

JO ANNE HOUSE, PhD
CHIEF COUNSEL
JAMES R. BITTORF
DEPUTY CHIEF COUNSEL
REBECCA M. WEBSTER
SENIOR STAFF ATTORNEY

ONEIDA LAW OFFICE

N7210 SEMINARY ROAD
P.O. BOX 109
ONEIDA, WISCONSIN 54155

(920) 869-4327

FAX (920) 869-4065

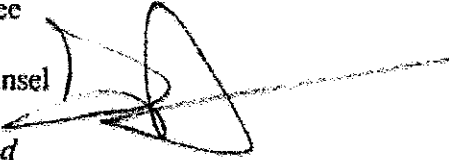
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ANDREW J. PYATSKOWIT
ROBERT W. ORCUTT
PATRICIA M. STEVENS GARVEY
CAROYL J. LONG

MEMORANDUM

TO: Oneida Business Committee

FROM: Jo Anne House, Chief Counsel 

DATE: March 12, 2013 - *Corrected*

SUBJECT: Dodge - Petition - Land Use - Oneida Seven Generations Corporation

You have asked for a legal review of the above petition submitted by Leah Sue Dodge. The petition contains the following request.

General Tribal Council directs the Oneida Business Committee to stop Oneida Seven Generations Corporation (OSGC) from building any 'gasification' or 'waste-to-energy' or 'plastics recycling' plant at N7329 Water Circle Place, Oneida, Wisconsin or any other location within the Oneida Tribal boundaries.

The petition contains 82 signatures, of which 79 were verified by the Enrollment Department.

To develop this opinion, this office has reviewed the Constitution of the Oneida Tribe of Indians of Wisconsin, minutes and resolutions of the General Tribal Council and Oneida Business Committee, laws of the Tribe, and various other resources. Citations to specific documents, laws and Internet addresses are included to assist the reader in further researching this subject.

There are two areas impacted by this resolution - land use and corporations. This legal opinion will address each of these separately.

Background - Responsibility for Land Related Decisions

The Constitution of the Oneida Tribe of Indians of Wisconsin authorizes the General Tribal Council, "to veto any sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets of the tribe." *Article IV, Section 1(c)*. Since adoption of the Constitution the General Tribal Council has exercised its powers regarding the land, including delegating that authority to the Executive Committee and ultimately to the Land Committee, now Land Commission. This section will review those delegation actions.

Since 1941 the Oneida Tribe has had some law or policy statement regarding the land within the Reservation. Ordinance No. 1 - Lands was adopted by the General Tribal Council on February 28, 1941. This law created the Land Committee with three members appointed by the Executive

Committee to make recommendations regarding land assignments. The Land Committee recommendations were approved by the Executive Committee.

The General Tribal Council discussed land acquisition and the priority over the years. The first official policy statement regarding the land occurs in 1977 by adoption of resolution # GTC-1-8-77-B.

Whereas, land now held by the Oneidas will be the foundation of tomorrow's Oneida Tribal people.

Now Therefore be it Resolved, that the General Tribal Council of the Oneida Tribe of Indians of Wisconsin instruct the Business Committee to secure the future of the Tribe through the maintenance and reacquisition of all Oneida lands, including those lands now designated as the Sacred Heart Center.

Three months later, the General Tribal Council adopted resolution # GTC-4-16-77-B. This resolution directed that, "...an Oneida Tribal land office be established, and that adequate staff be provided to maintain all land records for the Tribe." The purpose of this resolution was to identify adequate support for the Land Committee in processing land transactions.

In 1980, the Oneida Business Committee re-recognized the responsibilities of the Land Committee and the expansion of the committee from three members to seven members. This resolution identified that the terms of office would continue to be staggered from one- to three-year terms. In 1981 and for successive years thereafter, the Oneida Business Committee adopted resolutions requesting the Bureau of Indian Affairs to approve a self-governance contract for the provision of land services. In addition, the Oneida Business Committee adopted updated rules for land assignments. Finally, in the following year the General Tribal Council set aside funding for the purpose of land acquisition.

In 1986, the General Tribal Council adopted resolution # GTC-1-6-86-A. This resolution identified that, "...the Land Committee shall be involved in all land purchases for the Oneida Tribe and upgrade and develop Tribal fee land, and Tribal Trust Land."

