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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

DAVID V. DILLENBURG
AND THOMAS G. SLADEK,

Appellants,

v.

NOTICE OF APPEAL

MIDWEST REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,

Docket No. IBIA _____

Appellee.

David V. Dillenburg and Thomas G. Sladek ("Appellants"), pursuant to 43 C.F.R. § 4.332, hereby submit this Notice of Appeal of the Notice of Decision ("NOD") issued on August 28, 2014 by the Secretary of the Interior, Regional Director, Diane K. Rosen, to take Brown County, Wisconsin Tax Parcel No. 6H-1125-1 into trust status for the Oneida Tribe of Indians of Wisconsin ("Oneida Tribe"). A copy of the NOD is attached hereto. The Appellants are property owners within the City of Green Bay whose interests are impacted by the placing of this parcel into trust. The Appellants addresses and telephone numbers are:

David V. Dillenburg
1520 Woodland Drive
Hobart, WI 54313
Telephone: (920) 655-1442

Thomas G. Sladek
2634 Sequoia Lane
Green Bay, WI 54313-4933
Telephone: (920) 499-7701

I. IDENTIFICATION OF THE CASE

This appeal arises not only out of the BIA's decision relating to this parcel, but also out of an ever escalating conflict between the Oneida Tribe and the local communities. The conflict is the result of the Oneida Tribe's mission, as stated on its website, to reacquire 100% of its original reservation (51% by 2020 and 75% by 2030) and its continued efforts to place the land it does acquire into trust.

The parcel specific to this appeal is significant not only in its own right but also as part of the Oneida Tribe's continuous attempt to place thousands of acres of land in trust status not only within the City of Green Bay, but all of Brown and Outagamie Counties. The placement of such a substantial amount of land into trust will have serious detrimental, social, economic and environmental effects on the local community.

The placement of this parcel into trust will also negatively impact the other properties within the community by creating a checkerboard patchwork of parcels subject to competing ordinances, zoning regulations and other laws.

As a result of the above-referenced concerns, in November 2013, the Appellants submitted correspondence to the BIA Midwest Regional Office objecting to the fee to trust application for several parcels, including the parcel which is the subject matter of this Notice of Appeal.

II. STATEMENT OF REASONS FOR APPEAL

1. The BIA improperly applied 25 U.S.C. § 465 to land owned in fee simple by the Oneida Tribe.

2. The BIA improperly interpreted and applied 25 C.F.R. § 151.10(a) when it found the existence of statutory authority for the acquisition.

3. The BIA improperly concluded that the Oneida Tribe was under federal jurisdiction at the time the Indian Reorganization Act was enacted in 1934, a finding required by 25 U.S.C. § 479, the applicable regulations and the U.S. Supreme Court ruling in *Carcieri v. Salazar,* 129 S.Ct. 1058 (2009).

4. The BIA's decision that this Tribe was eligible to place property in trust was in error because it was arbitrary and capricious.

5. The BIA erroneously assumed that a federal Indian reservation, encompassing the Oneida Tribe's former and entire reservation boundaries, exists for the Oneida Tribe, and that the Tribe and its members remain under federal jurisdiction as required under the IRA and the U.S. Supreme Court's holding in *Carcieri v. Salazar,* 129 S.Ct. 1058 (2009). The Oneida Tribe's reservation was disestablished, and the Tribe and its members are no longer under federal jurisdiction, as evidenced by the facts, Congressional Acts, and the federal court rulings of *Stevens v. County of Brown*, No. 3807 Civil Docket (E.D. November 3, 1933) and *U.S. v. Hall*, 171 F. 214 (E.D. Wis. 1909).

6. The Secretary has no authority under any statute to remove lands from state jurisdiction. Once land has ceased to be territorial land by Congressional cession

or act and is under state jurisdiction, there is no federal authority to nullify state jurisdiction. The Indian Reorganization Act (IRA) and specifically 25 U.S.C. § 465, upon which the BIA based its decision, was intended to stop further allotments and prevent any further Indian land from being removed from federal jurisdiction. The IRA allows federal land parcels slated for disposal or Indian allotments still subject to federal restrictions on alienation to be restored to Indian tribes. Likewise, the BIA failed to consider the impact of the U.S. Supreme Court holding in *Hawaii, et al. v. Office of Hawaiian Affairs, et al.* 129 S.Ct. 1436 (2009), and the very ability to eliminate state and local jurisdiction which the BIA and Oneida Tribe have claimed is the automatic consequence of the placement of land into trust.

