Attorney General Doug Peterson

News Release

FOR IMMEDIATE RELEASE
May 30, 2018

Lincoln -- Nebraska Attorney General Doug Peterson today joined the State of Iowa and the City of Council Bluffs in challenging the federal government's November 2017 approval of a casino the Ponca Tribe of Nebraska has proposed to build in Carter Lake, Iowa. The casino is proposed to be built on land which was taken into trust for the Tribe based, in part, on the Tribe's representation in the early 2000s that the land would be used for a healthcare facility. Moreover, federal law limits the Tribe's lands to Knox and Boyd Counties, Nebraska; both counties are more than a hundred miles away from Carter Lake.

Because of Carter Lake's unique geographic situation relative to Nebraska, the negative effects of expanded gambling in Carter Lake will spill over into Omaha, Nebraska's largest and most densely populated metropolitan area. Local Iowa law enforcement has already expressed a concern that it will be unable to handle the increased activity generated by the casino. Since one cannot travel to or from Carter Lake without traveling through Nebraska, this means that Carter Lake's gambling problem will become Nebraska's gambling problem.

This is the second time the issue has reached federal court. In 2007, the federal government issued its initial approval of the Tribe's proposal. That decision was challenged by Nebraska, Iowa, and Council Bluffs, and was ultimately found to be incomplete. The courts remanded the issue back to federal tribal gaming regulators to perform a more thorough analysis. After pending for years, last fall the regulators issued an amended decision approving the casino. Despite having a second chance to consider the issue, the approval suffers from the same flaws raised by challengers in the 2007 case.

Council Bluffs already filed suit challenging the amended approval and the States of Iowa and Nebraska have requested permission to intervene as co-plaintiffs in that action. The case is pending in the United States District Court for the Southern District of Iowa. The federal government does not oppose the States' intervention request, which is expected to be ruled on in the coming weeks.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

CITY OF COUNCIL BLUFFS, IOWA,

Plaintiff,

and

STATE OF NEBRASKA ex rel. DOUGLAS J. PETERSON, Attorney General of the State of Nebraska,

Intervenor-Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN K. ZINKE, in his official capacity as Secretary of the Interior; NATIONAL INDIAN GAMING COMMISSION; JONODEV OSCEOLA CHAUDHURI, in his Official capacity as Chairman of the National Indian Gaming Commission; and KATHRYN ISOM-CLAUSE, in her official capacity as Vice Chair of the National Indian Gaming Commission,

Defendants.

Case No. 1:17-CV-00033

[PROPOSED] COMPLAINT IN INTERVENTION BY INTERVENOR-PLAINTIFF STATE OF NEBRASKA ex rel. DOUGLAS J. PETERSON

COMES NOW the Intervenor-Plaintiff State of Nebraska ex rel. Douglas J. Peterson, Attorney General of the State of Nebraska (collectively "Nebraska" or

"Plaintiff"), and files this Complaint in Intervention against the above-named Defendants, stating in support as follows:[1]

PRELIMINARY STATEMENT

1. This case ultimately presents the question of whether the Ponca Tribe of Nebraska ("Tribe") may build a Class II gaming facility—what many have referred to as a "casino"—on a tract of trust land in Carter Lake, Iowa. The land in question—which the Tribe originally asked to be taken into trust based on the Tribe's representation that it would be used for healthcare services—is nearly two hundred miles away from the Nebraska counties specified in the Tribe's congressional restoration act.

2. This matter has been subject to litigation for almost two decades. This marks the second time the issue has come before the federal courts, which in 2010 remanded back to the United States Department of the Interior ("DOI") and the National Indian Gaming Commission ("NIGC") those agencies' incomplete 2007 approval of the Tribe's gaming application. *Nebraska ex rel. Bruning v. U.S. Dep't of Interior*, 625 F.3d 501 (8th Cir. 2010). As the dissenting judge in *Bruning* put it, the federal government was given "yet another chance to 'get it right.'" *Id.* at 513 (Kornmann, J., dissenting).

[1] In the interest of maintaining consistency with the pleadings in the earlier litigation and with those of the existing parties to this case, Nebraska's complaint here is substantially similar to the pleadings Nebraska filed to initiate the first judicial review action, *see Nebraska ex rel. Bruning v. U.S. Dep't of Interior*, No. 08-cv-6, CM/ECF Doc # 1 (S.D. Iowa Jan. 30, 2008), available at 2008 WL 1896705. The additional allegations herein are consistent with those already made by the City of Council Bluffs in its complaint, and with those of the State of Iowa, which has filed an unopposed motion to intervene as plaintiff.

3. After languishing in the federal tribal gaming regulatory bureaucracy for years, the agencies finally issued an amended final decision in November 2017. The plaintiffs appeal from that decision, which, as described below, is as arbitrary, capricious, abusive of agency discretion, and unlawful as was its 2007 predecessor.

4. The federal government had its second chance "to get it right." It has failed, and it is incumbent upon the Judiciary to rectify that failure by vacating the approval of the Tribe's gaming application.

NATURE OF THE CASE

5. This is a challenge to a November 13, 2017 final decision ("2017 Decision") of the DOI and the NIGC approving an amended gaming ordinance submitted by the Ponca Tribe of Nebraska. The 2017 Decision purported to identify lands located in Carter Lake, Iowa ("Carter Lake Tract") taken into trust by the United States for the Tribe on or about February 2003 as eligible for tribal gaming.

6. The Indian Gaming Regulatory Act ("IGRA") generally prohibits gaming on Indian lands acquired after the IGRA's date of enactment, October 17, 1988, unless certain exceptions apply.

7. This is the NIGC's second opportunity to review the facts surrounding the status of the Carter Lake Tract and issue a final agency decision. The NIGC issued a previous decision on December 31, 2007 ("2007 NIGC Decision"). Although IGRA and accompanying NIGC and Bureau of Indian Affairs ("BIA") regulations con-

template that DOI is supposed to review and concur with NIGC restored lands decisions, the 2007 NIGC Decision did not receive the concurrence of the DOI before it was issued.

8. In response to the blatant errors and omissions in that Decision, the States of Nebraska and Iowa both sued the NIGC and the DOI, and the City of Council Bluffs, Iowa, intervened on the side of the plaintiffs. The District Court held in favor of the States and the City and reversed the agency decision, and the agencies brought a "limited appeal." The Eighth Circuit raised numerous concerns regarding the decision, but ultimately determined that principles of administrative law required remand so that the NIGC, with the concurrence of the DOI, could interpret applicable law and properly consider all the relevant factors in reaching its decision. The case was remanded to the NIGC for further proceedings.

9. On November 13, 2017, the NIGC, this time with DOI's concurrence, issued a final agency decision. The 2017 Decision affirms the 2007 NIGC Decision, yet again determining that the Carter Lake Tract qualified as "restored lands" under the exception provided under IGRA, codified at 25 U.S.C. §2719(b)(1)(B)(iii).

10. The Tribe was restored to Federal recognition by the Ponca Restoration Act, Pub. L. No. 101-484 (Oct. 31, 1990), formerly codified at 25 U.S.C. §983. The Ponca Restoration Act remains in effect, but was removed from the United States Code as of 25 U.S.C. Supp. IV (September 2016) as being of special and not general application in an effort by codifiers to improve the code's organization. For ease of

reference, this complaint continues to refer to the Ponca Restoration Act's sections as previously codified.

11. As was true of its 2007 decision, the 2017 Decision issued by the NIGC with the concurrence of the DOI is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with applicable law, including the fact that it is contrary to and exceeds the express terms of the Congressional mandate in the Ponca Restoration Act and the IGRA.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1346(a)(2) (civil action against the United States). Judicial review and declaratory relief are authorized by 28 U.S.C. §2201 (declaratory judgment) and 5 U.S.C. §701-706 (Administrative Procedure Act).

13. Venue is proper in this court pursuant to 28 U.S.C. §1391(e) and 28 U.S.C. §1402(a)(1). Venue is also appropriate under 5 U.S.C. §703.

PARTIES

14. Plaintiff State of Nebraska is a sovereign State, the residents of which are substantially affected by NIGC's decision to allow Indian gaming on the Carter Lake Tract because of its unique geographical relationship with Nebraska, in that one cannot access the Carter Lake Tract from Iowa without first traveling through Nebraska. Plaintiff Douglas J. Peterson brings this action in his official capacity as the Attorney General of the State of Nebraska.

15. Defendant DOI is the federal agency that holds the Carter Lake Tract in trust for the Tribe and that concurred with the 2017 Decision. Ryan K. Zinke is the Secretary of the Interior ("Secretary") and is sued in his official capacity. Defendant NIGC is the administrative agency which issued the 2017 Decision that is being appealed in the present instance. Defendant Jonodev Osceola Chaudhuri is the Chairman of the NIGC ("Chairman") and is sued in his official capacity. Defendant Kathryn Isom-Clause is the Vice-Chair of the NIGC ("Vice-Chair") and is sued in her official capacity.

THE PONCA TRIBE'S STATUS UNDER FEDERAL LAW

16. Federal recognition of the Tribe was terminated on September 5, 1962 pursuant to Pub. L. No. 87-629, §1 (Sept. 5, 1962), 76 Stat. 429, formerly codified at 25 U.S.C. §971 et seq.

17. On October 31, 1990, the Ponca Restoration Act, 25 U.S.C. §§983-983h, restored federal recognition to the Tribe. 25 U.S.C. §983 et seq. The Ponca Restoration Act was previously codified but has been removed the United States Code in an effort to improve organization.

18. In restoring the Tribe's rights and lands, Congress provided for "1,500 acres of any real property located in Knox or Boyd Counties, Nebraska" to be "transferred to the Secretary [of the Interior] for the benefit of the Tribe." *Id*. §983b(c); *see id*. §983(2).

19. Congress also permitted the Secretary of the Interior to accept "additional acreage in Knox or Boyd Counties." *Id*. §983b(c).

THE CARTER LAKE TRACT

20. The Carter Lake Tract was not taken into trust under the terms of the Ponca Restoration Act.

21. On September 24, 1999, the Tribe purchased in fee the Carter Lake Tract which consists of approximately 4.8 acres of land in Carter Lake, Iowa.

22. On or about January 10, 2000, the Tribe passed a resolution seeking to have DOI place the Carter Lake Tract into trust for the Tribe. The Tribe represented to DOI at that time that the Tribe planned to place a healthcare facility on the land. *Iowa v. Great Plains Reg'l Dir., Bureau of Indian Affairs*, 38 IBIA 42, 44 (2002).

23. On or about February 23, 2000, the BIA Great Plains Regional Director wrote letters to Iowa state and county officials indicating that she was considering accepting the Carter Lake Tract into trust for the benefit of the Tribe. *Id.* at 44.

24. At no time was Nebraska notified of the pending fee to trust application by the BIA Great Plains Regional Director.

25. The State of Iowa and Pottawatomie County appealed the BIA Great Plains Regional Director's decision to take the Carter Lake Tract into trust, on the basis that the Director failed to take into consideration the Tribe's true intent to utilize the Carter Lake Tract to build a gaming facility. *Id.* at 52.

26. On August 7, 2002, the IBIA affirmed the ruling of the BIA Great Plains Regional Director, holding that the Carter Lake Tract "was purchased … and is currently used for health care facilities" and that any possible gaming use was speculative. *Id.*

27. On December 6, 2002, the BIA published in newspapers of general circulation, including the Council Bluffs Nonpareil, a corrected notice of intent to take land into trust wherein the Tribe acknowledged the Carter Lake Tract was to be taken into trust for non-gaming related purposes and that the Carter Lake Tract was not eligible for gaming under the exceptions listed in 25 U.S.C. §2719(b)(1)(B). (December 6, 2002 Corrected Public Notice).

28. The purpose of the notice was to advise the public of the BIA's intent to take the land into trust so that affected parties could sue in federal court to prevent the trust acquisition before the land was formally acquired because at the time, it was the common understanding of the Federal government and the parties to this dispute that the Quiet Title Act, 28 U.S.C. §2409(a), precluded judicial review after the United States acquired title. Preamble to BIA regulation, 61 Fed. Reg. 18082 (Apr. 24, 1996), cited in and confirmed by NIGC Final Decision and Order, December 31, 2007, at 14. A true and correct copy of the NIGC's Final Decision and Order from December 31, 2007 is attached hereto as Exhibit 2.

29. Before the land was taken into trust, the State of Iowa and Pottawattamie County, Iowa, and other parties with standing including Council Bluffs, had the right to seek judicial review of the IBIA's decision. However, in light of the public notice described above, providing notice of the Tribe's clearly stated intent not to conduct gaming on the Carter Lake Tract, the State of Iowa and Pottawattamie County agreed to forego any further litigation as to the appropriateness of the Interior Board of Indian Appeals' (IBIA) decision, and thus detrimentally relied on their

agreement with the Tribe and the public notice. Council Bluffs also detrimentally relied on the December 6, 2002 Corrected Public Notice.

30. The Carter Lake Tract was taken into trust by the DOI on or about February 2003.

THE TRIBE'S EFFORTS TO OBTAIN AN AMENDMENT TO THE CARTER LAKE TRACT ORDINANCE TO ALLOW FOR GAMING

31. On or about July 23, 2007, the Tribe submitted a site-specific Class II gaming ordinance amendment ("Carter Lake Tract Ordinance") to the Chairman for review and approval. In this ordinance, the Tribe defined the Carter Lake Tract as "Indian lands" meeting the restored lands exception to the general prohibition on gaming on lands acquired after October 17, 1988, detailed in 25 U.S.C. §2719(b)(1)(B)(iii).

32. A memorandum was issued by Michael Gross, NIGC Associate General Counsel, to the Chairman on October 22, 2007, wherein it was determined that "the factual circumstances surrounding the acquisition of the Carter Lake land show that it was not taken into trust as part of the Tribe's restoration." A true and correct copy of the October 22, 2007 Memorandum is attached hereto as Exhibit 3. Based on the reasoning detailed in the October 22, 2007 Memorandum, the Chairman disapproved the ordinance. A true and correct copy of the Chairman's letter of disapproval is attached hereto as Exhibit 4.

STATUTORY AUTHORITY REGARDING TRIBAL LANDS

33. Pursuant to 25 U.S.C. §5108 (the Indian Reorganization Act, formerly classified as 25 U.S.C. §465 and editorially reclassified in 2016 as part of an effort of

codifiers to improve the organization of the code), the Secretary has authority to take lands into trust for the benefit of Indian tribes.

