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### MEMORANDUM

**TO:** Oneida Business Committee

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

**DATE:** ~~August 19, 2015~~ *Corrected* February 4, 2016<sup>1</sup>

**SUBJECT:** Genskow – Petition – Unclaimed Per Capita Fund Allocation

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 a single Whereas section.

- "...sufficient numbers of home site for Oneida Tribal member which are located on water and sewer lines have not be provided by the Tribe."

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 one Resolve section.

- "...unclaimed per capita funds from per capita payments shall go into a fund to provide more water and sewer home sites for Oneida Tribal members who do not qualify for HUD. Tribal members who can get their own funding can build their own homes."

To draft this opinion, I have reviewed prior actions of the General Tribal Council, Tribal law, policies and procedures, and various other resources. This opinion is broken into sections to address the following issues raised in the resolution – Per Capita Ordinance, current use of unclaimed funds, directions regarding housing and the Reservation, water and sewer infrastructure.

#### Per Capita Ordinance

The Per Capita law was adopted in July, 2000, to set forth procedures regarding per capita payments. The law identified that, "it is the policy of the Oneida Tribe of Indians of Wisconsin to have a consistent methodology for issuance of per capita payments[.]" *Section 9.1-2*. The law sets out deadlines for new enrollment applications to be filed and acted upon in order to be eligible to receive a per capita, when payment forms are mailed and deadlines for the forms to be returned, when missed per capita payments can be claimed and when the missed payment will be

<sup>1</sup> Correction in Conclusion indicated by struck-through and italicized language.

made, and what happens to unclaimed per capita payments. In addition, the law sets forth responsibilities by different parties to manage aspects of the per capita payment.

The Tribe budgets for every potential per capita payment in a fiscal year. This includes payments that may be made to new members as well as payments that would have been made to deceased members. The law sets forth deadlines for claiming payments in order to identify a time period for liability for making the per capita payment. This one year statute of limitations – unclaimed payments, missing payments, minors' trust fund, and deceased members – allows the Tribe to identify when the funds should no longer be held aside for potential payment. Once a per capita payment reaches the statute of limitations period it becomes eligible for re-allocation in accordance with the Per Capita law.

The current allocation of unclaimed per capita was made in 2004 by the Oneida Business Committee adoption of resolution # BC-01-28-04-A in accordance with the Per Capita law, section 9.5-6. This Special Business Committee meeting took up the General Tribal Council agenda from a meeting which did not have a quorum. After 2008, this is no longer an action the Oneida Business Committee undertakes because General Tribal Council meetings regularly meet and exceed the quorum requirements.

The 2004 resolution identified that approximately \$1.7 million had been collected in the unclaimed per capita pooled account. The resolution directed that the interest from the account would be used for the Oneida Language Revitalization Program each year. The principle of the fund would be untouched and future unclaimed per capita payments would be added to the principle. No changes to this directive have been located in the records.

From Fiscal Year 2012 to Fiscal Year 2015, the following amounts have been allocated from the unclaimed per capita fund to be used by the Language Revitalization Program.

FY2012	\$41,442.80
FY2013	\$35,001.33
FY2014	\$57,580.82
FY2015	\$52,197.20

The allocation is placed in a fund which carries over from year to year if all funds are not expended. Overall, the programming fund is carrying a balance of a little over \$20,000.

The Trust and Enrollment Committee has identified an investment strategy, the *Investment Policy Statement for the Oneida Trust Funds*, which outlines how trust funds are managed. The investment philosophy is stated as follows.

“The Oneida Trust Committee emphasizes maximum investment productivity. This is the highest overall rate of return that can be achieved without excessive risk which is consistent with the Tribe’s financial, social, political and environmental concerns.”

The Trust Department assists the Trust and Enrollment Committee to identify acceptable risk and updating that determination on a periodic basis. This risk assessment is used to identify types of investments that should be made with each type of fund. It is necessary to do this with each fund and with groups within each fund. For example, the Trust and Enrollment Committee addresses Minor’s Per Capita Trust Accounts by reviewing how long funds will be invested to determine

the appropriate type of investment – long term, mid-term and short term investment vehicles. On the other hand, the Language Revitalization Fund, or the unclaimed per capita fund, is a long term investment fund. The fund is managed on a conservative risk investment portfolio.

In 2004, the fund began with an approximate \$1.7 million investment. The current balance is approximately \$2.8 million in the funds. This is the result of three types of growth. The first set of contributions is from unclaimed per capita payments from annual per capita payments. Second, 25% of the interest income is re-invested back into the fund. Finally, the fund itself earns income from the investment strategy being implemented. If the investment strategy continues to have consistent returns, the fund is expected to double from reinvesting 25% of the interest income alone by 2030. This does not include the additional interest that would be earned from ongoing unclaimed per capita payment contributions.

