



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

GEORGE E. PATAKI
GOVERNOR

RICHARD PLATKIN
COUNSEL TO THE GOVERNOR

February 28, 2006

VIA FACSIMILE (615-564-6701) AND U.S. MAIL

Mr. Franklin Keel
Regional Director
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive – Suite 700
Nashville, TN 37214

Re: Land-In-Trust Application of Oneida Indian Nation of New York (Group 3)

Dear Mr. Keel:

This letter (and accompanying Memorandum and Report) is submitted on behalf of the State of New York (“State”) in opposition to the application (the “Application”) of the Oneida Indian Nation of New York (the “OIN”) to have more than 17,000 acres of land owned by the OIN in fee taken into federal trust status by the United States. Many of my comments regarding the Group 3 properties reiterate and build upon the comments provided in my letter of January 30, 2006 regarding the Group 1 and Group 2 properties.

The Group 3 properties contained within the larger Application consist of 104 parcels of land totaling approximately 7,407 acres scattered throughout Oneida and Madison Counties in upstate New York. No land within this State has ever been held in federal trust status on behalf of any Indian nation, tribe, group or individuals. Further, I find no valid legal authority for the Secretary of the Interior (“Secretary”) to act on this unprecedented Application that would have profound negative impacts to the State, its political subdivisions, residents and citizens.

As explained in my January 30, 2006 letter on this matter, the Indian Reorganization Act of 1934 (“IRA”) has been not recognized to apply to tribes in New York and, consequently, 25 U.S.C. § 465 is not and cannot be available to the Oneidas. Further, there are serious questions

as to whether the delegation of authority contained in Section 465 is constitutional, particularly under the circumstances presented by this Application.

Even assuming *arguendo* that some valid legal authority exists, which it does not, the Application could not be approved because it fails to comport with the requirements for taking land into federal trust status. First, as discussed previously, there is no valid legal authority for granting the Application. Second, the OIN has failed to demonstrate that taking the subject land into federal trust status would have no significant adverse impact on the environment. Third, there has been no demonstration of tribal need, as it is clear that the OIN has the capacity to use its land in an economically productive way absent trust status. Fourth, there would be adverse consequences to the State and its political subdivisions resulting from the removal of the land from the tax rolls. Fifth, taking the subject lands into trust would result in an unworkable jurisdictional patchwork that will place at risk the public health, safety, environment and welfare. Finally, the BIA lacks the resources necessary to discharge the additional responsibilities resulting from the acquisition of the land in federal trust status.

As a threshold matter, the Application should be treated under 25 C.F.R. § 151.11 (and not under Section 151.10) since the land which the OIN seeks to have taken into trust is not within an existing reservation. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S.Ct. 1478, 1483 (2005), the United States Supreme Court held that the OIN can not “unilaterally revive its ancient sovereignty, in whole or in part, over” parcels purchased in fee on the open-market. Consequently, the fee lands purchased by the OIN in recent years are sovereign lands of the State of New York and are subject to state and local law. Although the Court in *Sherrill* declined to expressly decide whether the former Oneida reservation was diminished or disestablished by the 1838 Treaty of Buffalo Creek, the decision makes clear that the area set aside for the historic Oneida Indian Nation by the State in the 1788 Treaty of Fort Schulyer and acknowledged by the United States in the 1794 Treaty of Canandaigua is not an Indian reservation.

Indeed, the BIA’s own regulations provide that an “Indian reservation” is an area in which a tribe is “recognized by the United States as having governmental jurisdiction. . . .” See 25 C.F.R. § 151.2(f). Tribal sovereignty also is the central feature of land designated as “Indian country,” which is defined to include Indian reservations (see 18 U.S.C. § 1151(a)). By deciding that the OIN has no right to exercise tribal sovereignty on the subject lands, the Supreme Court held in substance that the land lacked reservation (and Indian country) status. The language of the Court’s decision, which repeatedly characterized the reservation in the past tense, is entirely consistent with that conclusion.

At the heart of the *Sherrill* decision is the profound concern that allowing tribally-owned land scattered throughout communities in Central New York to be removed from state and local jurisdiction would fundamentally and irreparably injure the affected communities. These communities cannot be maintained without the ability to govern in a coherent and comprehensive fashion. Piecemeal removal of land from state and local jurisdiction threatens the regulatory scheme as a whole because land use, environmental and other laws are effective only if they apply uniformly and equitably over an extended geographic area.

Moreover, *Sherrill* makes clear that the history and character of the affected areas has created justifiable expectations that should not be upset by permitting the OIN to exercise sovereignty over land interspersed in existing communities long governed by state and local governments. This Application for hundreds of scattered parcels to be taken into trust status *en masse* is a blatant effort to circumvent the concerns articulated by the Court.

Although we strongly oppose this Application, the State remains committed to working towards a comprehensive land claim settlement that avoids further costly and disruptive litigation. However, meaningful settlement discussions cannot occur unless and until the OIN abandons its unilateral strategy and commits to working in good faith to cooperatively achieve a comprehensive settlement.

If the BIA continues to process the Application notwithstanding the lack of valid legal authority to do so, the State would of course cooperate in the National Environmental Policy Act review. As detailed in the accompanying Report prepared by the firm of O'Brien & Gere (which may be found at www.dec.state.ny.us/website/ogc/oneida/index.html), it is imperative that the BIA prepare a comprehensive Environmental Impact Statement to fully analyze all of the potential environmental impacts presented by the Application, including both cumulative and non-cumulative impacts. Unless the cumulative impacts of the Group 1, Group 2 and Group 3 properties are fully considered, the segmentation of the Application by the BIA into three separate groups will result in a flawed and inadequate assessment of the environmental impacts of taking these lands into federal trust status.

This letter and accompanying Memorandum and Report together constitute the State's comments on the Group 3 parcels. I also refer you to my letter (and accompanying materials) dated January 30, 2006, addressing the application of the OIN to have Group 1 and Group 2 parcels taken into trust. Collectively, these materials constitute the State's comments to date on the entire Application as it has been presented to us.

Thank you for your cooperation in this matter.

Sincerely,



Richard Platkin
Counsel to the Governor

cc (w/o accompanying Report):

Harriet Miers, White House Counsel
Gale A. Norton, Secretary of the Interior
James Cason, Associate Deputy Secretary for Indian Affairs
David Moran, Solicitor's Office
Philip Hogen, Chairman, National Indian Gaming Commission
Alberto R. Gonzales, United States Attorney General
Glenn Suddaby, United States Attorney, Northern District of NY
Senator John McCain
Senator Charles Schumer
Senator Hillary Clinton
Congressman Richard Pombo
Congressman Sherwood Boehlert
Congressman John McHugh
Congressman James Walsh
Eliot Spitzer, New York State Attorney General
Senator Joseph Bruno
Speaker Sheldon Silver
Denise Sheehan, Commissioner of Environmental Conservation
Rocco DiVeronica, Chairman, Madison County Board of Supervisors
Joseph Griffo, Oneida County Executive