34. Under IGRA, the Secretary has limited authority to authorize gaming on lands acquired into trust for the benefit of an Indian tribe after October 17, 1988, the effective date of IGRA. Pursuant to 25 U.S.C. §2719, gaming regulated by IGRA shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 unless the lands fit within one of the exceptions set forth in said statute. One of those exceptions provides that the prohibition on gaming does not apply to lands that are taken into trust as part of "the restoration of lands for an Indian tribe that is restored to federal recognition." 29 U.S.C. §2719(b)(1)(B)(iii).

35. The Secretary does not have any authority under IGRA or any other statute to determine whether tribal gaming is permitted on a particular parcel of land other than as expressly authorized by 25 U.S.C. §2719(b)(1).

36. Pursuant to 25 U.S.C. §2705(a)(3), the Chairman, on behalf of the NIGC and subject to an appeal to the NIGC, has the authority to "approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title."

37. The Tribe was entitled to appeal the Chairman's decision to deny its proposed amendment to the Carter Lake Tract ordinance to the NIGC under 25 U.S.C. §2705(a)(3) and 25 C.F.R. Part 580.

THE 2007 NIGC DECISION AND APPEAL TO THE EIGHTH CIRCUIT

38. The Tribe sought review of the Chairman's October 22, 2007 determination in front of the NIGC. Nebraska was not a party to that litigation. On December 31, 2007, the NIGC issued a final decision and order reversing the Chairman's decision on the grounds that the Chairman had improperly relied on events that occurred after the Department of the Interior's final agency decision to take the Carter Lake Tract into trust. (NIGC 2007 Order, p. 1-2, see Exhibit 2).

39. The States of Iowa and Nebraska appealed the NIGC's decision to this Court, and the City of Council Bluffs intervened for the plaintiffs.

40. The grounds plaintiffs raised for seeking a declaratory judgment overturning the NIGC's 2007 decision included that (1) the NIGC lacked jurisdiction to make a restored lands determination necessary to allow gaming without concurrence from DOI and in light of the DOI's approval of the December 6, 2002 Corrected Public Notice; (2) the NIGC decision was arbitrary and capricious in lacking a fact-based, well-reasoned analysis; and (3) the NIGC decision was contrary to the 1990 Ponca Restoration Act, enacted two years after IGRA.

41. The district court declined to decide whether the NIGC's decision was contrary to the Ponca Restoration Act because "[t]he DOI or BIA should be the agency initially deciding whether the Ponca Tribe's Carter Lake, Iowa acquisition went beyond what Congress intended in seeming to limit to Knox and Boyd Counties, Nebraska, real property transferred to the Secretary for the benefit of the Tribe." The

court specifically noted that "[n]either the defendants in their briefs nor the NIGC Decision adequately addressed that question of statutory intent."

42. The district court then agreed that the NIGC lacked the authority to declare the Carter Lake land "restored lands" based on the circumstances of the 2003 conveyance in trust that followed the agreement between the Tribe and the State of Iowa. The district court therefore entered a declaratory judgment in favor of the States and Intervenor City of Council Bluffs, reversing the NIGC's decision because the decision lacked a rational basis on the law and facts of the record and was therefore arbitrary and unlawful.

43. The DOI and NIGC brought a "limited appeal" to the Eighth Circuit, asking the court to remand to the NIGC for two limited purposes.

44. First, the agencies asked for a remand to permit NIGC, in consultation with DOI, to weigh the three factors that the Federal government alleged are relevant to the determination of whether the Carter Lake Tract is eligible for gaming under IGRA's "restored lands" exception—temporal proximity, historical and modern connection to the location, and the factual circumstances of the trust acquisition. The United States argued that the NIGC had incorrectly failed to consider the Tribe's agreement with the State of Iowa memorialized in the December 6, 2002 Corrected Public Notice when it weighed these three factors under what is essentially a totality of the circumstances test.

45. Second, the agencies asked for a remand to permit NIGC, in consultation with the DOI, to determine whether the Ponca Restoration Act limits restored land to parcels taken into trust in Boyd and Knox Counties, Nebraska.

46. The States of Iowa and Nebraska asserted that the district court's reversal of the NIGC's decision should be affirmed without remand because, in part, the unambiguous terms of the Ponca Restoration Act, 25 U.S.C. §983b(c), provide that restored lands for the Tribe must be located in Knox and Boyd Counties, Nebraska, not in Carter Lake, Iowa.

47. The Eighth Circuit remanded the case, ordering this court to remand to the NIGC to consider, as part of its evaluation of the section 2719 factors for whether the Carter Lake Tract should be considered "restored" and eligible for gaming, first, whether the Ponca Restoration Act limits the land that may be considered "restored" for purposes of IGRA to exclude the Carter Lake Tract, and second, whether the agreement between the Tribe and the State of Iowa that the lands would not be treated as "restored" changed the outcome of the totality of the circumstances test applied under section 2719. *Nebraska ex rel. Bruning v. U.S. Dep't of Interior*, 625 F.3d 501 (8th Cir. 2010).

48. Although the majority of the Eighth Circuit panel decided to remand the case to the agencies, declining to reach the question of the permissible interpretation of the Ponca Restoration Act without an agency or district court record to review, a strong dissent by the Honorable Judge Charles B. Kornmann explained that because the Ponca Restoration Act is not ambiguous and precludes the NIGC's interpretation

treating the Carter Lake Tract as restored lands under IGRA, the NIGC's 2007 decision should be reversed without remand to the NIGC and DOI.

THE CHALLENGED DECISION: THE NIGC'S NOVEMBER 2017 "AMENDMENT TO FINAL DECISION AND ORDER"

49. On November 13, 2017, the NIGC issued an "Amendment to Final Decision and Order" affirming its original 2007 decision. The 2017 Decision finds, just like the 2007 Decision, that the Carter Lake Tract "is restored lands for a restored tribe." A true and correct copy of the NIGC's 2017 "Amendment to Final Decision and Order," referred to throughout this Complaint as the 2017 Decision, is attached as Exhibit 1.

50. The 2017 Decision finds and concludes that although the Tribe acquiesced briefly to the agreement the Tribe's counsel, Mr. Mason, negotiated with the State of Iowa under which the Tribe agreed not to seek to use the Carter Lake tract for gaming under the section 2719 "restored lands" provision, the Tribe clearly "repudiated" the agreement by 2005.

51. According to the 2017 Decision, "[w]hen the Tribe decided in 2005 to invoke the restored lands exception, Iowa was free to challenge Interior's land-into-trust decision. There was no time-bar to suit as the relevant statute of limitations, 28 U.S.C. §2401(a), was six years." Yet, in the NIGC's 2007 decision, the Commission explained that the Quiet Title Act, 28 U.S.C. §2409(a), precluded judicial review after the United States acquired title.

52. The 2017 Decision finds that the alleged agreement between Iowa and the Tribe's attorney was invalid and does not estop the Tribe from seeking the right to game under IGRA's restored lands exception.

53. The 2017 Decision finds that the Tribe subsequently "acquiesced in the agreement for a limited period of time from 2002 to 2005", but also "clearly repudiated" its ratification in 2005. 2017 Decision at p. 26.

54. The 2017 Decision further finds that the Ponca Restoration Act does not limit the Tribe's restored lands to Knox and Boyd Counties, Nebraska, although it fails to identify any ambiguity in the Act that would permit this interpretation. The Ponca Restoration Act makes certain acquisition in Knox and Boyd counties mandatory with no further need for statutory authorization, and, to the extent the Ponca Restoration Act allows DOI to take lands in other locations into trust for the Tribe under the general Indian Reorganization Act authority, the statute clearly limits acquisitions under the Restoration Act to the two named Nebraska counties.

55. The 2017 Decision acknowledges the existence of regulations at 25 C.F.R. Part 292 that would provide that the only lands that could qualify for the "restored lands" exception for Ponca would be located in Knox and Boyd counties, but finds that the regulations do not apply because the Ponca submitted their request for a restored opinion before the regulations were in place. Thus, the 2017 Decision concludes that the Ponca application is grandfathered in. The 2017 Decision finds that because the Ponca applied to have the Carter Lake Tract treated as restored lands before these regulations were effective, the regulations somehow support a reading

of the Ponca Restoration Act that is in conflict with the 25 C.F.R. Part 292. The 2017 Decision therefore fails to consider whether the Ponca Restoration Act can be reasonably and permissibly interpreted to allow lands outside of Nebraska to be treated as "restored lands" in light of the Part 292 regulations.

56. The 2017 Decision purports to find that the agreement between the Tribe and the State of Iowa is invalid and therefore cannot be used to estop the Tribe from seeking the right to game on the property. The 2017 Decision then fails to consider the agreement in the context of weighing the factual circumstances surrounding the Trust acquisition, even though the purpose of the Eighth Circuit's remand was to allow the NIGC to consider all relevant factual circumstances, including the agreement between the Tribe and Iowa that the NIGC says was temporarily acquiesced to by the Tribe.

57. If the 2017 Decision is allowed to stand, the Tribe will be able to engage in class II gaming under the regulations of the NIGC.

58. Nebraska is injured by the 2017 Decision in the following, non-inclusive, respects:

a. The State of Nebraska is a sovereign state and protector of the freedom, public health, and welfare of its citizens and residents. The people and government of Nebraska have seen fit to reject casino gambling within Nebraska's borders.

b. Although the Carter Lake Tract is technically in Iowa, Carter Lake itself is, by reason of geographic happenstance, wholly on the Nebraska side of the Missouri River. *Iowa v. Nebraska*, 143 U.S. 359 (1892) (deciding the current Iowa-Nebraska border at Carter Lake following an 1877 avulsion of the river, which cut a new channel to the south of Carter Lake). The practical result is that Carter Lake is accessible only by traveling through Nebraska and, more specifically, through Omaha, which is Nebraska's most populous and densely populated metropolitan area.

c. The effects (including, but not limited to, negative social welfare effects and increased law enforcement activity) of gambling in Carter Lake will spill over into Nebraska, adversely affecting the public health and welfare of Nebraska's citizens and residents and burdening the resources of governmental entities within Nebraska.

d. On information and belief, the leadership of the Carter Lake Police Department—which consists of less than ten sworn officers—has grown concerned about the anticipated law enforcement effects of the Tribe's planned gaming facility and that Department's ability and capacity to handle such effects. On information and belief, the Carter Lake Police Department has already approached at least one outside law enforcement agency—the Pottawatomie County Sheriff's Office, the facilities of which are located across the Missouri River and a 2.3 mile drive through Nebraska

away from Carter Lake—for additional manpower to handle increased activity generated by the Tribe's facility. Given Carter Lake's geographic situation relative to Nebraska, it is inevitable that Nebraska law enforcement entities will bear at least some of this increased burden.

e. Unlike the Iowa parties to this litigation, Nebraska will derive no revenue from the Tribe's gambling activities to offset these burdens.

59. Nebraska possesses and asserts *parens patriae* authority to protect the interests of its citizens who are or will be injured by the 2017 Decision.

CLAIM FOR RELIEF (DECLARATORY JUDGMENT)

60. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1 through 59.

61. The 2017 Decision is a final agency action subject to judicial review in accordance with 5 U.S.C. §704, 25 U.S.C. §2714, and 25 C.F.R. §580.10.

62. Plaintiff has exhausted all available administrative remedies to challenge the 2017 Decision.

63. The 2017 Decision to approve the Tribe's site-specific gaming ordinance was contrary to law because under the unambiguous provisions of the Ponca Restoration Act and IGRA, the Carter Lake Tract cannot qualify as Indian lands eligible to be used for gaming purposes.

64. To the extent the language of these statutes can be understood as ambiguous, when construed in accordance with accepted canons of statutory construction including, but not limited to, construction in pari materia and in accordance with

the intent of Congress, the only reasonable and permissible interpretation of these statutes precludes treatment of the Carter Lake Tract as Indian lands eligible for gaming purposes.

65. The 2017 Decision to approve the Tribe's site-specific gaming ordinance was contrary to law because of the agreement between Iowa and the Tribe's attorney memorialized in the December 6, 2002 Corrected Public Notice.

66. In rendering the 2017 Decision holding that the Carter Lake Tract was gaming eligible "restored lands" under IGRA, the NIGC unreasonably and arbitrarily failed to consider all relevant facts and circumstances known to it including, but not limited to: the Tribe's agreement with Iowa that the Carter Lake Tract would not be used for gaming under the restored lands provision of IGRA, and Iowa's and other stakeholders' detrimental reliance on this agreement and the December 6, 2002 Corrected Public Notice; the terms of the Ponca Restoration Act; and the regulations setting forth for how DOI will interpret and apply the exceptions to the prohibition of gaming on Indian lands acquired after October 17, 1988 contained in 25 U.S.C. §2719, including the "restored lands" exception. 73 Fed Reg. 29,354 (May 20, 2008), codified at 25 C.F.R. Part 292.

67. There is a present justiciable controversy between the parties as to whether the 2017 Decision that the Carter Lake Tract qualifies for the "restored lands" exception is contrary to law.

68. Plaintiff asks this Court to reverse the 2017 Decision's determination that the Carter Lake Tract is "restored lands for an Indian Tribe that is restored to

federal recognition" pursuant to the exemption detailed in the IGRA. 25 U.S.C. §2719(b)(1)(B)(iii).

69. Plaintiff is entitled to recover expenses, including reasonable attorney fees, incurred in this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

1. A declaratory judgment pursuant to 28 U.S.C. §2201, et seq., that the Carter Lake Tract does not qualify as restored lands under 25 U.S.C. §2719(b)(1)(B)(iii);
2. A declaratory judgment pursuant to 28 U.S.C. §2201, et seq., vacating and setting aside as unlawful the NIGC's November 13, 2017 decision approving the Tribe's amended gaming ordinance because the findings and conclusions in that decision are arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, see 5 U.S.C. §706(2);
3. An order remanding the case with instructions that the NIGC deny the Tribe's request for amendment to the Carter Lake Tract ordinance;
4. An order awarding the Plaintiff its costs and reasonable attorney fees to the extent permitted by law; and
5. An order awarding Plaintiff such other relief as deemed appropriate.

Dated May 30, 2018.