7. Taking land into trust pursuant to 25 U.S.C. § 465 of the IRA, as it applies to this case, is unconstitutional in that it strips the state and local government of long-standing jurisdiction over the parcels that are the subject of the fee to trust applications.

8. It is not in the public interest to have any lands placed into federal "trust" status. Restoring lands to "tribal sovereignty" deliberately removes the land from the framework embodied in the federal constitution to dispose of territorial land to form states and protect the rights of the states and their political subdivisions as representative governments.

9. The BIA's decision interferes with the public trust doctrine rights of the State of Wisconsin by impairing or impeding the local government's stormwater utility and management plan. For instance, the Tribe sued the Village of Hobart on

February 19, 2010, stating it will not abide by the Village's ordinances relating to stormwater management nor pay fees or charges associated therewith for trust land. *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin,* United States District Court, Eastern District of Wisconsin, Green Bay Division, Case No. 10-CV-00137-WCG.

10. The BIA failed to follow the Department of the Interior's policies and guidelines on trust acquisitions; thus, the decision was arbitrary and capricious, an abuse of discretion, and not in accordance with the law.

11. This Notice of Appeal is intended to only briefly state the Appellants' position regarding the incorrect nature of the BIA's NOD and briefly identify the issues to be addressed in the appeal. This Notice of Appeal should not be considered to be an exhaustive list or presentation of the Appellants' factual or legal arguments. The Appellants reserve the right to fully present those arguments pursuant to a briefing schedule and a hearing on the merits.

NAME AND ADDRESSES OF ADDITIONAL INTERESTED PARTIES

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III. RELIEF REQUESTED

Appellants request that the Board vacate the BIA decision to acquire Brown County, Wisconsin Tax Parcel No. 6H-1125-1 into trust.

Dated: September 19, 2014.

Respectfully submitted,

Jenna E. Clevers

Frank W. Kowalkowski
Jenna E. Clevers
Attorneys for Appellants

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
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TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Division of Fee to Trust
Goral

AUG 2 8 2014

NOTICE OF DECISION

CERTIFIED RECEIPT—RETURN RECEIPT REQUESTED – 9171 9690 0935 0036 0346 25

Honorable Edward Delgado, Chairman
Oneida Tribe of Indians of Wisconsin
P.O. Box 365
Oneida, WI 54155

Subject: Intent to take Land Into Trust -Former "**Goral**" Property

Dear Chairman Delgado:

The Oneida Tribe of Indians of Wisconsin[1] (hereinafter "the Tribe"), submitted an application[2] to have real property accepted in trust by the United States of America for the Oneida Tribe of Indians of Wisconsin. The property known as the "**Goral**" parcel is located within the exterior reservation boundaries in Brown County, Wisconsin, and are described as follows:

> **Goral:**
> The East 210 feet of Lots Twenty-seven (27) and Twenty-eight (28), Section Twenty-nine (29), Township Twenty-four (24) North, Range Twenty (20) East of the Fourth Principal Meridian, containing 1.20 acres more or less, in the City of Green Bay, West side of Fox River, Brown County, Wisconsin, excepting therefrom that part described in Vol. 887 Records, Page 240, and in Vol. 883 Records, Page 348 for road purposes.
>
> Address: 2612 West Point Road, Green Bay, Wisconsin
> Tax Parcel No. 6H-1125-1.

Regulatory Authority

The applicable regulations are set forth in the Code of Federal Regulations (CFR) Title 25, INDIANS, Part 151, as amended. The regulations specify that it is the Secretary's policy to accept lands "in trust" for the benefit of Tribes when such acquisition is authorized by an Act of Congress; and, (1) when such lands are within the exterior boundaries of the Tribe's reservation, or adjacent thereto, or within a Tribal

[1] 78 Fed. Reg. 26387 (May 6, 2013)
[2] Application to Place Goral property Into Trust. (Nov. 15, 2007) (on file with the Bureau of Indian Affairs).

consolidation area; or (2) when the Tribe already owns an interest in the land; or (3) when the Secretary determines that the land is necessary to facilitate Tribal self-determination, economic development, or Indian housing. This acquisition facilitates Indian housing. The land subject to the request for trust status is within the land acquisition policy as set forth by the Secretary of the Interior.

Pursuant to 25 CFR § 151.10, the Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located within or contiguous to the tribe's reservation, and the acquisition is not mandated:

(a) the existence of statutory authority; (b) need of the tribe for additional land; (c) the purpose for which the land will be used; (e) impact on the State and its political subdivisions resulting from removal of the land from the tax rolls; (f) jurisdictional problems and potential conflict of land use which may arise; (g) whether the Bureau Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and (h) compliance with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions.

