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Decision on Duck Creek: Two Green Bay Reservations and Their Boundaries, 1816–1996

JAMES OBERLY

INTRODUCTION

In recent years the federal courts have been busy interpreting the Treaty of 1831 between the Menominee Nation and the United States, and what it means for relations between the Menominee and the state of Wisconsin. The Menominee Nation asserted a claim to off-reservation hunting and fishing rights based on article six of the treaty. After many years of litigation, the federal district and appeals courts, and the US Supreme Court ruled against the Menominee Nation and in doing so brought to a close a contentious dispute.¹ The very same Treaty of 1831 also figured in a lesser-known court dispute in the 1990s between the state of Wisconsin and some Oneida Indian fishermen over access to netting on Duck Creek in Brown County by tribal members.

Duck Creek runs parallel to the Fox River and bisects the Oneida Indian Reservation for twelve miles as the sluggish stream makes its way toward the waters of Green Bay. The creek once provided good fishing, particularly for sturgeon that swam up the creek from the bay, for Oneida Indians in the nineteenth and early twentieth centuries. In the 1930s the state of Wisconsin erected a dam astride Duck Creek, right at the extreme northeastern end of the reservation on the west bank and at Brown County's Pamperin Park on the opposite east bank. An immediate effect of the dam was that it limited sturgeon and other fish from swimming upstream to the main settlements on the reservation.² After the erection of the dam, tribal members moved their

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fishing to the dam site and fished there unhindered by the state, if not by pollution, until the early 1990s, when the state's Department of Natural Resources (DNR) informed them they were fishing illegally. By that time the sturgeon had been supplanted by roughfish suckers. In 1994 Oneida tribal fishermen Simon DeCouteau, Dennis King, and Ronald King, who had been fishing at the damsite their entire lives, refused to accept the DNR's edict and announced in advance their intention to net suckers at the dam on Duck Creek's west bank. In modern fashion, their arrest was recorded by the local media and they briefly became local celebrities.

The state contended that the men netted from a bank on Duck Creek that was outside the reservation boundary, while the defendants insisted that they were on reservation land and cited the famous 1831 *Worcester v. Georgia* case in asking for relief from unlawful exercise of state police power inside a reservation's boundaries. The issue before the court was jurisdictional: What was the precise boundary of the Oneida Indian Reservation, as established in 1838, and how had it been set? Each side had a competing historical interpretation. The state argued that the US government had established control of the disputed bank of Duck Creek in 1829 as part of the Fort Howard Military Reservation in order to safeguard its nearby army post. The defendants disputed the legality of the army's control of land in Indian Country, and pointed to the importance of the 1831 Menominee Treaty that ran the boundary between the Fort Howard Military Reservation and the lands of the Oneida, known in the treaty as the "New York Indians." The treaty placed the boundary "down said Duck Creek," presumably a reference to the middle of the stream. Nothing in the subsequent 1838 treaty that established the Oneida Indian Reservation contradicted this 1831 boundary, and the defendants argued that the middle of Duck Creek should be the boundary today.

The evidentiary part of the case boiled down to a competing tale of two reservations, one army, one Indian. If the state's position was correct, then the men were outside the Oneida Indian Reservation in 1994 and subject to prosecution in Brown County Circuit Court. If the defendants were correct, the men were on the Oneida Indian Reservation, the court lacked jurisdiction, the charges should be dismissed, and the Department of Natural Resources enjoined from placing restrictions on tribal members fishing at that west bank point on Duck Creek. One of the competing histories of reservations had to take precedence—either the Fort Howard Military Reservation's reported boundary or the Oneida Indian Reservation's argued border was definitive.

Of course, the issue went beyond the matter of tribal members netting some rough fish each year. The state of Wisconsin was determined to prevent any expansion of treaty-based Indian fishing and hunting rights, particularly claims involving off-reservation rights. The state was also mindful that the Oneida were the only tribe in Wisconsin to have a reservation predating statehood by a decade, and that other claims might arise out of a case about netting suckers. Although the Oneida did not claim an off-reservation right in this case, the state's legal filings showed that it was suspicious that such a claim was in the offing. The Oneida boundary case arose soon after the close of seventeen years of litigation between the state and the Lake Superior Chippewa

over off-reservation treaty rights and in the midst of ongoing litigation between the state and the Menominee Nation.

In addition, the state and the Oneida Nation were embroiled in jurisdictional disputes over the right of the tribe to set its own independent air and water quality standards, so the litigation over suckers and the reservation boundary took place amid protracted conflict between tribal and state sovereignty in the 1990s. The tribal council decided that the defendants in the Duck Creek case would have the full backing of the tribe and supported them with a vigorous defense. While waiting for the court proceedings to begin, and in defiance of state power, more tribal members went to Duck Creek to net suckers and were in turn arrested. In 1995 Ronald Hill and Earl Jordan joined the 1994 defendants in the dock, and the irrepressible Simon DeCoteau got himself re-arrested and hauled into court again.

At the outset of this legal dispute between tribal members and the Department of Natural Resources, the Brown County Circuit Court was told by an expert surveyor that the field notes of a survey provided for in an 1838 treaty between the Oneida and the United States were too vague to establish with certainty the exact Oneida Indian Reservation boundary (see fig. 1). This required the court to delve into the events surrounding the history of the establishment of the Oneida Indian Reservation. It also required the court to inquire about the history of the boundaries of the lapsed reservation across Duck Creek from Oneida, the one-time Fort Howard Military Reservation. That military reservation had a boundary history even more confused and contentious than Oneida's.³

The same expert surveyor who examined copies of the field notes and 1838 plat map of the Oneida Indian Reservation found them too inexact to determine the reservation's boundary and testified that the ambiguity could be explained by reference to an earlier plat map, one ostensibly drawn in 1829, establishing the Fort Howard Military Reservation (see fig. 2). That plat map of land claims at Green Bay has a block of text announcing "Military Reservation" with the boundaries demarcated in text and on the map. Below the text block are the signatures of Senior Officer in the Army Major General Alexander Macomb, Secretary of War Peter B. Porter, and President John Adams, who affixed his signature on the penultimate day of his presidency. In its pleadings, the state maintained that the army garrison had a distinct interest in Duck Creek because it had established a sawmill and the army had to control both banks in order to guarantee the mill's operation.

The state claimed that the Oneida fishing rights issue could be settled by referring to the history of the boundaries of the Fort Howard Military Reservation, established in 1829, and not to the 1838 treaty between the Oneida and the United States. The 1829 map and order was the key document that the state submitted in the case; understanding its history and contesting its meaning became crucial to the defendants. For the defendants, the documentary history of the 1831 Menominee and 1838 Oneida treaties was the key evidence they wanted to place before the court.

The political context of the 1990s litigation in Brown County Circuit Court involved the statewide uproar over off-reservation treaty rights, but the

Map of the Oneida Indian Reservation, 1838

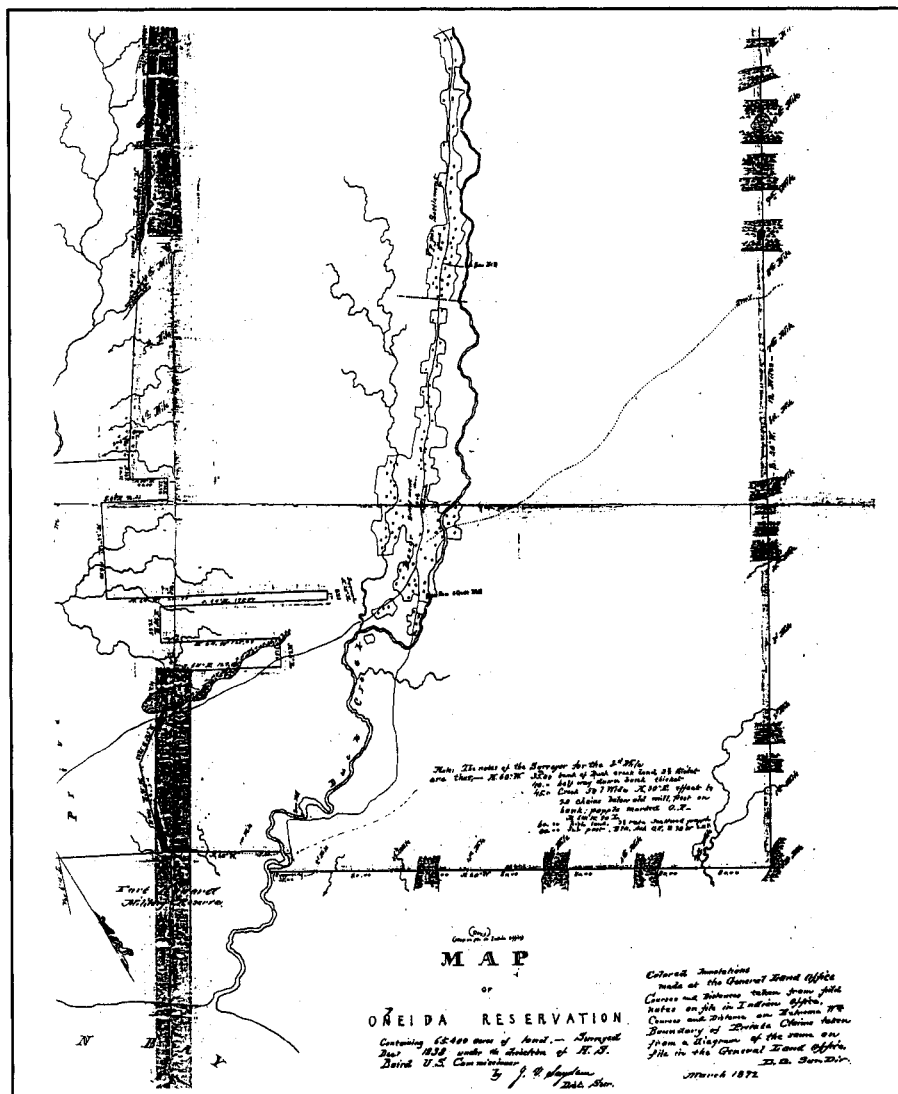


FIGURE 1. Drawn in 1838 by J. V. Suydam and annotated in 1872 by the Office of Indian Affairs, this map's depiction of the reservation's exterior boundaries are marked by mile posts. The 1872 annotation on the map reads, "Note: The notes of the Surveyor for the 2nd Mile are thus; —N 60 W. 35.00 bank of Duck Creek land 3rd rate thicket. 40.00 Half-way down bank thicket. 45.00 Creek 50 links wide. N 30 E offset to 20 chains below old mill. Post on bank: popple marked O.R. N 60 W 60.00 High land. 3rd rate scattered popple. 80.00 set post." (Source: Oneida Indian Reservation, Cartographic Records of the Bureau of Indian Affairs, Record Group 75, National Archives.)

Private Land Claims at Green Bay and the Fort Howard Military Reservation, 1828–1829

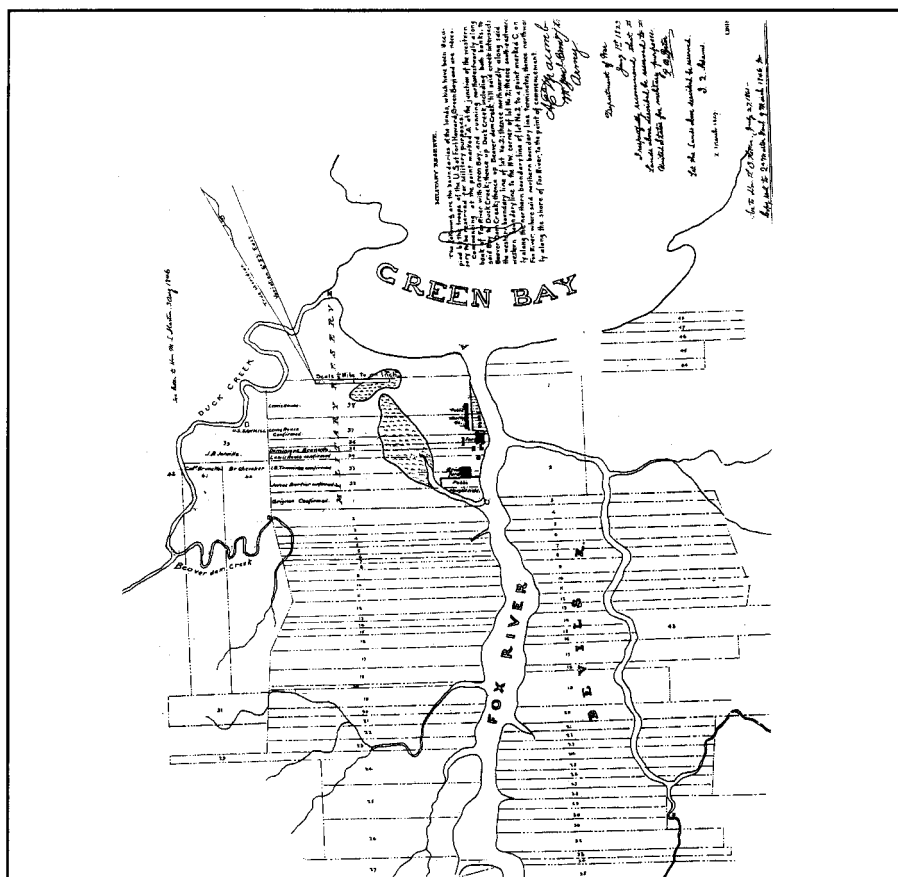


FIGURE 2. This map was drawn in 1828 by John Mullett and annotated between 1829 and 1846 by the War Department. The manuscript portion located near the top of the map reads, "Military Reserve. The following are the boundaries of the lands, which have been occupied by the troops of the U.S. at Fort Howard, Green Bay, and are necessary to be reserved for military purposes: Commencing at the point marked 'A' at the junction of the western bank of Fox River with Green Bay, and running northwesterly along said Bay to Duck Creek; thence up Duck Creek including both banks, to Beaver Dam Creek; thence up Beaver Dam Creek till said creek intersects the western boundary line of Lot No. 2; thence northwardly along said western boundary line to the N.W. corner of Lot No. 2; thence southeastwardly along the northern boundary line of Lot No. 2 to a point marked C, on Fox River, where said northern boundary line terminates, thence northwardly along the shore of Fox River, to the point of commencement." The annotation is signed by A. E. Macomb, major general of the army; P. B. Porter, secretary of War; and J. Q. Adams, president of the United States. (Source: Fort Howard, Wisconsin, Old Map File of Military Posts, Cartographic Records of the General Land Office, Record Group 49, National Archives.)

