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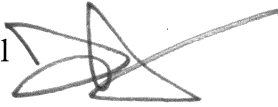
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### MEMORANDUM

**TO:** Oneida Business Committee

**FROM:** Jo Anne House, Chief Counsel 

**DATE:** April 30, 2015

**SUBJECT:** Genskow – Petition – Fee-to-trust Resolution

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You have requested a legal review regarding a petition submitted by Madelyn Genskow. The petition contains six resolutions. The legal opinion will review only the resolution identified above. The Enrollment Department has verified a sufficient number of signatures on the petition.

The resolution contains six Whereas sections.

- “the Village of Hobart brags that there were a total of 13 Litigations between Hobart and the Oneida Tribe between 2008 and 2013 and that Hobart won 11 and Oneida only two”
- “Hobart claimed the Oneida Tribe of Wisconsin entered into a Consortium with Tribe Shakopee, Mille Lacs and Ho Chunk with each tribe paying \$215,000 to the Regional BIA office to hire staff to fast track, fee to trust land applications”
- “There is no indication the Oneida Tribal attorneys warned the Oneida Business Committee to so may lead to an appearance of bias for the BIA to receive money from the tribe”
- “There is a Government Court call the ‘Interior Board of Indian Appeals’ that the Village of Hobart appealed to, claiming an appearance of bias on the part of the Regional BIA office who have received money from the tribes”
- “The Court called the “Interior Board of Indian Appeals” ruled (The applications from the Tribe were incomplete) and sent cases back to the BIA and to the Oneida Tribe”
- “In getting land into trust is very exact”

Whereas sections are intended to provide legislative history and background regarding why the resolution is brought forward. Whereas sections are not enforceable.

The resolution contains six Resolve sections.

- “the Land Department must hire a certified Land Surveyor to survey all land that will be purchased prior to the land purchase. The Surveyor shall be an employee of the Oneida Tribe”
- “All land descriptions must be read and certified by a licensed attorney who is an employee of the Oneida Tribe”
- “When fee to trust application fail because of bad advice given to the Oneida Business Committee or the Land Department by Oneida Tribal Attorney, the attorney’s employment with the Oneida Tribe must be terminated”
- “That fee to trust applications that fail due to the Oneida Tribal Attorney failing to read the land descriptions, the Attorney must be terminated”
- “When the Oneida Tribe hires a Land Surveyor as an employee, if the Fee to trust application fails due to the survey not being accurate, the surveyors employment shall be terminated”

- “This Resolutions as it applies to the Attorneys is retroactive and the Oneida Business Committee must see this process through”

To draft this opinion, I have reviewed prior actions of the General Tribal Council, ... Tribal policies and procedures, and various other resources. This opinion is broken into sections to address the following issues raised in the resolution – litigation summaries and fee-to-trust process.

### **Hobart Litigation Summaries**

The following summaries are regarding cases in which the Village of Hobart is either the plaintiff or defendant. The outcome favored the Tribe in five of the six cases. The cases are described more fully below.

- Railroad right of way - the Village had no interest in the railroad right of way and could not bring suit to determine the status of the land.
- 911 dispatching - the County could arrange dispatching through its systems as it determined was appropriate.
- Stormwater charges - the Village could not tax trust land.
- Restrictive covenants - the Tribe was not successful in clearing restrictions in the deed however we were able to purchase the land at a substantial discount in the bankruptcy proceedings.
- Fee-to-Trust appeals - the Interior Board of Indian Appeals has returned several fee-to-trust appeals to the Bureau of Indian Affairs directing the Bureau to address fully consider missing issues in regards to their decision and to address an allegation of bias; the decision was clear that there were no errors in the applications submitted and there was no question regarding the ability to take land into trust on behalf of the Tribe.
- Condemnation and special assessments - the Tribe was not successful in prohibiting the Village of Hobart from condemning or levying special assessments on fee land.

#### ***Condemnation and Special Assessments***

*Hobart v. Danforth et al. Brown County Circuit Court Case No. 03-CV-75*  
*Oneida Tribe v. Hobart, 542 F.Supp.2d 908 (E.D. Wis. 2008)*

In 2003, Hobart filed a lawsuit in the circuit court for Brown County against former Chairwoman Christine Danforth, former Division of Land Management Director Christine Doxtator, and former Division of Land Management Attorney Loretta Webster seeking a declaration that tribal fee land is subject to Hobart’s condemnation authority. Hobart claimed that these tribal officials acted outside the scope of their authority by denying that tribal fee land is subject to state condemnation procedures. The Tribe argued that the tribal officials were immune from suit, and that the state court lacked jurisdiction over the controversy. In 2006, the Tribe filed a lawsuit in federal court, Tribe v. Hobart, to resolve the issues raised in this state court case that Hobart filed. Hobart filed a counterclaim seeking a declaration that tribal fee land is subject to Hobart’s condemnation authority and special assessments. In 2008 the Court ruled in favor of Hobart and determined that Hobart may condemn and levy special assessments against previously allotted fee land owned by the Tribe, unless and until the land is placed into trust. The ruling is limited to these two issues, and the court otherwise agreed with the Tribe’s position that all land within the Reservation is “Indian country”, as that term is defined under federal law, and that this status

places limits on Hobart's jurisdiction. Also in 2008, the Brown County Court dismissed the state case, Hobart v. Danforth et al. due to resolution of the issues in the federal court decision in Tribe v. Hobart.

### ***Railroad Right of Way***

*Hobart v. Tribe and Wisconsin Central, Ltd. Brown County Circuit Court Case No. 06-CV-480, aff'd, 303 Wis.2d 761, 736 N.W.2d 896 (Wis. App. 2007)*

In 2006, Hobart filed action in the circuit court for Brown County seeking a declaration of its "interests" in the former railroad right-of-way running through the Oneida Reservation. The Tribe maintained that the former railroad right-of-way is restricted treaty land, i.e. the land was reserved for the use and occupancy of the Tribe by the 1838 Treaty with the Oneida, and was not thereafter allotted. Hobart contended that it had an interest in the land because if the court determines that the land is owned in fee by the Tribe, Hobart would possess the right to tax, condemn, and zone the land. The circuit court dismissed Hobart's lawsuit on the grounds that Hobart does not possess an interest in the land. Hobart filed an appeal of the circuit court's decision. In 2007, the Wisconsin Court of Appeals affirmed the circuit court's decision dismissing Hobart's lawsuit.