### **Current Use of Unclaimed Funds**

As identified above, unclaimed per capita funds are dedicated to a trust account. The interest income from that fund has been allocated to language revitalization activities. In Fiscal Year 2015, the Cultural Heritage Program has allocated the funds in the following manner.

- Contract for an android application has been issued. A second application is being considered for development.
- Special events have been scheduled to bring Oneidas together to discuss the language, history and culture of the Tribe. Examples include the On^yote aka Gathering and Decolonization. These types of special events average \$24,000.
- Travel for ceremonial purposes. Community members and staff travel to the Oneida community in Canada to attend ceremonies conducted in the language. Staff and community members are required to submit a report in order to reimburse the travel costs for staff and for fuel costs for community members. These types of events average \$10,000.
- Supplies and materials written in the Oneida language average \$2000.
- Teacher training averages \$2000.
- Tsi Niyukwalihot^ 2 year immersion is budgeted approximately \$7000.

The Cultural Heritage Program budgets activities each year. These activities are reported on to the Governmental Services Division and to the Oneida Business Committee on a quarterly basis.

### **Directions Regarding Housing and the Reservation**

The Tribal organization plans different activities based on feedback from the community. This feedback comes from different sources.

- Community meetings held to get input on specific actions or activities.
- Quality of Life Surveys
- Oneida Business Committee meetings where subjects are presented and discussed.
- General Tribal Council meetings where subjects are presented and discussed.

In addition to this community specific opinion gathering opportunities, the Tribal organization relies on the technical knowledge and subject matter specific knowledge for making determinations regarding community planning. For example –

- Low income housing is guided by federal regulations on placement, quality, quantity, and accessibility through the Oneida Housing Authority.
- Roads maintenance and development are managed through the Development Division and the Indian Roads program.
- Sewer programs are managed –
  - Individual residential basis through Indian Health Services programs
  - New neighborhood basis through the Development Division and Housing Authority
  - Existing neighborhood through the Utility Department or external infrastructure owners.

Development options and projects are guided by the Comprehensive Plan. This plan identifies the following general opinions expressed by members.

- “Build duplexes, minimizing land base consumption”
- “More elder housing – not just apartments”
- “Increased home ownership”
- “Houses built in appropriate areas with minimal environmental impact and high aesthetic value”
- “Rural characteristic as the standard”

*Comprehensive Plan, 2014 Presentation.* The Comprehensive Plan looks at all aspects of community development – examples of subjects include \housing, natural space, recreation, environmental and healthy living. The plan is presented at community meetings and through various other methods to obtain comments and information regarding community opinions. It is recommended that the amended Comprehensive Plan be reviewed to get a clearer understanding of member’s opinions regarding community development.

### ***Land Use Plan***

On June 16, 2014, the General Tribal Council adopted the following motions.

“Motion to direct the Oneida Business Committee to develop and lead a land use plan reflective of the GTC’s wishes for more residential opportunity in rural, urban (suburban), and apartment living. The Oneida Business Committee shall bring back this plan to GTC no later than October 31, 2014.”

“Motion...to direct the Business Committee to hold community meetings to get input regarding the land use plan.”

At the July 7, 2014, Semi-Annual General Tribal Council meeting the members received an update regarding revisions to the Tribe’s Comprehensive Plan. This plan covers how development within the Reservation will be conducted. The update report was accepted at that meeting.

At a Special General Tribal Council meeting on November 15, 2014, the land use plan was again discussed. The following motion was adopted.

“Motion to develop a system through the Division of Land Management that provides opportunities for two (2) acre or less parcels for residential use on the Reservation and bring that system back for GTC approval at the 2015 July Semi-Annual meeting.

At the Annual Meeting held on February 9, 2015, a report on the Comprehensive Plan was again presented. The members accepted the report.

The July 2015, Semi-Annual meeting agenda was not completed. The remainder of the agenda was scheduled for September 12, 2015. As of the drafting of this opinion, that meeting had not yet been held. However, the agenda for that meeting will conclude the items not completed at the Semi-Annual meeting. This includes the land use plan brought back as directed by the General Tribal Council.

The proposed plan utilized planning principles described above to balance the directive to have more available housing versus the desire expressed to maintain the rural character of the Reservation. The proposed plan identified that this was possible by utilizing three different programs or concepts.

The first option is in-filling in existing neighborhoods to piggyback on existing water and sewer infrastructure. This would allow the infrastructure costs to be reduced in building out those neighborhoods. In addition, this would be consistent with existing plans.