Respectfully submitted,

DOUGLAS J. PETERSON
Attorney General of Nebraska

s/David A. Lopez
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COUNSEL FOR THE
STATE OF NEBRASKA

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2018, I electronically filed the foregoing document with the Clerk of the United States District Court for the Southern District of Iowa CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

By: *s/ David A. Lopez*

EXHIBIT 1

National Indian Gaming Commission

In re: Gaming Ordinance of the Ponca Tribe of Nebraska	)	November 13, 2017

Amendment to Final Decision and Order

This is an amendment to the National Indian Gaming Commission's (Commission or NIGC) [1] Final Decision and Order in re: Gaming Ordinance of the Ponca Tribe of Nebraska. That decision, issued on December 31, 2007 (Commission decision), found that the Ponca Tribe of Nebraska's (Tribe's) trust parcel[2] in Carter Lake, Iowa (Carter Lake parcel or parcel) is eligible for gaming under the Indian Gaming Regulatory Act (IGRA) as land taken into trust as part of the restoration of lands for a restored tribe and resulted in the approval of the Tribe's site-specific gaming ordinance.[3]

The Carter Lake parcel was taken into trust by the U.S. Department of the Interior (Interior) in 2003.[4] Generally, IGRA prohibits gaming on parcels taken into trust after October 17, 1988;[5] however, it provides for several exceptions. One of these is the restored lands exception, which requires that land be "taken into trust as part of … the restoration of lands for

[1] The National Indian Gaming Commission (NIGC) is a federal regulatory agency established by Congress. 25 U.S.C. §§ 2704(a) & 2702(3). When the term "Commission" is used, it refers to the three individual members that make up the entity itself, including the Chair, Vice Chair, and Associate Commissioner. When the term "NIGC" is used, it refers to the agency.

[2] The parcel (Carter Lake parcel) is approximately 4.8 acres and was purchased in fee by the Ponca Tribe of Nebraska (Tribe) on September 24, 1999. The common address of the parcel is 1001 Avenue H, Carter Lake, Iowa. On January 10, 2000, the Tribe passed a resolution seeking to have the U.S. Department of Interior (Interior) take the land into trust. Ponca Tribe of Nebraska (Tribe) Resolution 00-01.

[3] Commission Final Decision and Order in re: The Gaming Ordinance of the Ponca Tribe of Nebraska (Dec. 31, 2007) (Commission decision); 25 U.S.C. § 2719(b)(1)(B)(iii).

[4] In February, 2003, Interior completed the trust acquisition. Letter from Interior, Bureau of Indian Affairs (BIA) Acting Great Plains Regional Director to BIA Superintendent, Yankton Agency (Feb. 10, 2003).

[5] 25 U.S.C. § 2719(a).

an Indian tribe that is restored to federal recognition."[6] Because Interior had not made a gaming eligibility determination when it took the Carter Lake parcel into trust,[7] the NIGC Chair (Chair) and, on administrative appeal, the Commission had to determine the eligibility of the parcel for gaming when the Tribe submitted a site-specific gaming ordinance to the NIGC that included the parcel in the ordinance's definition of "Indian lands."[8] The Commission decision, approving the Tribe's ordinance, was final agency action reviewable in federal district court.[9]

The States of Iowa and Nebraska (States) and the City of Council Bluffs, Iowa (City) challenged the Commission's decision, and the 8th Circuit Court of Appeals ordered the matter remanded to the Commission with instructions to reconsider the decision in accordance with its opinion. Specifically, the Commission decision was remanded to allow us, the Commission, to reconsider our determination that the Carter Lake parcel is eligible for gaming under IGRA's restored lands exception. In our original decision, we did not consider the agreement between the State of Iowa and the Tribe's outside counsel, Mr. Michael Mason (Mr. Mason or Tribe's attorney), concerning the process by which the Tribe would initiate gaming on the parcel and the public notice[10] (Corrected Notice).[11]

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[6] 25 U.S.C. § 2719(b)(1)(B)(iii).
[7] *Nebraska v. U.S. Dep't of Interior*, 625 F.3d 501, 511 (8th Cir. 2010).
[8] *See Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, 471 F. Supp. 2d 295, 324 (W.D.N.Y. 2007), amended on reconsideration in part, No. 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007) (finding that the NIGC Chair has a duty to determine whether a tribe's proposed gaming will occur on Indian lands before affirmatively approving a site-specific ordinance).
[9] 25 U.S.C. § 2714.
[10] On December 3, 2002, the BIA published a notice of intent to take the Carter Lake parcel into trust in a newspaper of general circulation in Carter Lake, Iowa but omitted certain language that the Tribe's attorney requested be included in the notice. On December 6, 2002, BIA published a corrected notice of intent to take the Carter Lake parcel into trust that included the Tribe's attorney's requested language. Council Bluffs Daily Nonpareil (Dec. 6, 2002). All references in this amendment to the published notice are to the Corrected Notice, unless otherwise indicated.
[11] *Nebraska*, 625 F.3d at 508.

In compliance with the remand order, after careful and complete review of the 8th Circuit's opinion, the agency record, the parties' submissions, and after consulting with Interior's Office of the Solicitor (Solicitor), the Commission finds and concludes that:

1) Upon review of the validity of the agreement between Iowa and the Tribe's attorney, we conclude that the agreement is invalid and does not estop the Tribe from gaming under IGRA's restored lands exception.

2) The Ponca Restoration Act does not limit the Tribe's "restored lands" to Knox and Boyd Counties, Nebraska.

3) The temporal, geographic, and factual circumstances factors of the restored lands analysis support the conclusion that the Carter Lake parcel is restored lands for a restored tribe.

Accordingly, we affirm our original conclusion that reversed the Chair's disapproval of the Tribe's site-specific gaming ordinance on the grounds that the Carter Lake parcel is restored lands for a restored tribe.

I. Procedural and Factual Background

In this amendment, we incorporate by reference the facts set forth in the original decision.[12] Given the significance of certain facts, they, along with the few new facts not previously discussed, are set out below.

The Tribe lost its federal recognition through a termination act[13] in 1962 and regained its federal recognition through the Ponca Restoration Act (PRA)[14] in 1990. On June 24, 1994, the Tribe adopted a Constitution.[15] Article IV of the Constitution created the Ponca Tribal Council, a

[12] Commission decision at 2-5.
[13] 25 U.S.C. §§ 971-980 (2012). Effective September 1, 2016, as part of a renumbering effort, the House of Representatives' Office of Law Revision Counsel removed more than 1,000 statutory provisions codified in Title 25, including the Ponca Restoration Act.
[14] 25 U.S.C. §§ 983-983h (2012) (PRA).
[15] Constitution of the Ponca Tribe of Nebraska, Certificate of Results of Election (June 28, 1994) and Certificate of Approval (July 22, 1994) ("Constitution of the Tribe"); Interior approved the Constitution of the Tribe on July 22, 1994.

nine member body, which constitutes the governing body of the Tribe.[16] Article V sets forth the Tribal Council's powers.[17]

On September 24, 1999, the Tribe purchased the Carter Lake parcel in fee, and, on January 10, 2000, it requested that Interior take the parcel into trust in light of the Tribe's desire to provide services to its members there.[18] Later that year, the Bureau of Indian Affairs (BIA) Regional Director notified relevant state and local officials in Iowa of her decision to accept the Carter Lake parcel into trust for the benefit of the Tribe.[19] Iowa and Pottawattamie County appealed that decision to the Interior Board of Indian Appeals (IBIA). The IBIA affirmed the BIA Regional Director's decision on August 7, 2002.[20]

A. Events after IBIA decision

After the IBIA's decision, the Tribe's attorney, Iowa, and Pottawattamie County reached an agreement to avoid further litigation, as Iowa could have sued Interior in federal court over the decision to accept the Carter Lake parcel into trust. Although there is no evidence to show that the agreement was reduced to writing, it was acknowledged by Iowa and the Tribe's attorney, Michael Mason, who had handled the administrative litigation before the IBIA on behalf of the Tribe.[21] On November 26, 2002, the Tribe's attorney sent the BIA an e-mail message requesting the notice of intent to take the Carter Lake parcel into trust include the following language:

> The trust acquisition of the Carter Lake lands has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000 decision under the Regional Director's analysis of 25 C.F.R. 151.10(c).

[16] *Id.* Art. IV § 1.
[17] *Id.* Art. V § 1.
[18] Tribe Resolution 00-01.
[19] Letter from BIA Great Plains Regional Director to Carter Lake Mayor, Iowa Governor, Pottawattamie County Supervisors (Sept. 15, 2000).
[20] *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002).
[21] *See* Affidavit of Jean M. Davis at ¶ 8 ("During the State's IBIA appeal, the Ponca Tribe of Nebraska was represented by Michael Mason of Oregon City, Oregon.") (Aug. 16, 2012).

> As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. sec. 2719(b)(1)(B). There may be no gaming or gaming-related activities on the land unless and until approved under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations under Section 20 of the Indian Gaming Regulatory Act has been obtained.[22]

In so doing, the Tribe's attorney stated: "Following is the language to append to the notice of decision for the trust acquisition for the Ponca Tribe of Nebraska in Carter Lake. This was negotiated with Assistant Attorney General Jean Davis of the State of Iowa and County Attorney Richard Crowl of Pottawattamie County, Iowa."[23] And he further added that "[o]n behalf of the Ponca Tribe of Nebraska, I request publication of the decision to take the Tribe's Carter Lake lands into trust as soon as possible."[24]

On December 6, 2002, the BIA published the Corrected Notice, which included the above language.[25]

On December 13, 2002, Iowa Assistant Attorney General Jean M. Davis wrote a letter to Mr. Mason at his office in Oregon stating, in part:

> Based upon our agreement that the lands will be used in a manner consistent with the original application and the corrected Public Notice, and not for gaming purposes, you have requested that the State of Iowa and Pottawatomie County forego judicial review and further appeals. Inasmuch as the corrected Public Notice now filed in this case contains the non-gaming purpose restriction to which we have agreed, the State of Iowa has agreed not to pursue judicial review or further appeals of the final decision of the United States Department of the Interior in this case.[26]

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[22] E-mail from Michael Mason to BIA Superintendent, Yankton Agency, re: Carter Lake settlement language (Nov. 26, 2002).
[23] *Id.*
[24] *Id.*
[25] *See supra* note 10 (Corrected Notice).
[26] Letter from Jean M. Davis, Assistant Attorney General, Iowa Department of Justice, to Michael Mason re: Ponca Tribe of Nebraska, Department of the Interior, Trust Acquisition of Carter Lake lands (Dec. 13, 2002).

Subsequently, the Tribe executed a deed conveying the Carter Lake parcel to the United States, and Interior completed the trust acquisition in February 2003.[27]

B. Gaming Ordinance Approval Process Before the NIGC

In October 2005, the Tribe, through its attorneys at the law firm Faegre and Benson, requested that the NIGC Office of General Counsel (OGC) issue an advisory legal opinion regarding the Carter Lake parcel, opining that the parcel constitutes restored lands for a restored tribe.[28] The attorneys' letter noted that "the Tribe orally agreed not to use the Carter Lake Parcel for gaming purposes provided the State and County agreed not to bring suit," citing to Ms. Davis' December 13, 2002 letter.[29] But, by invoking the restored lands exception, the letter also made clear that the Tribe did not consider itself bound by that oral agreement. This legal opinion request was subsumed by the Tribe's subsequent submission in February 2006 of a site-specific gaming ordinance for the Chair's review, which was withdrawn in May 2006.[30]

Iowa presented its views on the restored lands question to NIGC in an April 2006 letter, stating, *inter alia*, that "a serious argument may be made that the Tribe is now estopped from claiming that the restored lands exception … is applicable to the Carter Lake parcel."[31]

The Tribe's attorneys responded to this argument in a June 2006 letter, explaining that "any statements made by Michael Mason after the IBIA decision ... were not authorized by the

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[27] Warranty deed (Jan. 28, 2003); Letter from BIA Acting Great Plains Regional Director to BIA Superintendent, Yankton Agency (Feb. 10, 2003).

[28] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel for NIGC, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion (Oct. 7, 2005); *See, generally,* http://www.nigc.gov/general-counsel/nigc-office-of-the-general-counsel; http://www.nigc.gov/general-counsel/indian-lands-opinions ; and http://www.nigc.gov/images/uploads/game-opinions/SubmittingRequestforLegalOpinionDec112013.pdf

[29] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion at 9 (Oct. 7, 2005).

[30] Letter from Vanya S. Hogen, Faegre and Benson, to NIGC Chairman Hogen re: Amended & Restated Gaming Ordinance for Ponca Tribe of Nebraska (Feb. 13, 2006); Letter from Vanya S. Hogen, Faegre and Benson, to NIGC Commissioner Choney re: Amended and Restated Gaming Ordinance for Ponca Tribe of Nebraska (May 9, 2006).

[31] Letter from John R. Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Office of General Counsel, at 3 (April 21, 2006).

Tribe" and that "it is not reasonable to rely on an agreement with a governmental entity without having received confirmation that the agreement was in fact presented to and authorized by the government."[32] In August 2006, by resolution of its Tribal Council, the Tribe addressed the language in the Corrected Notice, declaring: "the Tribal Council was not aware of and did not approve the language that was added to the amended notice (the 'Acknowledgment Language'), but acknowledges that the Tribe's attorney did know about the Acknowledgment Language."[33]

Approximately a year later, in July 2007, the Tribe resubmitted the site-specific gaming ordinance for the Chair's review. The Chair disapproved that ordinance on October 22, 2007, on the grounds that the specified land was after-acquired trust land not eligible for gaming pursuant to Section 20 of IGRA, 25 U.S.C. § 2719, because, although the Tribe qualified as a restored tribe, the Carter Lake parcel did not qualify as restored lands.[34] The Tribe appealed the Chair's decision to the Commission pursuant to NIGC regulations, 25 C.F.R. § 524.1.[35] The record before the full Commission on appeal included 15 substantive submissions from the Tribe and States. The full Commission reversed the Chair's decision on December 31, 2007.

