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**TO:** Maria Wiseman, United States Department of the Interior, Office of the Solicitor  
Karen Lindquist, United States Department of the Interior, Office of the Solicitor

**FROM:** Carl J. Artman

**DATE:** May 13, 2009

**RE:** Status of the Railroad Right-of-Way Land within the Oneida Tribe of Indians Of Wisconsin Reservation

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### Introduction

The Oneida Tribe of Indians of Wisconsin ("Oneida Tribe") occupy and live on the Oneida Reservation in northern Wisconsin pursuant to the 1838 Treaty with the Oneida Tribe ("1838 Treaty"). The Oneida Tribe entered into an agreement with the Green Bay and Lake Pepin Railway Company (hereinafter "GB & LP") in 1870. This agreement granted GB & LP a right-of-way through the Oneida Reservation. In 1887 Congress passed the (Dawes) General Allotment Act ("Allotment Act") which allotted portions of the reservation land to individual Oneida Indians. Congress passed the Indian Reorganization Act ("IRA") in 1934 which alternatively sought to protect tribes' reservation lands by repudiating the Allotment Act and attempting to reverse its ramifications. The GB & LP right-of-way runs through Oneida reservation lands and individual parcels. The railroad continued to use the right-of-way until 2000. The Fox Valley & Western Ltd. ("FVW") sought official abandonment approval of the railway and the right-of-way in 2000, and received this grant in 2001. FVW entered into a Mutual Release Agreement ("Mutual Release") with the Oneida Tribe in 2003 that acknowledged the railroad received an easement, never obtained fee title to the right-of-way land, and the title remains in trust for the Oneida Tribe.

The Oneida Tribe does not seek any new designation for the land or development of a new legal standard to achieve a goal. The Oneida Tribe originally sought, and still seeks, confirmation that the land the Oneida Chiefs and the United States Congress approved for a railroad easement and right-of-way in 1870 and 1871, respectively, remains titled to the United States of America for the beneficial use of the Tribe.

### Short Conclusion

The GB & LP right-of-way was established in 1871, well before the Oneida Reservation was partially allotted in the 1890s. The survey descriptions from that era evince that the right-of-way land was not allotted to any individuals pursuant to the General Allotment Act. Title to the right-of-way land remains with the Oneida Tribe, held in trust and for the beneficial use of the Tribe by the United States, since the land was never allotted and always belonged to the Oneida

Tribe pursuant to the 1838 Treaty. The Mutual Release between the railroad and the Oneida Tribe acknowledges that the railroad never obtained fee title to the right-of-way land, and the right-of-way land is held in trust by the United States for the Oneida Tribe's beneficial use.

### Facts

The Oneida Reservation was established pursuant to the 1838 Treaty, which reserved approximately 65,000 acres for the use and occupancy of the Oneida Tribe. In 1866, GB & LP began efforts to construct a railroad from Green Bay through the Oneida Reservation. In 1870, the Oneida Tribe, through its Chiefs, entered into an agreement with GB & LP granting GB & LP the use of the Oneida Tribe's lands in the form of a right-of-way through the Oneida Reservation. This right-of-way consisted of approximately 130 acres.<sup>1</sup> Pursuant to 25 U.S.C. § 177, Congress approved the agreement for the conveyance of an easement from the Oneida Tribe to GB & LP in 1871.<sup>2</sup>

Congress passed the Allotment Act in 1887. The Allotment Act provided "for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."<sup>3</sup> The Allotment Act authorized the President to allot portions of reservation land to individual Indians. The Office of Indian Affairs directed Colonel N.S. Boardman, Deputy United States surveyor, to conduct surveys of parcels, to which more than two hundred Oneida Indians had private claims, by special instructions dated October 25, 1889.<sup>4</sup> The surveys are an accurate depiction of what was conveyed at that time. Boardman counted seventeen private claims in Brown County, WI and Outagamie County, WI which were bisected by the GB & LP railroad and, in each case, he made a notation that the land was "exclusive of the right-of-way of GB & LP Railway." The Boardman surveys were approved on December 11, 1890.<sup>5</sup>

Congress passed the IRA in 1934. The IRA, contrary to the Allotment Act, sought to protect the land base of the tribes. The IRA authorized the Secretary of the Interior to restore tribal ownership to any "surplus" lands acquired from the tribes under the Allotment Act.

