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
THE UNITED STATES OF AMERICA,	)	(Claims 3 and 7)
Defendant.	)	

Decided: September 22, 1978.

Appearances:
Marvin S. Chapman, Attorney for Plaintiffs, Dean A. Dickie and Aaron, Aaron, Schimbert & Hess, of counsel.

Milton E. Bander, with whom was Mr. Assistant Attorney General, James W. Moorman, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This case is before the Commission on remand from the Court of Claims. United States v. The Oneida Nation of New York, et al., 201 Ct. Cl. 546, 477 F 2d, 939 (1973). The decision under review by the court related to claims 3 through 7 in Docket No. 301, reported at 26 Ind. Cl. Comm. 138 (1971). The docket involved claims under clauses 3 and 5 of Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, (1946), for additional compensation for lands in New York State which were acquired by New York State from the Oneida Indians in 25 separate treaties

during the period 1795 to 1846. The court affirmed the Commission's holding that the Trade and Intercourse Act of 1790, 1 Stat. 137, 138, and subsequent amendments in effect during the period involved in this case, established a special relationship between the Indians and the United States which imposed a fiduciary duty upon the Federal Government regarding Indian land transactions; that the Act applied to transfers between the Indians and the State of New York, the Federal Government, owing a fiduciary duty to the Indians regardless of whether the other party to the land transaction was a private person or a state; affirmed the decision of the Commission with respect to two of twenty-five treaties because a Federal Representative was actually present at the treaty signing, and held that with respect to the remaining 23 treaties the Federal Government would be liable as a fiduciary if the Government had either actual or constructive knowledge of the treaties between the Oneida Indians and the State of New York. The case was remanded to the Commission to decide the issue of whether the Federal Government had actual or constructive knowledge of the 23 treaties.

In remanding the case to the Commission the Court stated:

> Although the Government did not actually participate in the remaining treaties, we hold the fiduciary relationship would continue to exist if the Government had either actual or constructive knowledge of the treaties. With such knowledge, if the Government subsequently failed to protect the rights of the Indians, then there would be a breach of the fiduciary relationship. This Court does not see any distinction between participation and failure to exercise a duty, and knowledge and the failure to exercise the same duty. Id., at 554.

The court then suggested in a footnote the various items which could be construed as imposing constructive knowledge on the Government. the footnote stated as follows:

> It is not difficult to contemplate possible items which could be construed as imposing constructive knowledge upon the Government. For example: the possibilities that the treaties were registered with some government agency; that there was pertinent correspondence relating to the treaties; that the treaties were reflected in federal land maps; that the treaties altered the state land tax structures which might have been reflected in federal government statistics; that the seat of the Government being in New York itself imposed knowledge and other similar items. Finally, it was also suggested at oral argument that the United States Government actually assisted in the subsequent removal of these Indians to the State of Wisconsin. If this be the case, then it could be assumed that someone in the federal bureaucracy knew why the Indians were moving, i.e. the sale of their lands to the State of New York. Id. at 555.

We believe that the record in this phase of the case, as reflected in our Findings of Fact, establishes that the Government had constructive knowledge of all of the 23 treaties, and probably had actual knowledge of most of them.

Beginning in 1789 the United States Government followed a policy of centralizing federal management of Indian matters. Its paramount control over Indian affairs was embodied in the Constitution which had been adopted that year. In the Indian Trade and Intercourse acts, beginning with the first one in 1790, supra, the Federal Government established procedures for setting boundaries and removing and punishing white encroachment on Indian territories. This Act provided in pertinent part:

> ". . . 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 pre-emption 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." 1 Stat. 137, 138 (emphasis added).

To effectuate the control which the United States had under the Constitution and the Indian Trade and Intercourse Act, federal agents were appointed by the Federal Government to reside with the various tribes and to represent the United States, carrying out its early policy of attempting to bring about the assimilation of the Indians into non-Indian society. The agents and subagents lived with or near the Indians under their supervision and became intimately aware of the daily happenings and activities of the tribes, including their councils, religious observances, economy, and their relations with the neighboring whites. The agents and subagents were required to submit detailed reports concerning the number of Indians under their jurisdiction and the amount of land which they occupied from time to time. The agents were also required to give the Federal Government their opinions on the progress being made by the Indians towards civilization and to make whatever recommendations they considered proper.

Between 1790 and 1795 the Federal Government went to great lengths to maintain good relations with the Six Nations in New York State because they feared that those Indians might join the Indians in Ohio who were then at war with the United States. The strategic location of the Six Nations along the principal supply routes to the Old Northwest could have presented a major threat to the Federal Government if an alliance was formed between the Six Nations and the hostile Ohio Indian tribes, who with the help of the British were carrying on intermitant warfare against the United States

citizens. The proximity of the Six Nations to the British-held forts at Niagara and Oswego and also to Canada, made those Indians particularly susceptible to British influence. Under the Jay Treaty the British promised to leave the border posts by June 1, 1796, and did so, but they continued to exert influence on the Indians near the Canadian border until the close of the War of 1812. As a result of these circumstances the federal Indian agents and subagents were required to maintain a close surveilance over the activities of the Indians in New York State, and to report all matters of concern to the Secretary of War who was then in charge of Indian affairs.

From 1792 to 1880 federal Indian agents resided in close proximity to the Six Nations in New York. Until 1824 these agents reported directly to the Secretary of War and after that to the Commissioner of Indian Affairs who was also in the War Department.