C. Litigation of Gaming Ordinance Approval

The States and the City challenged the Commission decision, suing NIGC and Interior, and the U.S. District Court for the Southern District of Iowa (District Court) reversed the decision. Its reversal was based in part on the Commission's failure to consider the agreement between Iowa and the Tribe's attorney and the Corrected Notice. The Commission and Interior

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[32] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska-Request for an Indian Lands Opinion (Supplemental Material) at 3-6 (June 15, 2006).
[33] Tribe Resolution 06-27. By a subsequent resolution in April 2007, the Tribal Council reiterated almost the exact same point. *See* Tribal Resolution 07-25 ("the Tribal Council was not aware of and did not approve the language that was added to the amended notice (the "Acknowledgement Language"), but acknowledges that the Tribe's attorney apparently did know about the Acknowledgement Language).
[34] NIGC Chairman's Disapproval Memorandum (Chair Disapproval).
[35] NIGC regulations concerning appeals from disapprovals of gaming ordinances were updated in 2012 and now can be found in 25 C.F.R. part 582.

appealed, and the 8th Circuit held that "the absence of a determination on the record as to the validity of the agreement entered into between [] Iowa and the Tribe necessitates a remand."[36] Specifically, the 8th Circuit found that "[i]f the NIGC concludes that no valid agreement exists estopping the Tribe from raising the 'restored lands' exception, then it may proceed to reexamine whether the Carter Lake land is eligible for gaming under the IGRA's 'restored lands' exception."[37] Additionally, the 8th Circuit remanded the question of whether the PRA[38] limits the Tribe's "restored lands" under IGRA to Knox and Boyd counties in Nebraska, indicating that Interior should make this determination. The 8th Circuit remanded the case to the District Court with instructions to remand it further to the Commission for reconsideration of its restored lands analysis in accordance with the court's opinion.[39] On January 24, 2011, the District Court issued its remand order, directing the Commission to reconsider its restored lands analysis in accordance with the 8th Circuit's opinion and directing that "[r]econsideration should include all of the issues analyzed and explained in the Court of Appeals majority opinion."[40]

D. Remand Process Before the NIGC

For purposes of considering the issues required by the courts, NIGC and Interior set out two separate briefing schedules for the Tribe, the States, and the City. First, the Solicitor and NIGC invited the Tribe, States, and City to submit legal memoranda and supporting materials on the threshold question of whether the PRA limits the Tribe's restored lands to Knox and Boyd Counties in Nebraska.[41] On that issue, opening and response submissions were received from the

[36] *Nebraska*, 625 F.3d at 511.
[37] *Id.* at 512.
[38] 25 U.S.C. §§ 983-983h.
[39] *Nebraska* , 625 F.3d at 513.
[40] *Nebraska v. U.S. Dept. of the Interior*, No. 1-08-cv-6 (S.D. Iowa).
[41] Letter from Interior Solicitor and NIGC General Counsel to all parties (Feb. 15, 2011).

Tribe[42] and from the States and City.[43] Next, the Commission ordered briefing and requested evidence from the parties on three issues: (1) the authority of the Tribe's attorney, Mr. Michael Mason, to enter the agreement on behalf of the Tribe; (2) the legal effect and weight of the agreement as included in the Corrected Notice; and (3) the legal effect and weight of the Corrected Notice.[44] In response, we received opening and response submissions from all the parties.[45]

After carefully considering the parties' submissions along with the other aforementioned materials described above, NIGC followed the process outlined in the 8th Circuit opinion and the District Court order and consulted with the Department of the Interior Solicitor's Office on this decision.

II. The Agreement is Invalid and the Tribe is Not Estopped from Claiming the Carter Lake Parcel Meets IGRA's Restored Lands Exception.

As explained above, the 8th Circuit held that remand was necessary because there was no determination as to the validity of the agreement between Iowa and the Tribe's attorney.[46] Accordingly, we must determine whether the agreement is valid.[47] If it is, we must assess the

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[42] Memorandum from Tribe to Interior and NIGC re: the PRA (Mar. 17, 2011); Letter from James T. Meggesto, Akin Gump, to Jeffrey Nelson, Office of Solicitor, Interior and NIGC General Counsel Larry Roberts, re: *Nebraska v. U.S. Dept. of the Interior,* No, 1-08-CV-6 (S.D. Iowa) (April 25, 2011).

[43] Consolidated Response from the States of Iowa and Nebraska (States), and City of Council Bluffs, Iowa (City), submitted to Interior (Mar. 15, 2011); Letter from States to Solicitor (April 6, 2011).

[44] NIGC Commission Briefing Order (May 21, 2012).

[45] Tribe's Legal Memorandum Responding to the May 21, 2012 Request for Briefing (July 20, 2012); Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order (July 20, 2012); Tribe's Response to the Consolidated Brief of the States and City (Aug. 20, 2012); Consolidated Response Brief of the States and City (Aug. 20, 2012).

[46] *Nebraska*, 625 F.3d at 511.

[47] As an aside, it is important to note that IGRA does not provide NIGC or Interior with the authority or jurisdiction to hear breach of contract claims or issue decisions on them. NIGC's jurisdiction is rooted in its authority to implement the provisions of IGRA. 25 U.S.C. §§ 2712(b)(2); 2706(b)(10). In addition to Interior's authority as to Indian lands and the § 2719 exceptions, it has authority and duties as to tribal-state compacts, Class III procedures, and tribal revenue allocation plans. 25 U.S.C. §§ 2703(4); 2710(b)(3), (d)(3)(B), (d)(7)(vii); 2719. The agencies cannot expand their jurisdiction to include the authority to arbitrate agreements between tribes and third parties, because federal agencies do not have the power to arbitrate disputes or rule on matters outside the jurisdiction established by their enabling acts. *American Vanguard Corp v. Jackson*, 803 F. Supp. 2d 8, 12 (D.D.C. 2011) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("A basic prerequisite to any act by a

impact of the agreement for purposes of the factual circumstances factor of the restored lands analysis. We conclude that the agreement included in the Corrected Notice was repudiated by the Tribe in 2005 and therefore the Tribe is not estopped from claiming the Carter Lake parcel meets the restored lands exception to IGRA's prohibition against gaming on land taken into trust after October 19, 1988.

A. The Tribe's Attorney Lacks Authority to Bind the Tribe

i. Parties' arguments

The Tribe argues that any agreement by Mr. Mason is invalid because he lacked authority to enter into it on the Tribe's behalf.[48] The Tribe posits that "[p]arties seeking to enforce an agreement against a governmental entity have the burden of demonstrating affirmatively that the agent who purported to bind the government had actual authority to do so."[49] According to the Tribe, "[l]ong-settled law establishes that governments – federal, state and tribal – are not and cannot be bound in perpetuity by the unauthorized acts of their agents."[50] And, as a matter of

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federal agency is that the agency possesses actual legal authority to undertake such action.")); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 158 (D.D.C. 2000) ("In all its actions, an agency is constrained by the statutory authority given by Congress."); *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139-40 (D.C. Cir. 2006) (*quoting, in part, MCI Telecomms. Corp. v. AT & T*, 512 U.S. 218, 231 n. 4 (1994) - "Agencies are therefore 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'"). Thus, we agree with the States' assertion that "[t]he central issue [in the remand]. . . is not whether to 'enforce' the agreement – that question appears to be beyond the power of the NIGC's jurisdictional mandate – but what import to give it in this proceeding." July 20, 2012 Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order.

[48] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Request for an Indian Lands Opinion (Supplemental Material) at 4-5 (June 15, 2006) ("Michael Mason lacked any authority to enter into a settlement on behalf of the Tribe"); Letter from Michael G. Rossetti and James T. Meggesto, Akin Gump, to NIGC Chairman Hogen, re: The Ponca Tribe of Nebraska - Request for an Indian Lands Opinion at 30 (July 23, 2007) (no agreement exists); Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 18 (no agreement with Tribe exists), at 31-33 (attorney acted beyond scope of his authority given the limitations set forth in tribal law and express reservations to the Tribal Council in same); Tribe's Aug. 20, 2012 Response to the Consolidated Brief of the States and City at 13 (no valid agreement exists).

[49] Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 9-11.

[50] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Amended Gaming Ordinance/Request for Indian Lands Opinion (Supplemental Material) at 12 (July 14, 2006) (citing Constitution of the Tribe, Art. V § 1(a)); Tribe's July 20, 2012 Legal Memorandum

tribal law, the Tribe's Constitution bestows the actual authority to enter into agreements with other governments on the governing body, the Tribal Council.[51] Thus, the Tribe claims that the agreement contravenes tribal law.[52]

Since the beginning of this matter, the Tribe has put forward an agreement with the City of Carter Lake as an illustration of how it made agreements with other governments during the time period at issue.[53] The Tribal Council passed Resolution 00-29 on April 17, 2000, authorizing a jurisdictional and services agreement with the City of Carter Lake for land that was potentially being taken into trust for the Tribe. The resolution explicitly stated that the "business affairs [of the Tribe] are conducted by the Tribal Council," and references the provision of the Tribal Constitution that authorizes the Tribal Council to negotiate and contract with other governments.[54] Further, the resolution announced that "[r]epresentatives of the Tribal Council and the City have negotiated an agreement on services and jurisdiction, including payments in lieu of taxes for the Property, and concurrent jurisdiction over disputes."[55] Next, the Tribal Council resolved that:

> [T]he Ponca Tribe approves and enters into the Cooperation and Jurisdictional Agreement with the City of Carter Lake ....[56] [T]he Tribal Council authorizes the

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Responding to the May 21, 2012 Request for Briefing at 10-14, 31-33; Tribe's Aug. 20, 2012 Response to the Consolidated Brief of the States and City at 3, 4-5, 12.

[51] Tribe's Aug. 20, 2012 Response to the Consolidated Brief of the States and City at 3 4, 5, 6, 12-14, 31-33.

[52] *Id.* at 4 (agreement contravened Tribal law, Constitution of the Tribe, Art. V § 1(a)), 6 (the agreement violates the Constitutional provision "vesting Tribal Council with the *exclusive* authority to 'negotiate and contract with the Federal State and Local governments on behalf of the Tribe.'"), 12 (the agreement cannot bind the Tribe, as it was made without authority and "thus contrary to Tribal law"); *see also* Letter from Michael G. Rossetti and James T. Meggesto, Akin Gump, to NIGC Chairman Hogen, re: The Ponca Tribe of Nebraska- Request for an Indian Lands Opinion at 30 (July 23, 2007) (Corrected Notice not lawfully authorized).

[53] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Request for an Indian Lands Opinion (Supplemental Material) at 4 (June 15, 2006); Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 18-19.

[54] Tribe Resolution 00-29 at 1 (April 17, 2000); *see also* Cooperation and Jurisdictional Agreement between the Tribe and the City of Carter Lake (Apr. 27, 2000).

[55] *Id.*

[56] *Id.*

> Tribal Council Chairman to negotiate minor changes to the Agreement to carry out this Resolution.[57]

The States responded to the Tribe's legal arguments regarding the limitations on government agents' ability to bind their principals and the Tribe's reliance on cases regarding tribal officials' limitations based upon unequivocal language in tribal constitutions, by insisting that such cases are irrelevant in this context.[58] The States also put forward substantive arguments and evidence regarding the actual authority and apparent authority of the Tribe's attorney.

Iowa argued that because the Tribe's attorney's actions were made in the context of litigation, a "pending dispute" between it and the Tribe, the Tribe may be bound by its attorney's agreement even if it was made without express actual authority since the Tribe failed to timely repudiate it.[59] In this regard, Iowa points out that the Corrected Notice, detailing the agreement, was published in a paper of general circulation, but "despite wide public dissemination of Mr. Mason's representations, only now [approximately 3 ½ years later] is the tribe attempting to repudiate" such actions and has failed to directly notify Iowa of Mr. Mason's "purportedly ultra vires actions."[60]

The States contend that the Tribe's attorney in fact had implied actual authority or apparent authority to enter into the agreement.[61] Specifically, the States posit that because "Mr. Mason represented the Tribe throughout the IBIA appeal and continued to represent the Tribe thereafter when the BIA and the Tribe knew that Iowa intended to challenge the trust acquisition

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[57] *Id.* at 2.
[58] Consolidated Response Brief of the States and City at 8 (Aug. 20, 2012); *see also id.* fn. 8.
[59] Letter from John Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Senior Attorney, re: Pending "Indian lands" decision for the Ponca Tribe in Nebraska in Carter Lake, Pottawattamie, Iowa, at 3-4 (July 19, 2006) (relying on and quoting *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089 (Ct. Cl. 1981)); *see also* Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 13 (July 20, 2012).
[60] *Id.* at 4.
[61] Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order (July 20, 2012) at 13-15; Consolidated Response Brief of the States and City at 3-10 (Aug. 20, 2012).

in federal court," he had implied or apparent authority to enter into an agreement or stipulation regarding the Carter Lake parcel.[62] In support of this argument, the States rely on and quote *Pueblo of Santo Domingo v. United States*,[63] for the proposition that "[a]n attorney employed for the purposes of litigation has the general implied or apparent authority to enter into such stipulations or agreements, in connection with the conduct of the litigation, as appears to be necessary or expedient for the advancement of his client's interest or to accomplishment of the purpose for which the attorney was employed."[64] Furthermore, the States assert that the litigation context also provides "a strong rebuttable presumption that the acts of [the Tribe's] attorney are within the scope of his employment" unless the Tribe can show that Iowa knew of relevant restrictions on his authority.[65] And, here, nothing in the record shows that Iowa was on notice in 2002 through 2003 of "any alleged limitation on the authority" of the Tribe's attorney, certainly not the Tribe's belated 2006 tribal resolution disclaiming the knowledge or approval of the language in the Corrected Notice.[66]

Finally, the States claim that Mr. Mason's communications with Ms. Davis, Iowa's attorney; Interior; and the public demonstrate that he possessed apparent authority.[67] Specifically, the communications with Iowa's counsel were detailed in affidavit by Ms. Davis, testifying:

> In the fall of 2002, I had multiple discussions with Mr. Mason concerning a possible negotiated resolution of the pending Carter Lake lands into trust issue. In a telephone conversation held September 13, 2002, Mr. Mason advised me that the Tribe had instructed the BIA to delay publication of the required public notice … so the parties would have time to reach a negotiated settlement. … On behalf of our respective clients,

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[62] Consolidated Response Brief of the States and City at 14 (Aug. 20, 2012).
[63] 647 F.2d 1087 (Ct. Cl. 1981).
[64] *Id.* at 1088–89.
[65] Consolidated Response Brief of the States and City at 15 (Aug. 20, 2012); *id.* (quoting *Pueblo of Santo Domingo v. United States*, 647 F.2d at 1088-89).
[66] Consolidated Response Brief of the States and City at 15 (Aug. 20, 2012).
[67] *Id.* at 8.