### ***911 Dispatch***

*Hobart v. Tribe and Brown County Brown County Circuit Court Case No. 08-CV-1313, aff'd 336 Wis.2d 474, 801 N.W.2d 348 (Wis. App. 2011)*

In 2008, Hobart filed an action in the circuit court for Brown County against Brown County and the Tribe concerning the ability of Brown County to dispatch 911 calls to Oneida police officers without Hobart's consent. Hobart claims it has the authority to decide how law enforcement services are provided in Hobart. Hobart also claims the provision of the Service Agreement between the Tribe and Brown County concerning Brown County's dispatch of 911 calls originating from "downtown Oneida" to Oneida police officers should be found void. The court dismissed the Tribe as a party based on sovereign immunity grounds and awarded the Tribe statutory attorney's fees. The court later granted summary judgment in favor of the County. Hobart asked the court to reconsider its decision, claiming the Tribe was not a public agency under state law eligible to receive 911 calls. The court denied Hobart's motion for reconsideration. Hobart appealed to the Wisconsin Court of Appeals. The Wisconsin Court of Appeals affirmed the Circuit Court's decision. Hobart asked the Wisconsin Supreme Court to review the decision. The Supreme Court denied Hobart's request.

### ***Restrictive Covenants***

*Hobart v. TCGC, LLC, Baylake Bank and Oneida Tribe, 08-MC-59 (E. Dis. Wis. 2008)*

In 2008, TCGC, the owner of a golf course and a debtor bankruptcy proceedings, agreed with its secured creditor and the Tribe that the Tribe would purchase the golf course under the bankruptcy plan. Prior to the bankruptcy proceedings, Hobart was an owner of the property and placed a set of restrictive covenants that required Hobart's approval of a transfer in the event a proposed transfer would cause: 1) the removal of the property from the tax rolls, 2) diminishment of the tax value, or 3) the removal of the property from Hobart's zoning authority and zoning jurisdiction. The Tribe asked the court to invalidate these restrictive covenants on the grounds they were inconsistent with federal law. The court rejected the Tribe's arguments. In order to remove any grounds for Hobart to object to the transfer, the Tribe passed a resolution and signed

an acknowledgment to be bound by Hobart's zoning authority and zoning jurisdiction for that property. Despite the Tribe's efforts, Hobart objected to the transfer. The bankruptcy court denied Hobart's objection. Hobart appealed to the Eastern District of Wisconsin. The court, denied Hobart's appeal. The Tribe purchased the property shortly thereafter.

### ***Stormwater Charges on Trust Land***

*Tribe v. Hobart* 891 F.Supp.2d 1058 (E.D. Wis. 2012); *aff'd* 732 F.3d 837, (7<sup>th</sup> Cir. 2013)  
In 2010, the Tribe initiated its first lawsuit against Hobart, asking the court to declare that Hobart does not have the authority to impose storm water charges against the Tribe's trust property. The Tribe's complaint set forth three claims for relief: 1) Hobart's storm water charges are a tax on trust land, and federal law provides that trust land is not subject to taxation; 2) even if the charge is deemed to be a fee, the charges are still impermissible because the Tribe's trust land is subject to comprehensive federal regulations and Hobart's storm water charges interfere with those federal regulations; and 3) the Tribe has the inherent right to self-government and Hobart's storm water charges interfere with the Tribe's right to self-government. In response to the Tribe's lawsuit, Hobart filed a third-party complaint against the United States. The Tribe moved for Summary Judgment on its first two claims for relief and the United States moved for dismissal of the third-party complaint. In 2012, the court ruled that the charges are taxes and are precluded by federal law. Hobart appealed. In 2013, the 7<sup>th</sup> Circuit Court of Appeals upheld the decision. Hobart appealed the decision to the United States Supreme Court. The Supreme Court denied cert.

### ***Fee-to-trust Appeals***

*Hobart v. Midwest Regional Director, Bureau of Indian Affairs*, 57 IBIA 4 (2013)  
In 2010 and 2011, Hobart filed a total of five consolidated appeals with the Interior Board of Indian Appeals (IBIA), appealing several Notices of Decision (NODs) to accept a total of approximately 578 acres of land located in Hobart into trust for the Tribe. In its appeals, Hobart suggested the Tribe and its members were not under federal jurisdiction in 1934 and are not under federal jurisdiction today because the Oneida Reservation did not exist in 1934 and does not exist today. As a result, Hobart asserted the Secretary of the Interior never had the authority to take land into trust for the Tribe under federal law. Hobart also asserted a wide array of general legal challenges to the fee-to-trust process, many of which have already been addressed and rejected by the courts. The IBIA issued a decision determining that the Tribe was under federal jurisdiction in 1934 and the Secretary therefore had the authority to take land into trust for the Tribe. The IBIA also affirmed the BIA's assessment of the Tribe's need for land, the Tribe's use for the land, and the BIA's ability to handle additional responsibilities. However, the IBIA remanded the case back to the BIA for further consideration of the loss of tax revenue, jurisdictional and land use conflicts, environmental concerns, and potential bias in the fee-to-trust consortium. More specific discussion of these cases is set forth in the following section.

## **Fee-to-Trust Process**

### ***General***

When the Tribe buys land on the open market, the Tribe purchases the land in "fee." This means the land is taxable and the Tribe holds the title to the land. When the federal government takes land into "trust" status, the Tribe gives ownership of the land to the United States. The land is no

longer taxable and the United States holds the title to the land in trust for the Tribe. The Bureau of Indian Affairs utilizes the *Acquisition of Title to Land Held in Fee or Restricted Fee Status*, or the “Fee-to-Trust Handbook”. This manual is located on the Bureau of Indian Affairs website. In addition, the Division of Land Management has an approved Standard Operating Procedure which defines the fee-to-trust process, *Fee-to-Trust Process*, SOP # 67.3.3.1.

The Fee-to-Trust Handbook requires two sets of documents or information to be submitted with a fee-to-trust application. *PP 8-12*. This may be in the form of a single written correspondence, or multiple documents. The first set of information must include the following.

- A request for approval of a trust acquisition
- Identification of the applicant
- Legal land descriptions
- Need for the property – economic development, self-determination, Indian housing
- Use of the property
- Deed or other document verifying ownership
- Name of the Tribe as it appears in the Federal Register
- Statutory authority for taking land into trust

The second set of information is as follows.

- Map depicting the boundaries
- Commitment or binder of title insurance
- Legal Description Review
- Warranty deed

All fee-to-trust applications contain an Oneida Business Committee resolution authorizing the land to be transferred into trust status, a warranty deed prepared for the Secretary of the Interior’s signature, a title commitment, maps/surveys of the property, the statutory authority to take the land into trust, the reason the Tribe is requesting to have the land taken into trust, the historical and proposed use of the land, tax information relating to the impact of removing the property from the tax rolls, identification of jurisdictional problems which may arise from the trust acquisition and proposed resolutions to any conflicts, identification of the additional responsibilities the BIA will incur as a result of the acquisition, and background environmental data. The applications also contain a socio-economic report the Tribe compiles detailing demographic, housing, and economic focusing on tribal members on the Reservation.

The Tribe also sends out a consultation letter to the municipality, county and state government in which the property is located. This letter provides the location of the property and the current use of the property. The letter also asks the governments to send information directly to the BIA with a copy to the Tribe pertaining to annual property taxes levied, impact resulting from removal of the property from the tax rolls, any special assessments levied against the property, any government services provided by the municipal, county or state government, and any potential land use conflicts which may arise. The letter asks the governments to provide this information to the BIA with a copy to the Tribe within 30 days.