During the period when the Articles of Confederation were in effect New York State made it clear to the Federal Government and to the Indians residing within its borders that it considered the State power over the Indians to be paramount. New York State's attempt to subvert the Federal Government's treaty negotiations at the treaty of Fort Stanwick in 1783 and 1784 are detailed in our decisions concerning claims 1 and 2, 20 Ind. Cl. Comm. 337 (1969), 26 Ind. Cl. Comm. 583, (1971), and 37 Ind. Cl. Comm. 522 (1976), and also in the decision of the Court of Claims affirming our decisions. United States v. Oneida Nation of New York, et al., _____Ct. Cl._____ (decided May 17, 1978). New York State continued to take the

the same position concerning its superiority in control over Indian affairs after the Consititution was adopted, and after the Trade and Intercourse Act was passed. On March 27, 1794, the New York State Legislature enacted legislation (17th Session, Chapter IX), which appointed trustees for the Indians residing within New York State and granted them full power to make agreements or arrangements with the Six Nations respecting their lands so that they would produce an annual income for the Indians and insure their good will and friendship. The Act provided that any conveyances of land obtained by the Trustees from the Indians were to be in fee simple and for the use of the people of New York State. In the act of March 5, 1795, the Legislature authorized the Governor and others as he might appoint, to make any arrangements with the St. Regis Indians with respect to their land claims in New York that would tend to insure their goodwill and friendship. In subsequent legislation other persons were appointed to negotiate with the Oneida, the Onondaga and the Cayuga tribes relative to their lands. The agents were authorized to allot lands to the Indians in severalty if they so desired. The acts provided for the payment of annuities to the Indians in return for their land. The act provided that lands which were the basis for the annuities should be surveyed and laid out into lots not exceeding 250 acres and offered for sale at public auction. Also, on April 9, 1795, the Legislature appointed the Governor and several men to act as agents for the people of New York to make such arrangements with the Oneida, Onondaga, and Cayuga tribes relative to their lands as would promote the interest of the Indians and preserve their confidence in the justice of New York State.

The agents were authorized to allot land if the Indians so desired. In return for any residue of land not required for allotment, the agents were authorized to stipulate perpetual annuities to be paid to the Oneida and Cayuga tribes. Also on April 9, 1795, the Legislature enacted another bill which authorized the Governor or any agent he might appoint to treat with any Indian tribe or tribes for the purchase of their claims to land in northern New York State in such form and on whatever terms the Governor or his agents might deem best for New York State.

The first treaty between the Oneida Nation and the State of New York which is the subject of this suit, is the Treaty of September 15, 1795. The circumstances surrounding this treaty, particularly with respect to the Federal Government's attitude toward what New York State was doing, turned out to be a good indication of what the future would be regarding the relations between the Federal Government, New York State and the Oneida Nation as well as other Indian tribes living within the state. Early in March of 1795, Israel Chapin who was the Federal Indian Agent to the New York Indians, died, and his son, Israel Chapin, Jr., was appointed to succeed him. In his formal instructions from the Federal Government, Chapin was told that he was to serve under the Superintendent for the Northern District, and that he was to communicate through the Superintendent and to the Secretary of War in Philadelphia any significant occurrences regarding the Indians within his agency. On May 22, 1795, Israel Chapin, Jr., wrote to Secretary of War Timothy Pickering informing him that the Commissioners designated by the State of New York to treat with the New York Indians had convened a meeting with the Oneida Nation for the

purpose of negotiating a treaty for the purchase of Oneida lands. On June 16, 1795, in response to an inquiry dated June 13, 1795, from Secretary of War Pickering, William Bradford, Attorney General of the United States, advised Pickering that the Act of March 1, 1793 (a version of the Indian Trade and Intercourse Act then in effect), prohibited the sale of Indian lands to persons or states unless effectuated by a treaty or convention entered into by the Federal Government. He appeared to acknowledge New York's preemption rights to the Indian lands within its borders, but stated that as the Indians still had title to the land, the purchase of the land by New York was not permissable in the absence of the approval of the United States. On June 23, 1795, Secretary Pickering presented to President Washington for his approval a draft of a letter directed to Governor George Clinton of New York relative to the Federal Government's position on the legality of New York State's dealings with the Indians in New York respecting their lands. Pickering informed the President that if the President approved, the letter would be sent by the next day's post. President Washington approved the draft and the letter was sent to Governor Clinton accompanied by a copy of the June 16 opinion of the Attorney General. In June of 1795 John Jay replaced Clinton as Governor of New York. On July 3, 1795, Secretary Pickering wrote to Governor Jay concerning New York's proposed negotiations with the Onondagas, Cayugas, and the Oneidas for the purchase of their lands. He enclosed a copy of the Attorney General's opinion. On July 13, 1795, Governor Jay replied to Pickering's July 3, letter, stating that having

recently entered into his office he was not yet familiar with New York's Indian policy and thus his reply to Pickering's letter had been delayed. Pertinant parts of his letter are quoted in our finding No. 7. His letter indicates that despite his inexperience as Governor of New York State, John Jay considered the power of New York over the Indians in that state to be paramount. On July 16, 1795, Secretary Pickering wrote a most curious letter to Governor Jay in which he stated that he had been informed by a member of the New York Legislature that the act of that legislature authorizing the purchase of lands by New York from the Onondaga, Oneida, and Cayuga Indians required an application to the Federal Government for a treaty to be held, but that after reading Governor Jay's letter he realized the member of the legislature had been in error. Pickering stated that it was in reliance on this misinformation that Pickering had informed Israel Chapin, Jr., the federal Indian agent to the tribes in question, that the New York Indian Commissioners would be acting in violation of the laws of the United States if they negotiated any particular treaties with the New York Indians.