- 25 CFR § 151.10 (a) - Statutory authority for the proposed acquisition

On February 24, 2009, the U.S. Supreme Court issued its decision in *Carcieri v. Salazar*, which held that Congress granted limited authority to the Secretary of the Interior under the IRA to acquire land-in-trust for tribes. To acquire land-in-trust under Section 465 of the IRA, a tribe must have been "under Federal jurisdiction" at the time the IRA was passed in June 1934.

We find that the question of the tribe's status in 1934 has been determined by their long standing relationship with the federal government, which culminated in the fact that the Oneida Tribe voted to accept the IRA and in 1936 the Constitution and By-laws by the Oneida Tribe of Indians of Wisconsin was approved. See Haas, *Ten Years of Tribal Government Under the Indian Reorganization Act* (U.S. Indian Service 1947).

Additionally, by letter, dated April 28, 2009, and email, dated July 20, 2009, the Tribe provided supplemental information in support of their federal status through 1934. The tribal materials were reviewed, considered and made part of the record, which included copies of treaties, statutes, congressional acts and reports that show a continual tribal existence and federal relationship with the U.S. government since approximately 1784.

Based on our review and analysis of this information, we have determined that the *Carcieri* decision will not implicate the Oneida Tribe since the Oneida was recognized as under federal jurisdiction prior to 1934 and in fact under the IRA in 1934. The Tribe's IRA Constitution was approved on December 21, 1936.

The Oneida Tribe of Indians of Wisconsin is organized in accordance with the Indian Reorganization Act of 1934. Section 5 of the Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior discretionary authority to acquire any interest in lands for the purpose of providing land for Indians. Therefore, the request for trust acquisition is eligible for trust status under the authority of the IRA of 1934.

- 25 CFR § 151.10 (b) – The need of the Tribe for additional land.

Currently, there are approximately 12403.79 acres held in trust for the Tribe. The Tribe has approximately 16,986 members[3]. The subject parcel lies within the Tribe's aboriginal territory and is of historical significance, especially due to the devastating losses of land sustained by the Tribe since 1838. Evidence shows that this property has a history of being occupied by ancestral Oneida Indians. The property was once part of allotted lands lost by the Oneida Tribe through the General Allotment Act and were acquired in 1999 to expand the Oneida tribal land base. Returning the land to its original status as inalienable, to forever be held by the United States for the benefit of the Tribe, ensures that tribal investments within the Oneida Reservation will never be lost. This acquisition will expand and consolidate the Oneida Tribal land base in support of self-governance; self-determination through tribal jurisdiction and to provide much needed additional housing for members of the Oneida Tribe.

- 25 CFR § 151.10 (c) – Purpose for which the property will be used.

The **"Goral"** property contains 1.20 acres more or less, currently being utilized for residential purposes and the use is to remain the same.

- 25 CFR § 151.10 (e) – Impact on the State and its political subdivisions resulting from the removal of this property from the tax rolls.

The Notice of Application (NOA) is intended to provide State and local governments the opportunity to submit comments regarding the proposed trust acquisition in the areas of regulatory jurisdiction, real property taxes, and special assessments. On July 6, 2006, September 3, 2010, and October 25, 2013, notice was provided to the City of Green Bay, Brown County, and the State of Wisconsin to solicit comments regarding "potential impacts" resulting from the removal of this property from the tax rolls.

There were no comments submitted in response to the notice issued July 6, 2006 and the comments received to the October 25, 2010 and November 25, 2013 notices were received from the City of Green Bay and basically the same with the exception of the tax amount. The following was received from the City of Green Bay in response to the November 25, 2013 notice:

A. 2012 property improvements assessed at $48,000 and 68,500; gross real estate taxes equaled $2869.50 of which the City's share is approximately $1,042.68.
B. Reduction of City's real estate tax base equal to the land and improvement values stated above.
C. No knowledge of any current special assessments.
D. City currently provides all standard public works services to the property.
E. City does not foresee any zoning or land use problems or conflicts with Oneida's current use of the property.

On November 25, 2013 and December 2, 2013, nineteen (19) comment letters were received from residents claiming they have standing by virtue of the United States Supreme Court decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132S.Ct. 2199 (2012) and

1) Economic Burden Incurred by Nearby Property Owners where, the owners state, with the reduction of taxes that comes with trust status for the subject property, the burden of costs for government services will be shouldered by the fee property owners;

[3] Socioeconomic Conditions within the Reservation of the Oneida Tribe of Indians of Wisconsin, dated February 12, 2013 (on file with the BIA)

- The City of Green Bay and Brown County includes compensation to both of the municipalities for the cost of governmental services provided by them, in lieu of property taxes, while at the same time recognizing the value of services provided by the Tribe.

