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MEMORANDUM

Exhibit J

TO: Oneida Business Committee

FROM: Jo Anne House, Chief Counsel

DATE: September 15, 2014

SUBJECT: Opinion – Filling a Vacancy on the Oneida Business Committee

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You have requested a legal opinion regarding the filling of a vacancy on the Oneida Business Committee resulting after an election has been finalized and oath of office taken. Council Member Ben Vieau submitted a resignation from the Oneida Business Committee effective September 12, 2014 at the close of business. Chairwoman Cristina Danforth has requested a Special Oneida Business Committee to call a Special General Tribal Council meeting to fill the vacancy.

Applicable Law

The Constitution contains the following language in Article III, section 3.

The General Tribal Council may at any regular or special meeting fill any vacancies that occur on the Business Committee for the unexpired term.

Article III, Section 4, the Constitution contains the following language.

...The General Tribal Council shall enact necessary rules and regulations governing the election of tribal officials....

The General Tribal Council adopted the current Election Law in 1993, and the latest amendments by resolution # GTC-1-04-10-A. This law addresses calling elections, operating elections, and closure of elections. There is no rule or regulation regarding filling a vacancy on the Oneida Business Committee after an election has been concluded and during the course of a term of office.¹

The Oneida Business Committee is delegated Article IV authority under action taken by the General Tribal Council in 1969 and further identified in subsequent actions.² However, election

¹ Although the issue presented here is a vacancy resulting from a resignation and not a removal, the Removal Law was reviewed to determine if any guidance exists to fill a vacancy under this law. There is no direction in this law. It should be recommended to the Legislative Operating Committee that this be addressed and amendments presented for adoption by the General Tribal Council to avoid the questions raised in the event of a removal and how that vacancy would be filled.

² For example, see the Legislative Procedures Act (*formally the Administrative Procedures Act*) regarding adoption of laws, and Election Law regarding setting Special or Regular election dates.

or selection of Oneida Business Committee members is not in Article IV. Direction regarding filling vacancies resides in Article III. As a result, the Oneida Business Committee has not been delegated authority to address this matter, even to the extent of calling a Special Election to fill the vacancy.

Past General Tribal Council Actions

The General Tribal Council has addressed the issue of a vacancy on the Oneida Business Committee on several occasions, although no more recent than the 1980s. A review of those prior General Tribal Council actions back to 1969, when amendments to the Constitution were adopted, identifies the following actions of the General Tribal Council regarding filling vacancies on the Oneida Business Committee. Prior to 1969, the Executive Committee minutes and General Tribal Council minutes is rather sparse making it difficult to identify actions with any level of certainty.

1976-1978

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Between 1976 and 1978 there were a series of vacancies on the Oneida Business Committee. These vacancies were addressed in 1976, 1977 and then again in 1978 and are described below. I have used the minutes of the General Tribal Council or the Oneida Business Committee to identify the membership on the Oneida Business Committee where there is no other clear indicator of who filled the vacancy. I have underlined the vacancies discussed between the different ‘sets’ of Oneida Business Committee membership.

Oneida Business Committee identified on May 25, 1976 Minutes

Purcell Powless, Chair, Norbert Hill, Vice-Chair, Alma Webster, Treasurer, Amelia Cornelius, Secretary, and Council Members Rick Hill, Irene Moore, Joy Ninham, Ruth Baird, and Mervin Jordan.

- May 17, 1976: Motion to “hold Ruth Baird’s resignation in abeyance[.]” *Oneida Business Committee, Minutes, pg. 2.*³
- May 25, 1976: Motion to “consider a leave of absence from Council member Ruth Baird for an indefinite time[.]” *Oneida Business Committee, Minutes, pg. 1.*
- October 25, 1976: Motion to “accept the resignations of Peter Mervin Jordan from the Business Committee, O.T.D.C. and Nursing Home project superintendent[.]” *Oneida Business Committee, Minutes, pg. 2.*
- November 15, 1976: Motion to “accept Ruth Baird’s resignation from Oneida Business Committee[.]” *Oneida Business Committee, Minutes, page 2.*

³ During this time period many meetings began as General Tribal Council meetings but as a result of the lack of a quorum the Oneida Business Committee concluded the agenda or took action. Most often, that occurred immediately after identifying that a quorum did not exist. As a result, the minutes may identify that a General Tribal Council meeting began, but the action taken was that of the Oneida Business Committee. I have referred to the action as coming from either the Oneida Business Committee or the General Tribal Council minutes based on which entity was called to order at the time, even though the minutes appear to be a combination of both.

