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United States Department of the Interior

OFFICE OF THE SOLICITOR

MAR 15 2007

Honorable Eliot Spitzer
Governor
State of New York
Executive Chambers
Albany, New York 12224

Honorable Ray Halbritter
Nation Representative
Oneida Indian Nation
Box 1
Vernon, New York 13476

Dear Governor Spitzer and Mr. Halbritter:

On October 20, 2006, the Solicitor's Office requested the views of your attorneys as to the validity of the Nation-State Compact between the Oneida Indian Nation of New York and the State of New York signed in 1993. On November 30, 2006, we received a response from Gregory J. Allen, Deputy Counsel to the Governor, and from Michael R. Smith, on behalf of the Oneida Nation. In addition, on December 7, 2006, Mr. Allen supplemented the State's response with notification that the Supreme Court denied the Nation's petition for certiorari. We have reviewed the submissions as well as other relevant laws. As will be more fully explained below, I am notifying you that the Secretary is reconsidering the 1993 approval of the Nation-State Compact. You may submit additional comments you may have regarding the issues you deem relevant to the reconsideration on or before April 30, 2007. The Secretary intends to issue his reconsidered decision whether to approve or disapprove the 1993 compact 45-days later, unless, no later than April 30, 2007, you send a joint request to suspend the reconsideration pending negotiation of a new compact no later than October 1, 2007.

Overview

The Oneida Indian Nation of New York (Nation) and Governor Cuomo signed a gaming compact in 1993. The Compact was submitted to the Department of Interior for its review pursuant to the Indian Gaming Regulatory Act (IGRA).[1] The Department approved it on June 4, 1993, and published a Notice in the *Federal Register* that the compact was in effect. IGRA specifically provides that the compact shall only take effect when the Secretary publishes a notice in the *Federal Register*.[2] In July 1993, the Nation opened its Turning Stone Casino. In October 1993, Governor Cuomo and the St. Regis

[1] 25 U.S.C. § 2710(d)(8)(A).
[2] 25 U.S.C. § 2710(d)(3)(B).

Mohawk Tribe also signed a compact that was then approved by the Secretary. The St. Regis Mohawk Tribe opened its casino in April 1999.

Beginning in 1999 various citizen groups, state legislators, and others filed lawsuits to challenge the Governor's authority to enter into the Oneida and Mohawk compacts. The challenge to the Mohawk compact was litigated in *Saratoga County Chamber of Commerce, et al. v. Pataki*.[3] The challenge to the Oneida compact was litigated in *Peterman v. Pataki*.[4] In 2003, New York's highest state court, the Court of Appeals of New York, decided in *Saratoga County Chamber of Commerce* that Governor Cuomo lacked authority to enter into the Mohawk compact independent of the State legislature.[5] On June 25, 2005, the Supreme Court of New York issued an opinion in *Peterman* following the Court of Appeals findings in *Saratoga County Chamber of Commerce* and found the Oneida compact invalid.[6] On December 4, 2006 the United States Supreme Court denied the Oneida Nation's petition for certiorari in the *Peterman* case.[7]

During the pendency of these lawsuits, the New York legislature, in 2001, passed legislation authorizing the Governor to enter into compacts with Indian tribes as long as certain conditions were met. In January 2002, a group of citizens challenged the 2001 legislation in *Dalton v. Pataki*.[8] In May 2005, the Court of Appeals of New York rejected their challenge and upheld the Governor's authority to enter into compacts as authorized by the 2001 legislation. Thus, today, the Governor has the authority to enter into compacts pursuant to the 2001 legislation.

In both the *Saratoga County* and *Peterman* cases, the Oneida Nation and the State of New York argued that the Nation was an indispensable party, and therefore, the actions should be dismissed. The Court of Appeals addressed this argument in *Saratoga County*. The court found that the Mohawk Tribe chose not to be a party, therefore refused to dismiss the case on indispensability grounds.[9] Moreover, the court found instructive that the Oneida Nation filed an *amicus* brief in *Saratoga County* which put forth all the arguments that "we would expect to be made by the Tribe had it chosen to participate."[10] The court found that the equities weighed in favor of judicial review and that the Tribe's voluntary absence should not deprive citizens of their day in court.[11] The Court of Appeals also addressed statute of limitations and laches. The court rejected the

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[3] *Saratoga Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (June 13, 2003), *cert denied, Pataki v. Saratoga Chamber of Commerce*, 540 U.S. 1017 (2003).

