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## SPECIAL FEATURES

### CLAIMS ARISING: THE ONEIDA NATION OF WISCONSIN AND THE INDIAN CLAIMS COMMISSION, 1951-1982

*Karim M. Tiro\**

#### *I. Introduction*

The Oneida Indian Nation of Wisconsin is one of three Oneida tribes<sup>1</sup> today whose members trace their descent to the Oneida tribe that existed in present-day New York State when the first Europeans arrived, and constituted one of the Five (later Six) Nations of the Iroquois League. The Wisconsin Oneidas were a party to multiple claims before the Indian Claims Commission (ICC), usually as co-plaintiffs with other tribes, including other Oneidas.<sup>2</sup> These claims ranged widely across the spectrum of issues the Commission considered; in addition to their claims involving land ceded by treaty, the Wisconsin Oneidas were among the small number of tribes who filed accounting and mismanagement claims.<sup>3</sup>

An overview of the Wisconsin Oneidas' ICC claims provides a broad tour of the Commission's areas of activity as well as a glimpse of tribes' turbulent experience in the century following the American Revolution. Furthermore, the Commission's legacy is dramatically illustrated by the relationship

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1. The three Oneida tribes are the Oneida Nation of Wisconsin, the Oneida Indian Nation of New York, and the Oneida Nation of the Thames (Ontario). I use the term "Oneida" inclusively to designate all Oneida groups party to a particular claim, and "Wisconsin Oneida" (or "New York Oneida") to designate that particular group when they acted separately from the others. In the ICC cases that relate to Wisconsin exclusively, "Oneidas" refers to the Wisconsin Oneidas only. Canadian tribes could not bring claims before the ICC.

2. *See, e.g.*, Oneida Nation of N.Y. v. United States, 41 Indian Cl. Comm'n 391 (1978); Oneida Nation of N.Y. v. United States, 26 Indian Cl. Comm'n 138 (1971); Six Nations v. United States, 23 Indian Cl. Comm'n 375 (1970); Oneida Tribe of Indians of Wis. v. United States, 12 Indian Cl. Comm'n 1 (1962); Emigrant N.Y. Indians v. United States, 5 Indian Cl. Comm'n 560 (1957). ICC decisions are available online at Indian Claims Commission Decisions, <http://digital.library.okstate.edu/icc/index.html> (last visited Mar. 11, 2008).

3. MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 233-34 (1997).

between the Oneidas' ICC suits and their landmark land claims in the federal courts.<sup>4</sup>

## II. "Finally": The Origin and Purpose(s) of the Indian Claims Commission

According to Harvey D. Rosenthal, formerly the official historian of the ICC, the Commission was created by Congress in 1946 "to deal *finally* with the long-standing claims of Native Americans against the Federal Government."<sup>5</sup> Rosenthal's italics signal that this "finally" was understood differently by distinct constituencies that supported the ICC's creation. The ICC's first supporters partook of a backward-looking regret for past wrongs, now to be rectified belatedly. But they were joined by others who looked forward to an ultimate reckoning as a way to hasten the dissolution of Indian identities. The Commission's mandate thus encompassed disparate and contradictory rationales; nevertheless, this linguistic pliability was a necessary condition of the Commission's creation in a democratic political system.<sup>6</sup>

The initial momentum behind the idea of a commission came from a new generation of bureaucrats who had been brought to Washington by Franklin D. Roosevelt. Men like Secretary of the Interior Harold Ickes and his Commissioner of Indian Affairs, John Collier, demonstrated a high degree of interest in and respect for Native American cultures compared to most of their predecessors (and many of their successors as well). Recognizing the inherent injustice of the legal predicament of Native Americans, the policies they crafted, collectively dubbed the "Indian New Deal," militated for the strengthening of tribal structures.<sup>7</sup>

Indian tribes had longstanding grievances involving their treaties, but had no access to the federal courts until 1875.<sup>8</sup> Even after that, the doctrine of sovereign immunity precluded suits against the United States unless the plaintiff successfully undertook the burdensome task of obtaining special enabling legislation from Congress. Legal action against states was inhibited

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4. See *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *County of Oneida v. Oneida Nation of N.Y.*, 470 U.S. 226 (1985); *Oneida Nation of N.Y. v. County of Oneida*, 414 U.S. 661 (1974); *Oneida Nation of N.Y. v. New York*, 860 F.2d 1145 (1988).

