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MEMORANDUM

TO: Oneida Business Committee

FROM: Jo Anne House, Chief Counsel 

DATE: February 15, 2011

SUBJECT: Genskow Petition – Resolution – Oneida Seven Generations Corporation

You have requested a legal opinion regarding a resolution submitted with a petition by Madelyn Genskow. The number of signatures on the petition have been verified by the Enrollment Department. The resolution, in pertinent part reads as follows.

Whereas, the Oneida Tribal members have a right to know all business of the tribe.

Now Therefore be it Resolved, that the General Tribal Council directs the Business Committee to report on potential damage to government relationships as a result of corporate actions with discussion on how as a government we will respond to it.

Be it Resolved, that the General Tribal Council request discussion on the terms of the tribes agreement with Seven Generations and the potential of changing that agreement to bring about reporting to the Business Committee and the General Tribal Council on legal, political and fiscal matters.

Be it Resolved, that action may take place on these topics.

To develop this opinion, I have reviewed the Constitution of the Oneida Tribe of Indians of Wisconsin, the By-laws of the Oneida Tribe of Indians of Wisconsin, the corporate charter of the Oneida Seven Generations Corporation, the minutes of General Tribal Council meetings, and various prior legal opinions regarding corporations.

Background

Corporations – Tribes – Purpose

The following information was presented in a legal opinion dated July 10, 2008. *Genskow Petition – Resolution – Oneida Seven Generations Corporation, July 10, 2008.*

Typically, a corporation is owned by the owners of the shares of the corporation. Those shareholders have some rights to information regarding the corporation and its activities which

are set by law and/or the corporate charter. Further, there is an ability, through a vote of the shareholders, to direct actions of the corporation.

A corporation is made up of the shareholders in the business, run by a board of directors and operated by an executive officer or general manager. Shareholders are investors in the business and provide capital in return for dividends. Members of the board of directors are entrusted with the responsibility to provide long-term direction for the business. The chief executive officer provides daily management of the business.

The Tribe creates corporations to avoid liability for business activities and risks to Tribal assets. In addition to limiting liability to Tribal assets, the Tribe creates corporations in order to generate business relations that would otherwise avoid working with governmental entities and issues of sovereign immunity. Finally, the Tribe, as a shareholder, has certain rights to information regarding the corporation activities. Both of these subjects - liability and shareholder rights - are outlined in greater detail below.

Liability - Piercing the Corporate Veil

Generally, state laws recognize a corporation as a 'person' for purposes of the actions of the company. As a part of this independent existence, the liabilities of the corporation generally do not flow to those persons who hold shares in the corporation. However, there are occasions where a court will look beyond the corporate entity to the shareholders and assign liability to individuals.

The Oneida Business Committee has authorized two types of corporate entities - those chartered by the Tribe, and those issued a charter through state law. A corporate charter is subject to interpretation under the laws in which it is created, and a corporations actions are subject to interpretation under the laws in which the corporation is acting. As a result, this review provides general information. Specific actions require additional review based on the facts that arise. The Oneida Tribe does not currently have laws regarding corporations in place. This legal opinion will rely upon Wisconsin law as a basis for this discussion. In addition to applicable law, the charter itself contains directions to the corporation and authority of the shareholder.

As identified above, liability of a corporation is generally limited to the assets of the corporation. However, where the corporation has a small number of shareholders, or in this case where the Tribe is the sole shareholder, liability may pass through the corporation to the Tribe. In those circumstances, the court looks at whether "the corporation is not really a distinct individual, but merely an extension or 'alter ego' of its shareholders, being used to advance their private interests[.]" *Larson, A. (2004). Piercing the Corporate Veil, www.expertlaw.com*. Generally, "to prevail on a piercing claim..., a plaintiff must prove: 1) that the defendant shareholder completely dominates the business practice with respect to a subject transaction to the extent that the corporation has 'no separate mind, will or existence of its own'; 2) that the defendant shareholder used the control to commit fraud or wrong, to violate a statutory or other legal duty, or to act dishonestly or unjustly; and 3) that there was a causal connection between the first two elements and the harm to the plaintiff." *Hinkston, M. R. (2006). Piercing the Corporate Veil, Wisconsin Lawyer, 79(2)*.