[4] *Peterman v. Pataki*, 2004 N.Y. Misc LEXIS 2004, *aff'd* 2005 N.Y. App. Div. LEXIS 10372 (September 30, 2005), *appeal denied*, 2006 N.Y. LEXIS (May 4, 2006).

[5] *Saratoga Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (June 13, 2003), *cert denied, Pataki v. Saratoga Chamber of Commerce*, 540 U.S. 1017 (2003).

[6] *Peterman v. Pataki*, 4 Misc.3d 1028(A), 798 N.Y.S.2d 347 (Sup. Ct. Oneida Cty. 2004) (unreported decision), *aff'd* 21 A.D.3d 1387, 801 N.Y.S.2d 212 (4th Dep't 2005), motion for leave to appeal denied, 24 A.D. 3d 1328, 801 N.Y.S.2d 442(4th Dep't 2005), motion for leave to appeal denied, 6 N.Y.S. 713 (2006).

[7] *Oneida Nation of New York v. Peterman, cert. denied*, 127 S. Ct. 730 (December 4, 2006).

[8] *Dalton v. Pataki*, 835 N.E.2d 1180 (May 3, 2005).

[9] *Saratoga*, 798 N.E.2d at 1058.

[10] *Id.*

[11] *Id.* at 1059.

statute of limitations argument finding that the action was timely filed under state law.[12] The court also rejected laches finding no economic harm since the casino operated throughout this period.[13] Moreover, the court found that the Tribe was on notice of the possible illegality of the compact citing a memorandum from Governor Cuomo's counsel that the Tribe had been informed that legislative approval was necessary.[14] Thus, the court reasoned, laches should not attach.

After the New York Court of Appeals decision in *Saratoga County*, the Supreme Court of New York considered *Peterman*.[15] The State and the plaintiffs recognized that under the doctrine of *stare decisis*, the court was bound to follow the New York Court of Appeals' decision in *Saratoga County Chamber of Commerce*. The Oneida Nation entered a ". . . special appearance for the limited purpose of contesting the jurisdiction of the court and specifically to renew the nation's motion to dismiss the Complaint on the grounds of tribal sovereign immunity."[16] The court on two previous occasions, in unpublished Letter Opinions, ruled that the Nation was not an indispensable party. Here, the court again rejected the Nation's arguments. It found that the Nation voluntarily chose to be absent and by that absence could not deprive the citizens of the State of New York the opportunity to be heard.[17] The court also rejected the Nation's claim of laches. It found that, like the Mohawk Tribe, the Nation was on notice of the potential vulnerability of the compact.[18] The court, quoting from *Saratoga*, found that "...the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches."[19] The Supreme Court of New York, Appellate Division unanimously affirmed the decision[20] and the Court of Appeals denied the Motion for leave to appeal.[21] Thus, pursuant to state law, the compact signed by Governor Cuomo is invalid.[22] However, simply because the compact is invalid under state law does not address the separate federal law question of whether the compact is "in effect" under federal law.

Also during this time, the Oneida Nation and the United States were plaintiffs in litigation regarding the Oneida Nation's land claim. During this federal court litigation, the Oneida Nation filed a Motion to enjoin Scott Peterman from pursuing his state court action. The Nation argued that the "aid in jurisdiction" exception of the Anti-Injunction Act required the federal court to enjoin the state court proceedings so as to preserve federal court jurisdiction over Indian gaming.[23] The court rejected the Nation's motion

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[12] *Id.* at 1055-56.
[13] *Id.* at 1056.
[14] *Id.*
[15] *Peterman v. Pataki*, 798 N.Y.S.2d 347, 2004 N.Y. Misc. LEXIS 1583 (June 25, 2004).
[16] *Id.* LEXIS 1583 at 5.
[17] *Id.* at 10.
[18] *Id.* at 13-14.
[19] *Id.* at 15.
[20] *Peterman v. Pataki*, 801 N.Y.S.2d 212, 2005 N.Y. App. Div. LEXIS 10372 (September 30, 2005.)
[21] *Peterman v. Pataki*, 2006 N.Y. LEXIS 1271 (May 4, 2006.)
[22] In recent submissions to the Department, attorneys for the Nation say that the Nation intends to seek Supreme Court review of this decision.
[23] *Oneida Indian Nations of New York, et al. v. County of Oneida*, 132 F. Supp.2d 71 (N.D.N.Y. December 20, 2000.)