5. IMRE SUTTON, *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 35 (1985).

6. HARVEY D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* 73 (1990).

7. See GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-45*, at 17-18 (1980).

8. *The Supreme Court, 1984 Term — Indian Land Claims*, 99 HARV. L. REV. 254, 260-61 (1985).

by the Eleventh Amendment, and local hostility compromised Indians' ability to obtain redress in state courts.<sup>9</sup> Indians were caught in a legal tangle. In 1916, the federal government intervened in one notable case — *United States v. Boylan* — to defend land rights of the New York Oneidas, but declined to take further action.<sup>10</sup>

Adjudication of such claims in the federal courts became less viable over time, in part because Native Americans were disadvantaged by poverty and unfamiliarity with the legal system. Through the 1920s, they filed increasing numbers of requests for legislation permitting their claims to proceed. Although some of these requests were granted, dealing with the requests drew significant resources from the government.<sup>11</sup> As a result, various proposals were made for the airing and adjudication of Indian claims, including, most notably, the 1928 Meriam Report.<sup>12</sup>

The proposals languished. Although some of the delay was undoubtedly related to the Great Depression and World War II, lack of action could also be attributed to policymakers who feared the consequences of the United States being subject to potentially staggering liability under any circumstances. Thus, legislators and bureaucrats closely scrutinized and criticized any proposed entity for the adjudication of claims. The process eventually moved forward, but not because of the adoption by growing numbers of an “enlightened” attitude toward Indian rights, or the creation of a viable plan for the Commission.

Instead, congressional approval was the product of increasing support for a new, assimilationist Indian policy known as termination. Termination promised to definitively end relations between the government and Native Americans. For proponents of termination, including President Truman, the ICC was viewed as an opportunity to discharge any lingering, residual debts,

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9. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 769-71 (1992); Ward Churchill, *Charades, Anyone? The Indian Claims Commission in Context*, 24 AM. INDIAN CULTURE & RES. J. 47 (2000); *The Supreme Court, 1984 Term — Indian Land Claims*, *supra* note 8, at 260; John Eduard Barry, *Oneida Indian Nation v. County of Oneida: Tribal Rights of Action and the Indian Trade and Intercourse Act*, 84 COLUM. L. REV. 1852, 1858-60 (1984).

10. *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd* 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 641 (1921); ANTHONY WONDERLEY, ONEIDA IROQUOIS FOLKLORE, MYTH, AND HISTORY: NEW YORK ORAL NARRATIVE FROM THE NOTES OF H.E. ALLEN AND OTHERS 192-210 (2004); John Tahsuda, *The Oneida Land Claim: Yesterday and Today*, 46 BUFFALO L. REV. 1001, 1003-05 (1998).

11. See ROSENTHAL, *supra* note 6, at 18-19; see LIEDER & PAGE, *supra* note 3, at 53-57.

12. See ROSENTHAL, *supra* note 6, at 52; LEWIS MERIAM ET AL., THE PROBLEM OF INDIAN ADMINISTRATION (1928).

thereby ensuring that when the government closed the books on its relations with Indians, they would stay closed.<sup>13</sup>

Taking a wider perspective, Ward Churchill has argued that the United States took up the matter of Indian claims to burnish its international image in the run-up to the Nuremberg trials.<sup>14</sup> Certainly the treatment of minorities became a more sensitive subject during the Cold War, and the ICC could be useful to deflect criticism.<sup>15</sup> Embraced by very different constituencies with very different goals, the ICC represented simultaneously the last major initiative of the Indian New Deal and the first of the Termination Era.<sup>16</sup>

### *III. Docket 75: The Wisconsin Land Claim*

The first disposal of a Wisconsin Oneida case came in 1962. The Wisconsin Oneidas and Stockbridge-Munsees were co-plaintiffs (under the umbrella moniker "Emigrant New York Indians") in a land claim related to their settlement in Wisconsin (then Michigan Territory).<sup>17</sup> In 1822, two Oneidas of the First Christian party and several Stockbridges, led by the Oneidas' St. Regis Mohawk missionary, Eleazer Williams, entered into a treaty with Menominees for rights to settle on their land.<sup>18</sup> Backed by western New York land speculators, Williams's goal was to secure a western home for all the Indians of upstate New York.<sup>19</sup>

The representatives on both sides who negotiated the cession had highly dubious authority to do so; nevertheless, according to a treaty signed on Sept. 23, 1822, the "New York Indians" acquired the right to cohabitate with the Menominees on a tract of land that was eventually fixed at 3,931,000 acres.<sup>20</sup> President Monroe gave his approval to this treaty in March of 1823.<sup>21</sup>

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13. See Churchill, *supra* note 9, at 52-53; LIEDER & PAGE, *supra* note 3, at 60-61; William T. Hagan, "To Correct Certain Evils": *The Indian Land Claims Cases*, in IROQUOIS LAND CLAIMS 20 (Christopher Vecsey & William A. Starna eds., 1988). On the Oneidas of Wisconsin, see Laurence M. Hauptman, *Learning the Lessons of History: The Oneidas of Wisconsin Reject Termination, 1943-1956*, 14 J. ETHNIC STUD. 31-52 (1986).