juridical context was positively Jacksonian. The court had to consider several questions raised directly in the 1820s and 1830s: What was Indian Country? How was a boundary determined between Indian Country and the public domain, or private lands? In what ways could the United States exercise power in Indian Country? After statehood, what powers did a state have over Indian Country within state boundaries? To a remarkable degree, two predecessor circuit courts in Brown County faced similar legal issues in quite different cases in determining the extent of US power at Green Bay. In the celebrated 1825 case of *Ronde and Arndt v. Belknap*, the young Judge James Duane Doty ruled adversely on the legitimacy of the US claim to lands around Fort Howard. And between 1845 and 1847 the same territorial district court in Brown County heard a series of trespassing cases in which the central evidentiary issue was the boundary of the Fort Howard Military Reservation. More than 170 years later, the legal analysis of boundaries, sovereignty, and ownership of lands in the two cases at Green Bay helped a subsequent judge make sense of the history and law as to who could fish on the west bank of Duck Creek.⁴

THE FIRST RESERVATION: THE FORT HOWARD MILITARY RESERVATION, 1816–1863

The first half of this dispute involves the history of a special type of reservation: the lands surrounding the army's Fort Howard at Green Bay between 1816 and 1831. The least of the worries that the army had at Green Bay was the presence of the Oneida. Rather, the garrison became ensnarled in an extraordinary tangle of claims with the Menominee and with local French-speaking settlers, who had built a trading center at Green Bay.

The starting point for understanding the history of the land dispute in this litigation is the War of 1812. The leading modern historian of that war calls it a "forgotten conflict," in part because of its distance from today's scene, and in part because of its inconclusive outcome in many respects. In the far northwestern theater of the war, however, the United States was defeated at almost every turn by a coalition of forces involving British regulars, Canadian militia, and especially Indian warriors. The United States lost forts at Chicago, Prairie du Chien, and Mackinac during the war.⁵ The Menominee, among other present-day Wisconsin tribes, played an important role in the war against the United States in the Lake Michigan region and were prominent in the successful attack on Mackinac.

In the aftermath of the war, the United States embarked on a diplomatic effort to repair relations with the Indian nations of the Old Northwest, including the Menominee. To sever relations between the Menominee and Ho-Chunks (Winnebago) and British North America, American policymakers decided upon placing a fort at Green Bay. The acting Secretary of War Alexander Dallas made plans in June 1815 for "an Indian agency on the Fox River, in the neighbourhood of Green Bay . . . that the establishment, so formed, shall be a military station, to be occupied by two companies of the troops of the United States." Michigan Territorial Governor Lewis Cass con-

curred, stating that, “A display of the power of the United States in that remote quarter would be productive of Salutary effects upon the minds of the Indians.” A new agent, Colonel John Bowyer, was formally appointed in March 1816 to oversee relations with the Menominee and Ho-Chunks around Green Bay.⁶

In establishing Fort Howard, the United States had to obtain the land for the fort directly from its owners, the Menominee Indians. This was accomplished in 1816 by negotiation between Colonel Bowyer and the Menominee; however, there is no contemporary written record that describes the negotiations. There is an 1830 account of this transaction provided by Colonel William Lawrence, the then commandant of Fort Howard: “The Military Reservation extends from Duck Creek to the first Creek above the Fort. It was purchased by Colonel Bowyer in 1816 from the Indians at I believe \$800.”⁷

Colonel Bowyer arrived at Green Bay to take up his duties in May 1816. The troops from Mackinac arrived at the bay on August 8. There is a lengthy memoir of that landing, written in October 1816 by one of the accompanying officers, Captain John O’Fallon. That officer’s account shows that the army anticipated trouble with its incursion into Indian Country, and it also shows the contempt the army felt for the Métis, or mixed race community, which had been living at the bay since the 1730s:

[W]e arrived on the 8th of August last in four vessels accompanied by a detachment of Artillery and four companies of the 3rd Infantry, commanded by Col. Miller . . . the additional force accompanied the expedition hither as a precaution against any opposition from the Indians, it having been reported, but without any foundation that such was their intention and with which view they were embodied at this place to the number of 800 warriors—but instead of such manifestations, few were to be seen and their conduct most humiliating.... We are erecting the Fort on the position where the French had formerly stockaded, it is a most happy selection, being situated about one mile up this river, and one half mile below a mongrel French settlement which extends up the river for five miles on both sides....⁸

Another witness to the landing of the troops in the summer of 1816 was Augustin Grignon, one of the leaders of the Green Bay Métis community. His account of the location of the troops at the old French fort concurs with that of O’Fallon. Grignon, in addition, gives details of how the army and Menominee dealt with one another:

Col. Miller . . . and other officers visited Tomah at his village, less than half a mile distant. Col. Miller asked the consent of the Menomonees for the erection of a fort. Tomah said: “My Brother! How can we oppose your locating a council-fire among us? You are too strong for us. Even if we wanted to oppose you, we have scarcely got powder and shot to make the attempt. One favor we ask is, that our French broth-

ers shall not be disturbed or in any way molested. You can choose any place you please for your fort, and we shall not object.”⁹

Captain O’Fallon’s and Augustin Grignon’s accounts indicate that the army came to Green Bay expecting trouble, but found little from the Menominee. Clearly Colonel Bowyer had smoothed the way. It is also clear that he did not negotiate and sign a formal land cession treaty with the Menominee that was to be sent to Washington, D.C. for executive approval and Senate ratification. There is no description of the lands he obtained from the Menominee that is any more precise than that used in 1830 by Colonel Lawrence, namely, that the Fort Howard Military Reservation extends “from Duck Creek to the first Creek above the Fort,” and without any claim that the Fort Howard Military Reservation included both banks of Duck Creek.

Whatever the events of the summer of 1816, Colonel Bowyer came back to the Menominee three years later to ask them to sell more land for use by Fort Howard’s garrison. Colonel Bowyer called a council with the Menominee in May 1819, and despite some opposition from Menominee leaders who he termed “British Chiefs,” the US Indian agent claimed that he was able to secure the approval of the tribe to a land sale, “twenty five or thirty miles squar[e] of the lands in the neighbourhood of Fort Howard.” Colonel Bowyer had in mind a land cession that would run on both sides of the Fox River for fourteen miles with a depth from the river of one mile east and west. The main opposition to this plan, however, came not from the Menominee but from Bowyer’s civilian superior, Secretary of War John C. Calhoun. The economy-minded South Carolinian wrote Bowyer from Washington, D.C. that “The department is not desirous of obtaining a cession of this tract of country, unless it can be done at a very moderate expense; and you are authorized to treat with the Indians claiming it, only in the event of your being satisfied, that a purchase can be effected by a small consideration.” That directive from Secretary Calhoun proved impossible since Colonel Bowyer had already stated in writing that a large number of gifts and annuities would be needed to effect the purchase.¹⁰

The Menominee had a more restrictive view of what territory constituted Fort Howard and surrounding land applying to the army, the Métis settlers around Green Bay, and the incoming New York Indians. A speech given by Great Wave, a Menominee, in 1823, three years after Bowyer’s death, was translated into English and a copy given to the War Department’s quarter-master general’s office:

That they [the Menominee] gave Col. Bowyer the piece below the creek to build a council house on, and that he made them a present. Also, that Harlbrick, Jacques Vieux, & Franks were the only persons they gave permission to settle on their lands, on condition that they were to pay them small rents.... [T]hat after the Pontiac War when they [the Menominee] had reconquered the Country they gave the British the land where the Fort now stands. And that they [the British] paid them for it. Nobody has any claims below Johnson’s Creek and that the

last lands to the Six Nations was given to them as hunting grounds in common with themselves (and not solo to them as some pretend).¹¹

Great Wave, who took part in later treaty negotiations in 1827 and 1831, helps us understand that the army had permission to build its fort and surrounding outbuildings as a “council house,” but that the army had no legal claim to own the lands surrounding the fort. In other words, there was no Fort Howard Military Reservation established in 1816. Great Wave’s speech also refers to an ongoing dispute between the Menominee and the Oneida over the lands around Green Bay. The Oneida tribe, which he referred to as the “Six Nations,” had moved in small numbers to Duck Creek in 1821 and had quickly reached what they thought was an agreement with the Menominee to take title to the entire 10-million acre Menominee Nation. In the Oneida telling, the Menominee had agreed to the wisdom of ceding their entire landholding to the New York expatriates since the Oneida had more experience in dealing with the “long fingernails” of the Americans. Great Wave’s speech of 1823 clearly disputes this Oneida claim, and US efforts to clarify the agreement between the two groups of Indians failed in 1827 and were not ultimately settled until 1831.¹²

A long-standing conflict between the army garrison at Fort Howard and the local settlers around Green Bay came to a head in 1828. The actions taken by the parties to the conflict help make sense of the 1829 map and order. The Métis settlement at Green Bay was not the only one to come into conflict with the army over the boundaries between a post and private land claims. Similar conflicts kept garrison-settlement relations in turmoil at Prairie du Chien and Mackinac in the 1820s. In 1820 and 1823, Congress attempted to solve these conflicts over land with legislation. Congress revisited the Métis land claims disputes in an act of 17 April 1828 for the surrounding land at Fort Howard, Fort Crawford (Prairie du Chien), and Fort Mackinac. Congress ordered the General Land Office to attend to the matter, taking care to write into the statute language that denied land patents to claimants of “any lands occupied by the United States for military purposes.” In turn, the commissioner of the General Land Office, based in Washington, D.C., ordered the surveyor-general for the Northwest, based in Chilicothe, Ohio, to proceed with the survey of the private land claims at the three forts earlier confirmed by US action. The instructions from the commissioner to the surveyor-general included the following key passage: the surveyor-general will “ascertain from the Commanding Officers of the several posts adjacent to which claims are confirmed, the particular tracts occupied for military purposes, which are not to be surveyed.”¹³ This instruction was the basis for yet more conflict over who owned what land around Fort Howard, east of Duck Creek.

The army needed a land base around Fort Howard to supply many of the garrison’s needs. The office in the War Department most concerned with the working operations of Fort Howard was the Quartermaster General’s Office, which dealt with the provision of food, fuel, forage, and building materials. Food was usually handled through the transportation of bulk grain and meat over the lakes to Green Bay. The provision of fuel and forage, by contrast, was

provided locally, especially through the efforts of the enlisted men at the fort. Similarly, the enlisted men were often put to work to manufacture building materials, particularly bricks and sawed lumber.