finding that the validity of the compact required an analysis of both federal and state law. Citing *Saratoga County* and *Pueblo of Santa Ana*,[24] the court found that IGRA did not preempt the state court proceedings challenging the validity of the compact. This court did not address, however, whether the compact remained effective under federal law. The court limited its ruling to whether the state court challenge was not preempted by IGRA, finding it was not.

With the denial of the petition for certiorari in *Peterman*, the litigation concerning whether Governor Cuomo was authorized to enter into the 1993 compact is over. It is now clear under state law that the Governor did not have the authority to negotiate and enter into the compact. The question before the Department of Interior is what, if anything, the Secretary must do regarding the 1993 compact in light of this conclusion.

Inherent Authority To Reconsider Compact Approval Decision

In *Pueblo of Santa Ana*, the Tenth Circuit addressed the validity of a compact, when after the Secretary approved it, a state court found that the Governor did not have authority to enter into it.[25] In *Santa Ana*, the parties and the court focused on the language in IGRA that provides that once the Secretary approves a compact, he publishes a notice in the *Federal Register*. IGRA provides that the compact is "in effect" once this notice is published.[26] The United States and the tribes argued that a state court later invalidating the authority of the Governor to enter into the compact did not invalidate its effectiveness under IGRA. The court rejected this argument finding that the "entered into" language imposes an independent requirement and the compact must be validly entered into by a state before it can go into effect, via publication in the *Federal Register*.[27]

The tribes argued that to allow a state court to invalidate a compact would forever subject them to collateral attack. The United States argued that the only way to challenge an approved compact is to ask the Secretary to withdraw his decision and then have that action challenged under the APA. The court rejected the tribes' argument as being without merit, and, therefore did not reach the United States' argument.

The court also addressed the concern that the Secretary would be forced to examine state law in the short 45-day review period for approving or disapproving a compact. The court noted Secretary Babbitt's statement in a letter to Senator Bingaman discussing the New Mexico compacts at issue in *Santa Ana*:

> We agree that compacts between Indian tribes and states are valid only if entered into by the appropriate State officials. However, given IGRA's 45-day time constraints and the automatic approval

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[24] *Pueblo of Santa Ana, et al. v. Kelley, et al.*, 104 F.3d 1546 (10th Cir. 1997), *cert. denied*, 1997 522 U.S. 807 (1997).
[25] *Pueblo of Santa Ana, et al. v. Kelley*, 104 F.3rd 1546 (10th Cir. 1997), *cert. denied*, 522 U.S. 807 (1997).
[26] 25 U.S.C. § 2710(d)(1)(C).
[27] *Id.* at 1555.

> provision, we do not believe that Congress contemplated that the Department would address or resolve complex issues of State law raised by internal challenge to a Governor's authority. In this regard, we must defer to the representations of Governors, as the Chief Executive Officers of their states, unless it is clear beyond cavil that a Governor lacks the authority to sign a compact.[28]

The court viewed this language as tacit agreement with the tenet that a compact is not valid unless properly entered into. The court also agreed that the Secretary is not expected to resolve state law issues in 45 days,[29] and also rejected the tribes' argument that the compact is merely voidable. The court held that a state court could later invalidate a compact if it found the Governor lacked authority. Finally the court addressed the question of whether state law or federal law controlled the validity of the compact. The court found that state law governs whether the governor has authority to enter into a compact. The court agreed with the state court's finding, and therefore, did not reach the issue of whether the federal court needed to independently rule on state law. Thus, it remains an open question what happens in a circumstance, like this one, where a state court has ruled but there has been no federal court or federal executive branch action.