Based on a review of minutes of the Oneida Business Committee minutes in the time period between May 17, 1976 and January 1977, it is presumed that the vacancies being filled are for Peter Mervin Jordan, who resigned October 25, 1976, Ruth Baird, who resigned November 15, 1976, and Irene Moore. It is not clear when the vacancy for Irene Moore was declared.

- December 6, 1976: “Nominations for 3 vacant council members[.]” *Oneida Business Committee, Minutes, December 6, 1976.*
- January 8, 1977: excerpt from minutes of General Tribal Council. *General Tribal Council Minutes, January 8, 1977.*
 - “Loretta Metoxen moved to fill the vacant Business Committee terms as the next item of business.”
 - “Jerry Hill stated that [under] the Constitution and By-Laws [it is] the General Tribal Council fills unexpired terms of office.”
 - “Loretta Metoxen moved that a special election to fill the three (3) vacancies on the Oneida Business Committee take place today, Jan. 8, 1977, in the Oneida Nation Memorial Building gym by the previously prepared ballot with three clerks appointed, the election hours being 11:30 am til 4 p.m.”
 - “Jackie Thomas, Ann Skenandore, Sherman Thomas volunteered to be appointed to the election committee.”

Oneida Business Committee identified in Oneida Business Committee meeting minutes of January 17, 1977, and Special General Tribal Council meeting minutes of January 29, 1977
Purcell Powless, Chair, Norbert Hill, Vice-Chair, Alma Webster, Treasurer, Amelia Cornelius, Secretary, and Council Members Joy Ninham, Rick Hill, Wendall McLester, Robert Thomas, and Loretta Metoxen.

- March 7, 1977: Motion to “accept Alma Webster resignation [.]” *Oneida Business Committee Minutes, March 7, 1977, pg. 6.*
- March 7, 1977: Motion to “accept the resignation of Joy Ninham from the Oneida Business Committee[.]” *Oneida Business Committee Minutes, March 7, 1977, pg. 6.*
- March 21, 1977: excerpt from minutes of Oneida Business Committee. *Oneida Business Committee Minutes, March 21, 1977.*
 - “Wendell McLester moved to request secretary to get information to Trea. in regard to election and special election so they can be compensated per request of March 7, 77.”
 - “Norbert Hill moved to have nomination for vacant tribal positions tribal treasurer and member at the next regular meeting.”
 - “Amelia Cornelius moved to have a Special General Tribal Council meeting on April 16, 1977 at 9 am. to fill vacant positions.”
- April 16, 1977: excerpt from minutes of General Tribal Council. *General Tribal Council Minutes, April 16, 1977.*

- “Anna John present the Resolution 4-16-77-A for adoption which calls for the use of portions of the Election Ordinance and a election on the April 23, 1977. Second by Dale Webster.”⁴
- [Nominations were taken for the vacant position from the floor.]
- “The chairman explained that other candidates could get the signatures of 15 persons and still be on the ballot.”
- April 25, 1977: “Swearing in ceremony conducted by Mr. Manydeeds for Chester Smith, Jr. and Margaret Doxtator.” *Oneida Business Committee Minutes, April 25, 1977.*

Oneida Business Committee identified in Oneida Business Committee meeting minutes between April 25th and May 16th, 1977

Purcell Powless, Chair, Norbert Hill, Sr., Vice-Chair, Chester Smith, Treasurer, Amelia Cornelius, Secretary, and Council Members Rick Hill, Wendall McLester, Robert Thomas, Loretta Metoxen, and Margaret Doxtator.

Oneida Business Committee after July 1, 1978 General Election based on General Tribal Council minutes between August 19th and September 16th, 1978

Purcell Powless, Chair, Norbert Hill, Sr., Vice-Chair, Patricia Misikin, Secretary, Chester Smith, Treasurer, and Council Members Margaret Doxtator, Mark Powless, Edwin King, Sr., Myron Smith and Eugene Danforth.