On June 29, 1795, Secretary of War Pickering wrote to Federal Indian Agent, Israel Chapin, Jr., relative to the proposed treaty between New York and the Oneidas, Onondagas, and Cayugas for the purchase of some of their lands. He advised Chapin that he was to give no aid or countenance to the measure because it is "repugnant to the law of the United States made to regulate trade and intercourse with the Indian tribes. The Attorney General of the United States has given his opinion that the reservation of those tribes within the State of New York, formed no exception to the General Law; but whenever purchased the bargains

must be made at a treaty held under the authority of the United States." Chapin was also directed to tell the Indians that any bargains they made at such a treaty as that to be held by the State of New York would be "void". He was told that as the guardian of Indian rights he must advise them not to listen to any of the invitations of the Commissioners unless those Commissioners had authority from the United States to call a treaty, which they did not have. On July 3, 1795, Secretary Pickering again wrote to Agent Chapin expressing his displeasure that Jasper Parrish, a federal employee, and later to be appointed an Indian subagent in New York State, had assisted the New York State Indian Commissioners in inviting the Cayugas and Onondagas to a treaty without Secretary Pickering's authorization.

On July 18, 1795, Governor Jay wrote to Secretary of War Pickering stating that the St. Regis Indians had a claim to lands in northern New York State; that in previous negotiations the state had agreed to treat with these Indians and that legislation had been passed authorizing the Governor to do so. Governor Jay then requested through Secretary Pickering, that the President of the United States appoint one or more commissioners to hold a treaty with the St. Regis Indians so that the extinguishment of their claims to the lands might be conducted in accordance with the act of Congress of March 1, 1793 (the then Indian Trade and Intercourse Act). On July 21, 1795, Secretary Pickering wrote to President Washington concerning his recent communications with Governor Jay of New York. He pointed out to the President the different ways in which New York State was going about its negotiations with the St. Regis Indians and its

negotiations with the Onondagas, Cayugas, and Oneidas. In the case of the St. Regis New York State appeared to believe that the Indian Trade and Intercourse Act required that a federal agent be present with authority to oversee and approve any treaty that was made between the St. Regis Indians and the State of New York, whereas in the case of the other Indians Governor Jay's attitude was that New York State could do as it pleased without federal permission. He enclosed with his letter copies of all the communications he had received from Governor Jay. On July 27, 1795, President Washington replied to Secretary Pickering's letter stating that if the treaties with the Oneidas, Onondagas and Cayugas had taken place on July 15, as the communications from Governor Jay indicated, then any "further sentiment now on the unconstitutionality of the measure would be recd. too late." The President stated that if the treaties had not in fact taken place yet Pickering then should "obtain the best advice you can on the case and do what prudence, with a due regard to the Constitution and Laws, shall dictate."

On July 31, 1795, Agent Chapin wrote to Secretary Pickering informing him that the State of New York had purchased lands from the Cayuga Indians and that Pickering's letter of June 29 and his letter of June 3 had not arrived until after Chapin had returned from the treaties so that he had been unable to comply with the instructions contained in the letter. Chapin informed the Secretary that he would travel to the Oneidas at once and attempt to prevent them from treating with New York. On August 19 Chapin again wrote to Secretary Pickering stating that he had gone to the Oneidas and informed them of the illegality of their treating with

New York State. Chapin reported that the New York Commissioners were offering to purchase Oneida lands and that the Oneidas were divided on the matter of selling, some wishing to sell and some being very much against it. Eventually the Oneidas and the state commissioners reached an impasse over the amount of land to be purchased and the price to be paid and the treaty negotiations were discontinued.

On August 26, 1795, Secretary Pickering replied to Chapin's letter of July 31st, stating in part as follows:

> I received your letter informing of the treaty held at Scipio where the Commissioners of New York purchased the land of the Onondagas and Cayugas; and that you proposed to go to Oneida where you supposed that tribe might be influenced to avoid a sale. Seeing theCommissioners were acting in defiance of the law of the United States, it was entirely proper not to give them any countenance; and as that law declares such purchases of the Indians as those commissioners were attempting to make, invalid it was also right to inform the Indians of the law and of the illegality of such purchase. But having done this much, the business might there be left. The negotiation is probably finished ere now: if not, you may content yourself with giving the Oneida the information above proposed, & there to leave the matter. [Comm. Ex. 11, Docket 343] (Emphasis added.)

On October 9, 1795, Israel Chapin, Jr., advised Secretary Pickering that he had been informed that at a treaty held in Albany the Oneida Indians had ceded 100,000 acres of their land to New York State.

There can be no question on the basis of the above facts that the Federal Government was completely informed concerning New York State's intention to buy land from the Oneida Indians; that it believed the transaction to be unconstitutional, and also illegal under the Indian Trade and Intercourse Act, and that it so advised the Governor of New York and its own Indian agent in New York State. It is also clear that the Federal

Government was not seriously concerned over the illegality of the purchase of Oneida lands or of any injustice that might be done to the Oneida Indians and contented itself with being sure that the agent was present at the treaty negotiations and expressed the opinion of the Attorney General to those who were present at those negotiations. ". . . having done this much, the business might there be left." and there it was most certainly left. This was the last time that the Federal Government would make even a pretense of interferring with New York State's attempts to negotiate treaties for land cessions with any of the New York Indians, and certainly with the Oneida Indians.

We have made no findings concerning the treaty of June 1, 1798,or the treaty of June 4, 1802,because there were Federal Government representatives clearly in attendance at those treaty signings, and the Court of Claims has ruled that the Government had actual notice of those treaties with New York State. Of the remaining treaties we shall discuss in some detail those between March 21, 1805 and February 24, 1837, with reference to the Government's actual or constructive knowledge of the treaties. Regarding the eight treaties negotiated between June 19, 1840 and the last treaty in this suit, February 25, 1846, we did not make findings regarding the Governments knowledge because in the Treaty of Buffalo Creek between the United States and the Six Nations, January 15, 1838, 7 Stat 550, Article 13 provided that future purchases of Oneida land by the State of New York were authorized and therefore we believe the United States became chargeable with knowledge of all treaties which ensued between the Oneidas and the state after that date.