14. See Churchill, *supra* note 9, at 51-52.

15. LAURENCE M. HAUPTMAN, *THE IROQUOIS STRUGGLE FOR SURVIVAL: WORLD WAR II TO RED POWER* 190 (1986).

16. JOHN R. WUNDER, "RETAINED BY THE PEOPLE" A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 89-91 (1994); see LIEDER & PAGE, *supra* note 3, at 60-61.

17. *Emigrant N.Y. Indians v. United States*, 5 Indian Cl. Comm'n 560 (1957).

18. *Id.* at 569-75.

19. *Id.*

20. *Id.* at 572-74.

21. *Id.* at 574.

However, amidst complaints from the Menominees, a brewing war with the Winnebagos, and an emerging policy to move all the natives beyond the Mississippi, the federal government quickly backtracked on its recognition of the New York Indians' claims to Wisconsin lands. By the Stambaugh treaty signed in 1831, the federal government reduced the New York Indian acreage to 569,120, with provisions to reduce it further if more Indians did not emigrate from New York.<sup>22</sup> In the supplementary treaty of Oct. 27, 1832, the New York Indians agreed to this simply to secure some guaranteed land base after years of uncertainty.<sup>23</sup> Ultimately, through the treaty signed at Washington on Feb. 3, 1838, Oneidas residing at Duck Creek near Green Bay agreed to receive a reservation of just one hundred acres per capita.<sup>24</sup> As a result, a reservation was created for them amounting to 65,000 acres.<sup>25</sup>

The legitimacy of the treaty of September 23, 1822, between the 'Emigrant Indians' and the Menominees was problematic, but the Commission deemed that its mandate was only to look into whether the federal government "acted properly in its course of dealings with plaintiffs."<sup>26</sup> In 1957, the three commissioners, Arthur Watkins, T. Harold Scott, and William Holt, determined that it had not. Despite its initial recognition of the 1822 proceedings, in subsequent treaties, the U.S. failed to acknowledge the New York Indians as co-holders of aboriginal title to lands in Wisconsin, and permitted the "New York Indians" to be railroaded into accepting a smaller tract.<sup>27</sup> Thus, the federal government was now responsible to the "New York Indians" for their half-interest in the nearly four million acres (minus whatever lands had in fact been secured to them). In 1962, the Commission issued an opinion that, based upon a valuation of land at eighty cents per acre in 1832, the Oneida of Wisconsin and the Stockbridge-Munsee were owed the sum of \$1,488,629.60.<sup>28</sup>

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22. Treaty with the Menominee, Feb. 8, 1831, 7 Stat. 342; Treaty with the Menominee, Feb. 17, 1831, 7 Stat. 346.

23. Treaty with the Menominee, Oct. 27, 1832, 7 Stat. 405; Appendix to Treaty with the Menominee, Oct. 27, 1832, 7 Stat. 409; *Emigrant N.Y. Indians*, 5 Indian Cl. Comm'n at 603-04.

24. Treaty with the Oneidas, Feb. 3, 1838, 7 Stat. 566, art. 2.

25. The Oneidas filed an ICC claim that they had not received the correct acreage. However, since the extent of land they did receive was considered an offset against their award in this case, the claim was dismissed. *Oneida Tribe of Indians of Wis. v. United States*, 18 Indian Cl. Comm'n 433, 433 (1967).

26. *Emigrant N.Y. Indians v. United States*, 5 Indian Cl. Comm'n 607, 621 (1957).

27. *Id.* at 625.

28. *Emigrant N.Y. Indians v. United States*, 11 Indian Cl. Comm'n 359, 385-86 (1962).

In 1964, the Commission ordered the correction of a computing error, which reduced the award to \$1,452,824.<sup>29</sup> The award was reduced by another \$139,351 due to the court's practice of allowing the defendant to deduct "gratuitous offsets."<sup>30</sup> These offsets represented monies spent by the federal government for tribal benefit even if they had not been disbursed in connection with the transactions in question. Against the award the government claimed — and the Commission allowed — sums as small as \$40 expended for funerals for indigent Indians in 1936.<sup>31</sup> While the offsets included agricultural equipment, the bulk (\$128,249.57) was for purchases or grants of land. The total final award in 1964 was \$1,313,472.65.<sup>32</sup> Of this, the Oneidas' share, which was not appropriated until 1967, was \$1,171,248.<sup>33</sup>

ICC land claim awards were based solely upon the difference between what the Indians had been paid and "fair market value" of the land *at the time of purchase*.<sup>34</sup> By not adjusting the award to compensate for over 150 years of inflation, the ICC gave the government an additional benefit by allowing payment of the judgment in twentieth-century dollars.