- August 19, 1978: except from minutes of General Tribal Council. *General Tribal Council Minutes, August 19, 1978, no quorum.*
 - “Due to lack of quorum [the Chairman] suggested we have a caucus at the first regular meeting on September 5, 1978, to nominate people to fill Eugene Danforth’s position on the Business Committee.”
 - “Bob Thomas suggested we taken the person with the next highest ballot count to fill the vacancy. Suggestion was invalid because however or whatever route is chosen, we have to follow the regular election ordinance; i.e., nominate four people, set a time and date and vote by ballot. The election ordinance needs to be revised or amended for General Tribal Council adoption to provide for procedures when situations like this occur.”⁵
 - [Rescheduled special General Tribal Council meeting for September 16, 1978.]
- September 16, 1978: “Quorum of general membership was not present at 1:30 p.m. so it was suggested that the business be handled at the next regular meeting of the Business Committee on Monday, September 18, 1978.” *General Tribal Council Minutes, September 16, 1978, no quorum.*

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⁴ There are two versions of this resolution identified. One appears to be a draft document from the record which would delegate authority to the Oneida Business Committee to schedule special elections to fill vacancies. Subsequently a signed version of resolution # GTC-04-16-77-A was located. This resolution addressed the April 16, 1977 action specifically.

⁵ A review of the minutes of both the General Tribal Council and the Oneida Business Committee does not identify that these revisions have been presented or adopted. A review of prior versions of the Election Ordinance does not identify language that was considered to address the vacancy issue.

There is no identification in any minutes regarding how this was addressed. Based on the discussion in the minutes above, it is presumed that a caucus was held and a special election was scheduled.

Oneida Business Committee after based on Oneida Business Committee minutes of between October 3, 1978, and February 6, 1979

Purcell Powless, Chair, Norbert Hill, Sr., Vice-Chair, Patricia Misikin, Secretary, Chester Smith, Treasurer, and Council Members Margaret Doxtator, Mark Powless, Edwin King, Sr., Myron Smith and Loretta Metoxen.

1982

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There are no further vacancies identified on the Oneida Business Committee until 1982. In 1982, there are two sets of vacancies occurring. First, a vacancy occurred in June-July when a Council Member resigned. Second, vacancies occurred in October when four members of the Oneida Business Committee were removed from office.

Oneida Business Committee based on February 25, 1982 General Tribal Council minutes.

Gary Metoxen, Chair, Norbert S. Hill, Vice-Chair, Gordon McLester, Secretary, Wendell McLester, Treasurer, and Council Members Joy Ninham, Mark Powless, Tony Benson, Frank Cornelius, and Howard Cannon.

Joy Ninham was elected on the July 1981 General Elections based on the identification of members of the Oneida Business Committee in the minutes of the Oneida Business Committee and General Tribal Council. June 25, 1981, is the last set of minutes of the Oneida Business Committee or the General Tribal Council which references Joy Ninham as being on the Oneida Business Committee. In the July 1, 1982, Oneida Business Committee minutes Lloyd Powless is identified as a Council Member, presumably filling Joy Ninham's position. There is no record of how this took place.

I spoke with Bobbi Webster, Communications, Mark Ninham and Paul Ninham (Joy Ninham's sons) who confirm the resignation during that time frame. I also spoke with Lloyd Powless regarding this and he indicated that a special election was called to fill the vacancy for the remainder of the term. Finally, Records Management was able to locate August 2, 1982, Oneida Business Committee minutes which accepts the results of the special election in which Lloyd Powless was elected.

Oneida Business Committee based on August 8, 1982, Oneida Business Committee minutes.

Gary Metoxen, Chair, Norbert S. Hill, Vice-Chair, Gordon McLester, Secretary, Wendell McLester, Treasurer, and Council Members Lloyd Powless, Mark Powless, Tony Benson, Frank Cornelius, and Howard Cannon.

The General Tribal Council adopted resolution # GTC-10-02-82-A which suspended Oneida Business Committee members Gary Metoxen, Frank Cornelius, Wendell McLester, Howard Cannon, and Lloyd Powless. This resulted in a lack of a quorum for the Oneida Business Committee. The resolution further identified that "the Vice-Chairman will be in charge with the

assistance and consent of the other three (3) Business Committee members to continue with day-to-day business of the Tribe.” This set in place an interim Oneida Business Committee.

