

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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VILLAGE OF HOBART,

Plaintiff,

v.

Case No. 14-cv-201

UNITED STATES DEPARTMENT  
OF THE INTERIOR,

UNITED STATES DEPARTMENT  
OF THE INTERIOR,  
OFFICE OF SOLICITOR,  
DIVISION OF INDIAN AFFAIRS, and

UNITED STATES DEPARTMENT  
OF THE INTERIOR,  
OFFICE OF THE SPECIAL TRUSTEE  
FOR AMERICAN INDIANS,

Defendants.

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**DECLARATION OF REBECCA ROSS**

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I, REBECCA ROSS, declare as follows:

1. I am an Attorney-Advisor in the Branch of Environment & Lands of the Division of Indian Affairs ("DIA") in the Office of the Solicitor ("SOL") at the United States Department of the Interior ("Interior" or "Department"). I have held this position since November 2011. I have been licensed to practice law in Arizona since November 2010.

2. In my capacity as an Attorney-Advisor in DIA, my responsibilities include advising Bureaus and Offices within the Department on land issues relating to Indian Tribes. My

primary clients are the Bureau of Indian Affairs (“BIA”) and the Assistant Secretary – Indian Affairs.

3. As part of my official duties, I was assigned to prepare a legal memorandum evaluating whether the lands comprising an abandoned railroad right-of-way within the reservation of the Oneida Tribe of Indians of Wisconsin (“Tribe”) are held in trust by the United States for the benefit of the Tribe. I have worked on this matter from November 2011 to the present date.

4. The statements I make in this declaration are based on my review of the official files and records of the Department, my personal knowledge, and information acquired by me through the performance of my official duties.

BACKGROUND: Trust Status of Right-of-Way and 2009 Memorandum

5. On August 13, 2001, the Tribe submitted a request to the Great Lakes, Wisconsin office of the Bureau of Indian Affairs (“BIA”), asking that the Department confirm that the land comprising an abandoned railroad right-of-way running across the Tribe’s reservation is held in trust by the United States.

6. On October 12, 2001, the BIA referred the matter to the Twin Cities Field Office of the Office of the Solicitor for evaluation. The Tribe has renewed its request for a determination on multiple occasions by sending letters to various offices within the Department. The May 13, 2009, memorandum (“Memo”) referenced in Plaintiff’s FOIA request is one of these letters. Upon submission, the Memo was added to the record of materials the Solicitor’s Office continues to review as part of its ongoing effort to evaluate the Tribe’s request.

7. Since 2001, several Solicitor's Office attorneys have worked on the matter, including attorneys in both the Twin Cities Field Office and in Washington, D.C. While Solicitor's Office attorneys have prepared various draft legal opinions over the years, the Solicitor's Office has never finalized its legal position on the matter and no final legal opinion has ever been issued to our client offices.

8. The matter is still pending in the Solicitor's Office, as it was pending when the Tribe submitted its Memo to the Department.

#### PLAINTIFF'S FOIA REQUEST

9. On September 8, 2013, Lance Purvis, the SOL FOIA Officer, sent a copy of a FOIA Request dated August 23, 2013, ("FOIA Request") to Maria Wiseman and Karen Lindquist. Karen Linquist is an attorney in DIA, and Maria Wiseman was an attorney in DIA until October 2012. The FOIA request was submitted by Attorney Jenna Clevers but did not specifically identify the Village of Hobart as the requesting party.

10. The FOIA Request sought certain documents in SOL's possession related to the "Status of the Railroad Right-of-Way Land within the Oneida Tribe of Indians of Wisconsin Reservation." Specifically, the request sought documents prepared in response to a Memo sent by Carl Artman, counsel for the Tribe discussing the Right-of-Way. Although the FOIA Request focused only on the Memo from the Tribe's counsel, the matter has been under consideration by the Department for much longer.

11. I received a copy of the FOIA Request via email on September 9, 2013. In response to the FOIA Request, I and other DIA attorneys searched our files for responsive

documents. As part of our official duties, we provided Mr. Purvis with documents we determined were responsive to the FOIA Request.