2) Disruption to Regulations and Enforcement of Community Jurisdiction Related to the Peace, Safety and Security of Residents; where the residents claim the creation of islands of trust land is disruptive to these vital community interests, causing confusion regarding jurisdiction of local governments units over the land and the people, with any lack of uniformity of ordinance application resulting in dispute, disagreement and reduced cohesiveness in neighborhoods. Adding that property values suffer in the face of uncertainty regarding ordinance and application and enforcement, where the value of property will be diminished.

    - The service agreements mentioned above are established between the tribe and local governments to include and address these issues, and as a result, reflect the mutual understanding of the Tribe and the municipalities. Also, as noted by the Tribe in their response to the subject comments, Wisconsin is a PL 280 state and the property is located on the reservation. Therefore, trust acquisition of the subject property will not change the application of such.

3) Eligibility of the Oneida Tribe of Wisconsin for U.S. Acquisition of Land to be Held in Trust under which the opposition is in part based on the Oneida Tribe not being federally recognized when the IRA was enacted in 1934.

    - See above: *25 CDR § 151.10 (a) – Statutory authority for the proposed acquisition.* Further, the IBIA has already ruled in that the Oneida Tribe of Indians of Wisconsin is organized in accordance with the Indian Reorganization Act of 1934[4].

The real estate tax information referenced in the County's comments is $2899.30 and no special assessments are stated. The Brown County tax levy for tax year 2012/2013 is $80,862,276.[5] Therefore, we find the proposed trust acquisition will decrease the tax base for Brown County by less than .036%.

The proposed trust acquisition will decrease the tax base for Brown County by approximately .036%. In light of any concerns dealing with the impact of decrease in tax revenue, the Tribe together with Brown County and the City of Green Bay has entered into a service agreement, by which the tribe compensates the County and City in lieu of property taxes for governmental services, in areas such as law enforcement, storm water management, street improvements, and emergency management services.

Therefore, the benefits of the proposed acquisition appear to outweigh the potential for impact on the State and local subdivisions, which is foreseen as minimal.

- 25 CFR § 151.10 (f) – Jurisdictional problems and potential conflicts of land use.

The subject property is located within the exterior boundaries of the Oneida Reservation.
The City of Green Bay stated clearly, "...does not foresee any zoning or land use problems or conflicts with Oneida's current use of the Property".[6] The service agreement that is set in place between the

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[4] *Village of Hobart v. Acting Midwest Regional Director*, 57 IBIA 4 (2013)
[5] http:wistax.org/docs/facts/1369071116-county-levies-1989-90-to-2012-13.pdf (last visited October 29, 2013).

Oneida Tribe, Brown County and the City of Green Bay, that each entity with the mutual understanding agrees to strive and improve on the terms of agreement that include law enforcement; storm water management; peace & safety; street improvements and the compensation of these governmental services mentioned in the agreement. See above: *25 CFR § 151.10(e) Impact on the State and its political subdivisions resulting from the removal of this property from the tax rolls.*

On June 29, 2008, the Oneida Tribe and Brown County entered into "The Deputization Agreement between the Oneida Tribe and Brown County" states the purpose and intent of the agreement is, "to prevent and deter the commission of criminal offenses and to promote effective law enforcement for the mutual benefit of the Indian and non-Indian communities in Brown County."

The cooperative relationship and mutual understanding between the Oneida and their neighboring governments is apparent in promotion of the cooperative agreements intended to alleviate and/or eliminate any concerns with jurisdictional and potential conflicts of land use.

- 25 CFR § 151.10 (g) – Is the Bureau of Indian Affairs (BIA) equipped to discharge the additional responsibilities and duties resulting from the acquisition of this land in trust status.

Pursuant to Public Law 93-638, as amended, the Tribe has negotiated to assume various responsibilities of programs, services, functions, and activities that normally are funded and/or flow through the BIA. The Real Estate Services Program assumed by the tribe is essential as the first point of contact in a variety of Indian Trust land management services.

This property will require BIA oversight administered by the Great Lakes Agency, such as technical assistance and functions that hand in hand with the Midwest Regional Office are inherent to the federal government. Specifically, this transaction may require BIA to provide services in the areas of rights protection, leasing, rights-of-way, and mortgages, including review and approval of relevant transactions.