- October 23, 1982: Gary Metoxen, Wendell McLester, Frank Cornelius, Howard Cannon were removed from office. Excerpts from the meeting minutes regarding filling these vacancies below. *General Tribal Council Minutes, October 23, 1982.*
 - “Mark Powless stated that a process is set in place now and the things that were just suggested [regarding the employment policies of the Tribe] need to be heard but the process now should be the process for election to fill the vacant positions. A caucus date should be set.”
 - “Parliamentarian stated that the Acting Business Committee and the attorneys and herself did work on a process to do what needed to be done. Discussion on next procedures.”
 - “Bobbie Webster made a motion to delegate to the Business Committee the setting of the caucus for the vacancies on the Business Committee.”
 - “Lee McLester moved to recess until November 1, 1982 at 7:00 P.M. at the Sacred Heart Auditorium and finish the original agenda and to hold the Caucus.”
- November 1, 1982: “Bobbie Webster moved to go to the caucus and table the balance of the Agenda.” *General Tribal Council Minutes, November 1, 1982.*

Oneida Business Committee based on December 1, 1982 Oneida Business Committee minutes. Purcell Powless, Chair, Norbert Hill, Vice-Chair, Kathy Hughes, Treasurer, Gordon McLester, Secretary, and Council Members Lois Powless, Loretta Metoxen, Lloyd Powless, Tony Benson, and Mark Powless.

Exhibit J **Page 6 of 7** **Analysis**

There are no laws or regulations regarding how a vacancy on the Oneida Business Committee is filled. Although the General Tribal Council recognized this gap needed to be filled at the meeting of August 1978, the procedural gap was not corrected.

There were 5 occasions when vacancies occurred on the Oneida Business Committee. Four of the five occasions occurred as a result of resignations. The October 1982 vacancies were the result of a removal. The records are clear about how all the vacancies occurred and filled. Although, it is not clear how the special election to fill Joy Ninham’s vacancy occurring in 1982 was called – i.e. by the Oneida Business Committee or the General Tribal Council.

Where there is discussion on the record regarding filling a vacancy on the Oneida Business Committee the process has been consistent.

- Call a General Tribal Council meeting, regular or special
- Notify of the vacancy(-ies) resulting on the Oneida Business Committee
- Call a caucus to nominate candidates at the meeting and notify the members that petitions will be accepted as identified in the Election Law
- *Direct Oneida Business Committee to schedule a special election*
- Accept candidate petitions

- *Conduct special election*

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The Election Board is now a formal institution of the Tribe and does not need to be appointed at the meeting. Initially, the special elections were scheduled from the floor of the General Tribal Council meeting. However, later actions directed the Oneida Business Committee to schedule the special election. Since the Election Law identifies specific timelines for the conduct of an election including petition deadlines, it is consistent with the Oneida Business Committee approving a Special Election date recommended by the Election Board. This would accommodate not only the nomination/petition process, but also scheduling the voting machines and ordering the ballots.

I have also highlighted two additional steps which would be affected by the current Election Law. First, General Elections for Oneida Business Committee members now have a primary election. Second, General Elections have polling places on the Reservation as well as in Milwaukee.

Based on the litigation regarding the Special Election for the Judiciary positions, and consistent with electing Oneida Business Committee members, it is recommended that if a Special Election is called that polling places be scheduled on the Reservation as well as in Milwaukee. However, it is not entirely clear if a primary election should be held. The purpose of a primary election was to reduce the number of candidates to either the top two (officer positions) or 15 candidates for the five Council member positions. This would equal either three candidates for a single Council member position, or 15 candidates for a single Council member position. The legislative history suggests the former is the intent. Since this is for a single position, it is not likely that a primary will result in narrowing the field considerably since 15 candidates would be transferred to the final ballot. It is a policy decision regarding whether a primary should be conducted if a Special Election is called.

Conclusion

The Constitution identifies that the General Tribal Council fills a vacancy on the Oneida Business Committee for the remainder of the term. The prior actions of the General Tribal Council have identified a preference for calling a special election to fill the vacancies. It is recommended that the Oneida Business Committee call a Special General Tribal Council meeting to hold a caucus and request a Special Election be scheduled. If this is the desired action, a resolution should be presented to the General Tribal Council for consideration which would identify the process for scheduling the Special Election.

If you have further questions, please contact me.