If a court finds that the corporation has been operated for 'personal purposes' (in this case upon direction of the Tribe, i.e. the General Tribal Council or the Oneida Business Committee) then the

shareholders can be held personally liable. Studies have found that this liability is greater for small closely held corporations. *Larson, A. (2004). Piercing the Corporate Veil, www.expertlaw.com.*

Shareholder Rights

Shareholders in a corporation generally have rights set forth in the corporate charter and under the state laws in which they are incorporated. Under Wisconsin law, the by-laws must include basic information such as the name of the corporation, number and class of shares, authority of the board of directors, and the address of the corporation or the office of its registered agent. *Wis. Stat. 180.0202(1)*. In addition, state law provides that the articles of incorporation may set forth other information, including "defining, limiting and regulating the powers of the corporation, its board of directors and its shareholders." *Wis. Stat. 180.0202(2)(b)(3)*. In addition to the articles of incorporation, corporations may have by-laws that provide further direction, process, or information. Bylaws "may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with its articles of incorporation[.]" *Wis. Stat. 180.0206*.

Oneida Seven Generations Corporation

The Oneida Business Committee began developing the concept of the Oneida Seven Generations Corporation when it approved a grant application in 1995. *Resolution # BC-10-25-95-B*.

WHEREAS, the national priority of the Oneida Tribe is to ensure a stable Oneida economy that sustains our sovereign government, family, community and affords all members the opportunities to participate in the economic resources, and
WHEREAS, the Oneida Tribe through the Oneida Development Division is to provide and expand a stable land and economic base in order to increase the quality of life for the Nation and its members, and
WHEREAS, the Oneida Tribe believes the community will be revitalized by diversifying our economy, and renewable financial resources that are generated through the development of ventures which have long range "Seventh Generation" potential.

The end result of this grant was the development of the Oneida Seven Generations Corporation created by the adoption of Resolution # BC-10-16-96-A.

WHEREAS, it is in the best interest of the Oneida Tribe of Indians of Wisconsin to charter a tribal corporation to promote and enhance the business and economic development of the Oneida Tribe (*Whereas #5*).

This charter was granted under the authority set forth in the Constitution under Article IV, section 1(h).

To charter subordinate organizations for economic purposes and to delegate to such organizations, or to any subordinate boards or officials of the tribe, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power.

The right to 'review' identified in this section was defined by Resolution # GTC-12-69 as to change or amend.

The current corporate charter of the Oneida Seven Generations Corporation identifies the following purposes for the corporation in Article VI.

- (A) To promote and enhance the business and economic diversification directly or as a holding company for real estate and other business ventures of the Nation.
- (B) To purchase, take, receive, lease, solicit, take by gift, devise or bequest or to otherwise acquire, hold, improve, use and otherwise deal in and with money, real and personal property, rights and services of any kind and description, or any interest therein.
- (C) To buy, sell, mortgage, pledge, lease, hold, transfer and assign all or any part of the Corporation's property and assets, PROVIDED, that title to all trust or restricted real or personal property of the Oneida Nation must be and remain in its trust or restricted status for the Oneida Nation which includes the necessary approval of the Oneida Land Commission or its successor.
- (D) To enter into, make, perform and carry out contracts, and to receive financial assistance from any governmental or private source and to expend its funds in furtherance of its purpose.
- (E) To waive only the sovereign immunity the Corporation possesses for the purposes of dispute resolution or contract enforcement in contracts, agreements or other similar documents for the furtherance of the Corporation's business and/or purpose.
- (F) To develop business development opportunities, PROVIDED that such activities comply with the laws the Oneida Nation and policies of the Corporation.
- (G) To hire, discharge, train and supervise all labor and employees required for the purpose of the Corporation through consensus of the OSGC Board of Directors.
- (H) To elect or appoint officers and agents of the Corporation and define their duties and fix their compensation, PROVIDED that such elections or appointments comply with the laws of the Oneida Nation and the policies of the Corporation.
- (I) To amend and alter by-laws, consistent with the charter or the executing of the affairs of the Corporation.
- (J) To sue and be sued in its Corporate name as herein specifically provided to the extent allowed by Oneida tribal, state or federal law upon any contract, claim or obligation of the Corporation arising out of the accomplishment of its purposes. Recovery against the Corporation is limited to the assets of the Corporation. The Oneida Nation will not be liable and its property or assets will not be expended for the debts or obligations of the Corporation.
- (K) To purchase insurance for any property, real or personal, or person against any risks or hazards.
- (L) To establish and maintain bank accounts as may be necessary or convenient.
- (M) To borrow money and to issue temporary or long term evidence of indebtedness of the Corporation and repay the same.
- (N) To pledge and otherwise encumber the assets of the Corporation as security for debts; and to acquire, sell, lease, exchange, transfer or assign personal property and interests therein.
- (O) To set up separate corporate business systems and processes; i.e. LLC's and LLP's, etc.
- (P) To take further actions as are commonly engaged in by corporate bodies, as the Board of Directors may deem reasonably necessary to effectuate the purposes of the Corporation.