A constant refrain coming from Green Bay was the need to build a permanent stone barracks at Fort Howard, preferably on another site not so close to the marshy bayou that is shown clearly on the 1829 map and order. The housing that was erected after the arrival of the Fifth Infantry was made of logs and was not intended to be a permanent fort. The immediate and lasting consequence was that the men of Fort Howard suffered from the cold every winter. The quarters for both officers and enlisted men would, said one army inspector in 1821, “answer for summer, but without additions and very considerable repairs, will be inconvenient and extremely uncomfortable in the winter.” A year later, an army report urged that the quartermaster purchase stoves for the post, because of “the extreme severity of the Greenbay winter, in quarters built of logs & green timber, crevices do and will remain open.”¹⁴

Conditions did not improve through the rest of the 1820s, despite frequent urging from men stationed at the post. For the years 1820 and 1822, the garrison abandoned the locale at Fort Howard and moved upstream and across to the east bank of the Fox River near what locals called “Shantytown” or “Menomoneeville,” and to what the army called Camp Smith. The conditions were not much better at that site, however. Whether at Fort Howard or Camp Smith, hundreds of troops stationed at Green Bay in the winter lived in log huts and burned wood at a voracious rate. One Fort Howard quartermaster estimated that the post burned as many as 1,500 cords of wood each winter. The search for firewood and its transport to the fort was an important consideration for all who lived and guarded Fort Howard, starting with the commander. In the first few years after 1816 the Fort Howard garrison did not have to go far to obtain wood for fuel. But written accounts by the post quartermaster and others throughout the 1820s attest to the ever-widening range that the enlisted men had to cover to obtain firewood. By February 1826 Major Henry Stanton wrote to General Samuel Jesup that:

The difficulties of obtaining fuel for the Garrison at Green Bay by the labour of the troops represented to me during my late visit to that post and the heavy expense of foraging the number of public cattle deemed necessary by the Commandant for hauling of same a distance of three miles induces me to make inquiries about the price at which a thousand or fifteen hundred cords could be obtained on Contract, delivered on the beach within one hundred yards of Fort Howard.¹⁵

A little more than a year later, on 21 May 1827, Acting Quartermaster Smith at Fort Howard wrote to General Jesup about how far from the fort firewood was obtained: “Fuel—which is usually procured about seven miles from the garrison, and requires it to be drawn a distance to the water, where it is transported to the fort in boats. In the winter it is drawn from two to three miles.”¹⁶

By the end of 1827, Captain Smith described to General Jesup the work of a wood-chopping detail of fifteen men, who were “procuring fuel at the distance of about eight or nine miles from the garrison.” By 1830 the commandant of Fort Howard, Colonel William Lawrence, told General Jesup that there was no firewood within six or eight miles of the fort.¹⁷ The correspondence from the quartermaster general’s files does not allow the modern researcher to determine with any precision where the wood-chopping and fuel-gathering details worked. However, it is safe to conclude that the soldiers did draw wood from far outside any of the boundaries for the Fort Howard Military Reservation listed in the 1829 map and order. That means that in the 1820s the army was probably cutting timber on Menominee lands and, after 1831, on lands belonging to the Oneida Indians.

Fort Howard’s men similarly had to search an increasingly wide area for hay. The hay, or forage, was used to feed both the horses used at the fort, and the draft oxen used in transporting the sawed wood. Just as Fort Howard consumed wood at a prodigious rate, so too did the post’s animals consume forage. An 1831 forage contract asked for a total of fifty-eight tons of hay to be delivered to the fort.¹⁸ The richest source of hay was the bayou upriver and to the west of the fort. However, health concerns in the mid-1820s caused the post surgeon to order that the troops not be asked to cut hay on that bayou, at least not northern-born troops that had no resistance to what seems to have been a sickly disease environment. Instead the post turned further afield and by 1827 was cutting hay “on the indian prairies from two to five miles distant from the fort—this includes forage and the allowance of straw to the troops.”¹⁹ Again, it seems as if the garrison at Fort Howard had to forage in Indian Country in order to satisfy the fodder needs of the post.

The final commodity that the men of Fort Howard had to obtain by their own exertion was sawed lumber. This was used in a number of endeavors at the post. The annual repairs on the dilapidated buildings at Fort Howard required fresh lumber. The construction of boats and bateaux also necessitated sawed lumber in large quantities. At first, Fort Howard depended on a sawmill just upriver on the Fox from the post, but in 1820 the commandant and the quartermaster planned for a sawmill on Duck Creek and had it operating by 1822. This site is shown on the 1829 map and order as “US Sawmill,” and the state argued in court that to secure and protect its existence was surely the reason that the 1829 order wrote in US control over “both banks of Duck Creek.” However, the sawmill on Duck Creek was washed away in an 1826 flood, destroying both mill and mill dam. The quartermaster at Fort Howard did not attempt to rebuild on that site. Instead, for the years after 1826 the garrison relied on the private market around Green Bay to secure sawed lumber. Acting Quartermaster Smith wrote General Jesup on 25 September 1826 that “Boards, plank, and timber must be purchased, which may be done here at a reasonable rate. Captain. Brady [the Fort Howard Commanding Officer] has in person explored in vain all the country for many miles in this vicinity for a mill seat. The only situations are already occupied by citizens, or civilized Indians [the Oneidas].”²⁰ Four months later, Captain Smith wrote a lengthy letter to General Jesup explaining the solution

Sketch of Fort Howard and the Lands Between Fox River, Duck Creek,
and Green Bay

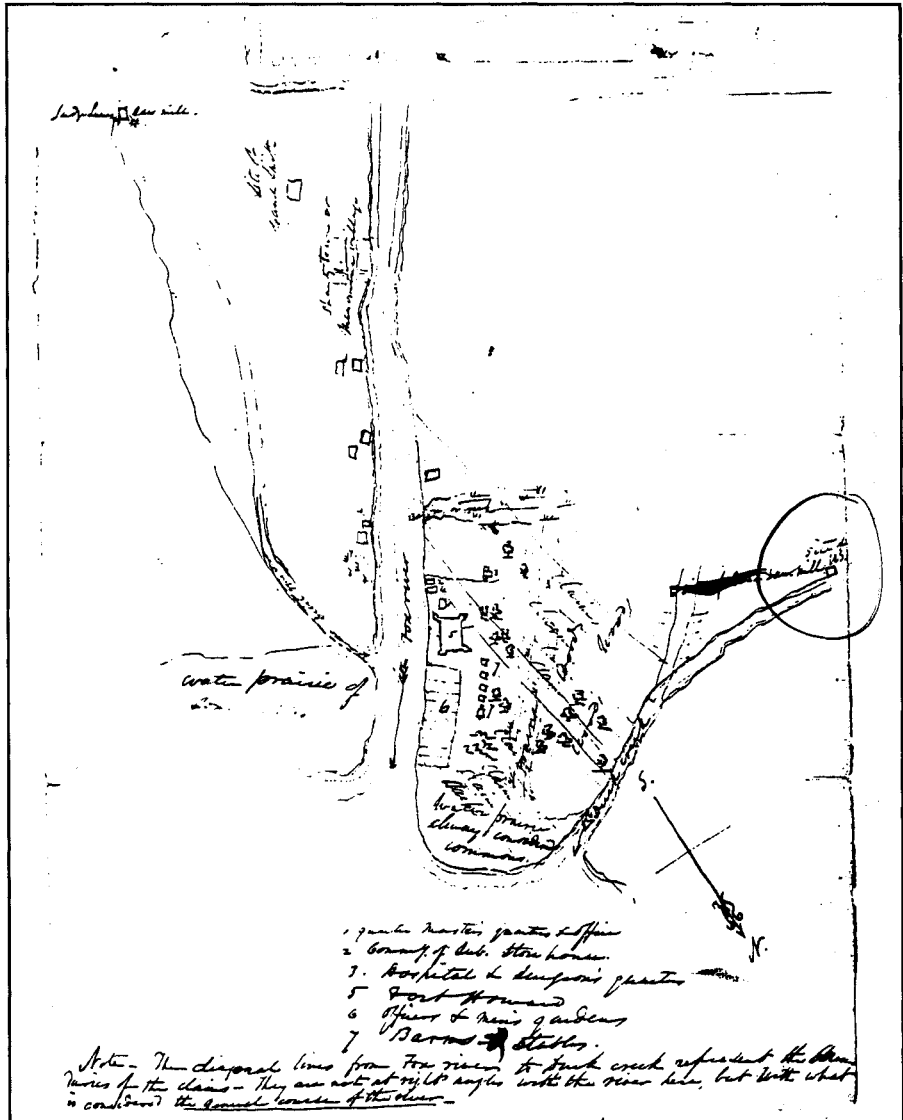


FIGURE 3. The above depiction of Fort Howard and its surrounding area was drawn in 1827 by Captain Smith, US quartermaster at Fort Howard. The legend, located on the lower portion of the map, reads: "1 Quarter Master's quarters and offices; 2 Store houses; 3 Hospital & surgeon's quarters; 5 Fort Howard; 6 Officers & men's quarters; 7 Barns & stables." (Source: Quarter Master General's Consolidated Files on Fort Howard, Wisconsin, 1819-1873, Records of the War Department, Record Group 92, National Archives.)

that General Brady had devised, namely, a sharecropping arrangement whereby the post supplied enlisted men's labor to work on a citizen-owner's private property and mill for a share of the output. Smith's letter bears careful study because it explains not only that Fort Howard had turned in another direction for sawed lumber, but also that the post had lost interest in the Duck Creek site:

A sawmill was erected by the Public on Duck Creek (a stream which empties itself into the head of Green Bay about two miles below the Fort) at a distance of nine miles from this Post. I examined in company with Brig. Gen. Brady three months since the ruins of this mill, with a view to its re-erection, but we both deemed it almost impracticable, as the 3rd Regt. had already found it. The only rapid water on the stream above mentioned within many miles of this place is the site of the present ruins. But the nature of the banks, which are very low and entirely alluvial, together with the exceeding rises to which this stream is annually subject (overflowing the whole valley which forms its bed) has caused the abandonment of this site.... I have, with the advice of the commanding officer taken of a citizen of this place (Judge Lawe) a mill on Devil River (erected by that gentleman on his own land) about five miles by land from the Fort, and ten by water which is to be worked and kept in repair by soldiers of the garrison for one half the lumber so sawed.²¹

Captain Smith subsequently drew a map in May 1828 of the fort, the US sawmill site on Duck Creek, and the new site owned by Judge John Lawe (see fig. 3). It certainly seems that Captain Smith was referring to the same "US Sawmill" that is shown on the 1829 map and order. Yet a reading of Captain Smith's 1827 letter shows that he and General Brady had no interest in reestablishing a sawmill on the Duck Creek site, or at any other site on Duck Creek.

Whatever interest the army may have had in controlling both banks of Duck Creek between 1820 and 1822, it had lost such interest in Duck Creek as a source of waterpower for milling purposes for the garrison at Fort Howard by 1827. It is true that the garrison wanted continued access to the hay and timber in Indian Country. However, this access to Indian Country for timbering and foraging certainly did not depend on controlling the west bank of Duck Creek.

Subsequent correspondence in the quartermaster general's files shows that the next post commander, Colonel William Lawrence, pushed repeatedly in 1829 and 1830 for an abandonment of the Fort Howard site and a relocation of the garrison to a site on Green Bay itself about the location of the present-day University of Wisconsin's Green Bay campus. The ever-greater difficulty in obtaining fuel, forage, and building materials caused Colonel Lawrence to ask that the troops be relocated. That the War Department did not acquiesce had more to do with the expense involved. Still, it is instructive to read Lawrence's 28 September 1830 letter to General

Jesup in which the commanding officer of Fort Howard said his men had “to go 6 or 8 miles for wood. The distance is increasing every year, and if the New York Indians [the Oneidas] obtain the land they ask for we shall not be able to procure the wood.”²²

It is safe to say that relations between the townspeople at Green Bay and the officers at Fort Howard reached a low point in 1828. One of the reasons for this was the increasing ethnic conflict between the officers at Fort Howard and the emerging multi-ethnic society at Green Bay. Added to the mix of Menominees, Ho-Chunks, and Métis was a new group of migrants including the Protestant New York Indians and Yankee migrants from New England and upstate New York. The officers stationed at Fort Howard, many of them southern-born, showed a disdain for the relaxed ways of the Green Bay Métis community. One soldier, sent to Fort Howard in 1828, wrote that the fort was “surrounded by swamps & creeks—no place to visit but chanty towns or as the vulgar call it, Upper Hog Rooting.”²³ But the Fort Howard officer corps reacted with fury to the newly aggressive presence of the Yankees at Green Bay. There were numerous conflicts over illicit whiskey being sold to the enlisted men. There were also frequent conflicts over who controlled the Fox River, especially between the post’s officers and new residents of Green Bay such as the New Yorker James Duane Doty, the New Hampshireman Daniel Whitney, the Massachusetts migrant Ebenezer Childs, the Pennsylvanian John P. Arndt, and the Irishman Henry Baird.²⁴

Perhaps the most aggressive of the English-speaking newcomers was Doty, the leader of the nascent bar at Green Bay. He served in nearly every capacity of government in territorial Wisconsin, including governor. In the mid-1820s, he held the federally appointed office of territorial judge for Brown, Michilimackinac, and Crawford counties in the Michigan Territory, covering all of present-day Wisconsin and Michigan’s Upper Peninsula.²⁵ As judge, Doty antagonized the officers at Fort Howard, and in June 1825 he convicted one of them, Captain William Belknap, of false imprisonment of two civilians, Isaac Ronde and John P. Arndt. Captain Belknap had detained Ronde and Arndt when both were engaged in operating a Fox River ferry that landed near Fort Howard, an action contrary to army rules. Judge Doty’s lengthy opinion on the case awarded Ronde and Arndt the right to run their ferry as they pleased to the lands claimed by Fort Howard and called into question the legitimacy of the federal landholding at Fort Howard. Judge Doty cited Jay’s Treaty of 1794 as the guarantor of the land ownership rights of the Métis settlers at Green Bay, which he wrote were subsequently reconfirmed by Congress in statutes passed in 1807 and 1820. He warned Captain Belknap and the War Department that “the United States could not molest a single man without violating the Treaty.” The judge’s opinion in *Ronde and Arndt v. Belknap*, which bristled with republican, anti-standing army sentiment, is also instructive in another regard. Judge Doty pointed to the army’s shaky claim to the land around Fort Howard when he wrote: “It is neither alledged or shown in evidence, that the President of the United States has directed the Commanding Officer to take possession of this, or of any other, tract of land in this county for the use of the troops or for public purposes.”²⁶