Throughout the period covered by this suit the Federal Indian agents in New York State played conflicting roles with regard to Indian, state, and Federal Government relations. As early as March 11, 1793, the New York State legislature enacted a law which appointed Israel Chapin, then Indian Agent to the Six Nations, to be a State agent for the purpose of treating with the Oneidas, the Onondagas, and Cayugas for the purchase of some of their lands for New York State. On June 2, 1797, John Taylor, an employee in the office of the Comptroller of the State of New York, certified that $2,300 was delivered to Israel Chapin, Jr., to be distributed as New York State annuities due to the Cayuga Indians (Findings 41 and 42). It appea that the Federal Indian Agent distributed the New York State annuities to the Six Nations on an informal basis at least until January 15, 1808, when Erastas Granger, the Federal Indian Agent to the Six Nations wrote to Governor Tompkins of New York State that he was aware of the fact that it was costing New York State "upward of $500 annually to transport and pay over the annuities from the State of New York to the Oneidas, Onondagas and Cayuga Indians." His letter continued:

> Having the agency of the United States to the Six Nations, and being assisted by Jasper Parrish, Esq. of Canandiagua who has been appointed an assistant agent, we have concluded to make a proposal to you for doing the business & we will receive the money in Albany - transport and pay it over to the Indians - taking their receipts according to Law, for $350. - If required we will give security for performance.
>
> The law seems to require that an agent be appointed on the part of the state who shall pay over the money to the agent of the United States - If our proposal is accepted Mr. Parrish can be the agent of the State. - having often to visit the different tribes of Indians & our attention in some measure from having annually to transport dollars from Albany taken up with their affairs, are reasons why we can do the business cheaper than any other person. - If the proposal is accepted we shall be solicitous in rendering satisfactory services.

The record makes it clear that from 1808 at least through 1823, Federal Indian Sub-Agent Jasper Parrish acted as agent for the State of New York in distributing New York State annuities to the New York Indians These actions of the Federal Indian agents in New York State were duly communicated to their superiors in the War Department in Washington. Erastas Granger who served as a Federal Indian agent to the Six Nations from 1804 through 1818 and was headquartered in Buffalo was also a Judge of the Court of Common Pleas for Niagara County in the State of New York from 1808 through 1818. At other times during this period he served as a surveyor of the Port of Buffalo, Collector of the Port, and United States Postmaster at Buffalo. According to his biographer, he performed the duties of all his offices through deputies except for his positions as Federal Indian Agent and New York State Judge. As Federal Indian Agent to whom subagent Jasper Parrish had to report and who was headquartered at Canandiagua not far from Buffalo, Judge Granger must have been fully informed concerning the sales of Six Nations' lands to New York State and the services of the Federal Indian subagent acting as agent for the State of New York in the payment of New York State annuities to the Indians. During Granger's term as Indian agent and as Judge of the New York Court of Common Pleas, the New York State legislature passed several laws relative to treaties of cession of Oneida land to the State of New York involving consideration and cash and annuities, the latter undoubtedly being distributed by Federal Indian subagents acting on behalf of the Comptroller of New York State. These laws were published along with all other New York State laws in volumes entitled "Laws of New York"

and copies of these laws would have been sent to all New York State Judges including Judge Granger.

In addition to acting for the State of New York and distributing New York State annuities to the New York Indians, some of the agents, particularly Jasper Parrish, served as interpreters in treaty talks between the State and New York Indians.

From time to time the Indians in New York State communicated with the Federal Government in Washington complaining about the fact that New York State was taking their lands away from them. In 1802 Handsome Lake, a leader in the Seneca Nation, wrote a petition to President Jefferson complaining of, among other things, recent sales of land to New York State by the Six Nations and by the Oneida Nation. In response, President Jefferson pointed out that such sales even to a state were forbidden by federal law unless an agent of the United States attended the sales to see that the Indian's consent was freely given; that a satisfactory price was paid; and then reported to the Federal Government what had been done for the Federal Government's approval. He mentioned the fact that United States officials had been present at the treaties of June 1, 1798, and June 4, 1802 between New York State and the Oneida Nation. The President said that the Federal Government had confidence in those agents to see that the Oneidas had given their consent freely and that the sale was fair. He stated that it was his opinion that the Oneidas had the right to sell their land and that the sales had not been injurious to the Indians; that while they had depended on the hunt in the past they should now turn to agriculture which would require much smaller parcels of land

and would be better for them in the long run. It seems that the President was plainly encouraging the Six Nations to sell their "surplus" land to New York State.

As early as 1808 the Federal Government and New York State were thinking of moving Indians from the east to the newly acquired lands in the west. In a letter dated December 21, 1808, Federal Indian Agent and New York State Judge, Erastas Granger wrote to Secretary of War Dearborn concerning problems he was encountering as Federal Indian Agent in New York State. He wrote of white citizens who were constantly stealing from and generally harrassing the Indians of the Six Nations and stated that there existed in the minds of many white people in the United States a strong prejudice against the Indians. He then spoke of the fact that he had learned the Federal Government had purchased from certain Indian tribes a large tract of country lying west of the Mississippi River, and stated that if the Federal Government would allocate some of that land to the Six Nations he might be able to persuade them to move to such western lands where they would be free of the harassment of the New York State citizens and beyond the influence of British agents and factors. He expressed the opinion that the Six Nations might form a good barrier against the unfriendly and hostile Indians residing in the west and that the western country would be more suitable to the work of civilizing the Six Nations.

On February 19, 1810, Red Jacket, a leader of the Seneca Indians, on behalf of himself and other leaders of the Six Nations, directed a message to the President of the United States, translated by agent

Jasper Parrish in the presence of agent and Judge Erastas Granger. This communication also contained complaints of the numerous depredations committed against the Indians by the whites in New York State and the failure of the Federal Government to live up to its 1794 Treaty committments to protect and indemnify the Six Nations. He reminded the President that at the time of the Treaty of 1794 the Federal Treaty Commissioners had warned the Six Nations that the time might come when enemies of the United States would endeavor to alienate the friendship of the Indians, and he stated that the time had indeed come. He said that he was aware of chronic disputes existing between the United States and England and of the efforts of the British agents in Canada to turn the western Indians against the United States. He said that a general council of the Six Nations had been called and it had been resolved that they would be loyal to the United States and that a large deputation of Six Nation Indians had been sent to a council in the west to persuade those Indians to also remain loyal to the United States.