These land related responsibilities were formally established under Tribal law by adoption of resolution # BC-5-29-96-A adopting the Real Property Law. This law codified prior General Tribal Council directives. In addition, the Oneida Business Committee adopted the law in accordance with delegated authority of the General Tribal Council and in compliance with the procedures adopted by the General Tribal Council as set forth the Administrative Procedures Act.

Most recently, the General Tribal Council considered a petition to change the appointment of Land Commissioners by the Oneida Business Committee to election by the membership. The petitioner identified reason for this proposed change as the Land Commission being equally as important as Land Claims Commission, Gaming Commission. Resolution # GTC-5-14-05-A, adopted by the General Tribal Council, directed that Land Commissioners be elected positions and directed, "...the Oneida Business Committee request a special election as timely as possible to fill the board with elected seats after going through the APA process."

The actions of the General Tribal Council, beginning in 1941, identify a desire to have land related decisions made by an independent entity. And, the last action of the General Tribal Council in 2005 directing that Land Commissioners be elected by the membership confirms this long term position by creating a level of independence to the elected body. As a result, actions directly affecting the land, such as purchase and leasing, are delegated by the General Tribal Council fully to the Land Commission. The General Tribal Council has retained two processes regarding these decisions – the first is selection of Land Commissioners during the election processes, and second is removal of elected officials under the Removal Ordinance.

Background – Corporations

The Constitution of the Oneida Tribe of Indians of Wisconsin authorizes the creation of corporations in 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 forgoing powers [as set forth in this Section], reserving the right to review* any action taken by virtue of such delegated power.

* As defined by resolution # GTC-12-69, "review" means to change or amend.

Since adoption of the Oneida Business Committee has created corporations to act in a business capacity for the Tribe. The following is a brief listing of corporations. The list may not include all prior corporate entities of the Tribe.¹

- 1984: *Oneida Airport Hotel Corporation* – created in 1984 and still in operation. This corporation was created to develop and manage a hotel which began under a Rodeway Inn franchise logo and now operates under a Radisson Inn franchise logo. The corporation also purchased and operates the Wingate.
- 1988: *Oneida Enterprise Development Authority* – created in 1988, purpose redirected in 1995, dissolved in 2004, re-chartered and purpose redirected in 2004, and still in operation. This corporation originally began as the enterprise to develop the Tribe's convenience stores. The corporation then developed the Einstein mobile phone business after which it was dissolved. The re-chartered corporation is delegated responsibility for development of land claims related business activities in the State of New York.
- 1993: *Oneida Airport Business Development Corporation* – created in 1993 and dissolved in 1999. This corporation was created to manage lands of the Tribe. All assets were returned to the Tribe and all leases were transferred to the Oneida Seven Generations Corporation to manage.
- 1994: *Oneida Construction Corporation* – created in 1994 and dissolved in 1998. This corporation was created to act as a general contractor and subcontractor in construction projects. All assets were returned to the Tribe upon dissolution.
- 1994: *Oneida Nation Electronics* – created in 1994 and all shares purchased by Oneida Seven Generations Corporation, still in operations as a subsidiary corporation. This

¹ For example, it is not clear if the Utilities Commission was a corporate entity, or simply an independent government agency.

corporation was created to act in partnership with Plexus to create computer electronics, the corporation continues limited involvement in the technology industry through a partnership with a third party vendor.

- 1995: *Oneida Seven Generations Corporation* -- created in 1995 and still in operation. This corporation was created as a commercial land management company, now holds several master ground leases, created subsidiary corporations to manage partnerships and loans related to the construction of facilities of managed properties, and operates a construction company.
- 2007: *Oneida Total Integrated Enterprises* -- created in 2007 and still in operation. This corporation was created to receive the assets of an ongoing business (TN&A) and continues to manage and increase governmental contracting opportunities under a federal minority business program.
- 2009: *Oneida Golf Enterprise* -- created in 2009 and still in operation. This corporation was created to manage the Thornberry Creek Golf Course business and related property.
- 2012: *Oneida ESC Group, LLC* -- created in 2012 and still in operation. This corporation is the next generation of Oneida Total Integrated Enterprises to manage the succession of the federal minority contracting opportunities.