In its brief in the *Santa Ana v. Kelley* litigation before theTenth Circuit, the United States took the position that the Secretary could reconsider his compact approval in the situation where a state court later found the Governor lacked authority to enter into the compact. The United States reiterated this position before the Supreme Court when it filed a response in opposition to the petition for certiorari that had been filed by the tribal plaintiffs. In this brief, the United States said:

> IGRA is silent concerning the circumstances, if any, under which a compact that has been entered into by a State and a Tribe, and "take[s] effect" under IGRA upon the approval of the Secretary, may thereafter become ineffective as a matter of federal law. As a general rule, however, the power of a federal official to make a decision carries with it the power to reconsider that decision. [Citations omitted.] In light of that general rule and IGRA's silence on the point, we believe that the Secretary of the Interior has the authority to withdraw his approval of the compact. In doing so, the Secretary presumably would consider the same statutory factors that he is to consider in deciding whether to approve or disapprove a compact in the first place.[30]

The United States' response in opposition further stated that a factor to be considered in withdrawing approval is whether the Governor lacked authority under state

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[28] *Id.* at 1557

[29] *Id.*

[30] *Santa Ana v. Kelley*, On Petition for a Write of Certiorari to the United States Court of Appeals for the 10th Circuit, Brief for the Federal Respondents in Opposition, at 10-11, (1997); http://usdoj.gov/osg/briefs/1996/w961617a.txt.

law to enter into the compact. Thus, the United States has already taken the position that in the circumstance of a state court finding that the Governor lacked authority to enter into the compact, the response of the Secretary could be whether to reconsider the compact approval.

It is clear that an agency has inherent authority to reconsider its decision. Two of the cases that explore this issue are *Bellville Mining*[31] and *Dun and Bradstreet*.[32] In these cases the courts looked at the scope of the authority and the due process required when reconsidering a decision. The courts examine several factors in reviewing the agency's ability to reconsider its decision. One element of the court's review is the timeliness of the reconsideration balancing the desirability of finality against the general public interest in attaining correct results in administrative actions. Also, the courts look to whether notice of the reconsideration was properly provided. In addition, courts examine whether the reason for the reconsideration is an effort to correct a legal error or merely an effort to make a policy change. Courts have also found that while reliance is a factor, the agency may nevertheless reconsider the decision upon a showing that the initial decision was erroneous.

This letter is advising the parties of the Secretary's intent to reconsider the 1993 compact approval. The reconsideration is to address a legal error, not to change policy. The only reason for reconsidering the compact approval is the state court's rulings that under state law the Governor lacked authority to enter into the compact. The United States Supreme Court has refused to examine these rulings. It is true that the original compact decision was almost fourteen years ago, however, the state court challenges just concluded in December 2006 with the United States Supreme Court's denial of certiorari. Thus, this reconsideration is only a matter of months after the conclusion of the litigation.

The Department does not take lightly the decision to reconsider a compact approval. This is the first time the Department has taken this step since the inception of IGRA. In the past, the Department has said that it will not question the authority of a Governor to enter into a compact unless it is "clear beyond cavil" that the Governor lacks the authority. It was this policy that the court in *Santa Ana* accepted, but then nevertheless invalidated the compact based on the state court finding that the Governor lacked authority. Here, after many years of state court litigation, the court found that Governor Cuomo lacked authority. The Department cannot simply ignore this finding. We must at a minimum reconsider whether the 1993 approval was correct.

Given the importance of the issues to all concerned, we will offer the Nation and the State a final opportunity to submit comments regarding the issues they deem relevant to the reconsideration. Any comments should be received by April 30, 2007. The Secretary intends to issue his reconsidered decision on the compact by June 14, 2007.

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[31] *Bellville Mining v. United States*, 999 F.2d 989 (6th Cir. 1993).

[32] *The Dun and Bradstreet Corporation Foundation v. United States Postal Service*, 946 F.2d 189 (2nd Cir. 1991).

Alternatively, if the State and the Nation choose to begin negotiating a new compact in light of this letter, you should send a joint request, no later than April 30, 2007, for the Secretary to suspend reconsideration. If that occurs, compact negotiations should be concluded and a compact submitted for the Secretary's review no later than October 1, 2007.

Sincerely,

Lawrence J. Jensen
Deputy Solicitor

cc: James E. Cason, Principal Deputy Secretary
Phil Hogan, Chairman, National Indian Gaming Commission