The Commission also adhered to the "no-interest rule" that applies to federal liability, taking the position that absent specific congressional authorization, it was unable to award interest.<sup>35</sup> But in adhering to the "no-interest rule", the ICC (and Congress) were not simply bowing to precedent: Application of the no-interest rule protected the treasury from awards that were large but justifiable. Given the fact that the Indians had been prevented from filing suit for so long, time and the no-interest rule essentially nullified awards.

#### IV. Docket 159: The Timber Stripping Claim

From the creation of the Duck Creek reservation in 1838, timber had been cut and sold off by individual tribal members, effectively denuding the forest on the 65,000-acre tract. Occasional Oneida requests for intervention led the federal agent to occasionally request individual Oneidas to stop, but no firm

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29. *Emigrant N.Y. Indians v. United States*, 13 Indian Cl. Comm'n 560, 573-a, 573-b (1964).

30. See ROSENTHAL, *supra* note 6, at 29-31, on the history of this practice prior to its adoption by the ICC.

31. *Emigrant N.Y. Indians*, 13 Indian Cl. Comm'n at 562.

32. *Emigrant N.Y. Indians*, 13 Indian Cl. Comm'n at 573-c.

33. Loretta Metoxen, "The New York Emigrant Claim and What We Did With It," in F.Y.I. NEW YORK LAND CLAIMS, ONEIDA LAND CLAIMS COMMISSION (Oneida, Wis., n.d.).

34. See Newton, *supra* note 9, at 820.

35. See *id.* at 820-21.

action was taken prior to 1870. At that time, suits were initiated against purchasers, compensation of about one thousand dollars secured, and unauthorized lumbering ended.<sup>36</sup>

Although the commissioners found that “the timber on the reservation was tribal property” and as such “could not be disposed of without the approval of the Government,” they did not grant the Oneidas relief.<sup>37</sup> The ICC cited the Oneidas’ lack of “clean hands”<sup>38</sup> since the cutting and sale of the timber had been effected by individual Oneidas and countenanced by some of their chiefs. Although the federal Indian agent to the Oneidas had knowledge of the removal of the timber, he had not played an active role in the mismanagement of the reservation’s timber resources. The absence of active involvement on the part of the agent distinguished this case from the successful Wisconsin timber case won by the Menominees before the Court of Claims in 1950.<sup>39</sup> Once again taking a narrow view of the federal trust responsibility, the commissioners denied that the guardian-ward relationship implied a duty to intervene to protect reservation resources, because no such obligation was specified in the treaty that created the reservation.<sup>40</sup>

On appeal, the Court of Claims rejected the Commission’s opinion that the government had no responsibility to protect the Oneida timber.<sup>41</sup> However, the court let stand the Commission’s decision on the grounds that the government’s responsibility had been fulfilled (albeit minimally) by whatever actions the agent had taken.<sup>42</sup>

#### *V. Docket 344: The Pennsylvania Land Claim*

The Wisconsin Oneidas were a party to a claim filed by the Six Nations collectively, challenging the acquisition from them of roughly the northwestern third of Pennsylvania in 1784, as well as the Erie Triangle in 1789. It was dismissed unanimously in 1963 by the same three commissioners

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36. *Oneida Tribe of Indians of Wis. v. United States*, 12 Indian Cl. Comm’n 1, 2-5 (1962); *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1873); *E.E. Bolles Wooden Ware Co. v. United States*, 106 U.S. 432 (1882).

37. *Oneida Tribe*, 12 Indian Cl. Comm’n at 2.

38. *Id.* at 20.

39. *Menominee Tribe of Indians v. United States*, 95 Ct. Cl. 232 (1941); see LIEDER & PAGE, *supra* note 3, at 232-33.

40. Commissioner T. Harold Scott differed from his colleagues on this point, stating that there were instances in which such a relationship existed absent specific language, although he did not say this was one of those instances. *Oneida Tribe*, 12 Indian Cl. Comm’n at 23.

41. *Oneida Tribe*, 165 Ct. Cl. 487, 493-94 (1964).

42. *Id.* at 494-500.



who had decided the previous two cases. At the heart of the Commission's reasoning for the dismissal was the relationship between the United States and Pennsylvania under the Articles of Confederation. The ICC was authorized to hear claims against the federal government, but the treaties under which the Six Nations lost these lands were signed with the state of Pennsylvania.

The power of Congress over Indian Affairs under the Articles of Confederation was poorly defined. Article IX granted Congress the power to "regulat[e] the trade and manag[e] 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."<sup>43</sup> According to James Madison, Article IX was "obscure and contradictory," and the definition of "Indians not members of any of the States" remained "a question of frequent perplexity and contention in the federal councils."<sup>44</sup>

The Commission narrowly interpreted the power of the federal government to regulate Indian affairs under Article IX; it held that an official of the federal government would have violated the Article by offering the Indians advice in their land negotiations with a state.<sup>45</sup> The Commission reasoned that because the United States was barred from playing any role in the treaty, it could not be liable for its outcome. The claim to the area encompassed by Pennsylvania's charter boundaries that was ceded in 1784 was therefore dismissed.