Relationship of Corporation to the Tribe

The Oneida Business Committee, on behalf of the Tribe, created the Oneida Seven Generations Corporation. The Tribe owns all of the shares in the corporation. However, as identified above, the corporation was created as a separate entity to allow the corporation to conduct business

without the hindrance of third parties having to work with a government or to negotiate sovereign immunity concerns. As a result, the corporation is given a significant amount of independence. This is balanced by the appointment of members of the Board of Directors by the Oneida Business Committee as well as quarterly reporting requirements.

The difficulty is maintaining a separateness of the Tribe from the corporate actions and the perceptions of the community at large. The corporation is intended to be independent, but it is in some facets guided by the philosophy of the Tribe. Further, the corporation has the power to take actions that would not otherwise be approved by the Tribe, whether that is the Oneida Business Committee or General Tribal Council. The response of the Tribe to these types of actions is extreme within the charter – dissolution. The reason for this limited response is identified above, to avoid the political aspects of a government directing the actions of the corporation.

These relationships can be changed to provide more direction to the corporation. However, this affects the corporation's ability to maintain and develop relationships with other companies. For example, would the corporation have been able to partner with Bellin or Badger Sheet Metal, or would have been able to rent facilities to Maaco or Schneider? Further, if the change were made, would the Tribe be jeopardizing these existing relationships? There may be discussion needed to identify how to set further philosophical guidelines for Oneida Seven Generations Corporation, as well as other corporations.

Reporting Requirements

The Oneida Seven Generations Corporation has, in the corporate charter, a requirement to report to the Tribe four specific times a year – twice to the Oneida Business Committee and twice to the General Tribal Council. These reports require the following information to be submitted.

- A. The business done and intended to be done by the Corporation;
- B. Material changes and developments since the last report in the business described;
- C. Any material pending legal proceedings to which the Corporation is a party; and
- D. Financial statements of the Corporation, including a consolidated balance sheet and consolidated statement of income and source and application of funds. *Corporate Charter, Article XIII.*

The General Tribal Council has discussed reporting requirements on several occasions. The most recent occurred on November 15, 2008. At this meeting the General Tribal Council was presented a petition which requested approval of a resolution prohibiting further investment in Oneida Seven Generations Corporation until it had completed financial disclosures related to every subsidiary and partnership of Seven Generations and a complete financial and operational audit had been conducted. The Oneida Business Committee recommended an alternative resolution which was ultimately adopted. *Resolution # GTC-11-15-08-B, Directing Review of Corporate Charters.* This resolution directed the Oneida Business Committee to develop and adopt amendments to corporate charters which set forth standard requirements for reporting.

The Oneida Business Committee adopted Resolution # BC-01-26-11-A which set forth standard reporting requirements for Oneida Seven Generations Corporation. The new reporting requirements set forth reporting in a public report and a confidential report. The confidential

report can be viewed by members; however it will be maintained in a confidential manner. The report forms are described below and in the following table as originally presented by Kathy Hughes, Vice-Chairwoman to the Oneida Business Committee in 2009.

- A narrative report is considered that report that is typically delivered to the shareholders. This type of a report identifies the activities and accomplishments of the corporation, provides information regarding goals and future activities, and a financial report.
- A financial report provides greater information regarding the corporate financial activities. This is the type of report that would be received by the Board of Directors.
- A disclosure report identifies relationships within the corporation regarding the primary officials. This type of report would be received by an Audit Committee.

Report	Audience	Timing	Location	Public/Confidential
Narrative	GTC BC	Annually Quarterly	Annual Report BC Packets On-line Library	Public
Financial	BC Treasurer Audit Committee	Quarterly *1 audited *3 unaudited *As requested	BC Packets Treasurer Audit Committee	Confidential Available to Members
Disclosure	Audit Committee BC Treasurer	Annually	Audit Committee Treasurer	Confidential Available to Members

The reporting requirements are included in Article XIII of the attached Oneida Seven Generations Corporation charter, and have been incorporated into every other corporate charter by individual resolutions.

Actions of Oneida Seven Generations

This petition asks for information regarding how the actions of Oneida Seven Generations Corporation affecting the Tribe’s relationships with local governments. This question arises out of the issues surrounding the waste-to-energy project proposed by the corporation.

