid treaties, to the constitution of the United States, and to the law regulating trade and intercourse with the Indian tribes. 14/

Later in that same year, August 17, 1791, the Secretary of War wrote to Governor Clinton of New York on the subject of the pending sale of Cayuga Indian lands:

> The right of the State of New York, to the pre-emption of the Cayuga lands, is unquestioned, and also, that the said right embraces all possible alienations of said lands by the Indians, with the concurrence of the United States, according to the Constitution and laws. 15/

On May 22, 1792, the Secretary of War sent the following instructions to General Putnam, relative to a pending treaty with the hostile Indians in Ohio.

> You will represent to them [Indians], that a new state of things has taken place in the United States; that formerly, we were an association of several separate States, like their several tribes, and that there was no portion of union and strength sufficient to regulate the several parts, as belonging to the same machine.

14/ Id., at 112.

15/ Id., at 169.

> But, that now we have a Federal Government, embracing all parts of the Union, as it respects foreign nations and Indian tribes. That General Washington is placed at the head of this government, and that he, or some person immediately authorized by him, must make all treaties with the Indian tribes. 16/

The recurrent theme marking the newly found supremacy of the United States in the management of Indian Affairs under the Constitution as expressed in these early historical documents has been carried over in several meaningful court decisions.

In the leading Supreme Court case of Cherokee Nation v. Georgia, 5 Pet. 1 (1832), Chief Justice Marshall spoke of the intention of the constitutional convention on the matter of Indian affairs:

> . . . to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly and omitted those qualifications which embarrassed the exercise of it, as granted in the confederation. [Id., at 13.]

A candid observation concerning the vitality of the federal authority in Indian affairs prior and subsequent to the adoption of the Constitution was made by Mr. Justice Davis in the United States v. Forty Three Gallons of Whiskey, 93 U.S. 188 (1876), p. 194.

> Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and the Congress now has exclusive and absolute power to regulate commerce with the Indian tribes.

16/ Id., at 234.

In its most recent expression on the same subject, the Court simply states "Once the United States was organized and the Constitution adopted these tribal rights to Indian lands became the exclusive province of the federal law." *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974).

In retrospect, the Commission's definition of the phrase "Indians, not members of any of the States," as it appears in Article IX, namely, that it comprehends independent tribal organizations not subject to the domestic laws of the States, is more compatible with the exercise of preemption rights than with the denial of the same.

What discredits this definition and brings it into direct conflict with exercise of a state's preemption rights is the Commission's subsequent conclusion that "Indians 'members' of a state are those Indians *who had abandoned their tribal affiliation*, no longer asserted their independence, and made themselves subject to the laws of the state" (Emphasis added).[17/]

The Commission apparently is saying that, under Article IX, a state's legislative prerogatives in Indian affairs are limited to its dealings with individual, non-tribal, Indians, or a collection of the same. To accept this proposition would mean that the states had forfeited their preemption rights, since the exercise of such rights has nothing to do with Indians who are not members of a tribe or community. It is axiomatic that the essence of Indian title is the communal or tribal

17/ P. 21 - Commission's opinion. Page 542, *supra*.

ownership of the land, and the exclusive right to purchase that tribal interest is what preemption rights are all about.

Equally responsible for the Commission's erroneous and anomalous result is its failure to apply basic rules of statutory construction in giving the proper effect to the proviso in that portion of Article IX with which we are now concerned. It has treated the principal language preceding that proviso as though it limited the proviso rather than recognizing what is always the case, that the proviso limits the language which precedes it. The authorities on this point are myriad. I cite only one opinion of the Supreme Court of the United States as an example of those cases (McDonald v. United States, 279 U.S. 12, 20 (1928)), which states this principle:

> As a general rule, a proviso is intended to take a special case or class of cases out of the operation of the body of the section in which it is found. Waymen v. Southard, 10 Wheat. 1, 30, United States v. Dickson, 15 Pet. 141, 165. Ryan v. Carter, 93 U. S. 78, 83. United States v. McElvain, 272 U. S. 633, 635.

Since it is apparent that the words of the proviso ". . . that the legislative right of any State within its own limits be not infringed or violated," was intended to preserve inviolate a state's right of preemption just as it existed before the articles were ratified, of necessity, this proviso limited or qualified the general purpose of the principal language of Article IX which concerned itself with the scope of federal authority in Indian Affairs.

Admittedly, there has been some confusion and bewilderment concerning the meaning of the language preceding the proviso. But the meaning of these words is totally irrelevant to this case since, by virtue of the precise and unambiguous terms of the proviso, the legislative right of the State of New York, (including particularly, its sovereign power to preempt land within its own limits), cannot be "infringed or violated". That is the answer to the issue in this case.

If, from the foregoing, there can be any remaining doubt that New York and the twelve other states retained in toto their legislative rights of preemption which they possessed prior to the ratification of the Articles of Confederation, that doubt surely would have to be dispelled by a reading of Article II of the Articles of Confederation which is as follows:

> Article II. Each State retains its sovereignty, freedom and independence, in every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Nevertheless, the Commission, after seemingly conceding that New York had retained its exclusive preemption rights after the Articles of Confederation became effective, somehow, through tenuous and tortuous mental processes has arrived at the conclusion that the United States had the power and duty to enter into a special relationship with the Oneidas and should have protected them in their negotiations and cessions with and to New York State, and had thus held the United States liable for failing to perform functions and assume duties which were positively

prohibited to it by the then existing constitution of the United States of America, the Articles of Confederation.

For all the reasons above stated, the plaintiffs' claims should be dismissed.

Jerome K. Kuykendall, Chairman