Judge Doty's opinion shows that as of 1825 there was no entity known as the Fort Howard Military Reservation. Such an entity could only be created by presidential order out of land that was in the US public domain. Until the Menominee or the Métis agreed to cede their lands to the United States, there could be no basis in law for army ownership of the lands at and around Fort Howard. Judge Doty put his pocketbook behind his legal opinions. Starting in 1824, and accelerating thereafter, he purchased contingency shares of the claims of forty-three Métis settlers to lands in and around Green Bay, including lots thirty-seven, thirty-eight, thirty-nine, forty-five, forty-six, forty-nine, fifty, and fifty-two through fifty-seven, as shown on the 1829 map and order. Judge Doty thought that the claims of the Métis preceded those of the army, and he was prepared to rule so in his own court. The 1828 act of Congress that directed the general land office not to survey private claims within "lands occupied by the United States for military purposes" could only halt, not solve, the dispute between the army and the Métis.²⁷

The frustration of the officers at Fort Howard is apparent in some of the correspondence sent to Quartermaster General Jesup in 1828. For example, Acting Quartermaster at Fort Howard Captain Smith wrote of what he considered the outrageous claims of the Métis to land directly behind the Fort:

When it is considered that each of these claims extend from three to nine acres on the Fox River and three miles back; that the several claims are made by one individual so soon as the facility which they were allowed was known, who neither has or had industry or character sufficient to *cultivate* a hundredth part of one of his claims; that the government are to be dispossessed of all these resources for gardening, procuring fuel, forage, straw, coal, etc. etc. in short *compelled* to evacuate the Fort now occupied by the troops or purchase the land at an exorbitant price, one hardly knows which to admire most the impudence of persons who presented such preposterous claims, or the facility with which they were allowed by the commissioners.²⁸

Smith's reference to private land claims "allowed by the commissioners" is a reference to the plots marked "confirmed" as shown on the 1829 map and order that extend northwest of the fort and run back to Duck Creek. Smith went on to complain to General Jesup about the new practice of selling claims between Métis and soon enough migrating Yankees. In passing, his letter confirms for us a rough idea about how the officers viewed the extent of Fort Howard's lands in 1828:

the most valuable of all these claims, and the one which so far has given us the most annoyance was purchased by Judge Porlieu [a Métis resident] of the proprietor for three plugs of tobacco (1 1/2 lbs) and a half pint of whiskey. From the bayou above the Fort to the mouth of Fox River, a distance of about one and a half miles, and three miles back, the land extends, which it is deemed necessary that the garrison should occupy.²⁹

About the same time that Captain Smith was complaining to the quartermaster general in Washington, D.C., the commissioner of the general land office was giving his instructions to the surveyor-general in Chillicothe on how to proceed with the surveys of private claims at forts Howard, Mackinac, and Crawford. This was a well-paying and desirable job on the frontier for which one district surveyor in Michigan lobbied hard to get the contract. This person, John Mullett of Detroit, was eventually awarded the contract to survey the private land claims at Green Bay, Prairie du Chien, and Mackinac. He arrived at Green Bay in early June and started to work. Mullett's goal as a surveyor was not to produce a plat of the Fort Howard Military Reserve, but to establish with precision the boundaries of the private claims so that the general land office could then issue the claimants' patents to their land. Mullett surveyed private land claims on both sides of the Fox River, so his work was not exclusively focused on Fort Howard's boundaries. Still, the conflict between the military and the Métis soon overwhelmed Mullett's work. On August 23 the new commander at Fort Howard, Major David Twiggs, a Georgian, ordered Mullett to stop his survey of the private land claims because Twiggs felt that the claims encroached on land important to the fort. Twiggs then left Green Bay for what today is Portage where he supervised the construction of a new army post to be called Fort Winnebago. Surveyor Mullett left Green Bay for Prairie du Chien where he had somewhat better luck. He forewent going to Mackinac at all, in part because the Métis there preempted him by going to Judge Doty's federal court to thwart army attempts to reserve their lands.³⁰

Twiggs' action was quite unpopular with the Métis settlers of Green Bay but is understandable when Captain Smith's spring correspondence and Judge Doty's opinions and actions are recalled. If the Métis claims to the prime forage lands in back of the fort's building were patented to them by the General Land Office, the fort would have to be abandoned. In the wake of Twiggs' action, some Métis hired the young Irish-born attorney Henry Baird to secure their titles for them. In October Baird wrote the Michigan territorial delegate A. E. Wing about the injustice of Major Twiggs' action. Baird referred to the survey that Mullett had prepared and noted that the boundaries of the proposed Fort Howard Military Reservation ran three-quarters of a mile north and south of the fort on the Fox River, and three miles west of the fort. Baird and several of his clients were not opposed to these boundaries if the army first acknowledged Métis ownership of the land and then bought them out or paid annual rents. Attorney Baird was not subtle in threatening that a failure to settle with his clients would result in trespassing charges being brought against the officers of the garrison. This was no idle threat, as the War Department knew, since the commanding officer at Fort Mackinac had been jailed by Judge Doty in a parallel case. It would also mark an escalation in the legal wrangling between the officer corps at Fort Howard and the local settlers from the dispute over false imprisonment in *Ronde and Arndt v. Belknap*. A charge of trespassing would be heard in Judge Doty's court with that jurist's views on the subject well known to the officers at Fort Howard. Indeed, Judge Doty was so displeased with Major Twiggs that on November 3 he wrote the surveyor-general in Chillicothe asking that a new surveyor be sent in the spring to try once again to complete Mullett's work.³¹

Major Twiggs' successor as commanding officer at Fort Howard, Colonel William Lawrence, backed up Twiggs' action in trying to prevent the confirmation of Métis claims to the lands around Fort Howard. Colonel Lawrence wrote General Jesup on 4 December 1828 warning him that the Green Bay settlers were seeking to pressure Congress to move ahead with the confirmation of their land titles: "Use your influence to prevent the confirmation of those claims. Not one foot of them has been cultivated enclosed or built upon until last Spring, a short time before the passage of an Act reserving all lands then in possession of the military."³²

The conflicts over land reached a crisis point in the fall and winter of 1828 and 1829. Some action was taken in Washington, D.C. after Colonel Lawrence wrote in early December 1828, and once the Adams Administration stepped down on 3 March 1829. There are no surviving War Department records that bear on the matter after Colonel Lawrence's 4 December 1828 letter. What is likely is that the War Department obtained a copy of Surveyor Mullett's plat and imposed a military reservation on that map. General Macomb, Secretary Porter, and President Adams affixed their signatures and the map and order disappeared into a War Department pigeon hole, not to be rediscovered until 1842. The incoming Jackson Administration was entirely ignorant of the map and order and eventually decided that only a grand treaty between the United States and the Menominee would solve all problems about land boundaries.

If Colonel Lawrence and others in the War Department thought that their complaints in the fall and winter of 1828 and 1829 would put a halt to land claims around the fort, they were soon to learn otherwise. In fact, the practice of selling Métis claims to the Fort Howard lands proliferated in 1829 and 1830. The Yankee businessman Daniel Whitney informed Colonel Lawrence in the summer of 1830 that he, too, had a claim to Fort Howard land, and for the right price would be willing to accept a cash settlement. Suddenly it seemed to Colonel Lawrence that the entire power of the combined Métis-Yankee settlers at Green Bay had coalesced as a force to drive the fort off its site and away from the settlement. Colonel Lawrence was especially concerned that Whitney and the other claimants would win the suit they were pressing in Judge Doty's federal territorial court. Only a superior US legal authority could restrain Judge Doty, Colonel Lawrence reasoned, and failing that effort, the fort would have to be abandoned. Lawrence's letter to General Jesup of 28 September 1830 bears study in detail not only for what it tells us about the boundaries of the Fort Howard Military Reservation, but also for what it reveals about President Adams' order of 1829:

The Military reservation extends from Duck Creek to the first Creek above the Fort. It was purchased by Col. Bowyer in 1816 from the Indians at I believe \$800. At that time there was not a hut or [illegible] land on it. It remained in possession of the military from that time until the 2nd Regiment occupied this Post. Gen'l Brady gave one citizen permission to build who had previously purchased a part of a claim. Others followed until the number reached four or five and now they contend

that claim was confirmed by the last act [Act of 17 April 1828] of Congress confirming claims to citizens at Green Bay. The Act alluded to in my opinion excepts this land. And if the matter was referred to the Attorney Gen'l he would so decree. Then the President's Proclamation and Order to the Marshal of Detroit to put the Military in possession would save the officers from prosecution and unjust fines. If this cannot be done with propensity I see no other way to get rid of the many evils around us but to remove the troops which I hope will be done.³³

This letter is most helpful in making sense of the 1829 map and order. In March 1829 President Adams was not in a position to create a new military reservation at Fort Howard. Under American law, the president could not simply declare land in Indian Country to be a military reservation without a clear US title. Judge Doty had pointed this out in his 1825 decision in *Ronde and Arndt v. Belknap*. At the same time, Congress in 1828 was unwilling to recognize and extend patents to Métis claimants on land needed by the garrison at Fort Howard. The only legal recourse open to the president and the War Department was to use the executive power to remove trespassers. Colonel Lawrence believed that Colonel Bowyer's negotiations in 1816 had resulted in the creation of an entity rather like the Fort Howard Military Reservation, even though there was no treaty or, apparently, a document recording this agreement.

Colonel Lawrence was not asking that such an entity be newly created in December 1828; he merely sought to have his military and civilian superiors confirm the boundaries he understood to have been established in 1816 in order to thwart the maneuvers of the Yankee and Métis settlers. Colonel Lawrence's reference to "the President's Proclamation and Order to the Marshal of Detroit" indicates that what the president did in 1829 was invoke an 1807 law about trespassing on federal lands. On his penultimate day in office, President Adams ordered the US Marshal at Detroit to evict squatters from the Fort Howard Military Reservation. He could not issue a straightforward executive order reserving the lands for the fort from the public domain because the lands were not in the public domain. All he could do was use the law to harass the Métis and Yankees as alleged trespassers.³⁴

Whatever the provenance of the 1829 map and order, there is every reason to believe that the description of the Fort Howard Military Reservation in the text box on that exhibit accurately portrays what Colonel Lawrence, Major Twiggs, and the War Department believed in 1828 and 1829. The Fort Howard Military Reservation described in the 1829 map and order included the lands immediately around the fort, extended west to the east bank of Duck Creek and then up Beaver Dam Creek, before returning along the line of Private Claim Number 2 to the Fox River. Alas for the state's case from 1994 to 1996, some unknown War Department cartographer mistakenly placed "Beaver Dam Creek" some five miles west of its actual location and upstream at its Duck Creek mouth. That mistake had not been on Mullett's 1828 plat, and appears only on the 1829 map and order. Tracing the boundaries of the Fort Howard Military Reservation by relying only on the text description of the 1829 order

Two Versions of the Fort Howard Military Reservation, 1829 and 1831

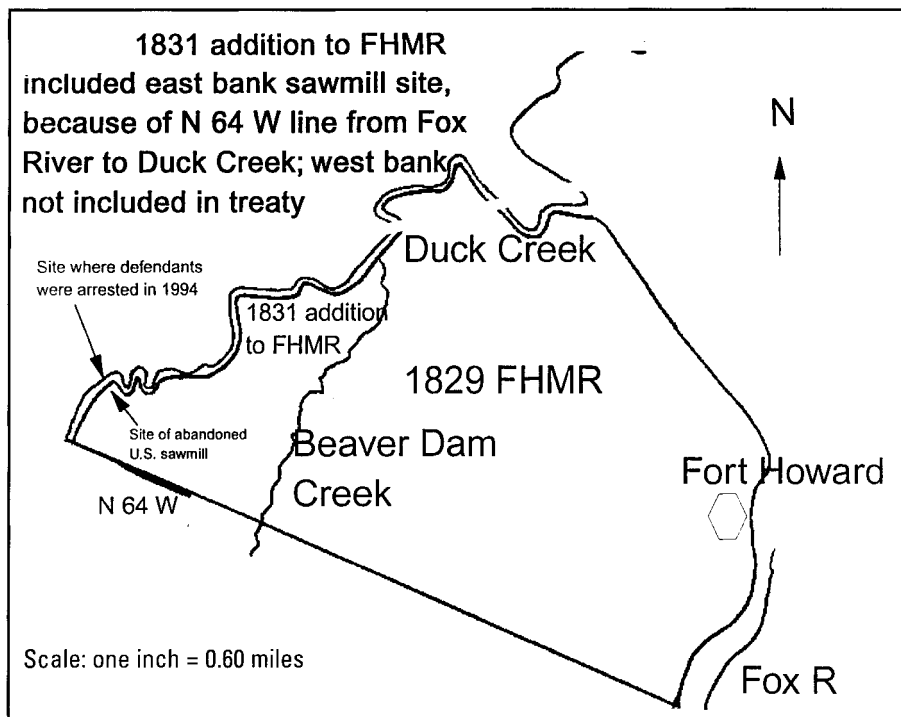


FIGURE 4. Sources: 1831 Menominee Treaty; 1844 Plat of T24N R 20E.

clearly excluded the site of the abandoned US sawmill. That site was far upstream on Duck Creek from the westernmost boundary of the Fort Howard Military Reservation (see fig. 4). This became clear to Green Bay settlers in the 1840s when the 1829 map and order emerged from the War Department files and was contrasted with the actual public land survey of Township 24 North, Range 20 East, as shown in figure 5.