Another issue that arose during the Confederation period involved definitions of the geographical boundaries of the states. Surveys in 1786 and 1787 revealed that Pennsylvania had only a few miles of frontage on Lake Erie.<sup>46</sup> New York and Massachusetts had already relinquished their competing claims in the area, so the property reverted to the federal government. Pennsylvania promptly undertook to purchase the Indian title to what became known as the Erie Triangle in 1789.

Although circumstances therefore differed from the 1784 purchase, the Commission dismissed the Six Nations' claim to the Erie Triangle on the grounds that they had not established exclusive use or occupancy over the area. In the Commission's Eurocentric view, occupancy was defined as more

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43. ARTICLES OF CONFEDERATION art. IX (U.S.); *Six Nations v. United States*, 12 Indian Cl. Comm'n 98, 118 (1963).

44. THE FEDERALIST NO. 42, at 236 (James Madison) (E.H. Scott ed., Albert, Scott & Co. 1894).

45. *Six Nations*, 12 Indian Cl. Comm'n at 118.

46. DONALD H. KENT, HISTORY OF PENNSYLVANIA PURCHASES FROM THE INDIANS 202-04 (1974).

or less synonymous with village location.<sup>47</sup> Absent the tribe's ability to establish proof of fixed residence in the area, the claim did not proceed.<sup>48</sup>

The Six Nations then appealed to the Court of Claims. The Court of Claims focused more on the 1784 U.S. Treaty of Fort Stanwix than the Articles of Confederation.<sup>49</sup> The court affirmed the Commission's decision, and denied the appellants' contention that the treaty created a fiduciary relationship between the central government and the Six Nations as a whole.<sup>50</sup> The court held that "the most significant part of the treaty was merely a peace pact . . ."<sup>51</sup> However, the court left open the possibility that the treaty might operate differently upon the "friendly tribes" referred to in Article Two of that treaty, which read, "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."<sup>52</sup> Furthermore, the court stated, "If this separate provision is thought to have had greater meaning for these friendly tribes, it is enough to note that the lands on which they were settled did not include the Pennsylvania territory with which this case is concerned."<sup>53</sup> Thus, the adverse decision in docket 344 did not preclude a different outcome for the Oneidas' claims to lands in New York.

#### *VI. Docket 84: The Accounting Claim*

Another claim originating in the eighteenth century was an accounting claim that the Oneidas mounted in conjunction with the rest of the Six Nations and Stockbridge-Munsee. The Six Nations were parties to an agreement with the United States in 1792 and to the Treaty of Canandaigua in 1794. The United States entered into these agreements as part of an effort to win political support during a faltering Indian war in the west. On March 23, 1792, with a delegation of the Six Nations visiting Philadelphia, the president arranged an annual payment to them of \$1500 for "clothing, domestic animals and implements of husbandry, and for encouraging useful artificers to reside in their villages." The Senate gave its advice and consent, and the president ratified, but the stipulation was never fulfilled until it was superseded by the

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47. *Six Nations*, 12 Indian Cl. Comm'n at 120-21.

48. *Id.* at 119-21.

49. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15.

50. *Six Nations v. United States*, 173 Ct. Cl. 899, 906-07 (1965).

51. *Id.* at 906.

52. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, art. 2.

53. *Six Nations*, 173 Ct. Cl. at 899 n.6.

1794 Treaty of Canandaigua. The Canandaigua treaty promised a \$4500 annual disbursement for similar purposes.<sup>54</sup>

The ICC found that the monies spent on the conversion of the Indians to European-style agrarianism fell \$32,218 shy of the total \$711,000 to which the treaty entitled them up to 1952.<sup>55</sup> The \$4500 never paid under the 1792 article raised the total sum owed the Indians to \$36,718.<sup>56</sup> As in the other claims, this small sum might have appropriately been magnified to reflect their loss through the application of compounding interest. However, the timing of the underpayments was not addressed and the no-interest rule was again invoked.<sup>57</sup>

Gratuitous offsets were also applied. The Commission reduced the award by \$5,340.17 because the government had paid the expenses of various Six Nations delegations between the years 1842 and 1905; the Commission also deducted \$1,448 paid for flour and beef for Stockbridge-Munsee Indians in 1865. Not all offsets presented by the government were allowed. Disbursements benefitting individual tribal members, such as expenditures for orphans, were rejected. Expenses paid for tribal delegations disputing improperly negotiated treaties were also rejected. In seeking to limit the award, the federal government presented sums as small as \$86.65 expenditure in 1942 to investigate marl deposits on a reservation. That expense, at least, was rejected because its benefit to the tribe was unknown.<sup>58</sup>

In 1973, after deducting offsets, the Commission awarded the Six Nations and Stockbridge-Munsee \$29,930.<sup>59</sup> Although the sum was trivial, the proceeding at least recognized the ongoing obligations imposed by the Treaty of Canandaigua, which is a touchstone of Iroquois sovereignty vis-à-vis the United States.