The Secretary (or the Regional Director acting as the Secretary’s designee) considers the information provided in the Tribe’s fee-to-trust application and the information and comments

provided by the municipality, the county and the state. The Secretary also considers any concerns noted on the title commitment or surveys.

The Secretary must also comply with the requirements of the National Environmental Protection Act in making a determination to accept land into trust. The level of analysis required is generally dependent on whether the land acquisition could significantly affect the environment. The levels of analysis include a categorical exclusion determination, an environmental assessment, and/or an environmental impact statement. The Secretary will not accept any property in trust if there are environmental concerns associated with the acquisition.

After all comments have been received and reviewed, after all title and survey issues have been addressed, and after the Secretary determines there are no environmental concerns associated with the trust acquisition, the Secretary is in a position to issue a decision on whether to take the land into trust.

If the Secretary decides to take the land into trust, and once the time line for an appeal has run or if the Secretary's determination to take land into trust is upheld on appeal, the Secretary signs the warranty deed and the property is placed into trust.

### ***Service Agreements***

A service agreement sets forth the government-to-government relationship between the Tribe and a local government. The Tribe began entering into service agreements many years ago as a way of creating partnerships and more efficiently and effectively using resources and identifying responsibilities of each government. The current service agreements are recognized in the Tribe-State Gaming Compact. The Tribe negotiated to keep \$1.5 million in Tribe-State Gaming Compact fees local. In other words, the service agreements allow the Tribe to pay fees directly to affected local governments that would have gone to the state.

Seven local governments are located either partially or entirely within the Oneida Reservation boundaries. These governments are: Outagamie County, Brown County, Town of Oneida, Town of Pittsfield, Village of Hobart, City of Green Bay, and Village of Ashwaubenon. The Tribe has intergovernmental agreements with all of these governments except the Village of Hobart and the Town of Pittsfield. All of these agreements contain assurances from the local governments that they will not object when the Tribe submits fee-to-trust applications as long as the Tribe meets certain requirements, such as owning the land for a period of three years before applying to have it taken into trust status. For example, the following is an excerpt from the Service Agreement between the Tribe and the Village of Ashwaubenon:

The Village will not oppose the Tribe's applications to place Tribal Fee Land located on the Oneida Reservation into trust during the term of this Agreement if the Tribal Fee Land meets either of the following criteria: 1) the Tribe has held fee title to the land for a period of three (3) years or more prior to the date of the application; or 2) prior to the Tribe's acquisition, a tax exempt entity held title to the property for a period of five (5) years or more. If a parcel of land does not meet either of the above-listed criteria, the Village may comment on or object to an application to place the parcel in trust as provided for in 25 C.F.R. Part 151.

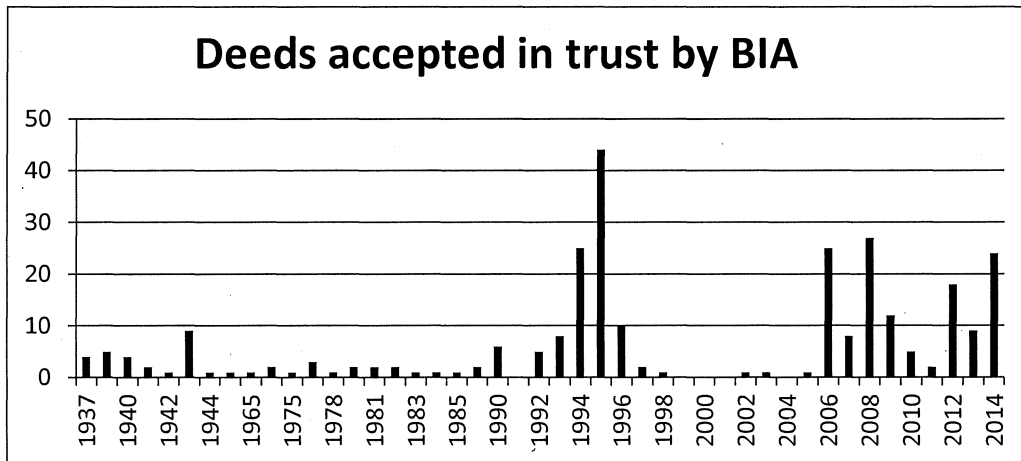
The following table depicts agreements with the local governments that contain provisions where the local governments agree not to object to the Tribe’s fee-to-trust applications.

	<b>Term</b>
Ashwaubenon	01/01/14 – 12/31/18
Green Bay	03/09/09 – 12/31/24 <sup>1</sup>
Brown County	06/30/08 – 10/31/23
Village of Hobart	Expired 11/16/07
Town of Oneida	08/01/12 – 07/30/15
Outagamie County	01/01/06 – 12/31/16

**Midwest Fee-to-Trust Consortium**

The Tribe’s Self Governance Compact with the United States Department of the Interior allows the Tribe to reallocate funding from the federal government with the approval of the Secretary of the Department of the Interior. In 2004, the Business Committee passed Resolution #10-06-04-B to redirect a portion of these Self-Governance funds to pay for Bureau of Indian Affairs staff to process the Tribe’s fee-to-trust applications. Pursuant to this resolution, the Oneida Tribe, along with the Shakopee Mdewakanton Sioux Community, entered into the Midwest Fee-to-Trust Consortium. In 2006, the Milles Lacs Band of Ojibwe joined the Consortium and in 2007, the Ho-Chunk Nation joined the Consortium. All four tribes redirect their Self-Governance funds to pay for BIA staff to process fee-to-trust applications from the tribes. The BIA staff does not make any policy decisions on whether the BIA should ultimately accept the land into trust; rather, the BIA staff compiles the relevant information required under the Code of Federal Regulations and forwards this information on to the BIA Regional Director to make a decision.

Historically, there was a period of time between 1990 and 1996 that the Tribe was successful in having land taken into trust. However, between 1996 and 2006, the Tribe had little success in its fee-to-trust efforts. Below is a chart depicting number of properties placed into trust status since 1937.



<sup>1</sup> The City of Green Bay and the Oneida Tribe are in the process of negotiating amendments to the Service Agreement. The negotiations were ongoing as this opinion was being drafted. It is possible that this agreement may be concluded early.

As a result of the Consortium, the Tribe has been able to increase its success rate in fee-to-trust applications. During 2005, the BIA began to process the fee-to-trust applications, and in 2006, the Tribe began to see results. Below is a table depicting the number of BIA decisions to take land into trust and acres placed into trust each year separated for the years 2001 to 2005 and then after joining the Consortium, the years 2006 to 2015.