The text description of the Fort Howard Military Reservation in the 1829 map and order is thus consistent with the writings of Captain Smith, which read that the garrison had abandoned the sawmill site and any interest in the location. The 1829 boundaries of the Fort Howard Military Reservation therefore excluded any control over Duck Creek, on either bank of Duck Creek in the area where the defendants were arrested in 1994. The judge in the case found this a key evidentiary element in the case and cited it in his ruling for the defendants.

As mentioned above, the new Jackson Administration was entirely unaware of the 1829 map and order. So, too, was Congress. The administration pressed in the summer of 1830 for a land cession treaty with the Menominee as a way to solve the dispute between the Menominee and Oneida over land in northeastern Wisconsin. Michigan Territorial Governor Lewis Cass called the parties to a treaty council at Green Bay in August 1830,

Survey Map of Sections 15, 16, and 17 of Township 24 North,
Range 20 East of Wisconsin

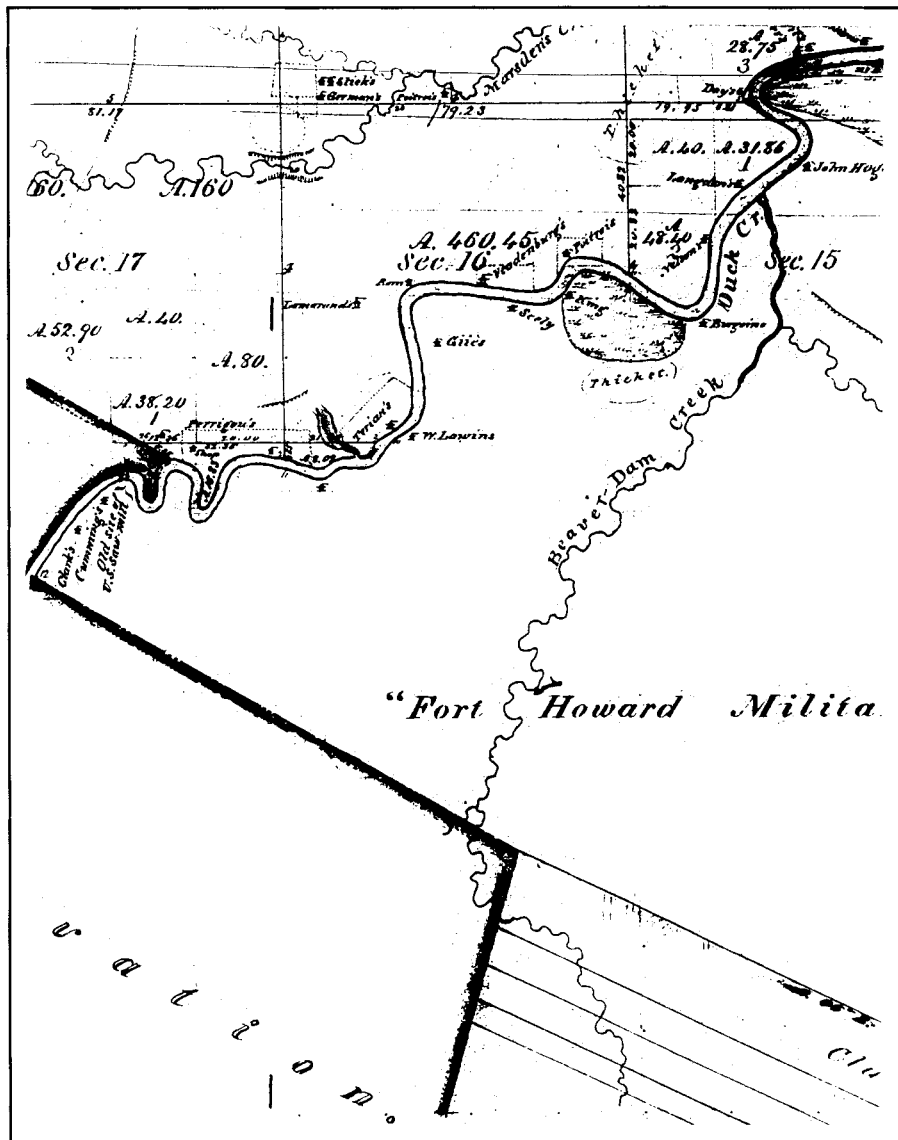


FIGURE 5. This map was drawn in 1844 by the surveyor general and based on field notes compiled by Albert Ellis, district surveyor. (Source: Territorial Papers of the United States [Wisconsin, Reel 122].)

but the parley resulted in a stalemate, and the negotiating moved to Washington, D.C. when Congress reconvened in December. The treaty that emerged during the winter of 1830 and 1831 was one of the most heavily lobbied treaties concerning the Indian nations of the Old Northwest during the Jacksonian era. Secretary of War John Henry Eaton and President Jackson devoted some part of each working day to the details of the Menominee treaty for five weeks between 10 January 1831 and 19 February 19 1831.³⁵

The Menominee treaty is important for three reasons: (1) it definitively established the boundaries of the Fort Howard Military Reservation “down said Duck Creek,” but nowhere suggested the inclusion of the west bank or included the words “along both banks”; (2) it established a 500,000 acre reservation from Menominee land for the benefit of the New York Indians, including the settlements along Duck Creek; and (3) it reserved timber-harvesting rights for the Fort Howard garrison in the country of the New York Indians, thereby making control of the creek’s banks a moot point.

The key passage of the 9 February 1831 treaty between the Menominee and the United States can be found in article one, where the Fort Howard Military Reservation finally received a legal basis. The 500,000 acre New York Indian tract was defined specifically as:

excluding therefrom all private land claims confirmed, and also the following reservation for military purposes, beginning on the Fox river, at the mouth of the first creek above Fort Howard; thence north sixty-four degrees west to Duck Creek thence down said Duck Creek to its mouth; thence up and along Green bay and Fox river to the place of beginning.³⁶

After Senate ratification of the treaty, the War Department and the Fort Howard garrison could relax their fears about the legal basis for army ownership of the lands around Fort Howard. The Menominee treaty of 1831 finally established to the War Department’s satisfaction what had been in such dispute throughout the 1820s and through the fall of 1830 at Green Bay. There would be no more threat of trespass suits brought against army officers in Judge Doty’s court. In fact, the 1831 treaty gave the War Department the legal basis for asking the Justice Department to prosecute trespass suits against those squatting within the boundaries of the Fort Howard Military Reservation. Presumably, if the army or War Department had thought it vital to national security that the garrison control both banks of Duck Creek in the newly added lands to the Fort Howard Military Reservation, then the principal negotiator for the United States, Secretary of War John Henry Eaton, would certainly have written this control into article one. The absence of such an interest indicates that the War Department and the Fort Howard garrison did not have any interest in the west bank of Duck Creek, opposite the lands west of Beaver Dam Creek and north of Private Claim Number Two.

The provision in the treaty for a half-million-acre New York Indian Reservation was based on assurances given Secretary Eaton by the Oneida and their allies in the New York congressional delegation that 5,000 Iroquois

Indians would depart New York State for the Green Bay region. Eaton welcomed the arrival of an Indian people he saw as Christian agriculturalists, and he hoped they would act as inspiring models for the Menominee and Ho-Chunks. As a precaution, however, the secretary was determined that each migrating Indian be given a maximum of one hundred acres so as to prevent what he feared would be the reverse influence of the Menominee and Ho-Chunks, who continued to hunt, trap, fish, and gather. In effect, the Jackson Administration was voicing fears of what later in the nineteenth century federal Indian policymakers termed “a return to the blanket.”

The third item of interest in the 1831 treaty is the army’s claim for gathering rights within the New York Indian Tract for wood. This was a form of off-reservation treaty rights, but was unusual because it was the army, not an Indian tribe, that made use of a treaty to reserve its rights. This clause in article one is important. It shows that the members of the War Department thought long and hard about the needs of the garrison at Fort Howard. The garrison did not need control of Duck Creek’s banks—it needed access to hay, firewood, and lumber.

The 1831 treaty line enclosing lands south and west of Beaver Dam Creek, while protecting the garrison from trespass suits, was something of a mixed blessing to Fort Howard Commander Brigadier General Brooks. On 11 March 1834 he wrote Quartermaster General Jesup of the new lands and the general problem of Métis-army conflict over lands within the Fort Howard Military Reservation:

Every foot of land around the Garrison is claimed by Individuals even to the very pickets on its sides, excepting the width of the front to the river and in the rear to Duck Creek. I send you an extract from a Treaty concluded on the 8th of Feby 1831 and wish to know if I am ordered to take possession of the land described in those limits. There are several houses built on this land some of which have been kept as Whiskey Shops . . . as I well know I shall be sued in this matter, I wish to receive instructions from the War Department which may justify my conduct.³⁷

There is no surviving response from the War Department to General Brooks about how it viewed the new lands in 1831 and over the next few years. Fort Howard diminished in importance in War Department planning through the 1830s, and after 1841 the fort was abandoned as the garrison was shipped to fight the Seminoles in the Florida War. In the mid-1840s the army evicted eight squatters on the Fort Howard Military Reservation from their cabins on the east bank of Duck Creek, but did not prosecute several Métis squatters who lived on the west bank. In 1852 the fort was closed, and in 1863 the military reservation was returned to the public domain and promptly sold to private individuals. When the army closed Fort Howard, it gave up not only its reservation, but also its off-reservation rights to log and forage in Oneida country.

THE SECOND RESERVATION: THE ONEIDA INDIAN RESERVATION,
1838–1996

The defendants in the case needed to do more than cast doubt on the state's interpretation of the 1829 map and order. The defendants needed to connect the establishment of the Oneida Indian Reservation to the boundary "down said Duck Creek" as specified in the 1831 Menominee treaty. This was a problem in two respects. First, the Oneida had not been a signatory to the 1831 treaty. They were merely a party at the negotiations between the United States and the Menominee. Second, the Oneida left no written accounts of their intentions. Efforts to reconstruct the Oneida history of the use of disputed area from oral history accounts proved of limited success. A member of the tribal council testified in court to a lifetime of fishing at the west bank dam site on Duck Creek, but this testimony mainly served to confirm the importance of the twentieth-century dam in setting fishing patterns. There was no oral-based tribal memory that stretched back in time before 1838 that addressed the Oneida's use of the west bank of Duck Creek in the disputed area. An archaeologist who reviewed the literature on northeastern Wisconsin sites, as well as the dam area itself, was also of only limited help. Fragments of aboriginal utensils were found at the west bank site, but these could not be linked to the Oneida. In sum, the legal and historical problem was to establish Oneida agency in claiming the disputed area in the 1830s.

The defense did discover one document from the 1830 treaty negotiations that bore on the issue. Governor Cass had invited Métis and Oneida to speak at the treaty council, and the secretary transcribed a speech by Daniel Bread, one of the Oneida leaders. Bread asked for a tract of land to be given the Oneida and Stockbridge Indians out of the proposed Menominee cession. After describing the large tract he wanted on behalf of the Oneida, Bread added:

It being also understood, that if the settlement of the Oneidas on Duck Creek shall be *without* these boundaries, a piece shall be added so as to include that settlement built upon the point intersecting the fork of the two streams between which, the settlement now lies, by the following rule. Bounded by parallel lines at right angles with the Northeast boundary five miles asunder and equidistant from the forks, or point above named, running till they intersect another line, parallel to the northeast boundary in a directline down Duck Creek, from the fork or point above named. The Northeast Boundary from Duck Creek settlement is, in any case, to fall three miles below the forks herein named.³⁸

A study of figure 1, admittedly drawn almost eight years later, shows that the "point intersecting the fork of the two streams" was just downstream from the "First Christian" (Episcopal) Lower Settlement and sawmill. Drawing lines "five miles asunder" would have worked to satisfy Daniel Bread's wishes to the west, but not to the east where such a line would have overlapped the Métis

private claims. Of more interest is the desire to have the "Northeast Boundary" be "three miles below the forks," or almost exactly at the disputed area in the case. As the Menominee treaty cession was defined in February 1831, the disputed area in this case was included in the New York Indian Tract. Bread gave no reason in his speech for an Oneida desire to control the area at the ruins of the old US sawmill, but his expressed desire was more evidence for interest in the site than could be found on the part of the US army.