As stated above, after 1795, the Federal Government made no effort to prevent the Oneida Indians from negotiating with New York State for the sale of their lands, and in fact, Federal Indian agents who were present in New York State took an active role in subsequent treaties between the United States and the Oneida Indians and also in encouraging the removal of the Oneidas and other members of the Six Nations from New York State to the west. In 1810 the Ogden Land Company was formed to exploit the preemption rights it owned in land belonging to the Six Nations in the western part of the State of New York, primarily land which was located in the Seneca reservations. David A. Ogden was at one time a representative of the State

of New York in Congress. Peter B. Porter, another partner in the Ogden Land Company, became Secretary of War of the United States in 1828. Two other active partners were Thomas L. Ogden and Robert Troup. These men apparently had considerable influence in New York State Government as well as in Federal Government circles. It was the purpose of this company to have the State of New York purchase the land of the Six Nations and then the company could exercise its preemption rights by buying the land from the State of New York. The citizens of New York State were very eager to have the Indians leave the state and as the memorials from the various chiefs of the Six Nations indicate, they made life as unpleasant as possible for the Indians living in their midst. Indian agents Granger and Parrish were deeply involved in the plans of both New York State and the Ogden Land Company to bring about the removal of the Six Nations to the west and the acquisition of their lands by New York State. In 1808 Agent Granger wrote to Secretary of War Dearborn suggesting that it would be in the best interest of the Indians to move to lands west of the Mississippi which the Government had recently acquired. He expressed confidence in his ability to persuade the Indians to move. In 1811 Agent Jasper Parrish wrote to Governor Tompkins of New York offering to solicit the Senecas to sell some of their lands to New York State. Subsequently there was continuous correspondence between the Secretaries of War and the Governors of New York State regarding the removal of the Six Nations to some country in the west. At some point Jasper Parrish became at least an informal employee of the Ogden Land Company and the record contains evidence that he was paid for his services in attempting to bring about

the sale of Indian lands to New York and the removal of New York Indians west.

In the correspondence between the Federal officials and the New York State officials and also between the Federal officials and the Ogden Land Company partners concerning the removal of the New York Indians there was a good deal of discussion about the proper place to remove them but never any discussion about the legality or illegality of the sale of New York Indian lands to the State of New York. The Federal Government was hesitant to move the New York Indians to Indiana, Ohio or Illinois although Federal officials felt the more civilized New York Indians would have a good effect on the western Indians and would insure the loyalty of those Indians to the United States in the event of further trouble with Great Britian after the War of 1812. However, the Federal Government pointed out to New York State that if some of the New York Indians were settled in strategic locations in Ohio, Illinois, or Indiana and the Government later wished to acquire that property for itself it would be much more difficult to get it from the New York Indians than from the Indians who were already there. After much correspondence it was decided to allow the New York Indians to attempt to buy land from the Winnebagos and Menominee Indians in the Michigan Territory in a location near Green Bay in what is now the State of Wisconsin. Our findings detail the long and complicated negotiations between the New York Indians and the Menominees and Winnebagos and the part played in those negotiations by the Federal Indian Agents, the Ogden Land Company, the State of New York and the Federal Government. In 1818

David Ogden wrote to President James Monroe at the Presidents request, and gave him the history of the removal effort up to that time. In that report Mr. Ogden informed the President that the Six Nations were receiving approximately $16,000 per year in annuities from New York State. In 1818 Ogden was then a member of Congress from New York and was attempting to have Jasper Parrish made the chief agent for the Six Nations in the place of Erastus Granger. In his correspondence with Parrish during that year it was clear that both of them were deeply involved in the business of getting the Six Nations out of New York, and if possible west of the Mississippi River. At one point David Ogden became very disturbed at the news from Parrish that there was a move on foot to move the Onondaga and Oneida Indians to the Tonnewanda and Buffalo reservations on which land the Ogden Land Company had preemption rights. This move, if carried out, would delay the acquisition of that land by New York State and ultimately by the Ogden Land Company. Parrish and the members of the Ogden Land Company had also become aware of the activities of certain missionaries who were living in the vicinity of the Six Nations and who were attempting to persuade them to hang on to their land and to refuse to move west. Ogden suggested to his partner,Mr. Porter, that if those people really had any influence on the Indians it might be advisable to find some way to "quiet them."

Some of the Indians themselves became deeply involved in the removal plans, notably a Reverend Williams, an Indian from the St. Regis tribe with an English education, who resided for a while with the Oneidas and converted

many of them to Christianity. He involved himself with the Ogden Land Company, with officias of the State of New York and with the Federal Indian agents in New York State in connection with the removal plans particularly the plan to remove the Indians to the area near Green Bay in Wisconsin. Ultimately land was purchased by the Six Nations from the Winnebagos and Menominee Indians only to have part of it ceded by the Menominees to the United States Government. After a great deal of confusion and negotiation another treaty was entered into by the United States and the Menominees, and land was set aside in Wisconsin for the Six Nations if they desired to move there. At no time did the United States offer to buy the land of the Six Nations in New York and give them land anywhere else. It seems to have been understood by the Federal Government that the New York Indians would dispose of their land to the State of New York and then would move west. The Federal Government would guarantee the Indians land west of the Mississippi only if they would agree to remove and their expenses would be paid only if they moved.