Fiscal Year	Decisions	Acres
2001	10	0.25
2002	1	306
2003	0	0
2004	0	0
2005	1	26.41

Fiscal Year	Decisions	Acres
2006	24	521.597
2007	9	641.262
2008	13	726.98
2009	24	1760.369
2010	6	646.45
2011	2	315.67
2012	19	206.491
2013	9	441.906
2014	21	1110.56
2015	3	1643.51

### ***Hobart Fee-to-Trust Appeals***

As identified in the litigation summary above, in 2010 and 2011, Hobart filed appeals with the Interior Board of Indian Appeals, appealing several Notices of Decision to accept land located in Hobart into trust for the Tribe. *Hobart v. Midwest Regional Director, Bureau of Indian Affairs*, 57 IBIA 4 (2013). The Interior Board of Indian Appeals issued a decision determining that the Tribe was under federal jurisdiction in 1934 and the Secretary therefore had the authority to take land into trust for the Tribe, affirmed the Bureau of Indian Affairs' assessment of the Tribe's need for land, the Tribe's use for the land, and the Bureau of Indian Affairs' ability to handle additional responsibilities. However, the Interior Board of Indian Appeals remanded the case back to the Bureau of Indian Affairs for further consideration of the loss of tax revenue, jurisdictional and land use conflicts, environmental concerns, and potential bias in the fee-to-trust consortium.

With respect to the bias issue, the Interior Board of Indian Appeals decision found that the Bureau of Indian Affairs Regional Director did not fully consider the Village's allegations that a potential bias existed in the Midwest Fee-to-Trust Consortium. The Village essentially claimed that the Tribe paid for Bureau of Indian Affairs staff to approve the Tribe's applications. While the Village failed to recognize the nature of the Consortium, the Interior Board of Indian Appeals determined that the Regional Director should give this issue further consideration and explanation. An excerpt from the Interior Board of Indian Appeals decision regarding this bias issue, with accompanying footnotes, states:

The Village argues that the BIA staff members who processed the Tribe's fee-to-trust applications were tainted by "blatant bias." Opening Br. at 48. The claim of bias stems from a "consortium agreement," whereby a group of tribes apparently directed Federal funding back to BIA specifically to fill staff positions to process the tribes' fee-to-trust applications.<sup>17</sup> According to a 2006 Government Accountability Office (GAO) report, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, GAO-06-781 at 20, two such agreements, including one involving BIA's Midwest Regional Office, were then under



investigation by the Inspector General of the Department (IG). *Id.*,<sup>18</sup> *see also* Memorandum of Understanding Between Tribe and Midwest Regional Office for FY 2008-2010 (Opening Br., App. at 37). The outcome of the investigation is not made clear in the briefs or in the Administrative Records. On remand, the Regional Director should specifically address the Village's allegations of bias as well as the outcome of the IG investigation and its relevance, if any, to the Village's allegations. The Regional Director should also discuss any corrective actions that may have been taken in response to the IG investigation prior to the NODs at issue, if relevant to the Village's allegations of bias.<sup>19</sup>

57 IBIA 15-16.

17. The tribes apparently received the funding from BIA as part of their Tribal Priority Allocation funding pursuant to Indian Self-Determination and Education Act contracts or Tribal Self-Governance compacts with BIA.

18. The Village cited to but did not provide a copy of the GAO report. A copy was found online at [www.gao.gov/assets/260/250940.pdf](http://www.gao.gov/assets/260/250940.pdf). This document is one of many cited by the Village in its briefs to the Board for which no copy appears in the administrative records or in the appendices to the Village's briefs. In addition to citing the GAO report, the Village also cited to a BIA publication, *Acquisition of Title to Land Held in Fee or Restricted Fee*, and to an NOD for the Shakopee Mdewakanton Sioux Community, June 7, 2007. See Opening Br. at 49, 59. Neither of these documents appear in the record nor did the Village provide a copy. The Board is not part of BIA, see *In re Shingle Spring Band of Miwok Indians*, 54 IBIA 339, 340 (2012), and does not have ready access to documents that may be in BIA's possession. Any party that wishes to have the Board consider such documents, or arguments based on such documents, must provide copies of them to the Board and to the parties on the distribution list.

19. We note that the IG investigation apparently was underway in 2006 prior to the NODs at issue in this appeal and prior to the consortium agreement in effect at the time of NODs.

To date, the Tribe has not received revised Notices of Decisions for any of the properties subject to these appeals.

With respect to allegations that the Tribe's applications were somehow faulty, the Interior Board of Indian Appeals rejected that allegation and found no fault with the tribe's applications. In this regard, the Interior Board of Indian Appeals decision states:

The Village contends that the Tribe's fee-to-trust applications were insufficient. We reject this argument. The application process is not meant to be onerous but simply must set out the "identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. § 151.9. If additional information is required for a decision on the application, BIA may request the applicant to provide the information needed. *Id.* § 151.12. We do not find fault with the Tribe's applications in these proposed fee-to-trust acquisitions. 57 IBIA 17.

### ***Brown County Residents Fee-to-Trust Appeals***

In 2014, two Brown County resident filed appeals with the Interior Board of Indian Appeals, appealing several Notices of Decision to accept a total of approximately eleven residential properties located in the City of Green Bay into trust for the Tribe. The two appellants are David Dillenburg, a Trustee for the Village of Hobart, and Thomas Sladek, an Alderman for the City of

Green Bay.<sup>2</sup> In the appeals, the residents hired Attorneys Frank Kowalkowski and Jenna Clevers. These two attorneys represented the Village of Hobart in the Hobart fee-to-trust appeals, as well as a number of other lawsuits involving the Tribe and Hobart. In this set of appeals, the residents raised many of the same issues that Hobart raised in its appeals. In addition to these issues, the residents also set forth a number of allegations related to how taking the land into trust would injure them, including allegations that the Tribe would unfairly compete with Dillenburg’s business as a landlord. The Tribe filed affidavits demonstrating that the appellants lack standing to challenge the decision to take the land into trust. The Tribe and the Bureau of Indian Affairs also filed briefs responding to the appellants other arguments. This case is still pending.

***Prioritization and Savings – Fee-to-Trust***

The service agreements and the Midwest Fee-to-Trust Consortium were intended, in part, to provide a process by which fee land would be taken into trust. As identified above, this has resulted in an increase of land taken into trust. The Division of Land Management, in conjunction with the Oneida Business Committee and as may be directed by the General Tribal Council, prioritizes both land acquisition and fee-to-trust applications. Recently, that prioritization has moved from large acreage parcels to maximize value and impact to residential properties to provide additional options for housing to Tribal members.

The majority of fee-to-trust applications were submitted between 2005 and 2007 when the Tribe entered the Midwest Fee-to-Trust Consortium. There remain lands which are eligible under the Service Agreements that being processed for fee-to-trust applications which were not submitted between 2005 and 2007. In addition, new lands have been acquired which may now fall outside of the restricted application period in service agreements for which fee-to-trust applications may be developed. All new applications will be prioritized as set out above. Of the initial 250 or more filings occurring between 2005 and 2007, it is estimated that half remain in the processing backlog at the Bureau of Indian Affairs.