The New York Indian Tract did not attract additional thousands of Iroquois Indians as had been promised by New York politicians who lobbied the Jackson Administration in 1830 and 1831. The Oneida in New York clung to their settlements and, if inclined to move, often chose an Oneida settlement on the Grand River in Ontario. By contrast, the years between 1832 and 1837 witnessed a tremendous boom in westward migration and land acquisition to northeast Wisconsin by settlers. In June 1834 the General Land Office established a district land office at Green Bay. The surveyor-general of the General Land Office began actively surveying the more southerly lands ceded earlier to the United States by the Potawatomi and the Menominee, and the land office soon began selling public lands. What in the 1820s had been a frontier region remote from white settlement was now at the edge of the wave of that very settlement. One consequence was that the Oneida came under intense pressure to give up some of their half-million acre tract. Lewis Cass, the former governor of the Michigan Territory and after 1831 the secretary of War, wrote that "from the nature of the country and the progress of the settlements west of Lake Michigan, the Indians now holding lands in the vicinity of Green Bay can only be considered as temporary residents there."³⁹

The Oneida and the United States signed a treaty at Green Bay on 3 February 1838 that was a part of the United States' overall effort to reduce the holdings of the New York Indians. This treaty does not describe the specific land to be maintained as a reservation by the Oneida, but does specify that the new reservation would consist of lands reserved from the old New York Indian Tract. In other words, the Oneida were ceding some but not all of the half-million acre reservation. The treaty states that the boundaries of the Oneida Indian Reservation were to be determined after a survey based on two principles: (1) that the reservation's size be the product of one hundred acres times the total population of Oneida; and (2) that the reservation include "all their settlements and improvements in the vicinity of Green Bay."⁴⁰

There is no surviving record of the negotiating documents for this treaty in the National Archives, unlike those for the Menominee treaty of 1831. However, the vagueness of the treaty regarding the extent and boundaries of the future Oneida Indian Reservation indicates that both parties understood that such details were to be worked out at a future date. This represents an important aspect of the history of treaty-making: United States-Indian treaties were not necessarily self-implementing. The aftermath of a treaty was sometimes as important as its actual signing and ratification. The actual implementation, or what contemporaries called its "stipulation," of the United States-Oneida Treaty of 1838 took more than a year to complete after the signing of the document in February 1838. A number of important US political

figures were involved in the stipulation, starting with President Martin Van Buren. In addition, the Oneida were consulted closely and frequently about the stipulation of the treaty. Nothing in the surviving written record from 1838 and 1839 shows that the United States had any interest in negotiating control of the west bank of Duck Creek at the ruins of the mill site, around today's Pamperin Park. On the other hand, surviving documentary evidence does point to the Oneida's interest in securing access to that very west bank.

After the signing of the treaty, the document went to Washington, D.C. for approval by the Senate. That body gave its assent in May 1838. The next action was taken on July 25 when the president, the secretary of War, and the commissioner of Indian Affairs met in the nation's capitol to discuss who they wanted to appoint as commissioner to stipulate the treaty. The three men, President Van Buren, Secretary of War Joel Poinsett, and Commissioner of Indian Affairs Carey A. Harris, agreed that the best person for the job was one of the leading Democrats in Wisconsin, the territorial delegate and future US Senator George Jones. Accordingly, on 7 August 1838 Commissioner Harris wrote Jones offering him the commissionership for the purpose of stipulating the treaty. The letter indicates the procedure that was anticipated by the commissioner:

With the approbation of the President and Secretary of War you have been selected to carry into effect a part of the stipulation in the treaty with the Oneidas at Green Bay of February 3, 1838.... Your first step will be to proceed to the reservation on which these Indians live, and in concert with Col. Boyd, the Sub-Agent, fix the times and places at which you will execute this duty, of which you will give ample notices.... Your first measure in the execution of this stipulation [article two], will be to take a census of these bands, to ascertain the entire quantity of land to be reserved. The second will be to learn the position and extent of the settlements and improvements near Green Bay. And third, to employ a competent person to run the exterior lines of the whole tract under your direction, in such manner as to give effect to the intent of the treaty.⁴¹

There is no discussion in these instructions of how or where to draw the reservation boundary lines. And despite the participation of the secretary of War in the discussion about the treaty stipulation, there is no mention in the letter about looking to secure or defend the claims of the Fort Howard Military Reservation against those of the Oneida. All decisions about how and where to draw the boundaries were left to Delegate Jones.

As it happened, Delegate Jones was unable to accept the commissioner's job. He declined in a letter to Commissioner Harris on 25 August 1838. The commissioner of Indian Affairs next turned to Territorial Governor Henry Dodge, writing him twice in September, each time asking Dodge to take the lead in securing someone to carry out the treaty stipulations. Dodge's first choice for the job, Colonel Philo White of Milwaukee, turned down the job. Governor Dodge then turned to a Green Bay resident, the territorial

Attorney General Henry Baird, the man who a decade earlier had defended Green Bay Métis land claimants against the army. During the month of September, when both the Indian Office in Washington, D.C. and Governor Dodge were looking for a commissioner for the Oneida treaty, Baird was filling a similar role at Prairie du Chien, where he was employed in stipulating the 1837 treaty with the Winnebago. Sometime around October 5, Baird passed through Mineral Point on his way home to Green Bay and visited with the governor. Soon thereafter, if not at that meeting, Dodge offered Baird the commissionership for the Oneida treaty stipulations and Baird accepted.⁴²

The commissionership that Henry Baird discussed in October (and was formally offered on November 5 by Dodge) was exactly the same one that Commissioner Harris had envisioned for George Jones back in August. Dodge confirmed this in writing:

The direction of the duties, prescribed in the enclosed letters addressed to Gen'l Jones by the Commissioner of Indian Affairs, having devolved upon me by reason of the former having declined the performance of them, I have the honor to request that you will accept the appointment. The instructions are so simple and explicit that nothing further will be necessary from me.⁴³

Governor Dodge confirmed that Baird had accepted the appointment in letters to Commissioner Harris dated 12 November and 21 November 1838. In turn the Indian Office in Washington, D.C. reminded Dodge on December 12 that the treaty would not be considered final until the stipulations were thoroughly reviewed in the capitol. Again, it must be emphasized that nowhere in the written record of 1838 did Commissioner Baird receive instructions from the War Department, the Indian Office, or the territorial governor about how to draw the boundary of the Oneida Indian Reservation. Instead he was to be guided by his consultations with the Oneida. Despite many opportunities to do so, no one in the War Department informed Commissioner Baird in writing that he should take care to defend the 1831 or 1829 boundaries of the Fort Howard Military Reservation.

On December 15 Baird reported to the new Commissioner of Indian Affairs T. Hartley Crawford that his work was done. His accompanying report affords some idea of how he went about stipulating article two of the 3 February 1838 treaty. Soon after his November 5 formal appointment, Baird placed advertisements in the *Green Bay Democrat*, published by John V. Suydam, that claims under the treaty would be examined. On November 14 and 15 Baird and Suydam, the man appointed to perform the surveying work, traveled to the Oneida settlements at Duck Creek and met tribal members in council. Baird reports that "The parties were fully represented by their chiefs and nearly all of their male population." Baird understood that the tribe was divided into two factions, the First Christian Party and the Orchard Party, and he took care to count both. These two parties reflected different family and religious groupings. The First Christian Party

worshipped at the Episcopal Church and the Orchard Party adhered to Methodism. Baird's census totaled 654 Oneidas. Suydam then "was employed to survey and mark the exterior lines of the Reservation." Baird continued, writing that Suydam "diligently performed that duty agreeably to the instructions given by me." Baird spent the next four weeks working on the problem of tallying the claims for monetary compensation under another article of the treaty. When he returned to Duck Creek on December 12, he not only had a proposed division of money for such claims, but also had "caused a survey of the land reserved to them by the Treaty of 1838, to be made, and presented them with a complete map, and a copy of the census of their people." Baird summarized his work in his report to Commissioner Crawford as follows: "The survey of the land is completed; the examination of the claims closed, and the result declared to the Indians; all to their perfect satisfaction." Baird accompanied his report with several appendices, including Suydam's field notes and map of the new Oneida Reservation.⁴⁴

Baird completed his work in a shorter period of time than Governor Dodge expected. The governor had anticipated some dispute among the Oneida between the First Christian and Orchard parties, but Baird was able to overcome any such difficulty. The month that elapsed between the census of November 14 and 15 and the council of December 12 was more than sufficient for Suydam to have done a careful job as a surveyor. The leading historian of the General Land Office estimates that a Jacksonian-era surveyor worked at a pace of about four linear miles per day. If the exterior boundaries of the new Oneida Indian Reservation were about forty linear miles (encompassing 65,400 acres), then Suydam had ample time to complete his work between the two councils with the Oneidas.⁴⁵

Governor Dodge received all Baird and Suydam's documents and forwarded them to Washington, D.C. with his endorsement that "Mr. Baird's course has generally been approved by all those interested." By 14 May 1839 the commissioner of Indian Affairs was satisfied with the work that Baird and Suydam had done, and officially approved the treaty stipulations with the comment, "It is not doubted that full justice has been done to the United States and to the reservees."⁴⁶

The surviving documents along with the stipulation of the 3 February 1838 treaty do not directly answer the question at issue in the modern case: Who was meant to have the west bank of Duck Creek along the northernmost part of the Oneida Indian Reservation? The documents, however, do settle this dispute. First, we know that Commissioner Baird made every effort to consult with the Oneida. He showed them Suydam's map and acquired their assent to the exterior reservation boundary. According to his report, they were pleased with Suydam's work. Second, we do know that the War Department did not make any attempt to inform its own subordinate agency, the Indian Office, Delegate Jones, Governor Dodge, or Commissioner Baird of any army interest in either controlling both banks of Duck Creek or retaining the reserved rights to timber and hay that were written into the Menominee treaty of 1831. A search of the correspondence sent by Fort Howard officers to the Quartermaster General between 1837 and 1839 also failed to produce any expression of

concern by the garrison staff that control of the west bank was an issue. Indeed, Surveyor Suydam drew the boundary of the Oneida Indian Reservation in such a fashion that he shrank the land area of the Fort Howard Military Reservation. He did so by changing the direction of the northeastern boundary line. What had been a straight line at North 64 West in 1831 now became that line from the Fox River to Beaver Dam Creek, then veered inward to North 60 West. This change in effect moved the boundary of the Fort Howard Military Reservation on the east bank of Duck Creek about seven chains downstream from where it had been. Again, a review of War Department documents from the Indian Office and the Quartermaster General does not reveal any objection to Suydam and Baird's work.

State witness Surveyor William Rohde testified early in the litigation in a 1994 affidavit that Suydam's map and field notes "are considered too general, incomplete or inconsistent, to determine the easterly boundary of the reservation along Duck Creek." At trial, the defendants were ready to agree that Suydam's survey was inconclusive and that the weight of the historical evidence showed the US army had no interest in controlling the west bank of Duck Creek in 1838. Surveyor Rohde, however, changed his mind and his testimony by 1996 regarding his interpretation of Suydam's field notes. Assistant Attorney General Steven Tinker argued that the trial judge should dismiss all the historical testimony previously heard and rely simply on Surveyor Rohde's new claim that he could retrace Suydam's field notes on the ground in 1996. Surveyor Rohde claimed that Suydam ran his survey line across Duck Creek (fifty links wide) to the west bank in a straight line on compass heading North 60 West and then, forgoing a bank side survey meander, simply offset his survey to twenty chains below (one-quarter mile downstream) staying on the west bank from the ruins of the old US sawmill. There he set another post and proceeded in a straight line on compass heading North 64 West. By this reasoning, the Oneida were intended to have access right up to the high-water mark of the bank on the west side of the creek, but not to the water of Duck Creek. If this were true, Simon DaCouteau in 1994 could plant his feet on the bank, but not lean over and dip his net into the water.

An alternate explanation of Suydam's field notes—the explanation the court accepted—is shown in figure 6, a close-up of figure 1. The close-up shows in detail an annotation made by personnel in the Office of Indian Affairs in 1872 who were examining the map and field notes. Suydam's field notes indicate that he reached the edge of the bank at thirty-five chains, proceeded halfway down the bank another five chains, and then reached the water of Duck Creek after yet another five chains. The dotted line with the inscription "45.00" shows that the Indian Office interpreted the survey to run forty-five chains to the edge where the east bank of Duck Creek touched water but not to cross the creek. Then Suydam walked downstream on the east bank until he found the ruins of the sawmill, at which point, still on the east bank, ran an offset (a straight line) on compass heading North 30 East for twenty chains across the creek to a point on the west bank. Next he set a post on that west bank and proceeded according to the Indian Office "supposedly 35.00" chains on compass bearing North 64 degrees West. Eighty

Close-up of the Disputed Region on Duck Creek

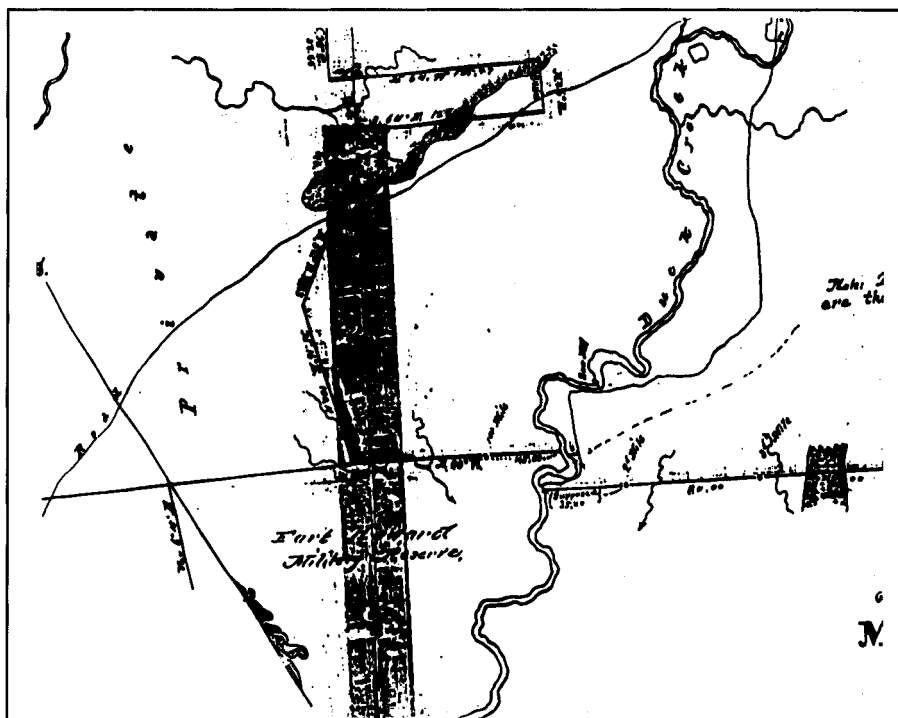


FIGURE 6.

chains equals one mile, and the Indian Office reasoned that Suydam's "2nd mile" was just that, excluding either the hundred or so yards on the east bank of Duck Creek from where the surveyor first touched water and then walked downstream until he reached the ruins of the old sawmill, which he then used as a mark to run his offset over to the West Bank. The court interpreted the 1872 Indian Office annotation as confirmation of the 1831 treaty language separating the Fort Howard Military Reservation and the New York Indian Tract as "down Duck Creek," in other words down the middle of the stream. The court also took very seriously the 1872 annotation as a better interpretation of Suydam's field notes than that offered by Surveyor Rohde, in part since the Indian Office was charged with protecting the land claims of the Oneida, and in part since the court looked unfavorably upon the credibility of an expert witness who changed his testimony at a point when the case was going against his client.