The Oneida Nation was split on the matter of the wisdom of removing to the west. Some actually did go to Green Bay, Wisconsin, but many of them stayed in New York State. In November of 1818 the Oneidas directed a memorial to President James Monroe explaining their position on the question of removal. In the course of it they stated that "your petitioners have sold to the State of New York a great portion of their reservation. . ." They stated that they had been given to understand, and they hoped that it was not true, that the Government of the United States was determined to have them removed from their present abode whether they

were willing to go or not and they begged the Federal Government to reassure them on this score.

No more was heard of the Indian Trade and Intercourse Act in the correspondence, memorials and other official documents relative to the sale of New York Indian lands to the State of New York and the removal of the Indians to the west except in a memorandum dated March 17, 1819, written by David Ogden regarding the problem of securing title to the land on which that company had the preemptive right. In the memorandum Ogden admitted that securing the land "legally" would probably mean dealing with the United States Government and he mentioned in particular the fact that the Senecas and the Oneidas had treaties with the United States and that they were subject in all matters in trade and intercourse to the regulations of the Federal Government. He stated that the President of the United States had the power to enter into treaty negotiations with those Indians and that as a matter of public concern for the interest of the State of New York he was sure that the President would at all times be inclined to give effect to New York State's views and wishes on the matter of securing title to the lands of the Indians residing in New York State. Mr. Ogden proved to be a true prophet.

In August of 1821, the Oneida Chiefs and Headmen again wrote to President James Monroe complaining of their treatment by New York State and of the indifference toward their welfare shown by the Federal Government. They also complained about the Reverend Williams, their missionary, who had gone to Green Bay, Wisconsin, to obtain lands from the western Indians for the Oneidas and other members of the Six Nations to move to. They expressed

outrage and confusion that their minister should plan to get their land away from them and to settle them among wild Indians in the west and said that they would not go west. They said that their reservation had already been diminished and was very small, but they hoped to keep what they had for themselves and for the generations that would come after them. They warned the President that it was probable that the Reverend Williams was acting out of selfish motives and was getting something out of the transaction for himself. They mentioned in particular how small their reservations in New York had become and reminded the United States of the close and friendly relations they had alwayes enjoyed with the United States since the beginning of the Revolutionary War. Secretary of War Calhoun responded to the Oneidas, attempting to assure them that they would never be forced to go west unless they wished to do so, but that he felt it would be to their advantage to remove beyond the white settlements and it was for this reason that a deputation of the Six Nations with the Reverend Williams had been allowed to visit the western Indians at Green Bay, Wisconsin. On January 22, 1822, the Oneidas wrote to President Monroe again complaining of the actions of Reverend Williams and also of the Ogden Land Company who were trying to persuade the Oneidas to go to Wisconsin. The President was told that the Reverend Williams had been dismissed from their midst and that he should never be considered as representing the Oneida Nation. They also warned the President that there were some individuals in the tribe who had probably been bribed by Williams and would represent to the President that the tribe was willing to sell their lands to New York and move west, but that the whole scheme had

been contrived by speculators in the Ogden Lane Company whose sole object was to get the Indians away from their land. The Oneida Chief writing the memorial said that the Stockbridge Indians were apparently willing to go west but that the Stockbridge had no authority to speak for the Oneida Nation. The President was reminded that for a long time the Oneidas had been engaged in the art of cultivating their land; that they had established a religious community and had founded a school for the education of their young people. They stated that if they left their home in New York it would mean giving up all the advantages of civilization for the privilege of going back to hunting and fishing. They then said that they had discovered that Captain Parrish, their Indian Agent, had become deeply involved in the plan to remove the Oneidas from their land.

In 1823 Thomas Ogden of the Ogden Land Company wrote to the Secretary of War telling him that the Six Nations would be satisfied with the tract which had been purchased from the Menominee and Winnebago Indians in Wisconsin and stating that one of the two main parties in the Oneida Nation were very much against moving from their New York reservation. He reminded the Secretary of War that the Ogden Land Company held the preemptive right to much of the Six Nations' reservation land and that the company had always been active in promoting negotiations in the Michigan Territory and in attempting to persuade the New York Indians to remove thence. He said that the Christian Party of the Oneida Nation were more disposed to go to the west but that they were confronted by the numerical superiority of their opponents in the tribe who were acting under the influence of "an unprincipled and contumacious leader openly opposing every effort to civilize and instruct

his countrymen."

In April of 1824 Commissioner of Indian Affairs Thomas McKenney wrote to the chiefs of the Oneidas, Onondagas and Seneca Indians encouraging them to go west but assuring them that they would not be forced out of New York State by the Federal Government. In reply to the complaint made the previous year regarding their agent, Jasper Parrish, and their minister, the Reverend Williams, the Commissioner said that he had referred their complaint to General Porter (a partner in the Ogden Land Company and later to become Secretary of War) and that Porter had found the Oneida's charges not to be well founded. Commissioner McKenney advised the Indians that the Federal Government believed that they would be far better off in Wisconsin but that no force would be applied to require them to leave New York State.

On February 11, 1825, Soloman Hendricks wrote to the Secretary of War regarding the removal of members of the Six Nations to Green Bay, Wisconsin. He advised Secretary Calhoun that he had been appointed by the Indians to represent them and present a petition to the New York State Legislature asking that the Indians be paid in full the value of the lands they owned in New York whenever they were ready to move to Green Bay. He stated that the state had only given $2.00 an acre for the Indian's land when they purchased it. He said that a bill then before the New York State Assembly to purchase the land would probably pass. He adivised Secretary Calhoun that the Stockbridge Indians were making plans to move to Green Bay, Wisconsin and that they were selling their remaining land in New York State to the State of New York.