12. In addition, after plaintiff commenced the present lawsuit, I was asked to review a set of documents for responsiveness to the Plaintiff's FOIA Request and for the applicability of potential FOIA exemptions and privileges. I determined that all the responsive documents, except one, should be withheld under the attorney work product, attorney client, and/or deliberative process privileges, as explained below.

JUSTIFICATION FOR WITHHOLDING RESPONSIVE DOCUMENTS UNDER  
EXEMPTION 5 OF THE FOIA

13. Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). This has been interpreted by the Supreme Court to exempt those documents "that are normally privileged in the civil discovery context." *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975). This includes the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

**Attorney Work Product Privilege**

14. As indicated on the Vaughn Index, SOL withheld approximately 32 documents comprised of approximately 150 pages, because they are protected by the attorney work-product privilege. The attorney work-product privilege protects documents and other memoranda prepared by an attorney in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3). The protection also extends to factual materials. *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).



15. Each of the documents withheld are “inter-agency or intra-agency memoranda” as described by Exemption 5. This exemption has long been held to encompass communications with hired experts and consultants. *See Soucie v. David*, 448 F.2d 1067, 1078 n. 44 (D.C. Cir. 1977); *Hoover v. U.S. Department of the Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980).

16. The materials withheld as work product consist of attorney communications within the federal government, and the materials have not been released outside of the federal government. These records are protected from disclosure by the attorney work-product privilege because they were created in anticipation of litigation. The United States has been sued, on several occasions, in connection with competing claims of ownership of the lands comprising an abandoned railroad right-of-way. While there is currently no active lawsuit against the United States in this matter, we are aware that at least one entity (Village of Hobart) has asserted a claim in the property and has asserted the Tribe is trespassing on its land. The Tribe’s request asks that the Department confirm the trust status of the property comprising the abandoned railroad right-of-way, and we anticipate that our decision will trigger litigation against the United States by any party asserting a claim in the property at issue.

#### **Attorney-Client Privilege**

17. As indicated on the Vaughn Index, SOL withheld approximately 36 documents comprised of approximately 146 pages, because they are protected by the attorney-client privilege.

18. As discussed above, the Tribe initially contacted BIA seeking confirmation of the trust status of the lands comprising an abandoned railroad right-of-way in 2001. The BIA then sent the request to the Solicitor’s Office in order to obtain legal advice. The BIA and the

Assistant Secretary – Indian Affairs requested legal advice from the Solicitor’s Office on the issue because neither the BIA nor the Assistant Secretary can provide the Tribe confirmation of the trust status of the property absent such legal advice. The legal status and ownership of the lands comprising the abandoned railroad right-of-way is seen by the Department as a legal question that must be answered by the Solicitor’s Office. Since the 2001 referral, the issue has been residing in the Solicitor’s Office, and the Tribe has submitted letters to various offices within the Department, including the Office of the Assistant Secretary – Indian Affairs and the Solicitor’s Office, renewing and supporting its request for such confirmation.

19. The documents at issue in this FOIA request were generated as part of the Solicitor’s Office ongoing work to provide the BIA and the Assistant Secretary a final legal opinion on the matter. The documents reflect discussion about what the client advice should be on the matter.

20. Some documents also reflect requests for advice from subject matter experts at the United States Department of Justice, with whom Solicitor’s Office has an attorney-client relationship.

21. Although the legal drafts contain some factual material, the factual material cannot easily be separated from the legal analysis for several reasons. First, the legal drafts that have been prepared take into account facts from many sources. While the Tribe has submitted materials to the Department, the Solicitor’s Office has also used facts provided by the client over the course of several years. In addition, the Solicitor’s Office has conducted its own research and examination of the relevant facts, to determine their veracity and reliability.

22. Second, the documents contain Solicitor's Office internal deliberations regarding the relevancy of specific facts to our legal analysis. These facts must be withheld because release of the factual discussions would reveal the legal analysis and questions that Solicitor's Office attorneys are working through and grappling with. Certain facts are pertinent to certain legal questions and issues, and the release of factual information would also reveal the legal questions under consideration by Solicitor's Office attorneys. Therefore, even the publicly available facts within the exempt documents must be withheld in order to preserve the attorney-client privilege.