As a result of the increase in accepting land into trust, the Tribe has realized a cost savings. This is identified in the table below.

	<b># Apps</b>	<b>Acres</b>	<b>Taxes</b>	<b>Accumulated Taxes</b>
<b>2006</b>	24	521.597	\$327,489.25	\$3,274,892.50
<b>2007</b>	9	641.262	\$15,439.74	\$138,957.66
<b>2008</b>	13	726.98	\$18,961.02	\$151,688.16
<b>2009</b>	24	1760.369	\$20,349.48	\$142,446.36
<b>2010</b>	6	646.45	\$5,918.84	\$35,513.04
<b>2011</b>	2	315.67	\$1,469.28	\$7,346.40
<b>2012</b>	19	206.491	\$66,208.04	\$264,832.16
<b>2013</b>	9	441.906	\$45,359.10	\$136,077.30
<b>2014</b>	21	1110.56	\$177,158.97	\$354,317.94
<b>2015</b>	3	1643.51	\$12,517.93	\$12,517.93
				<b>\$4,518,589.45</b>

<sup>2</sup> Both Mr. Dillenberg and Mr. Sladek filed their appeals in their individual, not official, capacities.

***Errors/Requests for Additional Information***

As identified above, the fee-to-trust process allows for additional information and clarifications to be requested by the Bureau of Indian Affairs during the decision making process. The Fee-to-Trust Handbook specifically identifies steps during the process for this purpose.

Step 2. Review of Written Request to Initiate Application Process.

6. Identify all missing information or documentation that is required, or materials submitted, that do not have appropriate signatures, dates or other deficiencies that would prevent a complete review of the application and result in incomplete status. Refer to Step 3[.]

Step 3. Responding to an Incomplete Case.

1(a) Prepare a written notice to the applicant including the following information is incomplete[.]

- 1) A statement that the application is incomplete.
- 2) Specify what information or documentation was omitted or required and explain why the requested information is necessary.
- 3) Request the applicant provide the omitted or required documentation or information to the BIA within 30 days of the applicant’s receipt of the written notice or the application will be inactivated and returned.

Step 4. Conducting Site Inspection and Completing Initial Certificate of Inspection.

3. Prepare a written notice to applicant advising of any inconsistencies that require an explanation and/or correction. Advise applicant that unless the inconsistencies are addressed, applicant may be prohibited from taking land into trust. See Step 3[.]

Errors and requests for additional information can result in formal action by the Oneida Business Committee through adoption of a resolution, or a simple correspondence and response from the Division of Land Management. The following chart reviews the 375 fee-to-trust applications from 2003-2014 and identifies corrective resolutions.

Year	New	Corrections	Year	New	Corrections
2014	0	1	2008	13	1
2013	4		2007	6	7
2012	8		2006	275	
2011	3		2005	55	
2010	9		2004	0	
2009	1		2003	3	

The nine corrective resolutions involve the following types of corrections.

Correcting Resolution	Prior Resolution	Correction
BC-11-12-14-A	BC-06-21-06-I	Withdrew application for 2522 West Mason Street
BC-06-11-08-A	Unknown	Parcel #
BC-01-31-07-B	BC-04-12-06-M	Parcel #
BC-01-31-07-C	BC-04-12-06-R	Land use
BC-01-31-07-D	BC-04-12-06-T	Land use
BC-01-31-07-E	BC-04-26-06-A	Land use
BC-08-29-07-C	Unknown	Property location and land use
BC-10-24-07-B	Unknown	Names of former owners
BC-10-24-07-C	Unknown	Legal description

A discussion with the Division of Land Management staff identifies that there are approximately 250 outstanding fee-to-trust applications with the Bureau of Indian Affairs.<sup>3</sup> Of the 319 filings made since 2006, the nine resolutions above constitute less than 3% of the total filings, and about 8% of the filings in which the Tribe has received a decision. There are at least six different resolutions which reference the survey, three of which are developed by outside vendors, most occurred prior to the current staff and only one of which involved an incorrect legal description.

The Division of Land Management identified two applications which were outside of the scope of the Consortium and for which the Tribe has been notified that the applications would not be processed. However, no fee-to-trust application has been denied. One involved a gaming related property and the other involved property owned by the Tribe in New York. In this last application, the Midwest regional office stated that the property was not within the regional area and that it would not consider the application. Finally, one application was closed under the determination it was incomplete as a result of failing to respond to requests for additional information. That application was resubmitted with the proper information the following year.

Many of the 2006 applications are in the communication processes of Step 3 identified in the Fee-to-Trust Handbook. This involves updating the information presented in 2006. Further, there are ongoing questions regarding clarifying survey or land descriptions to meet the requirements of the Land Description Review by the Bureau of Indian Affairs. These are generally minor issues of which only one required a correction deed which required additional Oneida Business Committee action. Finally, there are encumbrances which require additional explanation, or if not acceptable by the Bureau of Indian Affairs require the Division of Land Management to correct.

### ***Land Surveyor***

In general, a land surveyor identifies and measures the boundaries of a parcel. This is done by researching prior title and surveys, walking the described boundaries, and then by surveying the boundaries and corners. A survey for a title is developed based on metes and bounds, a plat map, government survey markers, and/or subdivision maps, for example. The land surveyor certifies that the description accurately identifies the boundaries of the property.

The Real Property Law sets forth the requirements of land descriptions in Section 67.7, Legal Descriptions. 67.7-1. Those sections are as follows.

67.7-1. The legal description for any land transferred under this Law will be derived from a Certified Survey Map (CSM) or Plat of Survey completed by a registered Land Surveyor according to currently accepted minimum standards for property surveys. If the Plat of Survey changes the legal description of the CSM for the same piece of property, the CSM legal description will be used on transfer documents along with the Plat of Survey description designated “Also Known as ...” Section, Township, Range and Fourth Principal Meridian must be within all tribal legal descriptions.

67.7-2. Every land survey shall be made in accordance with the records of the County Register of Deeds for fee land, and in accordance with the records of the Oneida Division of Land

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<sup>3</sup> In large part, these stem from the filings which occurred in 2006. Between 2006 and 2014, there have been 319 applications filed and 110 decisions regarding those applications. The difference may be accounted for by the 55 filings made in 2005.

Management for all trust lands. The surveyor shall acquire data necessary to retrace record title boundaries such as deeds, maps, certificates of title, Title Status Reports from the Bureau of Indian Affairs, Tribal Leases, Tribal Home Purchase Agreements, center line and other boundary line locations.

To file a land survey with the County Register of Deeds, the land survey must be conducted in accordance with state law. In Wisconsin, a land surveyor is an individual that conducts, “any service comprising the determination of the land boundaries and land boundary corners; the preparation of maps showing the shape and area of tracks of land and their subdivisions into smaller tracks; the preparation of maps showing the layout of roads, streets and rights-of-way of same to give access to smaller tracts; and the preparation of official plats, or maps, of land in this state,” *Wis. Stats, 443.01(4)*. A sample survey description is as follows.