> Mr. Mason and I ultimately negotiated an [oral] agreement … [P]rior to the conclusion of the negotiations, I directly asked Mr. Mason whether he had the authority to bind the Tribe to the terms of the proposed settlement and he answered that he did.[68]

In addition, in the affidavit, Ms. Davis referenced a September 2002 article in the *Omaha World Herald* concerning the potential judicial review of the IBIA's decision which quoted Mr. Mason as saying: "We're hoping to resolve this and clarify that this is not an acquisition for gaming."[69]

ii. *Authority to Enter into an Agreement on Behalf of a Sovereign*

Our analysis begins with a discussion of Mr. Mason's authority to bind the Tribe to an agreement with the State. In doing so, the Commission is mindful of the admonition of the Court of Claims:

> [T]he court may not substitute itself unconditionally for the executive in granting authority to an unauthorized person. The most the court can do is interpret the limited authority of an authorized person in a broader manner than ordinarily would be the case. As a predicate to a finding of implied actual authority, there must be, at the least, some limited, related authority upon which the court can "administer" the law so as not to ignore the policies and decisions of those persons charged with managing [the government]. The court believes that *Landau* and the theory of implied actual authority is of limited application, and was not intended to repeal the long established rule that, when dealing with the government, only government agents with actual authority can make a contract, express or implied.[70]

As discussed above, Iowa appealed a decision by the Bureau of Indian Affairs to accept the Carter Lake parcel into trust. Although not a party[71] to the appeal, the Tribe retained Mr. Mason to represent the Tribe's interests in the matter.[72] Several months after the IBIA ruled in the BIA's favor, Mr. Mason entered into the agreement at issue here in an attempt to prevent further litigation by the State against Interior. Although the agreement did not settle litigation,

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[68] Affidavit of Jean M. Davis at ¶¶ 8, 9, 11-12, 14, *supra* note 21.
[69] *Id.* at ¶ 14 (*attaching, Omaha World Herald,* "Carter Lake land owned by tribe won't become casino" (Sept. 29, 2002)).
[70] *California Sand & Gravel, Inc. v. United States*, 22 Cl. Ct. 19, 27 (1990), *aff'd,* 937 F.2d 624 (Fed. Cir. 1991).
[71] The Tribe was an "interested party" in the IBIA proceeding. *See* Brief of Tribe, Board of Indian Appeals, Interior (April 30, 2001). Interior regulations provide that an "interested party" "means any person whose interests could be adversely affected by a decision in an appeal." 25 C.F.R. § 2.2.
[72] Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 3.

since no litigation had been filed and the Tribe was not a party to the IBIA proceedings, it did resolve the State's concern regarding the trust acquisition. The question that must be addressed here, though, is whether Mr. Mason had the authority to enter the agreement.

In their briefs, the States underscore that "Mr. Mason's communications with Iowa's counsel, with the BIA and with the public, as well as the record as a whole, indisputably show that he had apparent authority."[73] Specifically, the communications with Iowa's counsel were detailed in the affidavit submitted by the counsel, who testified that Mr. Mason "advised [] that the Tribe had instructed the BIA to delay publication of the required public notice … so the parties would have time to reach a negotiated settlement;" and that "he had the authority to bind the Tribe to the terms of the proposed settlement."[74] As for the BIA, Mr. Mason provided the agency with the proposed language for the Corrected Notice, representing that he negotiated the language with Iowa's counsel,[75] and requesting, explicitly on behalf of the Tribe, publication of the decision to take the Tribe's Carter Lake parcel into trust.[76]And, the communications with the public involve a September 2002 article in the *Omaha World Herald* concerning the potential judicial review of the IBIA's decision, in which Mr. Mason is quoted as saying: "We're hoping to resolve this and clarify that this is not an acquisition for gaming."[77] Additionally, Iowa suggests that Mr. Mason's actions and the Tribe's be assessed by actions of a subsequent attorney for the Tribe, who sought to obtain consent from Iowa to a two-part determination to

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[73] Consolidated Response Brief of the States and City at 8 (Aug. 20, 2012).
[74] Affidavit of Jean M. Davis at ¶¶ 9, 14, *supra* note 21.
[75] E-mail from Michael Mason to BIA Superintendent, Yankton Agency, re: Carter Lake settlement language (Nov. 26, 2002).
[76] *Id.*
[77] Affidavit of Jean M. Davis at ¶ 14, *supra* note 21 (*attaching, Omaha World Herald,* "Carter Lake land owned by tribe won't become casino" (Sept. 29, 2002)).

allow gaming on the Carter Lake parcel and, thus, "appears to have" implicitly acknowledged Mr. Mason's agreement.[78]

Although Mr. Mason may have had apparent authority to take certain actions when representing the Tribe in a court or administrative proceeding, such as filing of pleadings, propounding of discovery, waiver of trial objections, and appearances at merits hearings, none of those activities are at issue here. Notably, the agreement between Mr. Mason and Iowa was not entered as part of a court or administrative proceeding.[79] But, even more to the point here, the States' contentions overlook the fact that they were dealing with another sovereign – the Ponca Tribe of Nebraska. Due to the Tribe's status as a sovereign government,[80] the Commission will apply the same standards to the Tribe that apply to other sovereigns, such as state and federal governments.[81] Doing so leads to the clear conclusion that to bind a sovereign to a contract or agreement, the government agent needs to possess actual authority to enter the agreement.[82]

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[78] Letter from John Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Senior Attorney, re: Pending "Indian lands" decision for the Ponca Tribe in Nebraska in Carter Lake, Pottawattamie, Iowa, at 4 (July 19, 2006).

[79] Letter from Iowa Attorney General to NIGC Senior Attorney at 3 (Apr. 21, 2006) (acknowledging that agreement occurred after conclusion of IBIA proceeding.). The IBIA issued its decision on August 7, 2002, and Ms. Davis acknowledged her agreement with Mr. Mason in a letter, dated December 13, 2002. *See* Letter from Jean M. Davis, Assistant Attorney General, Iowa Department of Justice, to Michael Mason re: Ponca Tribe of Nebraska, Department of the Interior, Trust Acquisition of Carter Lake lands (Dec. 13, 2002).

[80] *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L.Ed. 25 (1831) ("Indian tribes . . . exercise 'inherent sovereign authority.'"); *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (finding that Tribes are "quasi-sovereign tribal entities"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) ("As we observed in *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 711, 42 L.Ed.2d 706 (1975)(Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' They 'are unique aggregations possessing attributes of sovereignty over both their members and their territory.'") (internal citations omitted).

[81] *See, e.g., CDST-Gaming I, LLC v. Comanche Nation*, No. CIV-08-A12, Court of Indian Appeals, Southern Plains Region, Anadarko, Okla., at 8-9 (May 15, 2017) ("Tribe is a sovereign government, and law applicable to governments on public contracts, not private commercial dealings, controls. .... In an action involving contract formation, the party asserting the validity of the contract bears the burden that the contract was made by a person having authority to bind the government.").

[82] *See Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997); *Negron Gaztambide v. Hernandez Torres*, 145 F.3d 410, 412, 416 (1st Cir. 1998); *Tracy v. United States*, 55 Fed. Cl. 679, 682 (2003); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); *Hachikian v. F.D.I.C.*, 96 F.3d 502, 505 (1st Cir. 1996), *abrogated by Hardemon v. City of Boston*, No. 97-2010, 1998 WL 148382 (1st Cir. Apr. 6, 1998); *Rock Island, Ark. & La. R.R. Co. v. United States,* 254 U.S. 141, 143(1920) (Holmes, J.); *CDST-Gaming I, LLC v. Comanche Nation*, No. CIV-08-A12, Court of Indian Appeals, Southern Plains Region, Anadarko, Okla. (May 15, 2017); *See, e.g., Moore v. Beaufort County,* 936 F.2d 159, 163 (4th Cir.1991).

Even in the context of the government being represented by attorneys, the attorneys still need actual authority to bind the sovereign.[83] In that regard, the States misplace reliance[84] on *Pueblo of Santo Domingo v. United States*.[85] The Court of Claims in that case acknowledged that "[u]nless he has been specifically authorized to do so (i. e., not merely impliedly or apparently), an attorney may not by stipulation or agreement, surrender any substantial rights of his client."[86]

Actual authority may be express or implied.[87] "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms."[88] Implied actual authority "is restricted to situations where 'such authority is considered to be an integral part of the duties assigned to a government employee.'"[89] Further, "[c]ontracting authority is integral to a government employee's duties when the government employee could not perform his or her assigned tasks without such authority and the relevant agency regulation does not grant such authority to other [] employees."[90]

As the party attempting to bind the sovereign Tribe to the terms of the agreement, the burden is on the States to demonstrate that the Tribe's attorney had express or implied actual authority to enter into the agreement.[91] The record before us does not contain any materials

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[83] *Margalli-Olvera v. I.N.S.*, 43 F.3d 345, 353 (8th Cir. 1994); *Negron Gaztambide*, 145 F.3d at 412; *Moore*, 936 F.2d at 163.
[84] Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 14-15 (July 20, 2012).
[85] 647 F.2d 1087, 1089 (Ct. Cl. 1981).
[86] *Id.* at 1088.
[87] *Anderson v. United States*, 344 F.3d 1343, 1353 n. 3 (Fed.Cir. 2003).
[88] *Tracy*, 55 Fed. Cl. at 682.
[89] *Aboo v. United States*, 86 Fed. Cl. 618, 627, *aff'd*, 347 F. App'x 581 (Fed. Cir. 2009) (citing *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989).
[90] *Liberty Ammunition, Inc. v. United States*, 119 Fed. Cl. 368, 404 (2014) (quoting *Flexfab, LLC v. United States*, 62 Fed. Cl. 139, 148 (2004)), *aff'd*, 424 F.3d 1254 (Fed. Cir.2005).
[91] *Negron Gaztambide*, 145 F.3d at 416; *Contractor Ser., Inc. v. N.L.R.B.*, No. 3-00-10034, 2000 WL 1780461, at *6 (S.D. Iowa Oct. 11, 2000); *City of El Centro*, 922 F.2d at 821; *Trauma Serv. Grp.*, 104 F.3d at 1327.

demonstrating that the Tribe's attorney had express or implied actual authority to bind the Tribe to the agreement.

As to express actual authority, Article V, § 1(a) of the Tribe's Constitution, clearly authorizes the Tribal Council "to negotiate and contract with the Federal, State, and local governments on behalf of the Tribe."[92] The record reflects that during the time period of 1999 through 2001, the Tribe entered into three agreements with other governments - the cities of Lincoln and Crofton, Nebraska, and Carter Lake, Iowa. The 1999 and 2001 agreements with the cities of Lincoln and Crofton explicitly acknowledge the Tribe's Constitution, Article V § 1(a), as its authority for entering the agreement.[93] The Tribal Chairman signed both agreements. As discussed above, the Tribe has continuously put forward a 2000 agreement with the City of Carter Lake as illustrative of its process for entering into inter-governmental agreements. That agreement noted that the Tribe authorized its Chairman to execute the agreement via a resolution of its Tribal Council.[94] And, the corresponding Tribal Council resolution declares: "[t]he Constitution provides the express power to the Tribal Council to negotiate and contract with local governments on behalf of the Tribe."[95] Unlike the agreement at issue here, these resolutions clearly demonstrate express actual authority.

Additionally, nothing in the Tribe's Constitution authorizes a private attorney retained for a specific matter to enter into agreements on behalf of the Tribe. The Tribe's Constitution grants the Tribal Council the authority to "employ counsel for the protection and advancement of the

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[92] Constitution of the Tribe, Article V, § 1(a).
[93] *See* Agreement between the Tribe and City of Lincoln, Nebraska (May 28, 1999); Cooperation and Jurisdictional Agreement of the Tribe and City of Crofton, Nebraska (Oct. 24, 2001).
[94] Cooperation and Jurisdictional Agreement between the Tribe and the City of Carter Lake (Apr. 27, 2000); *see also* Tribe Resolution 00-29 (April 17, 2000) ("the Tribal Council authorizes the Tribal Council Chairman to negotiate minor changes to carry out this Resolution.").
[95] Tribe Resolution 00-29.

rights of the Tribe."[96] While the Tribal Council could have tasked Mr. Mason with negotiating with Iowa following the IBIA's decision, it is implausible that the Tribal Council would surrender to outside counsel the ultimate decision whether to enter into an agreement. Further, the record does not contain any evidence of such an extraordinary delegation of authority from the Tribal Council to Mr. Mason.[97]

Likewise, Mr. Mason did not possess implied actual authority to enter into the agreement. As set forth above, implied actual authority is limited to situations where the authority is "an integral part of the duties assigned to a government employee,"[98] meaning the government employee could not perform his assigned tasks without such authority. Mr. Mason was not a "government employee," but a private attorney retained to represent the Tribe for a specific matter.[99]

The doctrine of implied actual authority does not ordinarily extend to government contractors.[100] In addition, negotiating an agreement with Iowa after the conclusion of the IBIA proceeding cannot fairly be characterized as an integral part of his duties to represent the Tribe in

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[96] Constitution of the Tribe, Article V, § 1(b).

[97] *See, e.g., Humlen v. United States*, 49 Fed. Cl. 497, 504 (2001) ("Without a formal delegation of contracting authority, such designation is not enough to give a contracting officer's 'authorized representative' the requisite authority to bind the Government in contract."); *see also United States v. Lua*, 990 F. Supp. 704, 714 (N.D. Iowa 1998) ("The court [] concludes that Kozak has failed to establish that the FBI agents assigned to the [] investigation possessed actual authority to make an agreement with Kozak for her cooperation. Accordingly, Kozak is not entitled to specific performance of the alleged cooperation agreement because Kozak has failed to establish that the FBI agents were authorized to make promises to obtain defendant's cooperation. Absent such authority, there is no delegation of federal authority in the record.").

[98] *Aboo*, 86 Fed. Cl. at 627 (citing *H. Landau & Co.*, 886 F.2d at 324 ; *see also Cruz-Pagan v. United States*, 35 Fed. Cl. 59, 63 (1996) (finding that "integral" means "necessary or essential" to the employee's efficient performance of those duties); *United States v. Lilly*, 810 F.3d 1205, 1211 (10th Cir. 2016) ("integral" for purposes of implied actual authority requires that "the authority [] be incidental to some other express grant of authority." "Because implied actual authority emanates from an agent's core competency, the agent must first possess express actual authority in the subject area at question before implied authority may be invoked." (internal citations omitted)).

[99] Mr. Mason was a contractor, who owned his own legal office in Oregon and worked from it. *See* Affidavit of Jean M. Davis at ¶ 8, *supra* note 21 ("During the State's IBIA appeal, the Ponca Tribe of Nebraska was represented by Michael Mason of Oregon City, Oregon."); Letter from Jean M. Davis, Assistant Attorney General, Iowa Department of Justice, to Michael Mason re: Ponca Tribe of Nebraska, Department of the Interior, Trust Acquisition of Carter Lake lands (Dec. 13, 2002).