On January 15, 1827, Jasper Parrish, as agent for the Six Nations in New York, wrote to Commissioner McKenney giving him the required information regarding the Six Nations still in New York State. He told him, among other things, that the Oneida Nation had sold part of their lands to New York State in the preceeding year. He reported the decrease in the number of Indians living on the reservations, mentioning particularly the Oneidas some of whom had already gone to Green Bay, Wisconsin. He reported that the Seneca Nation had sold 5 small reservations on the Genesee River and part of three other reservations to the owners of the preemptive rights in that land. Parrish's reference to the Oneida's sales to New York State were concerned with the Treaty of February 1, 1826, between the First Christian Party and New York State.

Correspondence continued between partners of the Ogden Land Company and Federal officials in Washington, D. C., concerning the removal of the New York Indians in general and the Oneidas in particular.
The Ogden Land Company was greatly disturbed over disputes which had arisen over the amount of land which had been secured for the New York Indians from the Menominee and Winnebago Indians and were urging the Government to settle the matter. In December of 1827 Commissioner of Indian Affairs, McKenney wrote to Mr. Troup of the Ogden Land Company expressing the Federal Government's support of the plan to move the Six Nations to the Green Bay area. He assured the Ogden Land Company that the Government was aware of the great interest that company had in being sure that the Six Nations got clear title to the land in Wisconsin so that those who moved there might safely remain in Wisconsin and that others might be persuaded to follow them.

Commissioner McKenney wrote similar letters to Thomas Ogden on January 2, 1828, and also on January 15, 1828, assuring Mr. Ogden that it was the intention of the United States Government to rid New York of its Indians and move them to Green Bay as soon as possible. On February 26, 1829, Peter B. Porter, who was a partner in the Ogden Land Company, and had been appointed Secretary of War, named Nathan Sargeant as Indian Agent at Green Bay with responsibility for the New York Indians living in that area. On June 4, 1829, the new Secretary of War, John Eaton, wrote to Jasper Parrish telling him that while the Federal Government felt that it would be in the best interest of the New York Indians for them to leave the State of New York and settle in Green Bay, there were no means at the disposal of the Government to assist them in that move, and that the Indians should be told that when they got to Green Bay they could then place themselves under the protection of the United States and under the Federal laws made for the governance of Indian affairs. He suggested that since New York State was particularly interested in having the Indians leave the state, it might be well for Parrish to go to the state and ask for its financial help in moving the Indians from the state.

On December 23, 1829, Thomas Ogden of the Ogden Land Company wrote to Commissioner of Indian Affairs McKenney advising him that the Oneida Nation had sold a portion of their land to the State of New York in the expectation of moving to Green Bay, Wisconsin. This letter refers to the Treaty of October 8, 1829, between the First Christian Party and New York State. Ogden expounded his views on the right of the original states to extend the operation of their laws over the Indian tribes within their borders, notwithstanding

"the views of William Penn to the contrary". The Society of Friends had taken a strong position on illegality of the sales to the states by Indian tribes without the sanction of the Federal Government. Ogden was taking exception to this view and urging the legality of the New York treaties buying land from the Six Nations. He spoke disparagingly of what he called the "Georgia business" and was scornful of the efforts of the Quakers who were trying to persuand the Indians to remain in New York State and hang on to their lands. It is perhaps worthy of note that in the case of Georgia, one of the 13 original states, the Federal Government felt obliged to enter into treaties with the Indians residing in that state and purchased their land which the United States then turned over to the State of Georgia. The Federal Government felt under no such obligation with regard to the Indians in the State of New York.

On February 13, 1830, Secretary of War Eaton wrote to John Bell, Chairman of the House Committee on Indian Affairs, defending the removal policy of the Federal Government and the resettling of the Indians from the east on western lands. The Secretary referred to the conflicting legal opinions concerning federal and state control over Indians residing within the borders of the original states. He stated that in his opinion the denial of the states' right to deal with the Indians within their borders was denying the sovereignty of the particular state. He stated that the time had come when the Indians should be made to understand that their best interest lay in removing to the west, and that the compacts called "treaties and upon which they rely are of no sufficiency against the sovereignty and power of a state." He said he felt the Indians must be persuaded to leave the statesand go where the Government could <u>legally</u> care for them.

On March 8, 1830, Commissioner McKenney wrote to Chairman Bell stating that about 5,000 Indians from New York would be moving to Green Bay, Wisconsin. On March 25, 1830, Superintendent Ingersoll wrote to Indian Commissioner McKenney reporting that the Orchard Party of the Oneida Indians was planning to sell its land and that if Mr. McKenney could offer sufficient inducements, Mr. Ingersoll believed that all of the Oneidas would ultimately sell their land and go to Wisconsin. Since the United States was not buying Oneida land, Ingersoll could only have been referring to purchases by the State of New York.

In 1831 members of the Ogden Land Company were again in communication with the Secretary of War expressing their displeasure over the confusion regarding the land around Green Bay, Wisconsin, upon which the New York Indians were supposed to settle. Federal Officials were reminded that the Ogden Land Company had preemptive right to much of the land being occupied by the Indians in New York State and that until the Indians sold their land and moved to Wisconsin the company did not know what it was going to do. The Commissioner was advised of the fact that New York State had often purchased land from the Six Nations and would wish to purchase more in the future, but could not do so until the Federal Government found a place for the Six Nations to live in the west. Mr. Ogden stated that if there was any way of straightening out the matter of the extent of the Six Nations land in Wisconsin he would be willing to go to Washington to help out. In November of 1832, Secretary of War Lewis Cass wrote to Agent James Stryker in Buffalo, stating that the removal of the New York Indians

to the Green Bay area would be in the best interest of those Indians. He asked Stryker to communicate this view to the Indians and to determine upon what terms they could be persuaded to leave New York. He then stated as follows:

> . . . as the right of reversion in their land is not vested in the United States, but in individuals holding under the State of New York, the Government has no pecuniary interest in the accomplishment of this measure. Its only object is to improve the condition of the Indians.