### *VII. Docket 301: The New York Land Claim*

#### *A. Pre-1790 Claims*

In 1951, the Oneidas of Wisconsin, New York, and Canada filed a claim for approximately six million acres taken in treaties with New York State between

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54. 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 225, 229 (Washington, D.C., Gales & Seaton, 1832); *Six Nations v. United States*, 23 Indian Cl. Comm'n 387, 390-92 (1970); Treaty with the Six Nations, art. 6, Nov. 11, 1794, 7 Stat. 44.

55. *Six Nations*, 23 Indian Cl. Comm'n at 392-95.

56. *Id.* at 391, 400.

57. *Id.* at 396.

58. *Six Nations v. United States*, 32 Indian Cl. Comm'n 440, 440-52 (1973).

59. *Id.* at 453-59.

1785 and 1846. The first decision was not handed down until 1969, after the United States sought partial summary judgment. On the basis of its appellate victory in the Pennsylvania claim discussed above, the United States had requested the dismissal of those Oneida claims preceding passage of the Trade and Intercourse Act in 1790.<sup>60</sup> These happened to be the treaties of greatest consequence to the Oneidas, since more than ninety percent of their land at the end of the Revolution was ceded in treaties at Fort Herkimer in 1785 and Fort Schuyler in 1788. If the United States succeeded in removing these treaties from litigation, the Oneida claim would be reduced to roughly 250,000 acres.

The Commission rejected the government's motion for summary judgment. Commissioners Margaret Pierce, John Vance, Richard Yarborough, and Theodore McKeldin, distinguished this case from the Pennsylvania claim. They stressed the difference between the Oneidas' relationship with the United States and that of the Six Nations as a whole (the Pennsylvania plaintiff) at the end of the Revolutionary War.<sup>61</sup> In light of the Oneidas' fidelity to the United States and ample contemporaneous congressional recognition thereof, the ICC held that Congress intended to deal with them differently, and that Article Two of the Fort Stanwix Treaty had indeed created a special relationship. The federal government thus could be held liable because it failed to uphold its treaty commitment to its former allies that they "be secured in the possession of the lands on which they are settled."<sup>62</sup>

The majority of the Commission did not share their predecessors' opinion that addressing the Oneidas' dealings with a state would violate the Articles of Confederation. In arriving at their own conclusion, the Commission invoked its power to provide relief for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."<sup>63</sup> The Commission had the authority to consider moral claims,<sup>64</sup> but in keeping with the court format to which it adhered, it generally limited itself to legal ones involving land or money. In the absence of a more specific legal rationale, the most consistently pro-government commissioner, Jerome Kuykendall, dissented.<sup>65</sup>

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60. *Oneida Nation v. United States*, 20 Indian Cl. Comm'n 337 (1969).

61. *Id.* at 349-50. Theodore McKeldin served only temporarily and was replaced by Brantley Blue in May 1969.

62. *Id.* at 341-42; Treaty with the Six Nations, art. 2, Oct. 22, 1784, 7 Stat. 15.

63. *Oneida Nation of N.Y. v. United States*, 26 Indian Cl. Comm'n 583, 585-89, 624 (1971); Indian Claims Commission Act, § 2, 60 Stat. 1049, 1050 (1946).

64. See LIEDER & PAGE, *supra* note 3, at 66-67, 201; SUTTON, *supra* note 5, at 45.

65. *Oneida Nation*, 20 Indian Cl. Comm'n at 351; *Oneida Nation*, 26 Indian Cl. Comm'n at 591; LIEDER & PAGE, *supra* note 3, at 205.

In its 1976 opinion, the Commission found that the 1785 and 1788 treaties had been improperly negotiated by New York State. With respect to the first transaction, the Commission observed that “the Oneidas did not voluntarily part with their land . . . . They sold their land only in the face of unwarranted accusations and threats by Governor Clinton. . . . Under these circumstances the Oneidas had no choice but to sell the land which New York desired.”<sup>66</sup> The 1788 treaty was similarly problematic. According to the opinion, “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.”<sup>67</sup> The Commission concluded that

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.<sup>68</sup>

The Commission further concluded that the United States was aware of the transactions and that its intervention was not prohibited by the Articles of Confederation.<sup>69</sup> To reach the latter conclusion, the Commission was forced to explore the ambiguous language of Article IX.<sup>70</sup> In the Commission’s reading of that article, “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 overruled any inconsistent opinions in an earlier Docket 301 decision and in Docket 344.<sup>71</sup> Commissioner Kuykendall again dissented, challenging the political criteria used to define “Indians, not members of any of the States.” He stated the Commission’s conclusions “are too categorical, are not supported by the historical evidence of record, and have no judicial support.”<sup>72</sup>

The Court of Claims affirmed the Commission majority in 1978.<sup>73</sup> In its opinion, it upheld the Commission’s finding that Article II of the 1784 Treaty

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66. *Oneida Nation of N.Y. v. United States*, 37 Indian Cl. Comm’n 522, 526 (1976).

