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March 21, 2007

Hon. Dirk Kempthorne
United States Secretary of the Interior
1849 C Street NW
Washington DC 20240

Re: Turning Stone Casino – Verona, NY

Dear Mr. Secretary:

This office represented the successful Plaintiffs in both *Saratoga County Chamber of Commerce v. Pataki* and *Peterman v. Pataki*, which decisions are referred to in the recent letter dated March 15, 2007, written by Deputy Solicitor Lawrence J. Jensen on behalf of the U.S. Department of the Interior ("Interior"), addressed to both Eliot Spitzer, Governor of the State of New York, and Ray Halbritter, the Nation's Representative for the Oneida Indian Nation (the "Oneidas").

As that letter correctly indicates, the U. S. Supreme Court refused to review those decisions which ruled that in the absence of legislative authorization, the Governor of the State of New York could not enter into compacts with Indian nations to permit them to engage in Class III gaming pursuant to the federal Indian Gaming Regulatory Act ("IGRA"), including specifically the compact between the State of New York and the Oneidas. Mr. Jensen's letter notified both Governor Spitzer and Mr. Halbritter that in light of these decisions, Interior intends to "reconsider" its original approval in 1993 of the Compact entered into by then Governor Cuomo and the Oneidas under which the Oneidas claim the right to conduct Class III gaming in accordance with IGRA at the Turning Stone Casino located in Verona, Oneida County, New York.

Mr. Jensen's letter states, however, that Interior's decision to reconsider will be suspended provided that by no later than April 30, 2007 the State of New York and the Oneidas jointly request Interior to suspend such reconsideration pending their negotiation of a new compact which must be agreed to by no later than October 1, 2007.

What, Mr. Secretary, is there left for your office to "reconsider"? New York State's highest court has already twice held that the Governor lacked the

authority to enter into a gaming compact under IGRA without legislative authorization and that the Compacts were, therefore, illegal. Each time the U.S. Supreme Court refused to review these decisions. Surely, Interior cannot now take the position that it somehow possesses the authority to ignore these court decisions and to determine that the Compact may nevertheless be valid. In the past, Interior has consistently said that on issues of who has the power to bind a State to a Compact under IGRA, it will defer to state law and to a state's judiciary. See letter dated April 25, 1998 from Assistant Secretary of the Interior Kevin Gover to then Governor of California Pete Wilson on the subject of the power of the governor to bind a state to a Compact under IGRA where Mr. Gover stated: "We recognize, however, that issues concerning the scope of the Governor's authority are matters of state law appropriate for ultimate determination by the California judiciary." Are we to understand that Interior would even remotely suggest that it has the power to revalidate a Compact after the U.S. Supreme Court refused to overturn a state court decision invalidating that Compact on the grounds that the Governor acted illegally in entering into it in the first place?

What has changed since Mr. Gover wrote his letter?

We also wish to call to your attention "an inconvenient truth" everyone seems to want to ignore. Even if the State and the Oneidas were to come to an agreement on the terms of a new Compact, and even if the New York State Legislature were to approve such a Compact, gambling could not occur on the site of Turning Stone, which is not on "Indian land" within the meaning of IGRA. As you well know, IGRA authorizes Indian Class III gaming only on Indian land as defined in IGRA itself. *See* 25 U.S.C. §§ 2710 (d)(1) and 2703 (4).

In that respect, your attention is called to the fact that Interior never approved the operation of Class III gaming at Turning Stone in the first place. When, by letter dated June 4, 1993 (copy enclosed), your Department approved the original Compact by and between the State and the Oneidas (subsequently declared invalid in *Pataki v. Peterman*), the Department specifically warned that the Compact's language was not site-specific, but referred only to gambling that was to be conducted on "Indian land," which, of course, was consistent with IGRA. That letter further noted that the Oneidas were, at the time, conducting gaming within the boundaries of its current remaining reservation of 32 acres in Madison County. However, that same letter specifically warned that while Interior was aware that the Oneidas were building a new facility "in anticipation of being able to conduct gaming in the future," Interior said it was taking no position on whether that facility was on "Indian land" within the meaning of IGRA. Ignoring the warning, the Oneidas nevertheless completed construction of the casino and moved their Class III gaming operations to that facility, *i.e.*, Turning Stone, located in Oneida County (as opposed to Madison County, where their recognized 32 acre reservation was situated).