On March 2, 2001 the United States Department of Transportation's Surface Transportation Board ("STB") granted to FVW, the successor-in-interest to GB & LP, the right to abandon the railroad on the Oneida Reservation.<sup>6</sup> In 2003, the Oneida Tribe and FVW

<sup>1</sup> Letter from Dana C. Lamb, Special Agent for the allotment of lands in severalty to Indians, to Thomas Jefferson Morgan, Commissioner of Indian Affairs, October 31, 1890.

<sup>2</sup> Act of March 3, 1871, ch. 142, 16 Stat. 588.

<sup>3</sup> Dawes Act, 24 Stat. 388 (1887).

<sup>4</sup> Approval of field notes of the surveys of claims within the Oneida Indian Reservation, Wisconsin, Department of the Interior General Land Office, December 11, 1890, Lewis A. Groff, Commissioner.

<sup>5</sup> *Id.*

<sup>6</sup> Fox Valley & Western Ltd. – Abandonment Exemption – In Brown and Outagamie Counties, WI, STB Docket No. AB-402 (Sub-No. 8X), July 23, 2003, at 1. STB granted an exemption to the FVW to abandon its railroad from 4.78 west of Green Bay, WI to milepost 38.98 in New London, WI. The exemption was made subject to certain conditions, including completion of the 106 process of the National Historic Preservation Act ("NHPA") for lands impacted on the Oneida Reservation. *Id.* FVW achieved the mandates of the imposed NHPA conditions and limitations on the waiver were lifted by STB on July 23, 2003 (effective service date of July 28, 2003). *Id.* at 2.



entered into a Mutual Release. Through the Mutual Release, FVW consummated the abandonment of its right-of-way across the Oneida Reservation. Additionally, FVW acknowledged that it did not obtain title to the property by virtue of the 1870 right-of-way agreement and agreed to compensate the Oneida Tribe for the railroad's use of the land.<sup>7</sup>

### Analysis

A careful study of the initial agreement with GB & LP, historical documents, the Boardman surveys, applicable statutes, and the Mutual Release leads to several conclusions: (1) the right-of-way land was Oneida trust land before the agreement with GB & LP pursuant to the 1838 Treaty; (2) the agreement between the Oneida Tribe and GB & LP did not transfer ownership of the right-of-way land to GB & LP; (3) Congress approved the conveyance of a property interest consisting of nothing more than a right-of-way; (4) the right-of-way land was not conveyed to individual tribal members pursuant to the Allotment Act as confirmed in the N.S. Boardman surveys; (5) the railroad acknowledged in the Mutual Release that it never acquired fee title to the right-of-way land and that the land remained in trust with the United States for the beneficial use of the Tribe; and therefore (6) the right-of-way land always belonged to the Oneida Tribe as land held in trust by the United States, and this status remains in effect today.

#### *A. Initial Agreement Between the Oneida Tribe and GB & LP*

In 1870, the Oneida Tribe and GB & LP entered into an agreement which granted use of the treaty-reserved trust lands to the railway company for the construction of a railroad across the Oneida Reservation. The following is the language of the right-of-way, in its entirety:

Whereas the Green Bay & Lake Pepin Railway Company desire to run their proposed Railway across the Oneida Reservation in the State of Wisconsin:

The undersigned Chiefs of the Oneida Nation of Indians do hereby consent subject to the approval of the proper Indian Agent & of the Indian Commissioner or other proper authorities of the United States, that the said Company may, by such route as its Directors may determine, and subject to the laws of the State of Wisconsin, the same as if the lands were owned by white persons, construct and operate their said Railway across said Reservation appropriating further uses thereof a strip of land one hundred feet wide and extending the whole length of such part of said Railway as will be within the limits of said Reservation.