67. *Id.* at 529.

68. *Id.* at 530.

69. *Id.* at 535, 546.

70. *Id.* at 536-46.

71. *Oneida Nation*, 26 Indian Cl. Comm’n at 583, 588; *Six Nations*, 12 Indian Cl. Comm’n at 86, 118.

72. *Oneida Nation*, 37 Indian Cl. Comm’n at 556 (Kuykendall, Chairman, dissenting).

73. *United States v. Oneida Nation of N.Y.*, 217 Ct. Cl. 45 (1978).

of Fort Stanwix “incorporate[ed] the frequent pledges of protection made by the Continental Congress to the Oneidas and Tuscaroras with regard to their land.”<sup>74</sup> The Court of Claims also decided that under Article IX of the Articles of Confederation “the central government may not have been able to forbid the transactions, [but] the nature of the chicanery practiced upon the Oneidas suggest that feasible levels of assistance . . . might well have averted the harm.” Federal influence to mitigate the situation at the time was not only legal under the Articles of Confederation, but required by the Treaty of Fort Stanwix.<sup>75</sup> The United States’ liability was thereby affirmed.

### *B. Post-1790 Claims*

From 1969 onwards, the ICC had considered the pre- and post-1790 claims separately in light of the Trade and Intercourse Act passed by Congress. The act stated that “no purchase or grant of lands . . . from any Indians or nation or tribe of Indians . . . shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . .”<sup>76</sup> Although the Act explicitly established federal authority over Indian land cessions, the United States argued that this did not necessarily make it liable for actions in which it was not directly involved, and pointed out to the Commission the fact that federal representatives had been present at only two of the twenty-five transactions in question. In a 1971 opinion, the Commission refused to define the federal government’s duty so narrowly. If the federal government had knowledge of the treaties but did nothing, it could still be held liable.<sup>77</sup> The government also argued that the Act did not apply to New York as one of the original thirteen states, a position that the Commission rejected on the basis of its own decision in *Seneca*<sup>78</sup> as well as the Supreme Court’s in *Federal Power Commission v. Tuscarora Indian Nation*.<sup>79</sup>

The United States appealed in the Court of Claims, but without success. The appellate court reaffirmed the fiduciary relationship between the federal government and the Indians under the Trade and Intercourse Act. It remanded the case to the Commission to establish whether or not the federal government

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74. *Id.* at 57-59.

75. *Id.* at 61-62.

76. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 8, 1 Stat. 329, 330 (1793), available at <http://www.yale.edu/lawweb/avalon/statutes/native/na025.htm>. The 1793 version of the act was the version in effect in 1795, when the first of the purchases in question took place.

77. *Oneida Nation of N.Y. v. United States*, 26 Indian Cl. Comm’n 138, 145-47 (1971).

78. *Seneca Nation of Indians v. United States*, 20 Indian Cl. Comm’n 177, 182 (1968).

79. 362 U.S. 99 (1960).

had knowledge of each of the treaties in question (and therefore liability for any deficiencies therein).<sup>80</sup> The Commission found in 1978 that the federal government had actual knowledge of three of the treaties, and constructive knowledge of the remainder; it was thus liable for any deficiencies in all of them.<sup>81</sup>

The Oneidas won sweeping victories before the Commission in its claims related to New York lands. However, Docket 301 ultimately foundered because of the paltry compensation available in the absence of interest or any adjustment for inflation. While the ICC considered the Oneidas' claim, the federal courts were finally expressly opened to Indian claims by Congress in 1966.<sup>82</sup> In 1970, the Oneidas filed a claim against the counties that now sat on their reservation. (As noted above, a tribal suit against the state was barred by the Eleventh Amendment.) The potential awards in claims in federal court far exceeded compensation offered by the ICC. Moreover, the ICC offered only money, while the federal court could potentially return land.<sup>83</sup> The early results were striking, most notably a Supreme Court decision permitting tribes to initiate land claims in federal court for violations of the Trade and Intercourse Act.<sup>84</sup>

Ultimately, under the ICC the United States would not offer the Oneidas an award exceeding \$3.3 million. The Oneidas of New York were willing to accept the settlement, but the Oneida tribe of Wisconsin tabled it in 1980. The latter did so primarily out of an ongoing concern that it would compromise their more recent, more significant suit in federal court. The Wisconsin Oneidas did not trust their attorney's assurances that acceptance of the award would not have this effect.<sup>85</sup> In 1982, amid continued concern over the

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80. *United States v. Oneida Nation of N.Y.*, 477 F.2d 939, 945 (Ct. Cl. 1973).