In addition to the above, the Tribe is the sole owner of Baybankcorporation that operates Bay Bank under federal and state banking regulatory authority.

Finally, the Tribe was issued a federal corporate charter under the Indian Reorganization Act. This charter is not utilized by the Tribe for various legal reasons, including issues surrounding sovereign immunity.

All corporations of the Tribe are granted authority by the Oneida Business Committee adopting a corporate charter to act in a business-like manner. In addition, all corporation retain the sovereign immunity of the Tribe for their actions. In relation to land leased to the corporation by the Tribe, the corporation is prohibited from encumbering or otherwise pledging the land as collateral without express permission from the Tribe. Corporations are expected to report on their activities four times a year -- Annual and Semi-Annual General Tribal Council meetings and twice to the Oneida Business Committee. At least one of those reports must include the annual audit conducted by the corporation. All corporations are expected to return profits to the Tribe, except in cases where the Oneida Business Committee has authorized the corporation to retain the profits in order to build the business.

Corporations are created for the purposes of carrying out business in an environment that the Tribe would likely not be successful. In some circumstances, businesses are more comfortable doing business with other business entities, not governments. In addition, there are times when the Tribe desires to protect the assets of the Tribe as a whole and creates a corporation to limit liabilities to the corporate assets (excluding the land). Finally, sometimes a corporation is able to move quicker regarding business decisions than the Tribe.

The Oneida Seven Generations Corporation, as identified above, was created by the Oneida Business Committee to manage commercial lands owned by the Tribe. This action was taken in accordance with the authority delegated by the General Tribal Council on August 30, 1969, to

the Oneida Business Committee. Further, it is consistent with the 1982 action directing that the Oneida Business Committee focus on legislative actions. Finally, it is consistent with multiple discussions and directives of the General Tribal Council regarding the development of enterprises and diversification.

A corporation, once created, begins taking actions which create commitments with financial institutions, vendors, other business partners, to name a few. The Oneida Seven Generations Corporation, as identified in a 2008 legal opinion, carries approximately \$8 million in loans leases on approximately 15 different commercial properties, and over three corporate business partnerships. The complexity of unwinding these relationships or changing the authority of the corporation should be considered prior to any action being taken.

Unlike actions affecting the land identified earlier in this opinion, there is no legislation currently in place regarding corporations. Opinions regarding General Tribal Council, and even Oneida Business Committee, actions have generally revolved around liability issues. Two recent actions occurred regarding petitions submitted in 2008 and in 2011.

In 2008 a petition submitted by Madelyn Genskow requested the General Tribal Council to consider a resolution which called for financial disclosures, names of persons or entities with financial interests and conducting a financial audit by an external auditor. Primarily this petition was the result of an earlier interaction between the corporation and the Treasurer involving access to financial information related to a specific business transaction by the corporation. The legal opinion identified that shareholders of corporation (i.e. the Tribe) have access to certain information as defined in Tribal law and the corporate charter. The result of this petition was adoption of resolution # GTC-11-15-08-B, *Directing Review of Corporate Charters*.

This resolution directed the Oneida Business Committee to review all corporate charters to require consistent and greater amounts of information. This resulted in the Oneida Business Committee adopting amendments to all corporate charters, specifically resolution # BC-1-26-11-A amending the charter of Oneida Seven Generations Corporation.² A copy of these reporting requirements is attached to this memo.

2011 Petition -- Corporate Activities

In 2011, Madelyn Genskow filed a petition regarding the impact of the actions of Oneida Seven Generations Corporation on tribal government relations. The corporation was, and remains, involved in starting a pyrolysis plant. The plant would use household waste, excluding recyclable materials, to create multiple by-products -- electricity, re-usable char, and the capturing of various gases to name a few. The new process was originally proposed on tribal land behind the Brown County Waste Transfer Station that was physically close to the waste materials. Because access to the site was being negatively impacted by demands from the Village of Hobart, the corporate considered moving the proposed plant to Water Circle Drive Industrial Park.

² The charter for Baybankcorporation was not included in this series of amendments as a result of external banking regulatory authorities. However, the bank board has been notified of the format and substantially complies with the reporting requirements.

The corporation's primary goal of the proposed plan was sale of the energy by-product on the electrical grid. The Water Circle location was problematic because it was outside the electrical grid for which contracts had already been negotiated. The contracts with the alternative grid were not beneficial to the corporation and connection with the proposed grid was too expensive.