Provided however, that damages to the property of said Indians, consequent when the introduction of said railway shall be appraised determined and recovered under and by virtue of the laws of the State of Wisconsin, as if the land belonged to White persons.

<sup>7</sup> Agreement and Mutual Release between Oneida Tribe of Indians of Wisconsin and Fox Valley & Western Ltd. (2003)

And provided also, that this consent shall not be construed to include lands for Depots or for other purposes than the road bed and tracks and usual rights of way of such railway.<sup>8</sup>

The Oneida Tribe consented to GB & LP using the Tribe's land. This consent indicates the Oneida Tribe and GB & LP viewed the Oneida Tribe as the owner of the land. There is no grant of fee title or any language of conveyance of title in the agreement. Rather, the agreement speaks in terms of consent to the railroad's use of the land. The Mutual Release confirms further the parties' intent that the Oneida Tribe retained fee title to the right-of-way land.

Congress has consistently placed a general restraint on all forms of conveyance of land by tribal governments.<sup>9</sup> Only the United States has the ability to extinguish original Indian title, an authority that vests the federal government with great power over tribal land.<sup>10</sup> Termination of this title is "exclusively the province of the federal law."<sup>11</sup> Accordingly, Congress approved this agreement for the conveyance of an easement from the Oneida Tribe to GB & LP in 1871. The congressional act reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Green Bay and Lake Pepin Railway Company be, and is hereby authorized to build and maintain its railway across the Oneida Reservation, in the State of Wisconsin and to take sufficient land, not more than a strip of one hundred feet in width, for the purposes of said railway, in accordance with and subject to the conditions of an agreement made by the chief and headmen of the Oneida Tribe of Indians, on the twenty-third day of May, eighteen hundred and seventy, approved by and on file with the Secretary of the Interior.*<sup>12</sup>

#### *B. Mutual Release Agreement*

FVW sought to abandon the railroad and the underlying right-of-way in 2000. The STB granted this right in 2001. Two years later, the Oneida Tribe and FVW executed a Mutual Release. FVW acknowledged in the Mutual Release that the Oneida Tribe granted FVW's predecessor an easement for the purposes of constructing a railway through the reservation.<sup>13</sup> FVW acknowledged that the "United States holds title to such land in trust for the Oneida Tribe's beneficial use and occupancy pursuant to the 1838 Treaty with the Oneida."<sup>14</sup> Through

<sup>8</sup> Agreement between the Chiefs of the Oneida Nation of Indians and the Green Bay and Lake Pepin Railway Company, May 23, 1870.

<sup>9</sup> 25 U.S.C. § 177.

<sup>10</sup> Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974).

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* at 2.

<sup>13</sup> *Supra* at 7.

<sup>14</sup> *Id.* FVW relinquished and quit claimed any rights it or its predecessor had in the land or any structures upon it. *Id.* at 2, ¶2. In addition, "FVW agrees to execute any document which may be necessary to evidence or confirm the Oneida Tribe's title to the land underlying the entire right-of-way within the exterior boundaries of the Oneida Indian Reservation." *Id.*



the Mutual Release, FVW agreed to consummate abandonment of the estimated eleven westernmost miles of the railroad while reserving the right-of-way for the estimated one easternmost mile. FVW paid the Oneida Tribe \$93,000 for the railroad's past use of the right-of-way land.<sup>15</sup> The Mutual Release clearly delineates the initial granting of the easement to GB & LP and the reversionary interest in the right-of-way land of the Oneida Tribe.

Under the common law, once a right-of-way is abandoned or ceases to be used, the estate is extinguished and vests in the owner of the servient estate. To show abandonment the owner of the servient estate must prove two elements: (1) a cessation of use and (2) an intent to relinquish or abandon.<sup>16</sup> The United States system of property law cannot conceive of lack of ownership of property, hence an abandoned servitude, since it cannot be unowned, reverts to the owner of the servient estate from which the original grant came.<sup>17</sup> The Mutual Release both confirms abandonment of the right-of-way and the FVW's understanding that the Oneida Tribe retained beneficial title to the land.

