TESTIMONY
OF
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AT THE
OVERSIGHT HEARING ON THE STATUS OF SETTLEMENT OF THE CLAIMS OF THE FEDERALLY RECOGNIZED TRIBES TO LANDS IN THE STATE OF NEW YORK
BEFORE THE HOUSE COMMITTEE ON RESOURCES

July 14, 2005

Good morning, Mr. Chairman and Members of the Committee. My name is Michael Olsen, the Acting Principal Deputy Assistant Secretary – Indian Affairs. I am pleased to be here today to discuss the Department's role in facilitating the settlement of the New York land claims.

I begin my testimony this morning with a short summary of the background of these claims and close with a brief history of the United States involvement in numerous attempts to resolve the disputes at issue including a statement concerning the present status of these efforts.

At issue are tribal claims for lands reserved for the tribes of the Iroquois Confederacy in various treaties with New York State, and confirmed by the United States in the 1794 Treaty of Canandaigua, 7 Stat. 44 and the Treaty of 1796, 7 Stat. 55. Following the federal Treaty of Canandaigua, the State sought to obtain most of these tribal lands pursuant to numerous agreements entered into by the State and various tribal representatives, as well as through eminent domain. The vast majority of these transactions were not authorized by or participated in by the United States as required by the Trade and Intercourse Act, 25 U.S.C. 177. The legal position of the tribes and the United States, as trustee, is that New York's acquisitions of the subject lands are void and, as a matter of law, Indian title is paramount today. The claims have been brought on the basis of the common law right of action for unlawful possession (trespass) and violation of the Trade and Intercourse Act.

Initially, the tribes brought these claims on their own behalf, and they enjoyed some success in the early stages of litigation, including a favorable Supreme Court decision in the *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) case. However, later developments in Eleventh Amendment case law indicated that absent intervention by the United States, the State of New York would likely prevail on Eleventh Amendment defenses. Moreover, it was thought that U.S. intervention would greatly enhance the possibility of settlement of the claims and the tribes' positions in negotiations, expediting a settlement. Finally, U.S. intervention helped to ensure the burden of any remedy would fall on the State, rather than upon subsequent purchasers from the State.

For these reasons, the United States has intervened in five of the seven land claims brought by federally recognized tribes against the State of New York over the past decade. Of the cases in which the United States has intervened, four remain pending (*Cayuga Indian Nation of New York v. Pataki* (2d Cir.), *Oneida Indian Nation of New York v. Pataki* (N.D.N.Y), *St. Regis Mohawk v. State of New York* (N.D.N.Y.), and *Seneca Nation of Indians v. New York* ("Grand Island")(2d Cir.) (petition for rehearing *en banc*)). As of this date, the United States has not intervened in the Onondaga and the Stockbridge Munsee claims against the State.

In litigating these land claims, the United States had to determine what remedies to seek against the State, local governments, and private landowners. The United States believes and has always believed that private landowners who acquired lands within the claim area as bona fide purchasers should not have to shoulder any responsibility for the remedy. The law in this area, however, was undeveloped, and to avoid risking the integrity of the suits, the United States continued to litigate these actions in the manner in which it had intervened in them. In the fall and winter of 2000, however, the United States undertook a review of its position with respect to private landowners in the New York land claims, prompted by further development of the law, namely, the federal district court's decision in *Cayuga Indian Nation v. Pataki*, 79 F.Supp. 2d 66 (N.D.N.Y. 1999), at the United States' urging, to hold only the State liable for the entire damage award as the party which initiated the Trade and Intercourse Act violations, and the District Court's subsequent decision in O*neida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000) not to allow relief against private parties. Following this review, the United States determined that it would clarify that it would only pursue the New York land claims in a manner consistent with the federal district courts' rulings in *Cayuga* and *Oneida* regarding the respective liabilities of New York State and private landowners. Accordingly, on August 3, 2001, the United States filed papers in the majority of the pending land claims suits implementing this policy set by the previous administration. Specifically, the Government filed pleadings and/or letters to clearly reflect the United States position that the private landowners and parties other than the State of New York should not be subject to liability.

As the Committee is aware, negotiated settlements of Indian land claims brought under the Indian Trade and Intercourse Act require congressional legislation. In most cases, this legislation ratifies all transfers of Indian land before a particular date, extinguishing Indian title to that land. In addition, enacting legislation has often provided the tribe with financial compensation and the ability to reacquire a portion of the land within the original claim area.

The amount of land within the claim area that the tribe may acquire and assert jurisdiction over generally is far less than the size of the claim area and reflects a compromise reached between the tribe, state, and local communities.

Contrary to our early expectations, and contrary to the experience in other Northeastern states, settlement of the New York land claims has proved elusive. Although the United

States is on record that it will not contribute monetarily to assist in settlement of these claims, it has nonetheless expended a great deal of effort and volunteered substantial resources toward settlement of these cases. Notwithstanding its litigation against the State on behalf of the Tribes, the United States continues to work to facilitate amicable settlement of these claims between the Tribes and the State. The United States also has provided assistance to the State and the St. Regis Mohawk in developing the compromise the parties reached to resolve the Mohawk claim. This settlement is currently awaiting ratification by the New York State Legislature. Moreover, the United States facilitated discussions between the State, counties and tribes to develop proposed terms aimed at resolving the Cayuga and Oneida claims. Presently, the State is reviewing modifications to certain terms of these proposed settlements occasioned by the Supreme Court's recent decision in the *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005) case and the Second Circuit's opinion in the *Cayuga Indian Nation of New York v. Pataki*, 2005 U.S. App. LEXIS 12764 (2d Cir. June 28, 2005) claim. In closing, the Department remains committed and is eager to participate and facilitate fair and equitable resolutions of these longstanding claims.

This concludes my remarks for today and I would now welcome any questions the Committee may have.