23. For these and the above-mentioned reasons, the documents should be withheld in their entirety under the attorney-client privilege.

#### **Deliberative Process Privilege**

24. The documents responsive to Plaintiff's FOIA Request include email correspondence and draft memoranda. They reflect the historical and legal research conducted by Solicitor's Office attorneys so far, discuss outstanding factual and legal issues left to resolve, and seek the assistance of other federal attorneys in grappling with the legal complexities of the matter.

25. Solicitor's Office attorneys need to have the ability to have candid discussions with supervising attorneys and other Federal law attorneys who are subject matter experts in the relevant areas of law. Moreover, the legal analysis that one Solicitor's Office attorney drafts may be inconsistent with the analysis drafted by a different Solicitor's Office attorney, and these disparate views have to be considered by supervisory attorneys as part of the process of the Solicitor's Office reaching a final position on the matter. These disparate views may also rely on



a different selection of relevant facts, and supervisory attorneys would also need to determine the facts most relevant to a legal analysis prior to issuing a final opinion.

26. This internal discussion is an essential part of the Solicitor's Office process as it allows for a candid discussion of the strengths and weaknesses in different legal positions. Release of these positions would hamper the frank and open discussion of the historical and legal issues under debate.

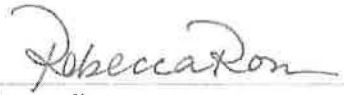
27. In addition, these internal deliberations and preliminary legal drafts reflect proposed legal analysis and legal positions that have not yet been adopted as the actual position of the Solicitor's Office. The release of any of these proposed positions, which vary in factual and analytical content and conclusion, would confuse the public as it would not reflect the final position of the Solicitor's Office. Therefore, any preliminary draft legal opinion, which has never been finalized for or issued to the client, does not reflect the official position of the Solicitor's Office.

28. I have reviewed the documents withheld pursuant to Exemption 5 to determine if there are reasonably segregable portions of these documents that could be released, in redacted form, to API. In many cases, all of the information contained within a document is exempt from release pursuant to Exemptions 5; thus, there is no reasonably segregable portion of the document that may be released. To the extent that some documents may contain non-privileged information, releasing such information is not possible because the material is inextricably intertwined with the exempted information, and releasing that information would necessarily release privileged material, including material protected by the attorney-client, attorney work product, and deliberative process privileges.



Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed this 1<sup>st</sup> day of July, 2014.

/s/   
Rebecca Ross,  
Attorney-Advisor  
Branch of Environment & Lands  
Division of Indian Affairs  
Office of the Solicitor  
United States Department of the Interior

HB-1330 Active CTH J

Owners

Both USA IN TRUST FOR ONEIDA TRIBE OF INDIANS OF WI; Document Number: 2337382

Mailing Address: ONEIDA TRIBE OF INDIANS PO BOX 365 ONEIDA WI 54155-0365

Former GREEN BAY & WESTERN RAILROAD

Former WISCONSIN CENTRAL LTD; Document Number: J23215-07

HB-1342-1 Active STH 54

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HB-1420-1 Active RIVERDALE DR

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HB-1428-1 Active CTH J

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Former WISCONSIN CENTRAL LTD; Document Number: J23215-07


 HB-742 Active RAILROAD AV

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 Former GREEN BAY & WESTERN RAILROAD

 Former WISCONSIN CENTRAL LTD; Document Number: J23215-07



2337382

CATHY WILLIQUETTE  
BROWN COUNTY RECORDER  
GREEN BAY, WIRECORDED ON  
10/18/2007 01:55:05PMREC FEE: 69.00  
TRANS FEE:  
EXEMPT #  
PAGES: 30Affidavit of  
EASEMENT CANCELLATION