The language of the initial agreement between the Oneida Tribe and GB & LP in 1870 and in the Mutual Release between the Oneida Tribe and GB & LP's successor, FMV, in 2003, demonstrates: (1) the Oneida Tribe retained ownership of the right-of-way land and did not transfer ownership of the right-of-way land to GB & LP, and (2) upon abandonment, consummated by FVW subsequent to the grant from Surface Transportation Board on June 30, 2003, the right-of-way land reverted back to the beneficial use of the Oneida Tribe and the United States continues to hold title to the right-of-way land in trust for the Oneida Tribe.

### C. *Property Surveys*

The Office of Indian Affairs hired Colonel N.S. Boardman, Deputy United States Surveyor, to survey the Oneida Reservation after enactment of the Allotment Act. These surveys confirmed the status of title at the time immediately following the Allotment Act conveyances and depict what land was conveyed. Boardman counted seventeen parcels in Brown and Outagamie Counties that were bisected by the GB & LP railroad. In each case, Boardman used language to indicate that the parcel is exclusive of the right-of-way of GB & LP Railway. Boardman did not simply state that the parcels were subject to the right-of-way but also indicated that the particular parcel's total acreage excluded the right-of-way entirely. In addition to the exclusivity language, each survey contains language that the "stake is in the center of railroad track."<sup>18</sup>

The "stake in the center of railroad track" language illustrates Boardman physically surveyed all of the land, including the right-of-way land, and then subjected the land to the railroad's rights.<sup>19</sup> Boardman then excluded the railroad right-of-way land from the legal description of the parcel through the use of the phrases that explicitly state that the acreage of the

<sup>15</sup> *Id.* at 3, ¶¶ 6-7.

<sup>16</sup> Roger Cunningham et al., *The Law of Property* § 8.12, at 465 (1993).

<sup>17</sup> *Id.*

<sup>18</sup> U.S. Department of the Interior, General Land Office. Survey by Colonel N.S. Boardman. (Dec. 11, 1890).

<sup>19</sup> For examples of this language see Survey Claim Nos. 164A, 172, 173, 195, 196, 200, 201, 202, or 203.

survey does not include the railroad right-of-way.<sup>20</sup> He uses language of exclusion in the surveys of properties that border the railroad right-of-way in Brown County. Colonel Boardman, in conjunction with Special Agent Lamb, conducted a survey of the lands to be allotted prior to the allotment so the BIA, Special Agent Lamb, and the Oneida allottees would have an accurate conveyance of land and rights.<sup>21</sup>

The *American Law of Property* describes the construction of survey descriptions and provides that when a grantor uses a public or private right-of-way as a boundary, the courts generally construe the description to extend to the center line thereof, “unless there are express provisions to the contrary.”<sup>22</sup> The courts will respect any express provision showing that no part of the right-of-way was intended to be conveyed; the general rule only applies when there is an undisclosed intention of the parties.<sup>23</sup> As the Eighth Circuit describes in a 1928 survey boundary case which involved a railroad, “The test is whether the deed expressed intention to exclude [the railroad] from the grant.”<sup>24</sup>

The Boardman descriptions clearly express the intent to exclude the railroad right-of-way. In each of the parcels that were bisected by the GB & LP right-of-way, Boardman included in the description language that the parcel is exclusive of the right-of-way of GB & LP.<sup>25</sup> “Allotment of the Oneida Reservation was a difficult and onerous task.”<sup>26</sup> The lands were surveyed prior to the allotment, but the land marks of the previous survey were destroyed by fire and individuals, and it became necessary to resurvey the lands.<sup>27</sup> Boardman’s precision in defining the original boundaries led him to rely on the prior surveys and to place an average of more than 50 stakes per section to demarcate the original boundaries.<sup>28</sup> Boardman exhibited equal precision in his use of express language in his survey field notes to exclude the railroad right-of-way from the conveyances that bordered the railroad.