81. *Oneida Nation of N.Y. v. United States*, 43 Indian Cl. Comm'n 373, 468 (1978).

82. 28 U.S.C. 1362 (2006).

83. GEORGE C. SHATTUCK, *THE ONEIDA LAND CLAIMS: A LEGAL HISTORY* 10-11 (1991). The Oneidas did not, however, request the return of land in this suit. They asked for the rental value of the land lost by a single transaction in 1795 over a two-year period, 1968-1969.

84. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); see Tahsuda, *supra* note 10, at 1007.

85. In 1978, the appellate court had rejected the Wisconsin Oneidas' request to postpone the proceedings because of potential implications for the other claim, as well as their attempt to dismiss their attorney. *Oneida Nation*, 217 Ct. Cl. at 50-52, 52 n.5. Also in 1978, the Indian Claims Commission denied a petition of the counties of Madison and Oneida to intervene in the Commission proceedings. *Oneida Nation of N.Y. v. United States*, 41 Indian Cl. Comm'n 391 (1978); see Barry, *supra* note 9, at 1861 n.68; Telephone Interview with Dr. John E. Powless, Oneida, Wis. (Aug. 28, 2007); SHATTUCK, *supra* note 83, at 201; Kristina Lyn Ackley, *We Are Oneida Yet: Discourse in the Oneida Land Claim* 121-36 (July 27, 2005) (unpublished Ph.D.

potential ramifications of the ICC claim in federal court, the Oneidas withdrew their ICC complaint.<sup>86</sup>

### VIII. FINALLY? *The Oneidas and the Legacy of the ICC*

So, how far did the wheels of justice turn? They certainly did not move full circle, ushering in “a new era for the American Indian,” as the rhetoric at the Commission’s creation promised.<sup>87</sup> Legal historian John R. Wunder has judged the ICC a “miserable failure.”<sup>88</sup> Although the Commission had been authorized to decide claims on moral grounds, by taking on the form of a court, it usually (but not always) based its decisions on more narrow legal grounds. Although not negligible, the monetary awards granted the Wisconsin Oneidas were certainly small. This was a typical outcome. It was a great irony that a Commission created to identify and redress “unconscionably low” payments to Indians itself paid awards in dollars that had depreciated over nearly two centuries.

With a geographically favorable location and careful management by the tribal government, the Docket 75 claim played a small part in helping the Wisconsin Oneidas develop their reservation. Unlike many tribes, the Wisconsin Oneidas prudently devoted only a small portion of the award for distribution as per capita payments.<sup>89</sup>

Legal critic Vine Deloria’s overall assessment of the ICC was not much more favorable than Wunder’s. At most, Deloria observed, the ICC helped “clear out the underbrush and allow the claims created by the forced political and economic dependency during the last century to emerge.”<sup>90</sup> Docket 301 certainly had this effect: it was abandoned due to the insufficiency of the proposed settlement, but not before demonstrating the strength of some of the Oneidas’ potential claims. According to George Shattuck, the attorney who crafted the Oneidas’ 1970 suit in federal court, “a generation became discouraged” over their failure to make headway in the courts since *Boylan*,

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dissertation, University at Buffalo, State University of New York) (on file with author).

86. See Barry, *supra* note 9, at 1861 n.68; Tahsuda, *supra* note 10, at 1006 n.22.

87. Quoted in LIEDER & PAGE, *supra* note 3, at 64.

88. See WUNDER, *supra* note 16, at 114.

89. Fifteen percent of the award was used for the acquisition of land that was subsequently developed for economic and tribal use. Personal payments were limited to interest derived from the remainder of the award; the principal and interest remain under the control of a tribal committee. See Metoxen, *supra* note 33. On the distribution of ICC awards generally, see LIEDER & PAGE, *supra* note 3, at 257-63.

90. VINE DELORIA, *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 228 (Univ. of Texas Press 1985) (1974).



despite continued efforts. The ICC revived them.<sup>91</sup> The Oneidas have yet to recover substantial compensation in the form of money or land via the federal courts, but the various cases they have filed there makes it obvious that the ICC did not end their attempts. Clearly, those who wished to see the matter of Indian claims resolved “*finally*” — in either sense — saw their hopes dashed.

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91. Telephone Interview with George Shattuck, Cazenovia, N.Y. (July 15, 2007); *see* Ackley, *supra* note 85, at 118; HAUPTMAN, *supra* note 15, at 179-203.