Document Number

Note: This document is to be recorded in the Tract Index at the office of the Register of Deeds in Outagamie County, Wisconsin and Brown County, Wisconsin. The Tract Index should be updated to reflect the accurate title to this property as follows:

**United States of America in Trust for  
the Oneida Tribe of Indians of Wisconsin**

AFFIANT, Gerald L. Danforth, Oneida Tribal Chairman, hereby swears or affirms that a certain railroad easement has been cancelled. This Affidavit of Cancellation of Easement has been executed for the purposes of formally recording with Brown and Outagamie Counties, Wisconsin, the cancellation of a tribally granted and federally approved railroad easement over restricted treaty land on the Oneida Indian Reservation in Wisconsin.

Pursuant to the 1831 Treaty with the Menominee, 7 Stat. 342, the Menominee Tribe ceded approximately 500,000 acres to the United States, so that land may be set apart as a home to several tribes including the Oneida Tribe. Pursuant to the 1838 Treaty with the Oneida, Article I, 7 Stat. 566, the Oneida Tribe ceded its interest in the lands reserved under the 1831 Treaty with the Menominee, and the United States permanently reserved the present Oneida Indian Reservation for the use and occupancy of the Oneida Tribe.

The tribal grant of easement is entitled "1870 Agreement between Oneida Chiefs and Lake Pepin Railway Co.," Dated May 23, 1870. Said Agreement was ratified by Congress by an Act entitled: "An Act granting the Right of Way to the Green Bay and Lake Pepin Railway Company for its Road across the Oneida Reservation, in the State of Wisconsin," March 3, 1871, 16 Statutes at Large, 588. Neither document contains a legal description of the former railroad easement.

The following documents are attached to this Cancellation of Easement:

1. Agreement and Mutual Release between Fox Valley & Western Ltd. and the Oneida Tribe, fully executed January 22, 2003. (Oneida Nation Register of Deeds Certified Copy attached).
2. Surface Transportation Board, July 23, 2003 Decision and Order, STB Docket No. AB-402 (Sub-No. 8x). (Surface Transportation Board Certified Copy attached).
3. Railroad Survey by Mau & Associates, Project No: O-15306, Drawing No.: L-6939, dated November 10, 2006. Said survey is of the Outagamie County portion of the former railroad easement. (Original attached).
4. Railroad survey by Mau & Associates, Project No: O-15306, Drawing No.: L-7144, dated September 21, 2007. Said survey is of the Brown County portion of the former railroad easement. (Original attached).

THIS INSTRUMENT WAS DRAFTED BY:  
Rebecca M. Webster, Staff Attorney

Recording Area

Name and Return Address  
Oneida Tribe of Indians of Wisconsin  
Land Management Division Director  
P. O. Box 365

HB-1036, HB-1330, HB-1342-1, HB-1364-1,  
HB-1368-1, HB-1372, HB-1380, HB-1389,  
HB-1409-1, HB-1410-1, HB-1414-1, HB-1416,  
HB-1420-1, HB-1422, HB-1425-1, HB-1426-1,  
HB-1428-1, HB-1429-1, HB-742, HB-786  
Parcel Identification Number (PIN)

Note: The Outagamie County portion of the former railroad easement on the Oneida Reservation does not have assigned parcel numbers.

Dated this 12 day of October, 2007.

*Gerald L. Danforth*  
\* Gerald L. Danforth, Oneida Tribal Chairman

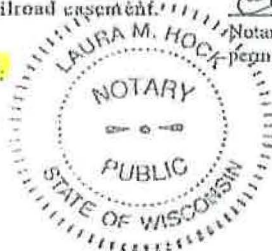
## ACKNOWLEDGMENT

STATE OF WISCONSIN )

*Outagamie* County ) ss.  
)

Personally came before me this 12 day of October, 2007, the above named Gerald L. Danforth to me known to be the person who executed the foregoing instrument and acknowledged the same.

*Laura M. Hock*  
Notary Public, State of Wisconsin. My Commission is permanent. (If not, state expiration date: March 2008)



ONEIDA NATION, WI  
REGISTERS OFFICE  
OCT 16 2007  
006122