Any additional responsibilities resulting from this transaction are deemed minimal.

- 25 CFR § 151.10 (h) – Environmental Hazards

National Environmental Policy Act Compliance
We are required to determine the level of impact upon the human environment this undertaking would create pursuant to criteria outlined in the National Environmental Policy Act of 1969 (NEPA). Due to the limited scope and intensity of the project, it may be categorically excluded from further environmental impact analyses under the provisions of NEPA. A Categorical Exclusion Checklists were completed on July 10, 2014 for the "**Goral**" Parcel.

National Historic Preservation Act (NHPA) Compliance
Since there is a limited scope of activities there is no potential to disturb historic properties. With the Regional Archeologist's signature of the Categorical Exclusion (dated July 10, 2014), no further compliance with NHPA is necessary.

Endangered Species Act (ESA) Compliance

[6] October 4, 2010 and November 25, 2013 comment letter from the City of Green Bay.

No further action is required for compliance with the Endangered Species Act. No endangered or threatened species will be affected according to the Categorical Exclusion (July 10, 2014).

Hazardous Substances Determination

In compliance with Department of the Interior Guidance, Part 602 of Interior Department Manual Chapter 2 (602 DM 2), we are required to complete an Environmental Site Assessment (ESA) to determine if there are any environmental and contamination related concerns and/or liabilities affecting the land being considered for trust acquisition. These procedures comply with the standards of the American Society of Testing and Materials (ASTM) Practice E1527-05, which were adopted by the Department of the Interior. The record includes a Phase I "Environmental Site Assessment," approved by the Midwest Regional Director on July 7, 2014 and July 10, 2014. No recognized environmental conditions were identified.

Conclusion

Based on the foregoing, we issue notice of our intent to accept the former "**Goral**" Property into trust status. Title will vest in the United States of America in trust for the Oneida Tribe of Indians of Wisconsin, in accordance with Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465, provided the Tribe delivers marketable title to the property in a manner as required in 25 CFR Part 151, Land Acquisition Regulations. In accordance with 25 CFR Part 151.13, we have requested an examination of the title evidence by the Office of the Field Solicitor, Bloomington, Minnesota, to determine whether title to the parcel is marketable. The parcel will not be accepted in trust until all title exceptions as required have been met.

Appeal Rights

This decision may be appealed to the Interior Board of Indian Appeals, 801 North Quincy Street, Suite 300, Arlington, Virginia 22203, in accordance with 43 CFR § 4.310-4.340. Your notice of appeal to the Board must be signed by you or your attorney and **must be mailed within 30 days of the date that you receive this decision.** It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your notice of appeal to (1) Assistant Secretary – Indian Affairs, 1849 C Street N.W., Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you are not represented by an attorney, you may request assistance from this office in the preparation of your appeal. If you file a notice of appeal, the Interior Board of Indian Appeals (IBIA) will notify you of further procedures.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

If you have any questions regarding this matter, you may contact Diane Baker, Supervisory Realty Specialist, directly at (612) 725-4583.

Sincerely,

Diane K. Rosen

Regional Director

cc: TO ALL INTERESTED PARTIES BY CERTIFIED MAIL—RETURN RECEIPT TO:

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Office of the Governor of Wisconsin
115 East State Capitol
Madison, Wisconsin 53702

Troy Streckenbach – 9171 9690 0935 0036 0386 47
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CERTIFICATE OF SERVICE

Pursuant to 43 C.F.R. § 4.333, the undersigned hereby certifies that on this 19th day of September, 2014, the foregoing NOTICE OF APPEAL was served on the following parties in the manner indicated:

VIA UPS OVERNIGHT:
Board of Indian Appeals
Office of Hearings and Appeals
U.S. Department of the Interior
801 North Quincy Street, Suite 300
Arlington, VA 22203

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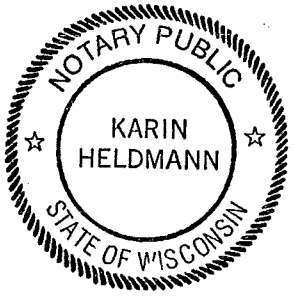
2930 Sandia Drive
Green Bay, WI 54313

I declare under penalty of perjury that the foregoing is true and correct.

Kay A. Marquardt

Subscribed and sworn to before me
this 19th day of September, 2014.

* KARIN HELDMANN
Notary Public, Brown County, Wisconsin
My Commission expires 7-10-2017.