[100] *Liberty Ammunition, Inc.*, 119 Fed. Cl. at 404, 405(quoting *Flexfab, LLC*, 62 Fed. Cl. at 148); *see also Peninsula Grp. Capital Corp. v. United States*, 93 Fed. Cl. 720, 731 (2010).

the IBIA proceeding. Moreover, even if Mr. Mason had some post-proceeding authority to negotiate, entering into an agreement with another government cannot be an integral part of his duties. As a general matter, and as the Tribe's Constitution itself makes clear, the decision to enter into an agreement lies with the client, the Tribal Council.

That Mr. Mason might have believed he had the authority to bind the Tribe is of no consequence here. Express or implied actual authority to bind the sovereign must exist "even when the government agents themselves may have been unaware of the limitations on their authority."[101] Thus, the record contains no evidence that Mr. Mason had express or implied actual authority to enter the agreement.

iii. Any party entering a contract with a federally recognized Indian Tribe accepts the risk of correctly ascertaining the authority of the agents who purport to act for the Indian Tribe.

By entering into an agreement with an agent of a sovereign tribe, the State accepted the risk of inaccurately assessing the agent's authority to bind the Tribe.[102] In that regard, courts have held:

> In order to create a binding contract with the federal government, the government's representative must have actual authority to enter into the contract. Actual authority may be express or implied. A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms. Implied actual authority is restricted to situations where such authority is considered to be an integral part of the duties assigned to a government employee. *Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.*[103]

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[101] *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (citing, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *United States v. Stewart*, 311 U.S. 60, 70 (1940) and *In re Floyd Acceptances*, 19 L.Ed. 169 (1868); *See also, Contractor Ser., Inc. v. N.L.R.B.*, No. 3-00-10034, 2000 WL 1780461, at *6 (S.D. Iowa Oct. 11, 2000).

[102] *Fed. Crop Ins. Corp.*, 332 U.S. at 384; *Marco Development Corp. v. City of Cedar Falls*, 473 N.W. 2d 41, 43 (Iowa 1991).

[103] *Jumah v. United States*, 90 Fed. Cl. 603, 612 (2009) *aff'd*, 385 F. App'x. 987 (Fed. Cir. 2010) (internal citations omitted) (emphasis added) (also citing *City of El Centro*, 922 F.2d at 820; *accord Harrison v. United States*, 120

The 8th Circuit has explicitly adopted this principle.[104] Even if the government agent is unaware of the limitations of his authority, the onus is still on the party contracting with the Federal Government to determine the true bounds of the agent's authority.[105] An example of this is *Contractor Services, Inc. v. National Labor Relations Board*, where the U.S. District Court in the Southern District of Iowa granted summary judgment in favor of the Board (NLRB) when a company claimed that an NLRB employee had entered into a settlement agreement with the company but the company failed to present evidence of its efforts to confirm the employee's authority. The court explained:

> Perhaps most importantly, however, CSI has failed to show that Mr. Palmer was authorized to make an offer of settlement on behalf of the NLRB. As held by the Federal Circuit in *Trauma Service Group*, the burden is on the party proposing to enter into an agreement with the United States to ensure the requisite authority exists, "even when the Government agents themselves may have been unaware of the limitations on their authority."*Trauma Service Group*, 104 F.3d 1321. CSI does not allege it took steps to ensure Mr. Palmer had obtained any authority to offer a settlement to CSI .... In short, even if Mr. Palmer had represented to CSI that he had authority to make the purported offer, it remained CSI's burden to confirm such authority existed. *Id.* Absent evidence suggesting CSI made any attempt to confirm Mr. Palmer's authority, the Court finds summary judgment appropriate.[106]

These principles also are well founded under Iowa law. In Iowa:

> One who contracts with a city is bound at his peril to know the authority of the officers with whom he deals, and a contract unlawful for lack of authority, although entered in good faith, creates no liability on the part of the city to pay for it, even in *quantum meruit.*[107]

Fed. Cl. 533, 546 (2015) and *Council for Tribal Employment Rights v. United States*, 112 Fed. Cl. 231, 243 (2013) *aff'd*, 556 F. App'x 965 (Fed. Cir. 2014). *Liberty Ammunition, Inc.*, 119 Fed. Cl. at 404, 405; *See Peninsula Grp. Capital Corp.*, 93 Fed. Cl. at 731.

[104] *United States v. Hoffart*, 256 F.2d 186, 192 (8th Cir. 1958); *see also Trauma Serv. Grp.*, 104 F.3d at 1325; *City of El Centro*, 922 F.2d at 820; *Jumah*, 90 Fed. Cl. at 612.

[105] *Federal Crop Ins. Corp.*, 332 U.S. at 384.

[106] *Contractor Ser., Inc. v. N.L.R.B.*, No. 3-00-10034, 2000 WL 1780461, at *6 (S.D. Iowa Oct. 11, 2000).

[107] *Marco Dev. Corp.*, 473 N.W.2d at 43(citing Am.Jur.2d *Municipal Corporations* § 504, at 557 (1971)).

Illustrative of this rule is *Madrid Lumber Co. v. Boone County*.[108] In this case, the Supreme Court of Iowa addressed a situation somewhat similar to the events at issue in this remand. A county Board of Supervisors accepted a proposal for work on a county home. Plaintiffs claimed that the Defendant County was estopped to deny liability under the oral agreement.[109] The Iowa Supreme Court disagreed and found:

> It is now well established that counties and municipal corporations, being creatures of the legislature, have such powers to contract and only such powers as the legislature grants them. When the legislature permits the exercise of power in a given case only in accordance with imposed restrictions, a contract entered into in violation thereof is not merely voidable but void. … When acting without authority or beyond its powers, the city council cannot estop the city, for, no matter what its representations, a party dealing with it is bound to take notice of all statutory limitations upon its authority.[110]

As to the present circumstances, when Iowa negotiated with Mr. Mason, it was certainly well aware of the unique nature of contracting with federally recognized Indian tribes. As discussed above, Iowa has entered into a number of agreements with other tribes in the state, including, as the Tribe points out, gaming compacts, as well as agreements related to the Indian Child Welfare Act.[111] And, even the Iowa legislature recognizes in its statutory law that agreements are entered into with the governing bodies of Indian tribes.[112] Therefore, the burden was on Iowa to confirm that Mr. Mason had the requisite actual authority to negotiate and enter into the purported agreement.

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[108] 55 Iowa 380, 381 (1963).
[109] *Id.* at 381.
[110] *Id.* at 383-384 (internal citations omitted).
[111] Tribe's July 20, 2012 Legal Memorandum Responding to the May 12, 2012 Request for Briefing at 16-17 (referencing compacts between Iowa and various tribes); *See* NIGC website – Compacts between Iowa and tribes - http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#Iowa , including approved compacts with the Omaha Tribe in 1992 & 1995, the Sac & Fox of the Mississippi in Iowa in 1995, and the Winnebago Tribe in 1995 & 1998; Tribal/State Agreement for Funding Tribal Foster Care Placements and Other Child Welfare Services Matters, between the Sac and Fox Tribe of the Mississippi in Iowa and Iowa (July 19, 2006).
[112] Iowa Code Ann. § 421.47 ("The department and the governing body of an Indian tribe may enter into an agreement to provide for the collection and distribution or refund by the department within Indian country of any tax or fee imposed by the state and administered by the department.").

The plain language of the Tribe's Constitution bestows express actual authority to enter into agreements with other governments on the Tribal Council, and the State has failed to meet its burden to demonstrate that Mr. Mason had express or implied actual authority to enter into the agreement on the Tribe's behalf. Thus, in accordance with the above analysis, we find – for the sole and narrow purpose of this remand – that the alleged agreement between Iowa and Mr. Mason is invalid.

B. Institutional Ratification: The Record Indicates that the Tribe Ratified the Unauthorized Agreement but also Timely Repudiated its Ratification in 2005.

The question then becomes whether the Tribe subsequently ratified the invalid agreement and is therefore bound by it. The States do not specifically argue the theory of institutional ratification but do contend the publication of the Corrected Notice constitutes the Tribe's acknowledgement of the agreement and communication "to the world" concerning it.[113] The Tribe did not, nor was it asked to, brief this argument.

"[I]nstitutional ratification may serve to validate an otherwise unauthorized contract."[114] Such ratification "may occur when the Government seeks and receives benefits from an unauthorized contract. It requires the involvement of government officials who have contracting authority and whose actions demonstrate 'clear acceptance of an unauthorized agreement.'"[115] "For an unauthorized promise to be binding under the doctrine of institutional ratification, an official with the power to ratify must know the material facts relating to the acceptance of the

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[113] State of Iowa's Request to Participate in Appeal and Written Submission at 6 (Nov. 29, 2007); Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 7 (July 20, 2012).
[114] *Home Fed. Bank of Tennessee, F.S.B. v. United States*, 57 Fed. Cl. 676, 689 (2003); *See also Digicon Corp. v. United States,* 56 Fed.Cl. 425, 426 (2003).
[115] *BioFunction, LLC v. United States*, 92 Fed. Cl. 167, 174 (2010) (*quoting, in part, Strickland v. United States,* 382 F.Supp.2d 1334, 1348 (M.D.Fl.2005)); *See also Doe v. United States*, 58 Fed. Cl. 479, 487-88 (2003), *aff'd*, 112 F. App'x 54 (Fed. Cir. 2004) ("Ratification requires knowing acquiescence to an unauthorized agreement"; "Plaintiff cannot show that there was *active* acceptance of his alleged contract").

benefits and must acquiesce in their acceptance."[116] These officials must "have actual or constructive knowledge of the unauthorized acts"[117] and fully know the material facts,[118] meaning the content of the unauthorized contract.[119]

As the U.S. Supreme Court has explained:

> Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event.... If there be want of it, though such want arises from the neglect of the principal, no ratification can be based on any act of his. *Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them.*[120]

To help us further understand the standard, Black's Law Dictionary defines *inference* as "[a] conclusion reached by considering other facts and deducing a logical consequence from them"[121] and defines *necessary inference* as "[a] conclusion that is unavoidable if the premise on which it is based is taken to be true."[122]

Lastly, the burden to demonstrate institutional ratification lies with the *plaintiff* or person or entity claiming it or the existence of a valid agreement.[123]

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[116] *Gary v. United States*, 67 Fed. Cl. 202, 217 (2005). *See also Villars v. United States, 126 Fed. Cl. 626, 633 (2016); P & K Contracting, Inc. v. United States, 108 Fed. Cl. 380, 390 (2012), aff'd, 534 F. App'x 1000 (Fed. Cir. 2013); SGS-92-X003 v. United States*, 74 Fed. Cl. 637, 654 (2007) (Institutional ratification "occurs when the Government seeks and receives the benefits from an otherwise unauthorized contract" and officials with ratifying authority know of the unlawful promise).

[117] *Doe v. United States*, 58 Fed. Cl. 479, 486 (2003), *aff'd*, 112 F. App'x 54 (Fed. Cir. 2004). *See also SGS-92-X003*, 74 Fed. Cl. at 654.

[118] *Villars*, 126 Fed. Cl. at 633; *Doe*, 58 Fed. Cl. at 486; *See also Gary*, 67 Fed. Cl. at 217 ("For an unauthorized promise to be binding under the doctrine of institutional ratification, an official with the power to ratify must know the material facts relating to the acceptance of the benefits …").

[119] *See, e.g., Doe*, 58 Fed. Cl. at 486 ("the question is whether DEA agents with procurement authority had actual or constructive knowledge of contractual promises to compensate Plaintiff … nowhere in Plaintiff's pleadings does he claim that these 'high-ranking officials' knew of the content of the alleged promises made to him"), *aff'd*, 112 F. App'x 54 (Fed. Cir. 2004); *Villars*, 126 Fed. Cl. at 633.

[120] *United States v. Beebe*, 180 U.S. 343, 354 (1901) (emphasis added).

[121] INFERENCE, Black's Law Dictionary (10th ed. 2014).

[122] NECESSARY INFERENCE, Black's Law Dictionary (10th ed. 2014).

[123] *See, e.g., Doe*, 58 Fed. Cl. at 487-88; *Gary*, 67 Fed. Cl. at 217-18; *Home Fed. Bank of Tennessee, F.S.B.*, 57 Fed. Cl. at 689; *Strickland*, 382 F. Supp. 2d at 1348.

The Tribal Council is the governing body with the relevant contracting authority. The initial inquiry is whether the Tribal Council had actual or constructive knowledge of Mr. Mason's agreement. When we review all of the circumstances, we must conclude that the Tribe had actual or constructive knowledge at some point during the period between 2002 and 2005 and for a limited period of time acquiesced in the agreement.

The record indicates that the Tribe had retained Mr. Mason to represent its interests in connection with Iowa's challenge to the land-into-trust decision before the IBIA. As explained above, in September 2002, the *Omaha World Herald* reported on Mr. Mason's efforts, following the IBIA's decision, to forestall a possible judicial challenge by Iowa with his assurances that the Tribe had no intent to game on the parcel.[124] Further, the Corrected Notice, which contained the content of Mr. Mason's agreement with the State, was then published once, on December 6, 2002, in the *Council Bluffs Daily Nonpareil*, a daily newspaper for Council Bluffs, Iowa.[125] Additionally, at some point, the Tribal Council reportedly decided to pursue gaming on the Carter Lake parcel by retaining Steven Sandven as its attorney to seek the support of the Governor of Iowa, the procedure contemplated in the agreement.[126] This effort proved unsuccessful. Eventually, the Tribal Council retained the law firm Faegre and Benson to assist in pursuing gaming on the Carter Lake parcel under IGRA's restored lands exception.[127] Faegre and Benson began that effort with an October 7, 2005 letter to the NIGC that included an acknowledgment of some sort of agreement: "the Tribe orally agreed not to use the Carter Lake

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[124] *Omaha World Herald,* "Carter Lake land owned by tribe won't become casino" (Sept. 29, 2002).
[125] *See* Proof of Publication by Jeannette Johnson (Dec. 18, 2002).
[126] Letter from John Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Senior Attorney, re: Pending "Indian lands" decision for the Ponca Tribe in Nebraska in Carter Lake, Pottawattamie, Iowa, at 4 (July 19, 2006).
[127] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion (Oct. 7, 2005).

Parcel for gaming purposes provided the State and County agreed not to bring suit."[128] Presumably, Faegre and Benson, consistent with its professional obligations,[129] conferred with the Tribe in drafting that letter and obtained the Tribe's authorization before sending it.

While none of the factors listed above, when viewed in isolation, would necessarily lead to a conclusion that the Tribe had actual or constructive knowledge of Mr. Mason's agreement, the sum of these circumstances indicates the Tribal Council's actual or constructive knowledge of the agreement at some time during this period.