Initially this project began through a grant application by the Tribe to the Department of Interior. The grant application was developed by the Oneida Seven Generations Corporation and presented to the Tribe for consideration. The Oneida Business Committee approved the grant application to be submitted by the Tribe through Resolution # BC-06-23-10-B. The grant was conducted by contract with Oneida Seven Generations Corporation to finalize the project review of a proposed waste-to-energy project. The findings were favorable to begin finalization of the business plan.

A second grant application was submitted in order to complete the project, and Oneida Seven Generations has received approval of a loan guarantee by the Department of Interior to construct the building for the business. In the interim, Oneida Seven Generations Corporation began finalizing the approvals to lease the necessary land from the Tribe and obtain agreements for the transportation of local garbage for the waste-to-energy process.

Initially, Oneida Seven Generations Corporation was requesting use of property adjacent to the Brown County Waste Transfer Station as it has preliminary approval for waste contracts with Brown County. The Land Commission approved the issuance of a lease of fee land behind the Brown County Waste Transfer Station.

In order to avoid conflicts in the construction and operations of the business, Oneida Seven Generations Corporation began to obtain permits from the Tribe as well as approval to access a road owned and operated by the Village of Hobart. Representatives of the Tribe were kept informed as to the progress of the access request. The Village of Hobart approved an access agreement for Dead End Road, however that agreement required the corporation to act on behalf of the Tribe, agree to the jurisdiction of the Village in regards to building permits, and other matters. The corporation requested the Village to remove the language in the agreement which was contrary to existing federal Indian law and exceeded the corporation's authority on July 19, 2010. However, they received no response from the Village and the corporation was forced to walk away from this location. The Oneida Business Committee was informed of these actions, but at no time was the easement presented to the Oneida Business Committee for consideration or action.

Oneida Seven Generations Corporation then began looking at existing properties it already had under lease. This led to looking at two parcels. The industrial complex which currently houses Little Bear, the United States Post Office, and Nori Damrow Food Distribution buildings, was determined to be inappropriate because it was outside of the working area of the energy provider the corporation had contracted with to sell the energy it was creating. The cost of creating the connection would have exceeded the potential revenues.

This led to selection of the trust property on Packerland in the Village of Ashwaubenon which was already under a master lease with the corporation. The corporation brought a presentation to the permitting committee of the Village of Ashwaubenon as a presentation of information, permitting from the Village of Ashwaubenon was not necessary as the land was trust property and permits would be issued from the Tribe.

Several issues have impacted the development of this location. First, the Village of Ashwaubenon objected to the positioning of the building on behalf of Schneider National which indicated it negatively impacted its business and property values. The Oneida Seven Generations Corporation and Schneider National met to discuss the issues. With the financial backing of Schneider National the building was repositioned farther back on the site and Schneider National's complaint was withdrawn. However, the Village of Ashwaubenon continues to argue that the proposed business is not appropriate in this area it had developed as a light industrial office park, as well as the number of garbage trucks would negatively impact traffic. Finally, during this period, neighbors have begun objecting to the project as being placed too close to homes, schools and other activities in the area. The Oneida Seven Generations Corporation continues to conduct public relations information sessions regarding the project and its impact on the community.

At the time of this opinion, the Oneida Seven Generations Corporation has begun obtaining all appropriate permits from the Tribe and federal agencies regarding water discharge and air permits. Until these permits or authorizations have been obtained, the Tribe's building permit has been placed on hold and no further construction is authorized.

The Oneida Business Committee adopted Resolution # BC-12-8-10-B which identifies that "...the Oneida Business Committee enthusiastically supports this project and will work with [Oneida Seven Generations Corporation] and Oneida Energy to help them realize the opportunity and to locate the facility on a site that is most desirable. The resolution does not indicate a specific location, but identifies support of an environmentally friendly project that reduces landfill garbage, creates energy, and useful by-products.

This project continues to be developed by the Oneida Seven Generations Corporation. At the same time, the Oneida Business Committee has met with the Board of Directors of the corporation to express its concerns about the confusion regarding the corporate versus Tribe in these actions and to monitor that the project continues to fall within tribal philosophies.

Conclusion

This resolution is a request to have information presented at a meeting during which discussion and action can take place. Although the resolution would require another meeting to be called to respond to the requests in this resolution, this opinion has attempted to be responsive to the concerns raised. If adopted, there are limitations on actions that can be taken by the General Tribal Council. It is not possible to list those limitations, but in general, any action affecting a prior contract entered into under existing authorities would be out of order under the rules.

Adoption of this resolution would require a simple majority vote.

If you have further questions, please contact me.