The court also heard testimony about why in 1838 Surveyor Suydam went to such trouble in his survey in the vicinity of the disputed area. The reservation, as generally described in article two of the treaty, was to provide one hundred acres to each Oneida Indian. When multiplied by the census figure of 654 Oneidas, Suydam realized he had to create a reservation of 65,400 acres, or nearly three townships worth in size. Figured another way,

Suydam had to devise a reservation of about 102 square miles. If he chose a rectangular shape, the reservation would be twelve miles long by eight and one-half miles wide. These are roughly the dimensions of the reservation shown in figure 1, except for a few notable features. The western boundary of the reservation was a straight line. The southern boundary of the reservation was a straight line. But the eastern boundary of the Oneida Indian Reservation, as drawn by Suydam, showed great respect for the private land claims of the Métis, as the saw-tooth pattern shows clearly. At first glance, the northern boundary is something of a puzzle. Why did Suydam not simply run a line on compass bearing North 60 West eight and one-half mile west from the northwest corner of Private Claim Number Two? Why did he vary the survey line to jog north and east down Duck Creek for less than a mile, and then resume his westward turn for seven miles? Careful study of the map in figure 1 suggests some answers.

Suydam's map shows the two principal Oneida settlements along Duck Creek, in the middle of the reservation. About one-third of the Oneidas lived at the Orchard (Methodist) settlement on upper Duck Creek, and about two-thirds lived at the First Christian (Episcopalian) settlement further down Duck Creek. Henry Baird's treaty stipulation 1838 census of Oneidas living around Green Bay grouped the 654 tribal members into about 165 families. The dots on the map at the two settlements account for most but not all of the Oneida families Baird counted.

Suydam's map also shows another feature of importance: part of the road and trail network of Northeast Wisconsin in 1838. One road led directly from the First Christian settlement to Fort Howard. Another road started above the Orchard settlement and ran down Duck Creek to the First Christian settlement, and continued running along the creek to the area in dispute in this litigation. The road crossed Duck Creek downstream from east to west, and past the last house shown at the First Christian settlement. It continued on the west side of Duck Creek for about three more miles, crossing another small creek, and passing directly opposite the site of the old, washed-out US sawmill. Suydam placed the road very close to the west bank for the last mile where he had it end at the very northeastern corner of the reservation. His map does not indicate that the road continued outside the reservation. All that can be told from the map is that the road intersected Duck Creek right at the northern boundary of the reservation. The road's existence is the likely answer to the above question asking why Suydam made the north and east surveying jog downstream on Duck Creek. The existence of the road leading to that part of Duck Creek was a sensible reason for the Oneida to have an interest in it.

Such an interpretation fits the language of the treaty that the new Oneida Indian Reservation include the "settlements and improvements" of the Indians. Roads in Jacksonian America were commonly known as improvements, so it is likely Suydam took the treaty language to heart in including the road. There do not seem to have been any houses ("settlements") in that corner of the reservation. The existence of sawmills at the First Christian and the Orchard settlements cast doubt on any Oneida interest in the old US sawmill site, any more than the army had by 1838. The Oneida had better sawmill sites

on Upper Duck Creek than that held by the army in the early 1820s, as Captain Smith's 1826 letter indicates. Yet the road ran to that corner of the reservation for some reason, and it ran very close to Duck Creek. Possibly Surveyor Suydam knew of their interest in that stretch of Duck Creek and the land on the west side, or the Oneidas told him and Baird of it in council. Either way it seems likely that they would want the use of the road to the corner of the reservation where the road ended at Duck Creek, as well as access to the creek itself. Perhaps there was good sturgeon fishing at that point; perhaps there was another factor that compelled their interest.

The external boundaries of the Fort Howard Military Reservation once again became an issue in the 1840s, and once again, the judge-speculator James Doty played a role. Doty had two interests: he worked as an attorney to secure a land patent on Private Claim Number One for an old Métis settler, Jacques Porlier, and he led a Green Bay group that petitioned the War Department in 1844 to close the Fort Howard Military Reservation and transfer the lands to the public domain.⁴⁷ By that date, numerous squatters already occupied lands of the fort. Rather than yield to the settlers and abandon the post and military reservation, Secretary of War Joel Poinsett deferred to the judgment of the senior general in the army, Winfield Scott, who wanted to keep control of Fort Howard in case of some future war on the Great Lakes with Great Britain. Secretary Poinsett went further and invoked the 1807 law against trespassers on military lands and ordered the US attorney and the federal marshal in the Wisconsin Territory to arrest trespassers. In effect, the War Department and the Green Bay settlers were right back where they had been in 1828. During the spring term of 1845 the US attorney indicted eight men for trespassing on the Fort Howard Military Reservation, including the aging, but ever-troublesome John P. Arndt, the man who was at the center of the 1825 dispute. Twenty years later, Arndt and one of his sons apparently considered it their right to cut timber wherever they pleased on the military reserve. When confronted by the military storekeeper of Fort Howard, the Arndts responded with oaths and a death threat.⁴⁸

The US marshal from Milwaukee, John Rockwell, visited Fort Howard to gather evidence for the prosecution. In making his investigation, the marshal at first considered the boundaries of the Fort Howard Military Reservation to be those set down by President Adams in the 1829 map and order. When Marshal Rockwell visited the cabins of the squatter-trespassers, he noted their position. In referring back to the 1829 map and order, however, he realized the map's flaw or perhaps used a better map, because he wrote: "I found them all without or beyond the Beaver Dam Creek and as the order of President Adams makes that Creek the line of the reservation there seemed to be a question whether the Govt would deem it necessary to drive them from their homes."⁴⁹

Marshall Rockwell acknowledged that there was about 900 acres of the military reservation that was east of Duck Creek but west of Beaver Dam Creek and north of Private Claim Number Two (see fig. 4). The War Department came to realize this discrepancy by 1846 and the department considered dropping the charges against the trespassers as it considered the upcoming trials. As Secretary of War Poinsett wrote:

[A] considerable portion of the old reserve occupied by the Mil. Authority long before the Indian cession and whose limites were fixed by the Menominee Treaty of Feb. 8, 1831 lies without the boundaries . . . and the trespassers contend that this exclusion (tho' clearly the result of an error in the map on which that order was based) relinquishes the right of this Dept to the tract in question.⁵⁰

The army high command, however, remained adamant about prosecuting the trespassers. At trial, the defendants brought many of the leading citizens of Green Bay to testify on their behalf. One of the issues that the prosecution raised was the army's interest in the ruins of the old sawmill site on the east bank of Duck Creek. Morgan L. Martin, the territorial delegate to Congress, countered this claim with his memories of Green Bay in the 1820s:

The idea that the intention was to reserve the U.S. Sawmill is wholly incorrect, as I know from my own personal knowledge. That the mill was torn down and entirely abandoned long before the reservation was made. Besides, if such was the intent, the Reservation would have been differently and more particularly described, as the officers at Fort Howard all of them well knew that they crossed Beaver Dam Creek in going to the old mill. It is a road well cut and marked and which was frequented by the officers and others in their daily rides around the garrison.⁵¹

Albert G. Ellis, a long-time resident of Green Bay, offered further testimony about the boundaries of the Fort Howard Military Reservation and instructed the court about the Oneida lands across Duck Creek: "I think the buildings on the west bank of the reserve were there when Gov. Cass held his council with the Indians," presumably a reference to Cass' supervision of the 1830 summer negotiations that ultimately produced the Menominee treaty. The New York-born Ellis offered the most definitive testimony about Oneida ownership of the area in dispute in the 1990s case:

I have acted as a deputy surveyor for the United States and received instructions to survey portions of the reservation [Fort Howard Military Reservation]. The saw mill was over 4 miles in a direct line from Fox River. The Oneida Reservation includes the west bank of the creek at the mill.⁵²

Ellis had served as surveyor-general for the Wisconsin and Iowa territories when the Oneida Reservation was laid out. In 1843, in the capacity of deputy surveyor in the Green Bay Land District, he performed the survey of Township 24 North, Range 20 East, the very township that included the land of the Fort Howard Military Reservation and the northern part of the Oneida Indian Reservation within its 102 square mile grid.

The trials of the Fort Howard Eight resulted in guilty verdicts on the charge of trespassing, so the army held to ownership of its lands, but the judge

sympathized with the defendants and imposed a fine of just 6¢ per defendant. In 1852 the War Department finally abandoned the post but not the military reservation. Congress settled the matter in 1863 by ordering the survey of the lands, and in 1866 the General Land Office put the land up for public auction. Litigation over the old Métis private claims continued into the 1870s, and as the case of the Oneida fishermen in the 1990s shows, an accurate history of the boundaries of the two reservations continues to be an important public policy matter.

POSTSCRIPT

The state of Wisconsin entered the litigation confident that the combination of the 1829 map and order with the surveys done since 1876 would confirm the historical accuracy of its case and erase any doubts about the vagueness of Suydam's 1838 map and field notes. The state was determined to prevent any expansion of Indian fishing rights, fearing that the Oneida might somehow be claiming new rights, perhaps within the confines of the 1831-based 500,000 acre New York Indian Tract or, worse from the state's point of view, perhaps within the prior 10 million acre Menominee cession. At trial, the 1829 map and order was shown to be flawed in its cartography, and its presidential order was shown to have been ignored the day after President Adams proclaimed it. In any event, the map was superceded by the 1831 treaty.

What remained unexplained is how the surveyors from 1876 to the present misunderstood their charges. The rationale had to do with the circumstances surrounding the 1876 survey, which arose in the context of an important part of federal Indian law in the nineteenth century. A study of figure 1, Suydam's 1838 plat of the Oneida Indian Reservation, shows that the Indians were concentrated in their two villages, organized around their churches and sawmills. Everyone lived near Duck Creek—no one lived in the far reaches of the reservation—and since the land was owned in common, the Oneida showed a pattern different than that of the typical mid-western farm settlement. The Oneida made their way employing a combination of small-scale agriculture and logging. Their farms were organized in the Métis style, with narrow fronts on Duck Creek and long strips of land moving away from the water. The rest of the reservation was heavily timbered and tribal members cut timber and shipped the sawlogs to their own mills and to nearby mills on Green Bay.

Starting in the late 1860s the Indian Office agent for the Green Bay superintendent began action to prevent individual Oneida tribal members from logging on the reservation. He persuaded the Indian Office that individual logging of common lands was theft of future property, namely the value of future individually owned Indian farms after a contemplated allotment. Twenty years before the Dawes General Allotment Act, the Indian Office had identified the Oneida Indian Reservation as a likely place to try out the allotment-in-severalty policy; logging would reduce the value of each allotment by stripping the land of its timber, thereby handicapping the future self-reliant Indian farmer. The Indian Office issued a logging prohibition on the Oneida Indian Reservation, and when challenged in court by mill owners, litigated

the issue all the way to the US Supreme Court. In 1874, the high court agreed with the Indian Office in the case of *United States v. Cook*. The Oneida were enjoined from logging their own common lands, and the Indian Office followed up this court victory with a move to survey the reservation into forty acre allotments. The office hired a surveyor from La Crosse, Henry Esperson, and he surveyed the interior lines of the reservation starting with the west bank of Duck Creek. He also refused to talk with any of the Oneida about his purpose, leaving in his wake confusion and fear.⁵³ The posts he set along that bank were later confirmed by surveyors who did not understand his purpose—setting interior allotment lines—and they assumed he was marking the exterior boundaries. Each subsequent survey confirmed Esperson's west bank post and meander as an exterior boundary, and thus was an error compounded for 120 years until the Brown County Circuit Court vindicated the rights of the tribal fishermen to net suckers in Duck Creek.