Further, Mr. Sandven's subsequent efforts on behalf of the Tribe to obtain the State's concurrence to game on the land, and the assertions of Faegre and Benson detailed above support the conclusion the Tribal Council acquiesced to Mr. Mason's agreement. However, it should be pointed out that the motivation for seeking a two-part determination is not known by this Commission. That being said, as with our discussion of constructive notice, when we look at the totality of all of the facts in the record, it is not unreasonable to conclude that the Tribe acquiesced in the agreement.

But, even if the Tribe became aware of and acquiesced in the agreement for a limited period of time from 2002 to 2005, it clearly repudiated that agreement beginning with the October 7, 2005 Faegre and Benson letter.[130] That repudiation was restated in Faegre and Benson's June 15, 2006[131] and July 14, 2006 [132] letters to NIGC. Furthermore, the Tribal Council's August 6, 2006 and April 2, 2007 resolutions made clear the Tribal Council did not

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[128] *Id.* at 9.
[129] *See, e.g.*, Model Rule of Professional Conduct 1.4(a)(3) ("A lawyer shall … keep the client reasonably informed about the status of the matter.").
[130] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion (Oct. 7, 2005).
[131] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Request for an Indian Lands Opinion (Supplemental Material) at 4-5 (June 15, 2006).
[132] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska: Amended Gaming Ordinance/Request for Indian Lands Opinion (Supplemental Material) (July 14, 2006).

believe any sort of agreement binding. The State asserts the Tribal Council's representations in the resolutions that it "was not aware of and did not approve the language that was added to the amended notice,"[133] is not the same as the Tribal Council being unaware of the agreement or its terms.[134] Whether the State's reading is a fair criticism of the Tribal Council resolutions, they clearly informed the State that the Tribe did not consider the agreement binding and it intended to game under the restored lands exception.

Significantly, neither Mr. Mason's 2002 agreement nor the Tribe's short-lived acquiescence was an admission that the Carter Lake parcel did not satisfy IGRA's definition of restored lands. At best, the agreement attempted to memorialize the Tribe's pledge that it would not invoke that exception to IGRA's prohibition of gaming on lands acquired after IGRA's enactment in exchange for the State's agreement not to seek judicial review of the IBIA's decision. When the Tribe decided in 2005 to invoke the restored lands exception, Iowa was free to challenge Interior's land-into-trust decision. There was no time-bar to suit as the relevant statute of limitations, 28 U.S.C. 2401(a), was six years.

Finally, the State's argument primarily relies on *Pueblo of Santo Domingo v. United States*,[135] which supports the conclusion that the Tribe timely repudiated the unauthorized agreement. That case involved the allegedly unauthorized stipulation by the tribe's attorney in a proceeding before the Indian Claims Commission ("ICC") in 1969. The stipulation that certain tribal lands had been taken by the United States formed the basis for further proceedings in the ICC leading to a published decision by the ICC on the extent and dates of taking and a published

[133] Tribe Resolution 06-27; Tribe Resolution 07-25.
[134] Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 7 (July 20, 2012).
[135] 647 F.2d 1087 (1981).

decision by the Court of Claims on interlocutory appeal.[136] The ICC's statutory authorization then expired in 1978, and the case was transferred to the Court of Claims for a determination of compensation. Twelve years later, when the tribe moved to withdraw from the 1969 stipulation on the ground that it had been unauthorized, the Court of Claims acknowledged that a client may "seasonably" apply for relief from an unauthorized stipulation but denied the motion because "it was far too late in the day."[137] The reasonable period for a client to repudiate an unauthorized agreement depends on the circumstances. In *Pueblo of Santo Domingo*, the United States, the ICC, and the Court of Claims had expended considerable resources in reliance on the stipulation. In this situation, in contrast, Iowa expended no resources in reliance on the 2002 agreement. The Tribe repudiated the agreement at a time when Iowa still had well over two years to challenge the IBIA's decision. Additionally, unlike *Pueblo of Santo Domingo*, here, no tribunal was burdened by the out-of-court agreement, the 2002 agreement had no judicial approval, and it was not subject to the supervision of any tribunal. The Tribe's repudiation was seasonable and not too late in the day.

We thus conclude that the appropriate response by Iowa to the Tribe's repudiation of the unauthorized agreement was to file suit against Interior challenging the IBIA's decision rather than using the NIGC proceeding as a collateral attempt to enforce the agreement. This case presents unusual factual circumstances in which a sovereign, despite an apparent short period of acquiescence, timely repudiated an unauthorized out-of-court agreement without any material injury to the other party. Here, the agreement by each party was to not do something – file suit or seek to game under the restored lands exception. Iowa has suffered no detrimental reliance or injury by the Tribe's repudiation of the unauthorized agreement.

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[136] *Id.* at 1088.
[137] *Id.* at 1088-89.

Further, Iowa could have protected its interests and avoided all dispute by obtaining the Tribal Council's express authorization of the agreement in 2002. Iowa had an additional chance to protect its interests, by challenging the land-into-trust decision in 2005 when the Tribal Council repudiated the agreement. We conclude that the Tribe is not estopped from asserting that the land is eligible for gaming pursuant to IGRA's exception for restored lands of a restored tribe.[138]

II. Ponca Restoration Act

The PRA, among other things, delineated a two-county (Knox and Boyd) area for mandatory trust acquisitions for the benefit of the Tribe and explicitly made the Indian Reorganization Act, and other federal laws of general applicability, applicable to the Tribe.[139] The Tribe asserts the PRA's purpose was to place the Ponca Tribe on an equal footing with all other federally recognized tribes. As such, the Tribe argues, with the unqualified application of the IRA and all other laws of general applicability, including IGRA, to the Tribe, the PRA permits the discretionary acquisition of additional lands either within or outside of Knox and Boyd Counties to restore the Tribe's land base.[140] And Congress expressly did not limit the restored land status to lands in those two counties.[141] The State argues that the PRA unambiguously limits trust lands that may be considered restored to land in Knox and Boyd Counties, particularly because the PRA did not expressly identify the Carter Lake parcel as restored land.

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[138] *United States v. Stewart*, 311 U.S. 60, 70(1940) *Madrid Lumber Co.*, 255 Iowa at 383-384.
[139] 25 U.S.C. §§ 938a & 983b(c).
[140] Tribe's Legal Memorandum Regarding the Ponca Restoration Act at 7-11(Mar. 17, 2011).
[141] *Id.* at 11-13; Letter from James T. Meggesto, Akin Gump, to Jeffrey Nelson, Office of Solicitor, Interior and NIGC General Counsel Larry Roberts, re: *Nebraska v. U.S. Dept. of the Interior,* No, 1-08-CV-6 (S.D. Iowa) at 1-2 (April 25, 2011).

The Solicitor provided the Commission an opinion concluding that, although the PRA provides for mandatory and discretionary trust acquisitions in Boyd and Knox Counties, the plain language of the statute allows Interior to take additional land into trust outside those counties under the Indian Reorganization Act and that land may qualify as restored land.[142] The Solicitor contrasted the PRA with other restoration acts that put geographic limits to the Secretary's authority to take land into trust for restored tribes, noting Congress knows how to restrict trust acquisitions if so intends and chose not to here.[143] Thus, although the Solicitor's opinion concludes that the Carter Lake parcel, which is outside Boyd and Knox Counties, may qualify for restored lands status, it does not address whether the parcel does qualify. That question is once again before us here as a result of this remand.[144]

III. Restored Lands Analysis

Although the legal framework and the purpose underlying the restored lands exception is set forth in our original Commission decision, it bears repeating.[145] Section 20 of IGRA, 25 U.S.C. § 2719, prohibits gaming on trust lands acquired by Interior for a tribe after October 17, 1988, unless an exception is satisfied. Relevant to this discussion, IGRA provides an exception for "lands taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition."[146]

Courts have provided insight as to the restored lands exception of § 2719. The 6th Circuit Court of Appeals found that IGRA does not define either the words "restored" or "restoration" in the restored lands exception; thus, the court determined that it must give the words "'their

[142] Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 9, 13 (Mar. 13, 2012).
[143] *Id.* at 10-11.
[144] In reaching this decision, the NIGC followed the process outlined in the 2009 Memorandum of Agreement with the Solicitor to obtain the Solicitor's concurrence. *See* Letter from Eric Shepard, Associate Solicitor Indian Affairs, Department of Interior, Office of the Solicitor, to Michael Hoenig, NIGC General Counsel (November 1, 2017).
[145] Commission decision at 6.
[146] 25 U.S.C. § 2719(b)(1)(B)(iii).

ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.'"[147] To that end, the 6th Circuit concluded that a district court "appropriately looked to the dictionary definitions of 'restore' and 'restoration,' which include the following meanings: to give back, return, make restitution, reinstatement, renewal, and reestablishment."[148] Further, courts have determined that, given the plain meaning of the term "restoration," the purpose of the restored lands exception, is to "place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion."[149] This is because:

> Under IGRA, tribes that had not been disbanded have the right to conduct gaming activities on lands which they held prior to October 17, 1988. Thus, only property acquired subsequent to this 1988 date is subject to IGRA's limitations on gaming activities. As such, Indian tribes that were disbanded, and then restored after 1998, were at a disadvantage *vis a vis* those tribes that had not been disbanded and held land prior to 1998. By providing an exception for restored lands of restored Indian groups, Congress intended to provide some sense of parity between tribes that had been disbanded and those that had not.[150]

As we articulated in our original Commission decision, "[t]he core question of any restored lands analysis is whether the land at issue was taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition."[151] "That language implies a

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[147] *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 369 F.3d 960, 967 (6th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 420, 431–32 (2000)); *see also Oregon v. Norton*, 271 F. Supp. 2d 1270, 1279 (D. Or. 2003); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 706 (W.D. Mich. 1999).

[148] *Grand Traverse*, 369 F.3d at 967 (citing *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney For W. Dist. of Michigan (Grand Traverse II)*, 198 F. Supp. 2d 920, 928 (W.D. Mich. 2002)); *see also Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1213 (D. Kan. 2006); *City of Roseville v. Norton*, 219 F.Supp. 2d 130, 159-60 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003).

[149] *Grand Traverse II*, 198 F. Supp. 2d at 935; *Wyandotte Nation*, 437 F. Supp. 2d at 1213; *City of Roseville*, 219 F. Supp. at 160; *City of Roseville*, 348 F.3d. at 1031 ("restoration of lands is to a restored tribe what the 'initial reservation' is to an acknowledged tribe: the lands the Secretary takes into trust to reestablish the tribe's economic viability.").

[150] *City of Roseville*, 219 F. Supp. at 160-61; *see also Grand Traverse & Chippewa Indians v. U.S. Attorney For W. Dist. of Michigan (Grand Traverse I)*, 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999).

[151] Commission decision at 12 (citing *Grand Traverse II*, 198 F. Supp. 2d at 934); *see also Nebraska*, 625 F.3d at 510 ("Under the exception, the general gaming prohibition does not apply when 'lands are taken into trust as part of ... the restoration of lands for an Indian tribe that is restored to Federal recognition.'"); *Wyandotte Nation*, 437 F.

process rather than a specific transaction, and most assuredly does not limit restoration to a single event."[152] Courts apply a three-factor test in a restored lands analysis: the acquisition's temporal proximity to restoration (temporal factor), the tribe's historical and modern nexus to the location (geographic factor), and the factual circumstances surrounding the acquisition (factual circumstances factor).[153]

The States argue in their brief that Interior's after-acquired lands regulations at 25 C.F.R. Part 292, which differ slightly from the common law test for restored lands, apply to this decision. However, the regulations contain a grandfather clause at § 292.26 that provides two separate grounds for escaping Part 292's applicability—both of which apply here.

Under the first ground, the regulations specify at § 292.26(a) that they "do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of the regulations." The Commission's final agency decision to approve the Tribe's site-specific gaming ordinance was issued on December 31, 2007, before the Section 20 regulations went into effect on August 25, 2008. Although the District Court by vacating the Commission decision called into question whether the Commission's decision still constitutes a final agency decision, on appeal the 8th Circuit determined that doing so was in error.[154]

Under the second ground, the Part 292 regulations "shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the [NIGC] issued a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a

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Supp. 2d at 1213. Here, the Tribe's status as a restored tribe is not at issue. *Nebraska*, 625 F.3d at 510 ("The States concede that the Tribe's status is one "restored to Federal recognition.").

[152] *Grand Traverse II*, 198 F. Supp. 2d at 936.

[153] *Grand Traverse II*, 198 F. Supp. 2d at 935; *see also Butte Cnty., Cal. v. Hogen*, 609 F. Supp. 2d 20, 27-28 (D.D.C. 2009) (*citing Grand Traverse II* as the leading case for restored land exceptions) and *Wyandotte Nation*, 437 F. Supp. 2d at 1214.

[154] *Nebraska*, 625 F.3d at 503 (finding that, once the district court concluded that the Commission improperly disregarded the purported agreement between Iowa and the Tribe, it should have remanded the case to the agency to consider all relevant factual circumstances).

particular gaming establishment ...."[155] A legal opinion from the NIGC Office of General Counsel was originally issued regarding this matter in conjunction with the Chair's decision on October 22, 2007. Even if the district court successfully vacated the Commission decision, the NIGC Office of General Counsel's opinion continues in effect, subject to "full discretion to qualify, withdraw or modify such opinion[]."[156] Therefore, the regulations do not apply to the Commission decision and this amendment to it.

A. Temporal Factor

The *Grand Traverse* court found that "land may be considered part of a restoration of lands on the basis of timing alone."[157] This factor is not at issue here. As stated in the original Commission decision, the Chair set forth a strong positive analysis of the temporal factor in support of a restored lands finding, which we affirmed.[158] In brief, though, the Chair concluded that:

> there were a total of 13 years between Congress's restoration of the Tribe and the acquisition of the Carter Lake land into trust but the Tribe did not acquire within that time a significant land base separate and apart from Carter Lake. In fact, what it did acquire represents only a fraction of what it could acquire under its restoration act and of what its Congressionally mandated economic plan calls for. ... The Tribe owned in trust only an office building in Lincoln, Nebraska [] and approximately 150 acres in Niobrara, Nebraska for a community building and bison grazing land. Though Congress restored the [Tribe] in 1990, the Tribe only had a constitution approved in 1994. The Tribe purchased the Carter Lake land in September 1999, only five years later, and filed its application to take the Carter Lake land into trust in January 2000. The trust acquisition would have been complete in September 2000 but for [] litigation ...[159]

B. Geographic Factor

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[155] 25 C.F.R. § 292.26(b).
[156] *Id.*
[157] *Grand Traverse II*, 198 F. Supp. 2d at 936 ("As a matter of timing, the acquisition of the [] site was part of the first systematic effort to restore tribal lands.").
[158] Commission decision at 1, 8.
[159] Chair Disapproval at 25-27 (internal citations omitted).