The third proposed site for the plant was the Packerland Industrial Park owned by the Tribe located in Ashwaubenon. Although the plant would have been within the zoned activities and was designed to fit in with the existing business designs, the Village of Ashwaubenon expressed concerns about the appropriateness of the 'fit' of the proposed plant in this area. In addition, residential property owners in the area also began expressing their concerns.

The petition was presented at a General Tribal Council meeting in May 2011. After lengthy discussion regarding the proposed project, the following motion was made.

...motion that Seven Generations provide documented answers on a complete financial report and audit to the General Tribal Council at the July 2011 semi-annual GTC meeting and that the GTC will carry out this motion to determine whether or not to retain Seven Generations Corporation[.]

Upon request of the chair, a parliamentarian opinion identified that the motion would be out of order for two reasons. First, that the motion is not clear regarding what would be reported to the General Tribal Council. Second, that the motion appeared to affect the continued existence of the corporation. It was recommended that the General Tribal Council could direct the Oneida Business Committee to dissolve the corporation in order to comply with the corporate charter and the complexities of dissolving the financial and contractual agreements the corporation had entered into over the course of its existence. The Chair ruled the motion out of order.

After a brief discussion, a motion to accept the report delivered by the corporation at the meeting. An amendment to the motion requiring, among other things, the Treasurer and Chief Financial Officer to present a report on their opinion of the validity of the project, was accepted and failed to pass. The General Tribal Council ultimately just accepted the report.

In light of these public issues, the corporation accepted an offer from the City of Green Bay to locate the plant in the city's industrial zone. A conditional use permit was issued to the corporation to begin the process of gathering final federal approvals and other applicable agencies. At the conclusion of the conditional use permit period, the City of Green Bay declined to issue a permanent permit because the City Council felt that it had been misinformed regarding the construction aspects of the plant. The corporation challenged this decision and lost that challenge at the trial court level. At the time of this opinion, the corporation was still in the process of deciding whether it would appeal this decision.

The corporation then revised the proposed plant plans, focusing on oil recovery and utilizing partially refined waste plastics with little focus on energy output except for use by the plant

itself. The proposed site is in the Water Circle Industrial Park.³ The corporate board has authorized consideration of the site with a formal decision to be made upon confirmation of zoning and permitting approvals. At the time of drafting this opinion, the Land Commission, after public comments, has approved a zoning variance in accordance with the Zoning Ordinance.

Corporate Loan for Project

The corporation appears to have two sets of loans and a grant for the purposes of construction of the plant -- federal Bureau of Indian Affairs Office of Indian Energy and Economic Development, a loan from the Wisconsin Economic Development Corporation, and a State of Wisconsin energy grant. This office has rendered an opinion regarding the liability to the Tribe arising out of the federal loan guaranty of the approximately \$24 million loan. This is a federal guaranty of a private lender loan to Oneida Seven Generations Corporation in the event of default. To the extent that funding has been obtained and used by the corporation, the corporation would be responsible for paying back those funds. The corporation has also obtained a state grant for \$2 million and a loan from the state for \$2 million. The corporation is responsible for carrying out the activities for which the grant was given, failure to do so would require the corporation to repay the grant.

Analysis

This petition requests the General Tribal Council to consider action that would direct the Oneida Business Committee to stop Oneida Seven Generations Corporation from building a pyrolysis plant on the Reservation. As identified above, the General Tribal Council does not have authority to affect decisions regarding allocation or zoning of land within the Reservation because it fully delegated land use authority. Further, it is not within the authority of the Oneida Business Committee to take actions affecting allocation or zoning of land within the Reservation because the General Tribal Council delegated that authority to the Land Commission and the Oneida Business Committee codified that delegation in the Real Property Law and Zoning Ordinance.

However, it is within the authority of the General Tribal Council to direct the Oneida Business Committee, within its capacity as the shareholder of all the shares in the corporation, to take certain actions. The retained authority in the charter adopted by the Oneida Business Committee limits these actions by the General Tribal Council and Oneida Business Committee.