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NOTES

1. *Menominee Indian Tribe of Wisconsin v Tommy G. Thompson et al.*, 943 F. Supp. 999 (Western District of Wisconsin, 1996). The ruling of the Court of Appeals is available online at <http://laws.findlaw.com/7th/963596.html>.

2. J. Peters, "Fish Story," in Laurence M. Hauptman and L. Gordon McLester III, *The Oneida Indian Journey: From New York to Wisconsin, 1784–1860* (Madison: University of Wisconsin Press, 1999), 124–125.

3. The court papers in *State of Wisconsin v DaCouteau* are filed with the Brown County clerk of courts. The decision of the Wisconsin Court of Appeals is online at <http://www.wisbar.org/WisCtApp2/3qr97/96-2735.htm>.

4. For general background on modern treaty rights history in Wisconsin, see Ronald S. Satz, *Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective* (Madison: Wisconsin Academy of Sciences, Arts, and Letters, 1991) and John R. Wunder, *'Retained by the People': A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994). The jurisdiction of the Fort Howard garrison was litigated in *Isaac Ronde and John P. Arndt v William Belknap*, Brown County Circuit Court, June 1825 term (James Duane Doty Papers, State Historical Society of Wisconsin, Wisconsin Microfilm Series 84); *U.S. v Arndt*, Spring 1847 term, US District Court, Brown County, Wisconsin Territory (*Territorial Papers of the United States*, National Archives Microseries, M-236, Roll 55). See also Alice E. Smith, *James Duane Doty: Frontier Promoter* (Madison: State Historical Society of Wisconsin, 1954), 72–76, 169 and Patrick J. Jung, "Soldiering at Fort Howard, 1816–1841: A Social History of a Frontier Fort at Green Bay, Part II," *Voyageur* (Winter/Spring 1996), 65n.

5. Donald Hickey, *The War of 1812: A Forgotten Conflict* (Urbana: University of Illinois Press, 1991).

6. Secretary of War Alexander Dallas to Michigan Territorial Governor Lewis Cass, 19 June 1815, in *Letters Sent by the Secretary of War*, Record Group 107, National Archives, Microcopy M-15, Roll 3, frame 120; Cass to Dallas, 15 July 1815, in *Territorial Papers of the United States: Michigan Territory*, vol. 10 (Washington, DC: Government Printing Office, 1943), 573–575. Subsequent citations will appear as *TPUS*. Francis Paul Prucha, *Bayonet and Broadax: The Role of the United States Army in the Development of the Northwest, 1815–1850* (Madison: State Historical Society of Wisconsin, 1953), 19–20; Alexander Macomb to Secretary of War, 20 June 1816, in *TPUS*, vol. 10, 652–653; Secretary of War Dallas to Colonel Bowyer, 15 March 1816 in *Letters Sent*, Microcopy M-15, Roll 3, frame 162.

7. Colonel William Lawrence to General Thomas Jesup, 28 September 1830. The state supplied this document to the defense in January 1995, and it was found in *Records of the Quarter Master General*, Consolidated Files on Fort Howard, Wisconsin, 1819–1873, Record Group 92, National Archives. The state reproduced its copies of these documents from the original manuscripts. The documents from this collection are also available on microfilm from the State Historical Society of Wisconsin, under the same title, with the classification “Wisconsin Microfilm Series 111,” which is where I consulted them. Since I refer frequently to these records, subsequent citations will appear as “Series 111.” There are no frame numbers on the microfilm series at the State Historical Society for easier retrieval, but the microfilmmers working in 1947 followed a chronological arrangement for their project so today’s researcher may easily find the microfilm documents cited in this report or by the state from the manuscript records.

8. Captain John O’Fallon to unknown, 8 October 1816, in *Letters Received by the Secretary of War*, Record Group 107, National Archives, Microcopy M-271, Reel 1, frames 1275–1824. There is also a typescript of this letter in the State Historical Society of Wisconsin Manuscript Collection known as “U.S. Army Papers—Fort Howard.”

9. Augustin Grignon, “Seventy-Two Years’ Recollections of Wisconsin,” in *Wisconsin Historical Collections*, vol. III (Madison: State Historical Society of Wisconsin), 281–282. Subsequent citations will appear as *WHC*.

10. Colonel Bowyer to Secretary of War Calhoun, 10 June 1819, in *TPUS*, vol. 10, 834–835; Calhoun to Bowyer, 24 August 1819, in *TPUS*, vol. 10, 852.

11. Great Wave, speech in Green Bay, 8 October 1823, copy in “Series 111.”

12. Patricia K. Ourada, *The Menominee Indians: A History* (Norman: University of Oklahoma Press, 1979), ch. 4.

13. Commissioner of the General Land Office to the Surveyor-General of the Northwest, 28 April 1828, in *Records of the Bureau of Land Management*, Record Group 49, National Archives, Microcopy 479, Roll 13, MSS 153. The relevant congressional legislation is as follows: Act of 11 May 1820 at *Statutes at Large*, vol. III, 572; Act of 21 February 1823 at *Statutes at Large*, vol. III, 724–725; Act of 17 April 1828 at *Statutes at Large*, vol. IV, 260–261.

14. Report of Colonel Woods, Inspector General’s Office, 1821, in “Series 111”; Colonel Smith’s Report to General Jesup, 14 February 1822, in “Series 111.”

15. Major Stanton to General Jesup, 21 February 1826, in “Series 111.”

16. Captain Smith to General Jesup, 21 May 1827, in “Series 111.”

17. Captain Smith to General Jesup, 1 December 1827, in "Series 111"; Lawrence to Jesup, 28 September 1830.
18. Notice of bid, 29 June 1831, in "Series 111."
19. Captain Smith to General Jesup, 21 May 1827.
20. Captain Smith to General Jesup, 25 September 1826, in "Series 111"; Arthur Hecht, "Land Controversy at Fort Howard, 1816–1854" (unpublished paper, copy at State Historical Society of Wisconsin Manuscripts Collection, 1945).
21. Captain Smith to General Jesup, 1 February 1827, in "Series 111"; see also Jeanne Kay, "John Lawe, Green Bay Trader," *Wisconsin Magazine of History* 64:1 (August 1980): 3–27 for a discussion of Lawe's land and lumber enterprises.
22. Lawrence to Jesup, 28 September 1830.
23. H. C. Clark to G. W. Grossman, 16 November 1828, in "Series 111"; Jacqueline Peterson, "Many Roads to Red River: Métis Genesis in the Great Lakes Region, 1680–1815," in *The New Peoples: Being and Becoming Métis in North America*, eds. Peterson and Jennifer Brown (Lincoln: University of Nebraska Press, 1985).
24. Ella Hoes Neville, *Historic Green Bay* (Green Bay, 1893), ch. 7; Ebenezer Childs, "Recollections of Wisconsin since 1820," in *WHC*, vol. 4, 153–195; Henry S. Baird, "Early History of Northern Wisconsin," in *WHC*, vol. 4, 197–221; and Morgan L. Martin, "Narrative of Morgan L. Martin," *WHC*, vol. 11, 385–413.
25. For a recent discussion of Doty's judgeship in a multi-racial setting, see Patrick J. Jung, "To Extend Fair and Impartial Justice to the Indian: Native Americans and the Additional Court of Michigan Territory, 1823–1836," *Michigan Historical Review* 23:1 (Fall 1997): 25–48.
26. *Isaac Ronde and John P. Arndt v William Belknap*, Brown County Circuit Court, June 1825 term, in James Duane Doty Papers, State Historical Society of Wisconsin, Wisconsin Microfilm Series 84. There are no frame numbers on this microfilm reel.
27. Land conveyances to Judge Doty, 1824–1828, in "Series 84."
28. Smith to Jesup, 1 May 1828, in "Series 111."
29. *Ibid.*
30. Major Twiggs' 23 August 1828 order to halt Mullett's survey is in *TPUS*, vol. 11, 1204; for the struggle at Mackinac, see Edward Coffman, *The Old Army: A Portrait of the American Army in Peacetime, 1784–1898* (New York: Oxford University Press, 1986), 72.
31. Henry S. Baird to Delegate Wing, 18 October 1828, in *TPUS*, vol. 11, 1233–1235; Doty to Surveyor-General, 3 November 1828, in *TPUS*, vol. 11, 1224.
32. Colonel Lawrence to General Jesup, 4 December 1828 in "Series 111."
33. Colonel Lawrence to General Jesup, 28 September 1830.
34. The congressional legislation about trespassers on the lands ceded to the United States is the act of 3 March 1807 at *Statutes at Large*, vol. II, 445–446. I have been unable to locate the order to the Detroit Marshal of 2 March 1829. I have found similar orders in contemporary documents. For example, on 14 May 1836 President Jackson issued an order stating "I recommend that the Marshal of the Territory of Wisconsin be authorized to remove from the public lands in the vicinity of Fort Winnebago any persons who have taken possession or made a settlement upon the same without proper authority" (*Territorial Papers of the United States: The Territory of Wisconsin, 1836–1848, A Microfilm Supplement*, Microcopy M-236, Roll 32, frame 166. Subsequent citations will appear as *TPUS-Micro*).

35. See Thomas Dean Papers, State Historical Society of Wisconsin, Wisconsin Microfilm Series 22, Roll 1, diary entries of 10 January through 5 March 1831.

36. Treaty of 8 February 1831 between the Menominees and the United States, in Charles J. Kappler, *Indian Affairs: Laws and Treaties*, vol. II (Washington, DC: Government Printing Office, 1904).

37. General Brooks to General Jesup, 1 March 1834, in “Series 111.”

38. Daniel Bread, speech of 25 August 1830, in Documents Relating to Ratified and Unratified Treaties, Record Group 75, National Archives, Microcopy T-494.

39. “Report of the Secretary of War on Extinguishing Indian Title to Lands around Green Bay,” in Senate Report 229 (24th Congress, 1st Session), Serial # 281; *TPUS*, vol. 12, 872–877.

40. Treaty of 3 February 1838 between the Oneidas and the United States, in Kappler, *Indian Affairs: Laws and Treaties*, vol. II.

41. Delegate George Jones to Commissioner of Indian Affairs, 25 August 1838, in Letters Received from the Green Bay Agency, Records of the Bureau of Indian Affairs, Record Group 75, National Archives, Microcopy M-234, Roll 317, frames 230–231; Henry Baird to Eliza Baird, 15 September 1838 and 29 September 1838; Henry Dodge to Henry Baird, 5 December 1838, all in Henry S. Baird Papers, Box 1, Folder 5, State Historical Society of Wisconsin.

42. Henry Dodge to Henry Baird, 20 October 1838, in Records of the Wisconsin Superintendent of Indian Affairs, Record Group 75, National Archives, Microcopy M-951, Roll 4, frame 47.

43. Henry Dodge to Commissioner of Indian Affairs, 12 November 1838, in Letters Received from the Green Bay Agency, Records of the Bureau of Indian Affairs, Record Group 75, National Archives, Microcopy M-234, Roll 317, frame 338.

44. Henry Baird to Henry Dodge, 15 December 1838, in Letters Received from the Green Bay Agency, Records of the Bureau of Indian Affairs, Record Group 75, National Archives, Microcopy M-234, Roll 317, frames 657–665.

45. Malcolm J. Rohrbough, *The Land Office Business: The Settlement and Administration of American Public Lands, 1789–1837* (New York: Oxford University Press, 1968), 96.

46. Henry Dodge to Commissioner of Indian Affairs, 2 January 1839, in *TPUS*, vol. 27, 1116; Commissioner of the General Land Office to Commissioner of Indian Affairs, 16 February 1839, in Letters Received from the Green Bay Agency, M-234, Roll 317, frame 486; Commissioner of the General Land Office to Commissioner of Indian Affairs, March 12, 1839, in *ibid.*, frame 489.

47. Commissioner of the General Land Office to Secretary of War, 6 February 1841; Secretary of War to Commissioner of the General Land Office, 2 March 1841; General Jesup to Secretary of War, March 2, 1841; Petition of “Citizens of the Northern Part of the Territory of Wisconsin,” 11 November 1844; and Governor Tallmadge to Secretary of War, 27 January 1845, all in *TPUS-Micro*, M236, Roll 55.

48. Captain Shaler to General Jesup, 12 March 1845; Samuel Ryan, affidavit, 12 March 1845, both in *TPUS-Micro*, M236, Roll 55.

49. Marshall Rockwell to Secretary of War, 12 June 1845, in *TPUS-Micro*, M236, Roll 55.

50. Secretary of War to Treasury Department Solicitor, 11 August 1846, in *TPUS-Micro*, M236, Roll 55.

51. M. L. Martin to Secretary of War, 8 August 1846, in *TPUS-Micro*, M236, Roll 55.
52. Testimony of Albert G. Ellis in *U.S. v Arndt*, Spring, 1847 term, US District Court, Brown County, Wisconsin Territory, in *TPUS-Micro*, M-236, Roll 55, frame 213.
53. Joseph Bridgman to Commissioner of Indian Affairs, 4 April 1876, in Letters Received from the Green Bay Agency, M-234, Roll 332; frame 147; W. R. Rouse to Timothy Howe, 24 November 1875 in *ibid.*, frame 461.