We know, however, that this new site is not on Indian land within the meaning of IGRA. In 2005, the U.S. Supreme Court handed down its decision in *City of Sherrill v. Oneida Indian*

Nation, 544 U.S. 197 (2005), which, quite remarkably, Deputy Solicitor Jensen's letter does not even mention. In *City of Sherrill* the Supreme Court decided that former reservation land held by the Oneidas which was long ago sold off, did not suddenly reacquire "Indian sovereign land" status when repurchased by the Oneidas in the open market over a century later, observing that the Tribe could not rekindle "embers of sovereignty that long ago grew cold." Accordingly, despite the fact that the Oneidas had repurchased the land, fee title and sovereignty were not united and the land remained subject to the laws of the State of New York. In fact, the Supreme Court in *Sherrill* specifically alluded to the same 32-acre tract mentioned in Interior's June 4, 1993 letter as being all that was left of the Tribe's original sovereign land. 125 S.Ct. at 1488.

While it is true that *City of Sherrill* specifically dealt with gasoline stations, convenience stores and a textile facility within the City's limits, it must be noted that the Turning Stone land was reacquired by the Oneidas in the exact same fashion as the parcels in the *City of Sherrill* case. Thus, Turning Stone is not "Indian land" and is, therefore, subject to the laws of the State of New York, whose Constitution and statutes prohibit commercial gambling. See NY Const., Art. I, §9 and NY Penal Law, Article 225. Gambling at that site is, therefore, illegal now and into the future until and unless that land were to be taken into trust in accordance with 25 U.S.C. § 465. There are, moreover, serious questions as to whether that statute applies to lands situated within the original 13 colonies.

It is also clear that no compact could even be approved by the Secretary of the Interior unless and until those lands were first taken into trust. *See* letter dated May 20, 2005 from Deputy Secretary of the Interior James Cason, addressed to Theodore Kulongoski, Governor of the State of Oregon. In that letter, Mr. Cason advised Oregon's Governor that approval of any Compact before the land in question was taken into trust would violate IGRA. Has Interior reversed its position on that issue as well?

Even the Draft Environmental Impact Statement recently prepared for Interior in conjunction with the Tribe's land-to-trust application (hastily filed less than a week after the *Sherrill* decision), concedes that gambling at Turning Stone would be illegal in the absence of the land's having been placed into trust. Moreover, by letter dated January 30, 2006, counsel to then New York Governor George Pataki advised the Bureau of Indian Affairs that in light of the *City of Sherrill* decision the laws of New York State now apply to Turning Stone.

This, of course, begs the obvious question: How can Turning Stone's current Class III gambling operation continue when, at this very moment, there is no valid compact, and the operation is not on Indian land but on the sovereign soil of the State of New York which prohibits such gambling?

We are astonished that no Federal officer has called for the enforcement of 18 U.S.C. § 1511, which makes it a Federal felony for state officials to conspire to obstruct the enforcement

of State anti-gambling laws for the purposes of facilitating an illegal gambling business. As we speak, with the full knowledge of the Governor and personnel within the office of the Attorney General of the State of New York, New York State Racing and Wagering and New York State Police employees, paid with State funds, are present and overseeing the conduct of gambling at Turning Stone, facilitating its operation rather than shutting it down. Moreover, any "negotiations" between State officials and the Oneidas to allow gaming to continue for the time being would be a blatant violation of § 1511.