Commencing at the Southwest corner of Indian Claim 158, Township 23 North, Range 19 East; thence South 89 degrees 40' 33" East, 1886.24 feet along the South line of said Indian Claim 158 to the Southeast corner of said Indian Claim 158; thence North 55 degrees 35' 39" West, 124.44 feet along the Northeasterly line of said Indian Claim to the Northerly right of way of S.T.H. “172” and the point of beginning; thence North 88 degrees 51' 12" West, 431.79 feet along said right of way; thence 82.69 feet along the arc of a 11,504.16 foot radius curve to the left whose long chord bears North 89 degrees 03' 33" West, 82.69 feet along said right of way; thence 18.94 feet along the arc of a 12.00 foot radius curve to the left whose long chord bears North 45 degrees 31' 46.5" East, 17.03 feet; thence North 00 degrees 19' 27" East, 320.79 feet to the Northeasterly line of said Indian Claim; thence South 55 degree 35' 39" East, 606.52 feet along said line to the point of beginning.<sup>4</sup>

A land surveyor must be licensed by the state. Although there are multiple combinations set forth in state law, there are general two ways to qualify for a license.

- A four year degree in land surveying, two years of practice, and pass a two part exam.
- A two year degree in land surveying, four years of practice, and pass a two part exam.

The two part of exam involves an exam on fundamentals and principles and an exam on Wisconsin jurisdiction. Upon receipt of a license, the land surveyor must report 20 hours of continuing education units every two years.

The Bureau of Indian Affairs, in its Fee-to-Trust Handbook, does not set forth requirements regarding who conducts a survey.<sup>5</sup> However, the Fee-to-Trust Handbook does require a legal land description to be, “in legally acceptable terms that is definite, legally defensible and susceptible to only one interpretation” *p. 8*. In most circumstances this involves identifying a government marker or some other clearly identifiable point, and describing the length of each side and each turn until the description reaches the beginning point. *Fee-to-Trust Handbook, p. 9*.

A review of salary information regarding land surveyors identifies multiple titles for these employees. The job qualifications identify positions ranging from internships, to non-licensed

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<sup>4</sup> This is a partial survey description of a larger parcel.

<sup>5</sup> All land acquisitions by the federal government are governed by 40 U.S.C. 255. The Department of Justice has defined title standards for land acquisition – *Title Standards 2001*. In regards to surveys, the Department of Justice provides the following guidance: “the title evidence should include or be accompanied by a plat or plan, based on a survey by a competent surveyor or engineer, sufficient to enable the reviewing attorney to locate the land described in the title evidence” *p. 18*.

surveyors, to licensed surveyors and project managers. For purposes of this review, I have included only positions which have a minimum of a two-year or four-year degree with experience. These types of positions would generally conform to the licensing requirements of the State of Wisconsin.

- The salary ranges from \$30,548 (payscale.com; land surveyor) to \$92,945 (payscale.com; professional land surveyor).
- These salaries are dependent upon type of employer. For example, at indeed.com, the average salary for a city surveyor is \$59,000 and a county surveyor is \$64,000. Recruiter.com identifies that a land surveyor for a local government can earn between \$40,000 to \$92,000, and the Bureau of Labor Standards reports that the mean wage for a land surveyor for a local government is \$61,940.
- Most land surveyors have five or more years of experience which has a starting salary around \$49,000 (payscale.com).

Salary surveys by Justechjobs.com identify a median salary for Wisconsin as \$54,200. In addition, the median to high salary range for Green Bay is \$44,100 to \$56,700.

The Division of Land Management utilizes a vendor to perform surveys. The firm producing the survey employs licensed land surveyors. There are two time periods involved when requesting surveys – when acquiring the land and when filing fee-to-trust applications. If a survey is conducted during the acquisition phase, those costs are generally included in the closing costs and are not separately documented.

The table below identifies costs associated with surveys from 2012 to 2015 for fee-to-trust applications.

	<b>Location</b>	<b>Cost</b>
October 2012	County H, Town of Oneida	\$4,000.00
November 2013	Oakwood Drive	\$950.00
January 2014	West Point Road	\$1,030.00
June 2014	Cormier – Revision	\$192.50
September 2014	Shady Drive	\$677.50
March 2015	Hillcrest	\$775.00
April 2015	Hillcrest – Revision	\$112.50
<b>Total Expenses</b>		<b>\$7,737.50</b>

The following table identifies costs associated with surveys from 2010 to 2014 across all of the Division of Land Management. The services billed include: plat of surveys, computing, drafting, field work, research, preliminary investigations, and boundary staking, marking corners, traversing, and revised drawings.

	<b>Cost</b>
2010	\$6,442.50
2011	\$10,457.50
2012	\$7,797.50
2013	\$17,720.40
2014	\$10,201.25
<b>Total Expenses</b>	<b>\$52,619.15</b>

The cost of the survey is related to the size of the property being surveyed and the history of the boundaries that may need to be researched. The list above identifies surveys for 4 residential lots, two corrective surveys and a farm. Assuming we purchase six similar lots per year, or even double the amount of purchases, it would still be less expensive to engage a vendor by contract per parcel than hiring an individual as a land surveyor with the same quality of work being conducted. It is possible that other areas of the Tribe would benefit from having a land surveyor on staff – for example mapping trails for Environmental Health & Safety, setting out plat maps for Development Division or Housing Authority, identifying markers for GLIS mapping. However, with a median salary of \$44,100<sup>6</sup> and average expenses of \$10,524 for surveys conducted over the prior five year period for all of the Division of Land Management, it would be a significant amount of work needed to meet those salary expenses.

### ***Employment Standards***

Employees of the Tribe are engaged under the rules set forth under the Personnel Policies and Procedures, other Tribal laws, and in accordance with standard operating procedures adopted by the Human Resources Department. Every employee of the Tribe has an approved and signed job description under which they undertake their employment responsibilities. Most departments operate in accordance with rules proscribed by the Tribe, under federal law, by grant, or by operating procedures created by the program, department, and division, Oneida Business Committee or General Tribal Council.

For example, the Training and Development Department includes the program Oneida Scholarship. This program was created by the General Tribal Council. However, the implementation guidelines have been approved within the department and the Governmental Services Division. Authorization to approve revisions or modifications to the program has been delegated to the Oneida Business Committee by the General Tribal Council.

The Division of Land Management is created under Tribal law, the Real Property Law, and is guided by the Land Commission which was created by the General Tribal Council. The Division of Land Management has developed Standard Operating Procedures which are guided by the Real Property Law, other laws of the Tribe involving use of land and expending funds, federal laws and regulations, such as the Fee-to-Trust Handbook, 25 C.F.R. 151, and federal law regarding probates and assignments in the land.