Cass then stated that all the Indians could expect from the United States was the expense of removal and some arrangement for their temporary subsistence in a country where they would settle. In fact, the Federal Govern ment refused to pay the expenses of delegationsof Indians wishing to go out and inspect lands in Wisconsin and on the Arkansas River west of the Mississippi River. Finally in 1834 the War Department decided that it would finance a small delegation of Seneca Indians to go and look at land west of the Mississippi River.

In our findings we have outlined in some detail the negotiations leading up to the Treaty of Buffalo Creek of January 15, 1838, 7 Stat. 550. It is apparent that the negotiators for the Federal Government were well aware that the Ogden Land Company owned the preemptive rights to the Tonnawanda Reservation and to part of the Seneca Reservation and those representatives felt that political jurisdiction over the tribes and the real fee in the land belonged to the State of New York and was not in the Federal Government. With respect to the Oneida Indians who were partly in Madison County and

partly in Oneida County, one of the Treaty Commissioners, Federal Indian Agent Gillet, advised the Commissioner of Indian Affairs that the fee title to the land was in the State of New York and therefore the Oneidas would have to make a treaty with the Governor of New York State relinquishing their interest in those lands. He stated that he felt the Oneidas should be guaranteed another home before they sold their lands to New York State and noted that some of the Oneidas had already gone to Green Bay,Wisconsin and held their lands under a treaty with the Menominee Indians. By this time the Indians living in Green Bay, Wisconsin, were faced with the necessity of moving west of the Mississippi since they were being forced to give up their lands in Wisconsin.

During this entire period the only voices being raised on behalf of the Indians and urging that the negotiations between the Indians and New York State were somewhat illegal were the missionaries who lived with the Indians and a Committee of the Society of Friends. There is no indication in the record that the Federal Government bothered to respond to the protests of the missionaries or the Society.

The Government's contention that the United States cannot be held to have had constructive notice of the treaties at which a Federal Representative was not present does not stand up in the light of the record in this case as reflected in our findings of fact. Defendant speaks of the hostility of the State of New York and that it was an effective bar to the Federal Government's obtaining reliable information concerning New York's dealings

with their Indians. There may have been hostility between New York State officials and Federal officials at the time of the treaty of Fort Stanwick in 1784, but from 1795 on no such hostilities existed. Far from an on-going struggle for supremecy between the Federal Govemment and the State of New York as to the jurisdiction over New York's Indians referred to by the defendant, responsible official of the Federal Government actually expressed the opinion that New York had the paramount rights to control the affairs of the Indians within its borders.

Assuming, without deciding, that Government liability in this case would depend on Federal knowledge prior to the negotiations of the New York Indian treaties rather than knowledge of the treaties acquired after they had been executed, we believe that this record indicates that the Federal Government was fully aware of New York's negotiations with the New York Indians at all times. The record also indicates that the United States had no desire to take any action to prevent New York from doing what would otherwise have been the Government's job, i.e., buying lands from the New York Indians in order to persuade them to move west. The Federal Government's removal policy applied not just to New York State,but to the entire Atlantic seaboard. In New York State the state was carrying out policy with very little Government help and that evidently was much to the liking of the Federal Government.

As for defendant's argument that the Indians voluntarily relinquished their title to their lands in New York, we believe the record shows that the Oneida Indians were not acting voluntarily in treating with New York

State over their lands. In any event, if the Oneidas did act voluntarily, the treaties were none the less illegal and invalid under the Indian Trade and Intercourse Act in effect during the time the treaties were entered into. Furthermore, the voluntariness of their action, if such it was, did not absolve the United States under the Trade and Intercourse acts and under the Fair and Honorable dealings clause of the Indian Claims Commission Act from attempting to advise the Oneidas of the consequences of what they were doing and of the fact that they did not need to to sell their land to the State of New York and indeed should not do so. In carrying out its general removal policy the Government required cessions to itself of lands in Georgia from the Indians in that state, but it had no need to do so in New York State, because New York was doing it for them.

For the foregoing reasons and based upon the record in this case, we conclude that the United States had actual knowledge of the treaty of September 15, 1795, between the Oneida Indians and the State of New York and that the United States also had actual knowledge of the treaties of June 1, 1798,and June 4, 1802, between the same parties there having been Federal representatives present at both treaties. We further conclude that the United States is chargeable with constructive knowledge of all of the treaties entered into between the Oneida Indians and New York State beginning with the treaty of March 21, 1805, and ending with the treaty of February 24, 1837. Defendant concedes that in the light of article 13 of the Treaty of Buffalo Creek, January 15, 1838, 7 Stat. 550, the United States authorized future purchases by New York State of Oneida lands and that therefore the United States is chargeable with.

actual knowledge of the subsequent treaties between the Oneidas and the State of New York. We further conclude that based upon these conclusions the United States will be liable under the Indian Claims Commission Act if the Oneida Indians received less than conscionable consideration for the loss of their lands to New York State under each of the twenty five treaties involved in these claims. Whether New York State acquired valid title to the lands which were the subject of the various treaties is not at issue in this case as it was not in claims 1 and 2 under this same docket, because the Government's liability rests not upon the passage of title from the Oneidas to New York State, but rather on the Government's failure to live up to its fiduciary obligation under the Indian Trade and Intercourse Act and to deal fairly and honorably with the Oneida Indians within the meaning of Clause 5 of section 2 of the Indian Claims Commission Act.[1/]

Questions of damages and consideration will be determined in further proceedings.

Margaret H. Pierce
Margaret H. Pierce, Commissioner

Concurring:

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Brantley Blue
Brantley Blue, Commissioner

1/ See footnote 26 regarding the issue of extinguishment of Oneida title of cessions to New York in the Court of Claims decision entered May 17, 1978 in U.S. v. Oneida Nation of New York et al. Docket 301, Claims 1 and 2, _____Ct. Cls. _____.