The charter for Oneida Seven Generations Corporation identifies that the shareholder, as represented by the Oneida Business Committee, appoints members to the corporate board, can remove those members for certain activities, and can dissolve the corporation. However, the

³ The Industrial Park is home to the Little Bear Development Center, a U.S. Post Office, the Nori Damrow Food Distribution Center, the vacant Tower Foods building, a solar panel array and a water tower. The Oneida Farmer's Market temporarily used part of the green space next to Little Bear Development Center during construction of the round-about at Seminary and State Highway 54. It is not clear if this is intended to be a long term location.

charter can be amended by the Oneida Business Committee to allow further ability to direct the actions of the corporation.

As identified in the 2008 legal review of the Genskow petition regarding financial disclosures, taking action that allows the Oneida Business Committee greater authority to direct the corporation's actions may result in greater liability to the Tribe for the debts and expenses of the corporation. Even if the action were limited to prohibiting construction and operation of a pyrolysis plant, there are liabilities tied to this restriction.

Oneida Seven Generations Corporation has two outstanding funding sources for the pyrolysis plant -- a state grant and a federal guaranty of a private loan. Both of these funding sources would be in default if the corporation is unable to complete the project. Although nothing in this petition suggests that the corporation cannot operate a plant at all, the corporation is limited via the state funding to operations within the State of Wisconsin. It is not clear if there is a deadline by which operations must commence; however, it is presumed that the lending sources will not wait indefinitely for the plant to begin operations. Action by the General Tribal Council, and subsequently by the Oneida Business Committee, may result in liability for repayment of these funds by the Tribe because its actions were so close to operations of the corporation that there is no significant difference between the two.

Conclusion

The petition calls for action that is within the authority of the General Tribal Council to take if no part of that action affects land use, zoning or land allocation. Although it would be clearer for the General Tribal Council to direct the Oneida Business Committee to amend the corporate charter for Oneida Seven Generations Corporation to prohibit the development or operation of a pyrolysis plant within the Reservation. Further, because the motion would affect no prior actions of the General Tribal Council, only a simple majority vote is needed.

However, caution is recommended in taking this action as there may be liability arising out of existing loan agreements, expenditures and contracts entered into by the corporation. Any action taking prohibiting the corporation may result in liability being transferred to the Tribe for becoming too involved in corporate activities.

If you have further questions, please contact me.

CORPORATE REPORT MODEL

The Secretary or other designated reporting officer of the Corporation shall file reports with the Oneida Business Committee and General Tribal Council in accordance with this Article. Reports shall be prepared at least annually to coincide with the annual meeting of General Tribal Council, with other reports quarterly to the Oneida Business Committee or as required by the Business Committee as the shareholder/member of the corporation.

Section 1: Narrative Report

- (A) **Definition:** Narrative report is defined generally as contextual and non-financial information reported with financial information in order to provide understanding of the corporation's business done, market position, strategies, performance and future expectations. The Narrative report should include topics and information covering four broad categories of information, including 1) Market overview; 2) Strategy and Structure of the Corporation; 3) Management of value of the Corporation; and 4) Performance of the Corporation over the reporting period.
- (B) **Components of Report:** Narrative reports should include, but are not limited to, at a minimum, the following components in a comprehensive means for easy distribution and understanding:
 - a. Explanation of the core of the Corporation's business practices and market overview.
 - b. Explanation of the Corporation's current place within the market.
 - c. Explanation of the outlines of strategies by the Corporation for improved value in the market.
 - d. Explanation of the Corporation's relative performance vs. competitors and identification of key competitors within the market.
 - e. Explanation of any material changes or developments in the market or nature of business the Corporation is primarily engaged in since the last reporting period.
 - f. Identification of the primary goals and targets of the Corporation and progress made towards accomplishment of the same.
 - g. Identification of key elements for success in strategies given, including risks, resources and relations available and needed in order to successfully fulfill outlined strategies.
 - h. Identification of medium (two to five year) and long (greater than five year) prospects and sustainability of the Corporation given present status, strategies and risks.
 - i. Explanation of market growth(if any) experienced by the Corporation, identifying sources of growth (i.e. organic growth through market share increase, volume of business increase, acquisition of competition or other assets, etc.).
 - j. Summary of the assets of the Corporation, including but not limited to its financial, physical, employee, customer, brand or intellectual property, and supply assets.
 - k. Summary and status update of any pending legal action to which the Corporation is a party and any relevant government regulation to which the Corporation may be subject.
- (C) **Report Due Date:** Narrative reports are due in time for the annual meeting of General Tribal Council generally held in July of each year, meaning it should be submitted no later than May 31st of each year unless GTC changes its meeting date or some other date is issued by the Business Committee.