It is possible to set employment standards that are in addition to currently existing employment responsibilities. However, it would be a violation of the Constitution of the Oneida Tribe of Indians of Wisconsin to retro-actively apply those employment standards. An individual taking action under accepted processes and procedures cannot be retro-actively terminated if the accepted processes and procedures were changed in the future. Further, such employment standards should be as clear and concise as possible. Finally, the employment standards should be under the control of the employee which will be held accountable for the standards being met or carried out.

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<sup>6</sup> It is important to note that the median salary of \$44,100 does not include the cost of vacation/personal time accruals, insurance benefit costs, and licensing fees to name a few employment related expenses..

The proposed resolution sets out the following new employment standard - all land descriptions must be read and certified by a licensed attorney.

The proposed resolution also sets out three new reasons for termination of employment.

- An inaccurate survey results in termination of the land surveyor.
- Fee-to-trust applications that fail because of bad advice to Oneida Business Committee or the ‘Land Department’ results in termination of the attorney.
- Fee-to-trust applications that fail because the attorney did not read them results in termination of the attorney.

The above proposed reasons for termination lack sufficient clarity. It is possible to correct some of the ambiguity in the reasons for termination. For example, it could be clarified that the inaccurate survey results refer only to the original document created by the land surveyor and not subsequent documents which may transcribe the description in error. However, all surveys are based on part on research of public records, for example to determine if easements and other encumbrances exist. As a result, such descriptions are subject to a caveat that there may be missing information which could change the property description.

On the other hand, what constitutes “bad advice”? It is not possible to be absolutely certain regarding advice in legal matters. This is in part because there are at least three groups interpreting the law – the attorney for the Tribe, the attorney for the other party, and the judicial officer. Anticipating how a court may rule on an interpretation or render a decision is simply an educated guess based on existing law, case law, and the prior history of the judge. Is it bad advice if, despite being based on the existing law and application of the law, a fee-to-trust application is denied? This would be presuming only the attorney had the ability to determine the content of the fee-to-trust application. Since these applications require actions from vendors, the Oneida Business Committee, the Division of Land Management, Intergovernmental Affairs and Communications, Enrollment Department, Environmental Division, and Finance Department, to name a few, it is not possible for the attorney to be responsible for the fee-to-trust application and whether it is accepted or denied.

Based on a review of the fee-to-trust applications, no application has been denied as a result of “bad advice” or inaccurate survey information. As identified in the Interior Board of Indian Appeals, the fee-to-trust applications were complete applications and no errors were identified. Based on the Fee-to-Trust Handbook, the Bureau of Indian Affairs has an understanding that errors will occur and corrections will be needed as a result of two opportunities in the processes to provide corrected documents or additional information.

Further, it appears that errors or additional information may arise many years after the submission of a fee-to-trust application. Although most of the corrective resolutions identified above were made a year after the original application was submitted, at least one was eight years after the application was submitted. Given the backlog of approximately 250 applications, it is likely this delay in correcting errors will only continue to increase. However, none of the errors has resulted in a denial and no applications appear to have been delayed or denied based on “bad advice” or an inaccurate survey. The human error portion of these applications is about 8% of 319 fee-to-trust applications that contain multiple complex documents.



The general time frame for getting an application for fee-to-trust accepted and transferred could be a year from start to finish if everything is in place to meet the needs of Indian country and fee-to-trust applications. A “perfect” fee-to-trust application process for the Oneida Tribe, as described by the Division of Land Management, would have a full and seasoned staff of six at Bureau of Indian Affairs, no title issues, no property description issues, no appeals of the fee-to-trust decision, a current service agreement, a current lease with signed disclaimer, no issues submitting paperwork to the Oneida Business Committee, no changes in policies within Department of Interior, and no issues with the environmental review. However, the latest actions appealing Notices of Decision to the Interior Board of Indian Appeals is simple one more delay in a less than perfect process.

Currently, as identified by the Interior Board of Indian Appeals, the fee-to-trust applications under appeal were complete, no further information was needed. However, we are currently waiting on a revised Notice of Decision from the Bureau of Indian Affairs. Further, appeals have been filed for recent fee-to-trust applications in the City of Green Bay. Presuming the fee-to-trust applications are in the same condition as those remanded to the Bureau of Indian Affairs in the prior appeals, there are no errors in these recent applications. As a result, errors in the fee-to-trust applications are not at issue in receiving a Notice of Decision to take land into trust.

### **Analysis**

The proposed resolution contains six Whereas sections outline reasons for the resolution and six Resolve sections setting forth directions.

#### ***Whereas Sections***

The Whereas sections contain numerous errors and misinformation. For example, the Tribe did not enter into the Fee-to-Trust Consortium to “fast track” applications. We did so in order to provide minimum support to the application process which was not available and continues to be less than required staffing levels today. Further, the funding used for the Consortium involved re-directing federal funds back to the Bureau of Indian Affairs for that purpose. The Interior Board of Indian Appeals decision did not state that the fee-to-trust applications were incomplete. The decision directed the Secretary to address the alleged bias and to respond to all elements of the fee-to-trust decision.

In addition to the errors in the Whereas sections, several Whereas sections are simply stating points of view as identified by the Village of Hobart. This is the same local government which believes that the Tribe no longer exists, that the Reservation no longer exists, and challenges every action and decision of the Tribe. It is not clear why such allegations by the Village of Hobart would be persuasive or preserved in a resolution presented to be acted upon by the General Tribal Council. As identified above, the decisions from the litigation that have occurred over the years is certainly less than clear about who “won” and who “lost.” It appears that in many circumstances the Tribe had outcomes that were beneficial.

The proposed resolution alleges that the Oneida Business Committee was not “warned” about an appearance of bias. There is no indication of how such a conclusion was arrived at by the

petitioner as, based on the record there is also no indication that such a discussion did not take place. Nor is there any indication that there was advice given regarding an appearance of bias and the Tribal leaders at that time determined that the potential benefits outweighed that concern. The increase in land taken into trust in the ensuing years, savings to the Tribe and increase in jurisdictional clarification of trust land may be an indicator of the results of that decision. It is a question which may never be clearly answered.

It is recommended that if the General Tribal Council considers adoption of the proposed resolution, that all the Whereas sections be deleted except the final Whereas. This recommendation is in order to avoid inclusion of erroneous and/or misinformation in the Tribe's historical record.

### ***Resolve Sections***

The Resolve sections of this resolution call for multiple actions. Each will be addressed below. In general, if the intent of this proposed resolution is to correct unnecessary errors in the fee-to-trust process, it is not clear how that will be accomplished.