The presumption that a right-of-way is intended to be conveyed is overcome by “either the use of express terms excluding it, or by such facts and circumstances as show an intention to exclude it.”<sup>29</sup> The surveys and the circumstances surrounding the allotted parcels support both exceptions to the presumption. First, the legal descriptions of the allotted parcels, as depicted on

<sup>20</sup> Boardman uses several phrases to state the explicit exclusion of the railroad right-of-way from the acreage included in the survey of the land. Examples include “This is exclusive of GBW & St. P. Rt-of-way.” in the Survey of the Daniel Webster Claim, No. 173; “This claim contains 3 acres of land exclusive of Right-of-Way of G.B.W. & St. P. R’y.” in the survey of Henry John Claim, No. 164-A; or “This acreage is exclusive of R.R. Rt-of-way.” In the survey of Peter Hill Claim, No. 153.

<sup>21</sup> *Supra* at 5. See also *supra* at 4. See also generally the Fee Patents of the Oneida Allottees, June 13, 1892.

<sup>22</sup> JAMES A. CASNER, 3 AMERICAN LAW OF PROPERTY § 12.112 (1952).

<sup>23</sup> *Id.*

<sup>24</sup> *Roxana Petroleum Corp. v. Sutter*, 28 F.2d 159, 162 (8th Cir. 1928).

<sup>25</sup> *Supra* at 21.

<sup>26</sup> *Supra* at 1, p. 4.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* Boardman’s precision was the source of consternation for Special Agent Lamb because of the time and money expended on this exercise. *Id.* Special Agent Lamb reflected on these issues by concluding: “However, the work is done, and I flatter myself, well done; and although the Indian office has manifested some impatience that the work was not sooner completed, I am satisfied that when my report with the accompanying maps and schedules, are inspected the officer of the government will award me the verdict of ‘well done.’” *Id.*

<sup>29</sup> *Huff v. Hastings Express Co.*, 63 N.E. 105, 108 (Ill. 1902).



the surveys, clearly exclude the railroad right-of-way, as discussed above. Second, the facts surrounding this argument show an intention to exclude the railroad right-of-way from the allottees' parcels. The express language provided in the Boardman survey descriptions along with the circumstances which support exceptions to the presumption provide compelling evidence that the railroad right-of-way is excluded from the allottees' parcels.

### Conclusion

A review of the initial agreement with GB & LP, historical documents, the Boardman surveys, applicable statutes, and the Mutual Release leads to several conclusions: (1) the right-of-way land was Oneida trust land before the agreement with GB & LP pursuant to the 1838 Treaty; (2) the agreement between the Oneida Tribe and GB & LP did not transfer ownership of the right-of-way land to GB & LP; (3) Congress approved the conveyance of a property interest consisting of nothing more than a right-of-way; (4) the right-of-way land was not conveyed to individual tribal members pursuant to the Allotment Act as confirmed in the N.S. Boardman surveys; (5) the railroad acknowledged in the Mutual Release that it never acquired fee title to the right-of-way land and that the land remained in trust with the United States for the beneficial use of the Tribe; and therefore (6) the right-of-way land always belonged to the Oneida Tribe as land held in trust by the United States, and this status remains in effect today.

The Oneida Tribe requests that the aforementioned conclusions, especially the final conclusion, be affirmed by the Department of the Interior. The Tribe specifically requests the Department ensure the land that was subject to railroad right-of-way is included in the Trust Asset and Accounting Management System ("TAAMS") database. In addition, the Tribe seeks a letter from the Department confirming this inclusion in the TAAMS database.

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Exhibits supporting May 13, 2009  
Memorandum from Carl J. Artman  
Re: Status of the Railroad Right-of-Way Land within the  
Oneida Tribe of Indians of Wisconsin Reservation

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