- (D) **Narrative Report Access:** The Narrative report is one submitted to the Business Committee and General Tribal Council of the Oneida Tribe. It is considered a public report and shall be made available to the public through the office of the Secretary and/or the Oneida website or other available means.

Section 2: Financial Report

- (A) **Financial Report Defined:** The Financial report is the formal record of the financial activities of the Corporation. Such statements shall be presented in a structured and understandable manner consistent with Generally Accepted Accounting Principles (GAAP).
- (B) **Financial Report Content:** the Financial report shall include information in the following broad categories including but not limited to: 1) an executive summary or broad overview; 2) a balance sheet of the Corporation's financial position listing assets and liabilities; 3) income statement reporting the income, expenses and general profit over the reporting period; 4) statement of retained earnings; and 5) statement of cash flow.
- (C) **Financial Report Due:** Financial Reports are due quarterly to the Oneida Business Committee with copies to the Oneida Treasurer and Chair of the Oneida Audit Committee and as otherwise demanded by the Oneida Business Committee as the representative owner of the Corporation.
- (D) Financial Reports are subject to an annual audit by auditors from the Oneida Tribe or by third party auditors as hired by the Oneida Tribe at the Corporation's expense detailing the fairness and accuracy of the financial reports. The audit reports shall be submitted as attachments to the financial reports as they are done and completed with each applicable reporting period.
- (E) **Financial Report Access:** Financial reports are proprietary and considered confidential information owned by the Oneida Tribe of Indians of Wisconsin, to be retained by the Secretary's office. Financial reports are accessible only to those authorized officers, officials and personnel of the Oneida Tribe of Indians of Wisconsin with a legal or legitimate need to know such report information. They may be disclosed with permission of the Corporation's Board and/or the Owner for economic solicitation purposes or as demanded by the Owner.

Section 3: Disclosure Report

- (A) **Disclosure Report Defined:** Disclosure reports financial and familial relationships and connections between the Corporation and other entities, as well as members of the Corporation's Board and key management personnel. Any financial or legal relationship, ownership interest, or any blood kinship within the Corporation and its financial practices or partnerships shall be detailed in a structured and easy to understand format.
- (B) **Disclosure Report Content:** The Disclosure report shall include, but not be limited to, the following detailed information:
- a. Names and title of all of the Corporation's Board members' names, time in the position, and date when position shall be up for renewal or replacement (if applicable).
 - b. Names and title of all of the Corporation's key management personnel, with length of service in that position, and if under contract, when that position is up for renewal or expiration of the contract term.
 - c. Summary of any financial or familial relationship between any of the people in part a. or part b. in this Section, as well as any relationship, financial or familial with any current member of the Oneida Business Committee or any member of any regulatory body within

Oneida such as a board committee or commission charged with regulating the Corporation's industry or activities.

- d. Names of any other person, whether it be a business in any legal form or an individual, doing business with the Corporation for purposes of mutual enterprise (i.e. including but not limited to: joint ventures; membership in an LLC together; acquisition as a subsidiary; partnership).
 - e. Summary of the financial transactions or relationship between those listed in d. above in this Section and the Corporation, including the purpose of the mutual enterprise, legal relationship, or other connection between the Corporation, its Board or its key management personnel and this other named entity or person.
- (C) Disclosure Report Due: An annual report to the Oneida Business Committee is due concurrently with the narrative report, as well as whenever there is a change to the Corporation's Board membership, turnover to key management personnel, or a business venture creating a new partnership, LLC, subsidiary, or any other legal entity connected to the Corporation for any purpose.
- (D) Disclosure Report Access: Disclosure reports are proprietary and considered confidential information owned by the Oneida Tribe of Indians of Wisconsin, to be retained by the Secretary's office. Disclosure reports are submitted to the Oneida Business Committee and accessible only to those authorized officers, officials and personnel of the Oneida Tribe of Indians of Wisconsin with a legal or legitimate need to know such report information.