- “the Land Department must hire a certified Land Surveyor to survey all land that will be purchased prior to the land purchase. The Surveyor shall be an employee of the Oneida Tribe”

The information above identifies that the Division of Land Management spends, on average, about less than \$11,000 per year on surveys – whether that is for acquisition, leasing, financing, or fee-to-trust applications. However, the average salary of a licensed land surveyor is about \$44,100. It would appear that employing a licensed land surveyor may not be the best use of limited Tribal resources. Further, this cost does not include the professional liability insurance maintained by a survey firm, the equipment needed to undertake such surveys, and the continuing education credits required to maintain licensing. In addition, survey firms generally employ multiple persons, both licensed and unlicensed, to manage the survey process and is thus able to take on multiple survey projects simultaneously.

The action within this Resolve is within the authority of the General Tribal Council.

- “All land descriptions must be read and certified by a licensed attorney who is an employee of the Oneida Tribe”

Reading land descriptions does not require legal training and the description is actually “certified” by the land surveyor. Further, the land description itself is written by the land surveyor. If errors occur in the land description, it is likely to occur in that process. Further, as identified above, the errors identified in the fee-to-trust process have not generally involved the legal description. Certainly the attorney assigned to review fee-to-trust applications can review the land description, however, it is not clear what benefit will be the result of this action.

The land description is included in multiple documents in the fee-to-trust application. It is not presumed that this Resolve would require reviewing each of those occurrences. To do so may not be an appropriate use of the attorney's time. The amount of time taken to review each occurrence of a land description could be better applied to legal issues arising in the course of business of the Tribe – land transactions, financing agreement, contracts, programing activities, drafting laws

and regulations, to name a few. Further, these types of errors can be noted by the individual that creates the documents, that individual that puts the packet together, or the individual that communicates with the Bureau of Indian Affairs during the fee-to-trust process.

The action within this Resolve is within the authority of the General Tribal Council.

- “When fee to trust application fail because of bad advice given to the Oneida Business Committee or the Land Department by Oneida Tribal Attorney, the attorney’s employment with the Oneida Tribe must be terminated”

As identified above, this Resolve contains a directive which is unclear. It is not possible to presume what “bad advice” might mean in the context of this resolution. Further, given the information in the Interior Board of Indian Appeals decision, there were no errors in the final applications at where the subject of those appeals. As a result, it appears that no “bad advice” has been given. If such an employment standard were adopted by the General Tribal Council, the result would likely be that no attorney would be willing to give any advice for fear of a reasonable interpretation and response could lead to termination. In the alternative, the fee-to-trust process would be unduly delayed by an attorney researching and drafting “advice” that attempts to identify possible scenario, even those that are unlikely, in order to avoid the potential of giving “bad advice.” Further, it is possible that such an employment standard would result in limitations and qualifications on any advice given, or such conservative risk-adverse advice being given, that no action would be taken on any fee-to-trust application. Finally, although there are assignments given to attorneys, it could result on no attorney wanting to act on fee-to-trust applications for fear of not knowing what constituted “bad advice.”

The General Tribal Council has authority to set process requirements. However, this Resolve is insufficiently clear to be acted upon by the General Tribal Council. If this resolution is considered, this Resolve cannot be implemented and should be deleted prior to adoption.

- “That fee to trust applications that fail due to the Oneida Tribal Attorney failing to read the land descriptions, the Attorney must be terminated”

There have been no fee-to-trust applications that “failed” since 2000. Two applications were inappropriate for the Consortium process (a gaming-related parcel and a parcel located in New York) and one application was closed because there was no response to an inquiry. Those applications were not denied because the land description was in error. However, having the attorney read the land description can be included within the fee-to-trust process. This review by the attorney will more likely than not be simply making sure the land description is accurately re-typed into the various documents. The land surveyor is responsible for the accuracy of the land description – whether that would be an outside vendor or an employee of the Tribe. The land surveyor reviews prior descriptions of the boundaries, reviews easements, walks the boundaries to notice encroachments and land marks, and ultimately measures the boundaries. It is not clear what additional benefit will be added by a review of the land description by an attorney.

It is presumed that the “failure” of a fee-to-trust application under this Resolve must be directly attributed to the attorney failing to read the land description in order to terminate the attorney. While it cannot be presumed that this may never occur, it would be difficult to provide evidence or other proof that a fee-to-trust application was denied because the land description was not read

by the attorney. In fact, the simple act of attaching a certification that the attorney read the survey would defeat such an action. In addition, the history from 2000 to the present would indicate that this has not been the reason for denial of an application.

The General Tribal Council has authority to set process requirements. The proposed Resolve calls sets a process requirement that does not result in improvement of the fee-to-trust process and by including a simple certification that the land description was read by an attorney would likely never result in termination of an attorney. This Resolve as interpreted above could be acted upon by the General Tribal Council.

- “When the Oneida Tribe hires a Land Surveyor as an employee, if the Fee to trust application fails due to the survey not being accurate, the surveyors employment shall be terminated”

As identified above, there have been no rejections or denials of a fee-to-trust application as a result of the survey being inaccurate. The Bureau of Indian Affairs Fee-to-Trust Handbook specifically identifies steps in the fee-to-trust process in order to correct errors. Whether employing a land surveyor or contracting for a land surveyor the surveys would be developed in the same manner. First, to comply with the filing of the land acquisition records in the appropriate county records office. Second, this survey would be updated to reflect any easements or encumbrances identified since the acquisition and placed in the fee-to-trust application. The Bureau of Indian Affairs, and the Department of Justice, would recognize this type of survey as being sufficient.

The General Tribal Council has authority to set process requirements. This Resolve as interpreted above could be acted upon by the General Tribal Council.

- “This Resolutions as it applies to the Attorneys is retroactive and the Oneida Business Committee must see this process through”

A retro-active law makes an individual subject to a penalty for action taken that was not in violation of the law when the action was taken. The Constitution of the Oneida Tribe of Indians of Wisconsin in Article VI, Bill of Rights, prohibits action which would hinder “due process of law, as guaranteed by the Constitution of the United States.” Further, as many of these fee-to-trust applications were submitted in 2006, it is not clear which attorney may have reviewed the application. Since the attorney was given no information that he or she would be responsible for reading each land description, they would not be expected to identify that he or she had actually done so. Which, if the Resolve were not unconstitutional and a fee-to-trust application were actually denied because the land description was inaccurate, it would not be possible to ascertain of the land description were wrong simply because the attorney did not read it, nor would it be possible to ascertain whether or not the attorney read the land description.

The General Tribal Council cannot enact a retro-active law. This would be in violation of the due process rights set forth in the Constitution. Further, if the General Tribal Council were to take action to adopt this resolve, the Oneida Business Committee, as a result of the individual oath of office taken would be prohibited from enacting the Resolve. If the General Tribal Council were to take action to adopt this resolution, this Resolve must be deleted.

### **Conclusion**

There are portions of this proposed resolution which contain inaccurate or misleading information which should either be corrected or deleted. Further, some of the Resolves are either insufficiently clear or unconstitutional which should be corrected or deleted.

The remainder of the proposed resolution would be within the authority of the General Tribal Council to act upon. A simple majority vote would be needed.

If you have further questions, please contact me.