

Judge allows Seneca, Cayuga nations to sell tax-free cigarettes

Diana Louise Carter • Staff writer • September 1, 2010

A federal judge on Tuesday temporarily stopped the latest brinkmanship between the state and Native American nations over the cigarette tax issue, hours before the state was due to begin collecting the sales tax.

U.S. District Court Judge Richard Arcara in Buffalo granted a temporary injunction requested by the Seneca and Cayuga nations.

This on-again, off-again tax conflict, which has lasted for more than two decades but has historical roots dating back two centuries, pits a deficit-ridden state government against Native Americans, many of whom have used their sovereign status to sell cigarettes free of state **taxes** that since July 1 have amounted to \$4.35 a pack.

"This is politics, and politics that involves lots of **money**," said Donald A. Grinde, a professor of Native American history at the State University of New York at Buffalo. He, like other Native Americans, said the state has no right to collect taxes on reservations.

But the state Legislature, with an eye on a potential \$150 million to \$200 million in annual revenue, enacted a law earlier this year to push the issue once again. To avoid potential confrontations on reservation property, the law would tax wholesale distributors who do business with tribes. Sales to Indians would remain tax-free but sales to non-Indians would be taxed.

"We are taking an action on our own territory involving the way taxes are collected," Gov. David Paterson said Monday. "So in no way will we invade the sovereignty of their governments or the way they do business."

The dispute has grown more heated in recent days as the Sept. 1 tax collection date approached. Stakes are high for both sides, with the state more desperate for revenue than ever before and Native Americans having built entire reservation-area economies based on non-taxed sales.

State disappointed

Paterson's administration reacted with disappointment Tuesday to Arcara's ruling, but maintained that it protects only the Senecas and Cayugas and not the other native nations in New York. Effective today, "It will be against the law for licensed stamping agents to sell unstamped cigarettes to any nation or tribe other than the Seneca and Cayuga," said Paterson spokeswoman Jessica Bassett.

In addition to the legal battles in federal and state courts, the Seneca Nation Council ratcheted up **financial** pressure on the state by voting Monday to withhold quarterly casino payments to Albany, claiming New York has violated the non-compete agreement in its compacts with the Senecas. Meanwhile, the Oneida Nation moved its cigarette manufacturing to its own territory in an attempt to avoid tax collections.

Passions were further inflamed when New York City Mayor Michael Bloomberg last week urged Paterson to wear a cowboy hat and tote a rifle while talking with Indians about the tax issue. The Senecas condemned Bloomberg for using racial stereotypes

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while urging their own people to avoid violent protests. In 1997, in a similar tax dispute, Indians blocked the Thruway near Buffalo with burning tires.

"Are things tense? Sure they are," said J.C. Seneca, a member of the Seneca Nation Council and a businessman who makes, distributes and sells cigarettes at the Cattaraugus Seneca Reservation.

He introduced this week's resolution to hold back casino **payments**, estimated as having totaled more than \$700 million since the first Seneca casino opened in 2002.

"Timing is everything," Seneca said, saying his nation has chosen to press its concerns over the growth of state-backed racinos at several race tracks in western New York in possible violation of the Seneca Nation's exclusivity agreement on gaming.

Joseph Heath, the Syracuse attorney who represents the Iroquois Confederacy and the Onondaga Nation, said the state is wasting its money on the cigarette tax issue.

"They will spend more money in **law enforcement** and litigation than they ever will gain in taxes," Heath said. "You shouldn't be chasing after \$150 million, particularly when it's going to cost you \$140 million in litigation to get it."

Plus, he said, treaties dating to the 18th century protect the Iroquois nation's **trading** rights from state intervention.

The two sides can't even agree on exactly what the state is seeking to tax. Several native sources said cigarettes manufactured and sold on their own territories wouldn't be subject to the state tax, and some have gone so far as to say they can share locally made cigarettes with other reservations without becoming subject to tax. But state tax officials won't spell that out.

"I'm not able to discuss any possible hypotheticals," said Brad Maione, a spokesman for the state Taxation and Finance Department. "We're prepared to enforce the law and we're moving ahead," he said Tuesday afternoon before Arcara ruled.

Building unity

On Tuesday afternoon in Rochester, 68-year-old Gary Snell, who has smoked cigarettes for 50 years, was hoping the state would be thwarted once again.

"It's not only me, it's going to be quite a few people I know who are going to be hurting," said Snell, who makes two or three trips a month to the Tonawanda Seneca Reservation on the border of Genesee and Erie counties to **buy** low-priced cigarettes.

Snell said the Indians have the right to sell cigarettes without taxes, and if the state interferes it will be bad for the economy.

The state's cigarette tax efforts have had a number of unintended effects, including building solidarity among native nations. An historic strategy meeting of all the native nations in the state was held outside Rochester two weeks ago, bringing together people who have sometimes been at odds.

"I've only been in this job for 30 years," Heath said. "I've never seen this kind of unity in the past."

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Customers can still buy tax-free cigarettes at Seneca and Cayuga nations after a judge granted an injunction. (DAVID DUPREY The Associated Press)

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