UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al, Plaintiffs, v. SALLY JEWELL, Secretary, United States Department of the Interior et al. Defendants and ONEIDA NATION OF NEW YORK Defendant-Intervenor	No. 6:08-cv-644 (LEK-DEP)

INTERVENOR CAYUGA NATION'S NOTICE OF INTENDED OBJECTIONS

On May 16, 2013, Governor Andrew M. Cuomo announced an agreement ("the Agreement") among New York State, Oneida and Madison Counties, and the Oneida Indian Nation ("OIN"). The Agreement purports to resolve a host of issues between the OIN, the counties, and the State, including this litigation. In addition, the Agreement purports to grant the OIN exclusive rights to casino-style gaming in ten counties across Central New York, including Cayuga County. The Agreement takes effect only when the parties submit it to this Court (as part of a stipulation of dismissal of the instant litigation) and this Court approves it.

The Cayuga Nation (the "Nation") now moves to intervene because the Agreement's casino gaming exclusivity provision violates its rights under federal law. *First*, the Agreement's gaming exclusivity provision purports to bar the Nation from engaging in casino-style gaming in

Cayuga County, where most of the Nation's reservation land is located. Yet under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, the State has an obligation to negotiate in good faith with the Nation for a compact regarding the procedures under which the Nation may conduct casino-style gaming (known as "Class III gaming" under the statute). By purporting to grant exclusivity to the OIN, the Agreement effectively *prohibits* the State from negotiating in good faith with the Cayuga Nation. *Second*, the Agreement requires that the federal defendants in this action join in endorsing the Agreement for this Court's approval and enforcement. But they cannot do so without violating the United States government's obligation of trust to federally recognized Indian nations.

The Agreement could easily have been drafted to avoid these grave encroachments on the Cayuga Nation's sovereign rights – for example, by excluding Cayuga County from the zone of exclusivity granted to the OIN. The parties who negotiated the Agreement, however, took no steps to protect the Cayuga Nation's interests. The Nation therefore has no choice but to urge the Court not to approve the Agreement in its present form.

PARTIES

1. The Court is familiar with the parties to the underlying action challenging the federal government's grant of the OIN's trust application.

2. Intervenor the Cayuga Nation is a federally recognized Indian nation. *See, e.g.*, 77 Fed. Reg. 47,868 (Aug. 10, 2012).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the underlying actions pursuant to 28 U.S.C. § 1331.

4. Venue for the underlying actions is proper for the reasons asserted by the existing parties in their pleadings.

FACTUAL BACKGROUND

A. The Nation and the OIN

5. The Cayuga Indian Nation of New York is a federally recognized Indian nation. *See* 77 Fed. Reg. 47,868 (Aug. 10, 2012). The federal government recognizes the Nation as the same entity with which it entered the Treaty of Canandaigua in 1794 (7 Stat. 44).

6. The Nation maintains a federally recognized reservation in New York State. More than half of the Nation's reservation land is located in Cayuga County, with the remainder located in Seneca County.

7. The Nation's reservation was established by the United States in the Treaty of Canandaigua in 1794. The New York Court of Appeals – as well as "every federal court" to consider the question – has held that the Nation's reservation in New York State remains extant. *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233, 247 (N.Y. 2010) (collecting authorities), *cert. denied*, 131 S. Ct. 353 (2010).

8. The OIN is also a federally recognized Indian nation. *See* 77 Fed. Reg. 47,868 (Aug. 10, 2012).

9. The federal government and courts similarly recognize that the OIN's reservation remains intact. *See Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011), *petition for cert. filed*, 81 U.S.L.W. 3277 (U.S. Nov. 12, 2012).

B. This Litigation and the Proposed Settlement Agreement

10. Since 1993, the OIN has conducted casino-style gaming at the Turning Stone Resort and Casino ("Turning Stone") in Verona, New York. Turning Stone is located within the

OIN's reservation. The OIN's gaming activities at Turning Stone have taken place with the approval of the federal government.

11. On April 4, 2005, the OIN submitted an application for the United States Department of the Interior to take certain of the OIN's reservation lands (including the lands on which Turning Stone is located) into trust, pursuant to 25 U.S.C. § 465. On May 20, 2008, the Department of the Interior approved that application.

12. The instant litigation challenges the Department of the Interior's grant of the OIN trust application. This litigation was filed by the State of New York, David A. Paterson (for whom Andrew M. Cuomo has been substituted in his capacity as Governor of the State of New York); Madison County; Oneida County; and Andrew M. Cuomo (for whom Eric T. Schneiderman has been substituted in his capacity as Attorney General of the State of New York). The Department's approval of the trust application has been stayed in light of this litigation.

13. On May 16, 2013, Governor Cuomo announced an agreement between the State of New York, the OIN, Oneida County, and Madison County (the "Agreement"). The Agreement purports to resolve various gaming- and land-related disputes between the OIN, the State, Oneida County, and Madison County.[1]

14. The Agreement requires the OIN to give the State 25% of its net gaming revenue from slot machines at Turning Stone – an estimated $50 million per year. It requires the State and the Counties to drop their legal challenges to particular OIN land issues, including this litigation. It also grants the OIN the exclusive right to conduct casino gaming in a ten-county region of Central New York, including Cayuga County.

[1] A copy of the Agreement is attached as Attachment 1 to the Declaration of Clint Halftown in Support of Cayuga Nation's Motion to Intervene.

15. By granting casino gaming exclusivity to the OIN in a region that includes Cayuga County, the Agreement purports to bar the Cayuga Nation from conducting casino gaming on its reservation lands in Cayuga County.

16. The Agreement requires a series of approvals. Specifically, after execution by the parties' representatives, the Agreement must be approved by the Counties' Legislatures, the OIN's Council, and the State Legislature.