The second option is a new program that would allow members to lead on the home purchase process and the Tribe would be involved in the home purchase cost by purchasing the land thus lowering the overall cost of the home purchase and allow the member to either increase their buying power or lower their mortgage payments. In addition, a long term savings to the home buyer results as the property tax costs would also be pro rata charged between the home buyer (home and other improvements on the land) and the Tribe (value of the land). This new program is being finalized to ensure the purchasing process moves forward without delay by the home buyer once the program is implemented. This requires pre-establishing procedures and acceptance by banks and title companies, to name a few areas.

The third option is to assist elders and veterans by developing a program involving an elder or veteran having an opportunity to sell land, not the house, to the Tribe and the elder or veteran maintaining the home. The sale value would then be used as desired by the elder or veteran.

These three options would be in addition to the existing DREAM home program and the home building opportunities (HBO) already available as an ongoing program.

### ***Quality of Life Surveys***

In addition to the above, the Quality of Life Survey is conducted to obtain opinions and insight from members living on the Reservation. Every member is given an opportunity to participate, and the surveys have had a statistically acceptable response rate for each survey series. The surveys have been conducted on 2000 and every two years thereafter beginning in 2008. The latest survey was conducted in 2014. The Quality of Life Survey is available via the Tribe's website. Relevant portions are set forth below.

*General Reservation Questions*

- The Reservation overall as a place to live is positively rated by 81% of the respondents. This is down from 85% positive rating in 2008. Neighborhoods as a place to live are similarly rated by respondents as 80% positive in 2014 and 83% positive in 2008.
- The Reservation as a place to raise a family has a 74% positive rating, down from 81% in 2000. However, as a place to retire has improved in positive rating of 78% in 2014 from 76% in 2008.

*Housing Specific Questions*

- Respondents in 2000 were 81% positive regarding the condition of their housing unit, and in 2014 that positive rating fell to 71%. It is presumed that this is home owners regarding the condition of their own housing based on responses to other questions in the survey.
- 63% of the respondents in 2000 owned their own home, and 68% of the respondents in 2014 owned their own home.
- 56% of respondents living on the Reservation were in homes on Tribal land in 2000, which increased to 58% in 2014.
- The average household size is three people, and two out of three of those individuals were members.
- Respondents were 65% positive regarding the variety of housing options on the Reservation in 2010, which is down to 52% positive rating in 2014.

The Division of Land Management and Development Division have begun the process of finalizing a Neighborhood Development Plan. This is a long term plan providing direction regarding how neighborhoods within the Reservation are expected to be built out. This new development will include various types of housing locations from urban to rural, and a broad array of housing types from multi-family (apartments, duplex, mixed-use), single family and creative housing options such as extended family and small housing options.

The following table identifies proposed future development sites. The table includes estimates for infrastructure costs where a rough estimate can be made.

<b>Neighborhood/Acres</b>	<b>Infrastructure/Cost</b>	<b>Current</b>	<b>In Progress</b>	<b>Future</b>
Green Valley Housing Area, 151 acres	Water/Sewer	43	24	51
Former Lancelle Farm, 6.25 acres	\$185,000	0	0	6-8
Green Earth Outlot, 4.5 acres	\$50,000	0	0	5
Former Blasczyk, 2 acres	\$320,000	0	0	12
Former Kurowski/Guntlisbergen Farms, 47.4 acres	\$3.4 million	0	0	76

There are also additional sites proposed for consideration which have not yet had sufficient analysis to estimate costs and lots. These include Former Maple Leaf property, County Highway FF, 200 Block of State Highway 54, Ranch Road Site, and 2898 West Mason Street.

This new development is in addition to the 1093 housing units managed by various programs of the Tribe. In addition, this is included in the approximately 9000 housing units on the Reservation.

## Water/Sewer Infrastructure

### *Infrastructure*

Housing sites, whether in rural areas or in neighborhoods have several levels of infrastructure which are private managed or publicly managed. This infrastructure includes water service, sewer service, electrical service, natural gas service, roads, stormwater management, sidewalks, and parks. This section will attempt to identify both costs and potential resources for funding.

The development of a neighborhood provides the greatest opportunity to create a living community through various funding resources. For example, the Department of Housing and Urban Development low income housing programs have identified a positive benefit to low income housing tenants being integrated into the community. Infrastructure in a mixed housing neighborhood that utilizes various federal and tribal funding sources can develop more housing sites than single unit development. However, each location has different geographic aspects that may result in higher or lower costs.

The Development Division has identified examples of infrastructure costs from two recent projects.

- The Green Valley Housing infrastructure of approximately 3000 feet of roadway to provide access to 20 new lots was approximately \$930,000 in construction costs and \$99,000 in design costs.
- The Elder Village infrastructure included 2000 feet of road way to provide access to 30 new lots. This cost approximately \$490,000 in construction costs, \$53,000 in costs associated with utilities placement, and \$100,000 in design fees.