This state of affairs has been pointed out in previous correspondence sent to Interior, its Inspector General, the United States Attorney General, the U.S. Attorney for the Northern District of New York, the Governor of the State of New York, the New York State Attorney General, and the office of the District Attorney for Oneida County. Despite blatant illegalities under both Federal and State Law, nobody seems to be willing to step up to the plate and do anything about it. It's time to stop "passing the buck" among the three levels of governments (federal, state and local) and to start enforcing the law. Why hasn't the United States Attorney for the Northern District of New York investigated this matter? Are the Federal and State Officials above the law? Why is everyone looking the other way? Who is protecting whom and for what reason?

By copy of this letter to appropriate federal, state and local officials, we reiterate our demand that they take the appropriate measures to carry out the duties of their respective offices to which they were elected or appointed and stop the continuing blatant illegalities occurring under both federal and state law.

Very truly yours,

O'CONNELL AND ARONOWITZ

By: Cornelius D. Murray

CDM:cm

cc: Hon. Eliot Spitzer, Governor of the State of New York
Hon. Ray Halbritter, Oneida Nation Representative
Hon. Alberto Gonzales, Attorney General of the United States
Hon. Fred Fielding, Counsel to the President
Lawrence J. Jensen, Deputy Solicitor, U.S. Department of the Interior
Earl E. Devaney, Inspector General, U.S. Department of the Interior
Phillip Hogen, Chair, National Indian Gaming Commission

Glenn T. Suddaby, U.S. Attorney, Northern District of New York
Hon. Andrew Cuomo, Attorney General of the State of New York
Richard Rifkin, Esq., Special Counsel to the Governor
Scott McNamara, Acting District Attorney, Oneida County
Daniel D. Hogan, Chair, New York State Racing and Wagering Board
Preston L. Felton, Acting Superintendent, New York State Police

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C - Letter dated June 4, 1993 to Niels Holch from Acting Assistant Secretary of the Interior Thomas Thompson (Pages 400-401)

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Mr. Niels C. Holch, Esq.
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400 North Capitol Street, N.W.
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JUN 4 1993

Dear Mr. Holch:

On April 21, 1993, we received from you the Compact Between the Oneida Indian Nation of New York (Nation) and the State of New York (State), dated April 16, 1993.

We have reviewed the Compact and conclude that it does not violate the Indian Gaming Regulatory Act (IGRA), Federal law, or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact. The Compact shall take effect when notice of our approval, pursuant to Section 11(d)(3)(B) of IGRA (25 U.S.C. § 2710(d)(3)(B)), is published in the FEDERAL REGISTER.

The Compact authorizes gaming on Nation lands in general terms that paraphrase the IGRA definition of "Indian lands." These lands include the Nation's recognized 32 acre tract in Madison County near the City of Oneida where gaming is currently being conducted. The Compact does not specifically refer to the site where we understand the Nation has built a major new facility in anticipation of being able to conduct gaming in the future. Since the Compact tracks the "Indian lands" definition of IGRA, we need not decide and take no position with regard to whether this new facility is on "Indian land" as that term is used in IGRA.

Notwithstanding our approval of the Compact, be advised that Section 11(d)(1) of the IGRA (25 U.S.C. § 2710(d)(1)) requires that gaming cannot be conducted without a tribal gaming ordinance approved by the Chairman of the National Indian Gaming Commission (NIGC). On July 8, 1992, the NIGC published in the FEDERAL REGISTER proposed regulations to govern approval of Class II and Class III gaming ordinances.

The final regulations were published in the FEDERAL REGISTER on January 22, 1993 (58 Fed. Reg. 5802), and became effective on February 22, 1993. Under the statute and regulations, even previously existing gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman.

In addition, if the Nation intends to enter into a management contract for the operation and management of the Nation's gaming facility, such contract must be submitted to and approved by the Chairman of the NIGC pursuant to Section 11(d)(9) of the IGRA (25 U.S.C. § 2710(d)(9)) and the NIGC's regulations. The Nation may want to contact the NIGC at (202) 632-7003 for further information on submitting the ordinance and the management contract for approval by the NIGC.

We wish the Nation and the State success in this economic venture.

Sincerely,

Thomas Thompson

Acting Assistant Secretary - Indian Affairs

Enclosures