17. To date, the Agreement has been approved by the Counties' Legislatures and the OIN's Council.

18. On or about June 5, 2013, Governor Cuomo released a bill that, if ratified by the State Legislature, would approve the Agreement. *See* http://www.governor.ny.gov/assets/documents/GPB10-BILL.pdf.

19. The Agreement does not become effective until the parties – including the federal defendants – provide this Court with a stipulation of dismissal incorporating the Agreement's terms, and this Court enters an order approving the Agreement.

20. The Agreement envisions that this Court will approve the Agreement, incorporate its terms into its order, and "reserve and retain jurisdiction, exclusive of any other court, to enforce th[e] Agreement according to its terms, to adjudicate any challenges by a party or by third parties to the enforceability of th[e] Agreement, to compel arbitration of disputes according to the terms of th[e] Agreement, or to confirm any arbitral award." Agreement VII.E.

21. On information and belief, the parties will submit the referenced stipulation, including the Agreement, to this Court for approval promptly upon enactment of the bill referenced in paragraph 18 above.

C. Gaming on "Indian Lands" Under IGRA

22. Under the Indian Gaming Regulatory Act (IGRA), Indian nations have the ability to conduct gaming on "Indian lands," which the statute defines in part as "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4)(A); *see* 25 C.F.R. § 502.12 (same).

23. IGRA divides gaming into three classes: Class I, Class II, and Class III.

24. Class I gaming consists of traditional and social games played for no significant financial stakes. 25 U.S.C. § 2703(6). Indian nations maintain exclusive control over Class I gaming. *Id.* § 2710(a)(1).

25. Class II gaming includes "the game of chance commonly known as bingo" and similar games if played in the same location. *Id.* § 2703(7). Class II gaming is regulated by Indian nations pursuant to their ordinances approved by the National Indian Gaming Commission (NIGC), an independent federal regulatory commission located within the Department of the Interior. *Id.* §§ 2704, 2710(a)(2), (b).

26. Class III – which the Agreement calls "casino gaming" – is a residual category, consisting of any games not included in Classes I and II. Class III gaming includes casino-style games, slot machines, and lotteries. 25 U.S.C. § 2703(8). Class III gaming may be conducted in States (such as New York State) that permit such gaming "for any purpose by any person, organization, or entity." *Id.* § 2710(d)(1)(B). Class III gaming may be conducted only "in conformance with a Tribal-State compact entered into by the Indian tribe and State . . . that is in effect." *Id.* § 2710(d)(1)(C).

27. IGRA expressly requires that the states negotiate with Indian nations "in good faith" to enter into Class III gaming compacts. Section 2710(d)(3)(A) of Title 25 states:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of

entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

D. The Cayuga Nation's Lands In Cayuga County

28. As previously noted, the Nation maintains a reservation in New York State, including land in Cayuga County. The Cayuga Nation therefore is eligible to conduct gaming pursuant to IGRA on lands in Cayuga County.

29. The Nation also has applied to have certain of its lands – including lands within Cayuga County – taken into trust by the Department of the Interior pursuant to 25 U.S.C. § 465. On June 3, 2013, the Eastern Region of the Department of the Interior's Bureau of Indian Affairs notified the Nation that it had favorably completed its review of the Nation's trust application. The Nation expects that its trust application will be approved.

E. The Effect of the Agreement

30. Because the Agreement effectively prohibits the State from negotiating with the Cayuga Nation "in good faith" to enter into a Class III gaming compact, it is contrary to, and preempted by, IGRA.

31. In addition, because the Agreement purports to bar the Nation from exercising its federal right to pursue a compact governing Class III gaming on its lands in Cayuga County, actions taken by the federal defendants in support of the Agreement would violate the United States' trust obligations to the Nation.

OBJECTION ONE (IGRA PREEMPTION)

32. The Nation repeats and realleges Paragraphs 1 through 32 above as if fully set forth herein.

33. The Agreement purports to grant the OIN Class III gaming exclusivity in Cayuga County, where the majority of the Nation's reservation lands are located. It thus effectively prohibits the State from negotiating with the Nation in good faith with respect to a Class III gaming compact, as required by IGRA, 25 U.S.C. § 2710(d)(3)(A).

34. In its present form, the Agreement is therefore preempted by federal law and should be rejected by the Court.

OBJECTION TWO (VIOLATION OF FEDERAL DEFENDANTS' TRUST OBLIGATIONS TO THE CAYUGA NATION)

35. The Nation repeats and realleges Paragraphs 1 through 35 above as if fully set forth herein.

36. The United States government has a trust relationship with all federally recognized Indian nations, including the Cayuga Nation.

37. For the Agreement to take effect, the federal defendants must enter into a stipulation of dismissal that incorporates the Agreement's terms – including the Agreement's purported grant of casino gaming exclusivity to the OIN – and ask this Court to approve and adopt those terms. The United States thus must affirmatively endorse the grant of exclusivity.

38. By endorsing the Agreement, and asking this Court to retain jurisdiction to enforce it, the federal government will help effectuate an outright ban on the Cayuga Nation's conduct of Class III gaming in the county where the majority of the Nation's reservation is located.

39. These affirmative steps to interfere with the Nation's right to pursue Class III gaming on its own reservation will violate the United States' trust obligation with respect to the Cayuga Nation. The Court should reject the Agreement in its present form.

PRAYER FOR RELIEF

WHEREFORE, the Nation respectfully requests that this Court:

(A) Deny any motion to approve the Agreement in its present form; and

(B) Grant such other relief as this Court deems just and proper.

Dated: June 12, 2013
Syracuse, New York

Respectfully submitted,

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