These costs do not include the costs of connection to the individual house of utilities such as electricity and natural gas, water, and sewer.

Individual housing lots have different infrastructure costs depending on whether those are connecting to an existing public utility such as water and sewer systems or putting in place a private well and septic system. The Tribe's Well Abandonment Ordinance requires connection to public systems where available and abandonment of private wells. As a result, if an individual housing site is on a public utility that is the option that must be utilized. Studies have shown that the overall costs are similar whether a private well or a public water system.

The same holds true for a private septic system. A private septic system is generally used when public sewer systems are not available. A permit for a private septic system is generally not available when connection to a public system is available.

### *Funding Options*

There are different funding options available for water and sewer systems, as well as roads or other infrastructure needs. These include the allocation of tribal funds, loans, and grants. Listed below are federal funding resources for public utility systems. This list is drawn from the comprehensive list on the U.S. Environmental Protection Agency website for programs available to Tribal governments.

- Rural Utilities Service Water and Waste Disposal Programs – this program provides loans and grants for drinking water, waste water, solid waste and storm drainage systems to be installed, repaired, improved or expanded.
- Economic Development Grants for Public Works and Development Facilities – this program provides project grants for economically distressed areas for projects with matching funds that promote economic development and create long term jobs.
- Clean Water Act Indian Set-Aside Grant Program (Wastewater) – this program provides grants for waste water systems and facilities.

In addition to the above public system grants, the Tribe operates the Sanitation Facilities Construction Program in the Indian Health Service. This program provides water, sewer/solid waste to individual homes.

### **Analysis**

The Per Capita Ordinance identifies that unclaimed per capita funds are set aside for specific allocation by the General Tribal Council. That action occurred in 2004 which delegated those funds for use for language revitalization in accordance with the Per Capita Ordinance. Re-allocation of those funds by action of the General Tribal Council is within the procedures set forth in the Per Capita Ordinance.

As identified by the Development Division, infrastructure costs for neighborhoods are generally greater than \$45,000 - \$60,000 which is the interest income from the unclaimed per capita fund. Individual home private wells can cost from \$5000 to \$20,000 depending on the depth of the well and the type of system installed. Individual home private septic systems are estimated to cost \$1500 - \$15,000. As identified above, there are federal grant funds available for private septic system installation and/or replacement.

The fund transfers approximately \$45,000 in interest income annually. This is 75% of the interest generated each year. This would be a total approximate interest generated of \$60,000. It is possible to transfer the entire fund for the development of water and sewer. The fund balance is approximately \$2.8 million. It is also possible to transfer ongoing unclaimed per capita funds to the development of water and sewer development.

The Resolve in the resolution identifies that unclaimed per capita payments “shall go into a fund[.]” Based on this language, it is possible to presume that the resolution will result in one of two options.

- Creation of a new fund and allocation of unclaimed per capita funds.
- Re-allocation of the existing fund for the purpose in the resolution.

The creation of a new fund will result in an appropriate investment strategy being developed in order to manage the funds for growth and disbursement of funds. If the existing fund is re-allocated, interest income would be allocated for use for the water and sewer systems. Depending on when the resolution is acted upon, the funds would be not likely to be available for the current fiscal year as those likely have been allocated for use under the existing resolution.



### Conclusion

The proposed resolution would reallocate funding from unclaimed per capita payments from language revitalization to water and sewer sites. It is recommended that the Resolve be amended to clarify the impact. Two alternatives are presented below.

- **Creation of a New Fund for Interest Income.** Now Therefore Be It Resolved that the allocation of unclaimed per capita payments in resolution # BC-01-28-04-A shall revised to be placed in a fund for water and sewer development from which investment income shall be allocated annually for that purpose.
- **Reallocation of Interest from Existing Fund.** Now Therefore Be It Resolved that resolution # BC-01-28-04-A is amended by re-naming the Language Revitalization Fund as the Unclaimed Per Capita Investment Fund, and the interest income shall be allocated on an annual basis for the purposes of water and sewer projects.

~~This action would require a simple majority vote.~~

*Resolution # BC-01-28-04-A was adopted at an Oneida Business Committee meeting which concluded the Annual meeting agenda of the General Tribal Council as a result of a lack of a quorum at that meeting. The actions of the Oneida Business Committee to conclude that agenda are actions on behalf of the General Tribal Council and have been consistently viewed as actions of that body. As a result, amending the resolution will require a two-thirds vote.<sup>2</sup>*

If you have further questions, please contact me.

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<sup>2</sup> See, for example, the series of actions regarding adoption of the Election Law and amendments. Some of which were adopted by the Oneida Business Committee on behalf of the General Tribal Council and subsequent actions required a two-thirds vote.