In *Wyandotte Nation v. National Indian Gaming Commission*, the court underscored that the geographic factor is "arguably most important [] component of the test," as it "relates to the location of the land in relation to the tribe's historical location."[160] Similarly, in *Grand Traverse II*, the court concluded that the reasoning contained in prior Solicitor's opinions was appropriate – "if a tribe is a restored tribe under the statute, any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under § 2719."[161]

In the original Commission decision, the Commission affirmed the Chair's conclusions regarding the geographic factor.[162] It is worth underscoring that the Chair found that "[t]he Tribe has historical and modern ties to its Carter Lake land and to the surrounding area that weigh in favor of finding that the land is restored."[163] In particular, as to the historical ties, the Chair determined that "[s]cholars have identified the aboriginal territory of the Ponca, and it includes Carter Lake"[164] and, as to the modern ties, that the Tribe possessed such ties because it had a "direct relationship with the Carter Lake land itself before it was taken into trust."[165] Therefore, the geographic factor continues to weigh in favor of restored land status for the Carter Lake parcel.

C. Factual Circumstances of the Trust Acquisition

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[160] 437 F. Supp. 2d at 1214.
[161] *Grand Traverse II*, 198 F. Supp. 2d at 935-36 ("The Solicitor concluded that the lands at issue were part of a restoration simply on the basis that the lands at issue were within the twenty-county area ceded by the tribe to the United States." The court found that "in light of the virtually identical history of these tribes with the Grand Traverse Band, reliance on the Solicitor's analysis is particularly appropriate. Treating similarly situated tribes in a similar manner is consistent with federal legislation that counsels against interpretations that distinguish among tribes in ambiguous circumstances. *See* 25 U.S.C. § 476(f)").
[162] Commission decision at 1, 8.
[163] Chair Disapproval at 23.
[164] *Id.* at 24-25.
[165] *Id.* at 25 (specifically detailing the nature of the Tribe's modern ties with the Carter Lake parcel).

Under the final factor, we examine the factual circumstances of the trust acquisition to assess whether there are indicia of restoration.[166]

1. There are no significant intervening trust acquisitions prior to the Carter Lake parcel.

Initially, we reiterate the finding articulated in the original Commission decision, which focused upon whether the Tribe had significant intervening trust parcels between its restoration as a federally recognized tribe and the Carter Lake parcel trust acquisition. The Commission determined that the "Carter Lake land is among the first acquisitions of the Tribe" without other significant intervening trust acquisitions on its behalf.[167] Notable for purposes of the factual circumstances factor, is not the timing of the acquisition of the Carter Lake parcel but the lack of other meaningful trust acquisitions after the Tribe's restoration.[168] Of consequence here is the fact – which was also noted by the Commission in its 2007 decision – that at the time of the acquisition, the Tribe owned in trust only an office building in Lincoln, Nebraska and approximately 150 acres in Niobrara, Nebraska for a community building and bison grazing land.[169]

Courts have examined tribes' acquisition of other trust parcels to assess whether a particular parcel's acquisition shows indicia of restoration.[170] For example, in the *Grand Traverse* cases, the courts found that "an absence of any substantial restoration of lands

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[166] *Wyandotte Nation*, 437 F. Supp. 2d at 1214.
[167] Commission decision (citing Chair Disapproval at 26 ("In fact, what it did acquire represents only a fraction of what it could acquire under its restoration act and of what its Congressionally mandated economic plan calls for. … The Tribe owned in trust only an office building in Lincoln, Nebraska . . . and approximately 150 acres in Niobrara Nebraska, for a community building and bison grazing land.")).
[168] *Id.*
[169] *Id.*
[170] *Grand Traverse I*, 46 F. Supp. 2d at 702 (Tribe introduced evidence of the absence of any substantial restoration of lands preceding the property at issue.); *Grand Traverse II*, 198 F. Supp. 2d at 936-37 (same); *Wyandotte Nation*, 437 F. Supp. 2d at 1217-19 (Court upheld Commission's determination that parcel was not restored, as the Tribe had substantial restoration of land preceding the parcel at issue and, consequently, the parcel was not a meaningful acquisition.).

preceding the property at issue" was a fact in support of a finding of restored lands.[171] Conversely, in *Wyandotte Nation v. National Indian Gaming Commission*, the court upheld the agency's conclusion that the parcel at issue was not restored, because, as part of its analysis, the agency found that the Tribe had substantial restoration of land preceding the parcel at issue.[172]

In the matter at hand, we agree with the Chair that the Tribe did not acquire "a significant land base separate and apart from Carter Lake" and that "there were no significant intervening trust acquisitions."[173] As a consequence, this noteworthy fact weighs in support of a restored lands finding.

2. Carter Lake parcel was acquired into trust in accordance with the Ponca Economic Development Plan, mandated by the PRA, to reestablish the Tribe's economic viability.

The D.C. Circuit Court of Appeals has advised that "the 'restoration of lands' is to a restored tribe what the 'initial reservation' is to an acknowledged tribe: the lands the Secretary takes into trust to re-establish the tribe's economic viability."[174] As to the Carter Lake parcel, the BIA Superintendent recommended approval of the trust acquisition, because "the acquisition is in accordance with the Ponca Economic Development Plan"[175] mandated by the PRA.[176] In submitting the plan to Congress, the Assistant Secretary of Indian Affairs stated that "the Plan

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[171] *Grand Traverse I*, 46 F. Supp. 2d at 702; *Grand Traverse II*, 198 F. Supp. 2d at 936-37.
[172] *Wyandotte Nation*, 437 F. Supp. 2d at 1217-18.
[173] Chair Disapproval at 25-26.
[174] *City of Roseville*, 348 F.3d at 1031; *See also Grand Traverse II*, 198 F. Supp. 2d at 936 ("the Band's evidence clearly established that the parcel was of … economic …significance to the Band.").
[175] Memorandum to BIA Area Director, Aberdeen, from Superintendent, Yankton Agency re: Ponca – fee to trust – Carter Lake, IA (Aug. 11, 2000) ("This acquisition is also in accordance with the Ponca Economic Development Plan that proposes having land in trust in Pottawattamie County."); *see also* Letter to Cora L. Jones, BIA Regional Director, from Mr. Fred LeRoy, Tribal Chairman (Aug. 23, 2000) ("The primary justification for taking this land [Carter Lake parcel] into trust is the intent of Congress in passing the Ponca Restoration Act and the Assistant Secretary's support for and understanding of the Ponca Economic Development Plan.").
[176] 25 U.S.C.A. § 983h. Recently, Interior underscored that "[t]he primary purpose of the PRA … is to acquire lands for the Tribe on which to support tribal economic development and self-sufficiency." *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) (Mar. 13, 2012).

calls for a diverse portfolio of development in each of the five main [tribal] service areas,"[177] including Pottawatomie County where the parcel is located.[178] To this end, the plan authorized the acquisition and development of land in these areas.[179] As to the Carter Lake area, Interior has concluded that "[b]y including trust acquisitions and commercial development [there], the plan recognizes both the Tribe's connections to that area and its intent to use that land for commercial purposes."[180] Further, upon submitting the plan to Congress, the Assistant Secretary represented that Interior had "complied with Section 10 of the Act which requires negotiation with the Tribe to establish a plan, consultation with State and local officials regarding the plan, *and having the property acquired for the Tribe taken into trust.*"[181] This representation was made subsequent to the Tribe's application to take the Carter Lake parcel into trust.[182] Finally, in the submission to Congress, the Assistant Secretary indicated that Interior was in "complete support" of the plan

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[177] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate (Feb. 17, 2000).

[178] On October 1, 1990, the House of Representatives Committee on Interior and Insular Affairs issued a report, detailing its amendments to S.1747 including an amendment whose intent was to "restrict[] the land that the Secretary can acquire for the economic development plan to Knox and Boyd Counties." H.R. Report No. 101-776 (1990). However, the plain language of the PRA does not support such a reading. *See* 25 U.S.C. § 983h. Furthermore, Interior has found that the plan is not so restricted, explaining that it authorized the acquisition and development of land in key service areas of the Tribe to include Pottawattamie County. *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 15 (Mar. 13, 2012). The plan in fact explicitly details the lands that the Tribe needed for purposes of its economic self-sufficiency. *See* Ponca Economic Development Plan. Specifically, the plan states: "the Tribe will need 160 acres in Douglas, Sarpy, and Pottawattamie Counties to locate manufacturing and service and niche retail businesses. These are to generate $14 million annually."; *see also* Ponca Economic Development Plan ("Proposed Tribal Lands – The Plan proposes a tribal land base of 2,235 acres, all within both the aboriginal territory of the Ponca Nation and the service areas established by the [PRA]," including "160 acres suitable for industrial and commercial uses in and around Omaha."). Finally, as noted by Interior, the PRA required that Interior submit the plan to Congress, which it did, and Congress "did not object or modify the plan." *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) (Mar. 13, 2012); 25 U.S.C. § 983h.

[179] Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 16 (Mar. 13, 2012); Ponca Economic Development Plan.

[180] *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 15 (Mar. 13, 2012).

[181] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate at 2 (Feb. 17, 2000) (emphasis added).

[182] *See* Letter to Mr. Timothy Lake, BIA Superintendent, from Mr. Fred LeRoy, Tribal Chairman (Jan. 10, 2000).

because "achievement of the major goals of the plan will mean self-sufficiency for the Tribe and an end to the poverty the Tribe has lived with since termination."[183] Given the above, it is apparent that the Carter Lake parcel was taken into trust to re-establish the Tribe's economic vitality. Therefore, this is a fact that weighs in favor of a restored lands finding.

3. Carter Lake parcel was acquired into trust from the PRA's service area.

Another fact of potential significance is that the Carter Lake parcel was taken into trust from lands within the Tribe's service area delineated in the PRA.[184] In *City of Roseville v. Norton*, the D.C. Circuit Court of Appeals indicated that "the term 'restoration' can [] readily be construed to include lands acquired pursuant to the restoration statute [] from within the restored tribe's service area designated in the [statute.]"[185] Admittedly, here, the Carter Lake parcel was taken into trust pursuant to the Indian Reorganization Act, not explicitly pursuant to the PRA.[186] Nevertheless, Interior concluded that the PRA did not foreclose discretionary trust acquisitions pursuant to the Indian Reorganization Act but explicitly allowed them.[187] In addition, the PRA mandated the creation of an economic plan, which when devised set forth a goal of acquiring land in Pottawattamie County. We therefore give some weight in favor of a restored lands finding to the fact that the Carter Lake parcel was accepted into trust from the Pottawattamie County service area designated by the Tribe's restoration act.

4. Carter Lake parcel was acquired in trust to re-establish the Tribe's land base and to compensate it for historical wrongs.

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[183] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate (Feb. 17, 2000).
[184] 25 U.S.C. § 983c.
[185] 348 F.3d at 1026. But, the court explicitly rejected providing guidance as to other circumstances. *Id.* ("Because the Auburn Tribe's land is located in Placer County, which was a designated area in the AIRA, and thus became, by operation of law, the Tribe's reservation, *see* 25 U.S.C. § 1300*l*–2(c), the court has no occasion to decide whether land obtained by a tribe other than through the tribe's restoration act is the "restoration of lands" for IGRA purposes....").
[186] Warranty Deed (Jan. 28, 2003).
[187] *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior*, No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 9 (Mar. 13, 2012).

Finally, "a 'restoration of lands' could easily encompass new lands given to a restored tribe to re-establish its land base and compensate it for historical wrongs."[188] As the Chair found, after the Tribe's restoration it did not have "a significant land base separate and apart from Carter Lake."[189] The only other trust holdings were an office building in Lincoln, Nebraska and approximately 150 acres in Niobrara, Nebraska for a community building and bison grazing land.[190] Hence, putting the Carter Lake parcel into trust signifies an effort to restore the Tribe's land base. As for historical wrongs, the Tribe suffered termination,[191] including resultant poverty,[192] and, prior to that, loss of its reservation and forced removal from it without adequate provision or preparation that resulted in the death of many of the Tribe's members.[193] Thus, this too weighs in favor of a restored lands finding.

In light of the facts outlined above, we find that the factual circumstances factor weighs in favor of the Carter Lake parcel constituting restored lands.

D. Consideration of All 3 Factors – Factual Circumstances, Temporal and Geographic

Next, all the factors articulated in *Grand Traverse* – namely the temporal, geographic, and factual circumstances factors – must be considered in total. That being said, it is worth reiterating that in *Grand Traverse*, the district court stated that "the land may be considered part

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[188] *City of Roseville*, 348 F.3d. at 1027.
[189] Chair Disapproval at 25-26.
[190] *Id.* at 26. However, the Chair Disapproval contains a typographical error. It erroneously cites the dates of the trust deeds for these parcels in 2003, when they occurred in 1993. *See* Warranty Deed (June 22, 1993); Letter from Michael G. Rossetti and James T. Meggesto, Akin Gump, to NIGC Chairman Hogen, re: The Ponca Tribe of Nebraska- Request for an Indian Lands Opinion, at 30 (July 23, 2007).
[191] Chair Disapproval at 19-21; *City of Roseville,* 348 F.3d. at 1029 ("Had the Auburn Tribe never been terminated, it would have had opportunities for development in the intervening years, including the possible acquisition of new land prior to the effective date of IGRA. A 'restoration of lands' compensates the Tribe not only for what it lost by the act of termination, but also for opportunities lost in the interim.").
[192] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate (Feb. 17, 2000).
[193] Chair Disapproval at 15-17.

of a restoration of lands on the basis of timing alone."[194] In the matter at hand, there were 13 years between Congress's restoration of the Tribe and the trust acquisition of the Carter Lake parcel. Congress restored the Tribe in 1990, the Tribe's Constitution was approved in 1994, the Tribe purchased the land in September 1999, the Tribe filed its application to take the land into trust in January 2000, and the trust acquisition would have been complete in September 2000 but for litigation. Based on this timing alone, then, we could determine that the Carter Lake parcel is restored.

Also, the geographic factor supports the finding that the Carter Lake parcel is restored lands. As we mentioned above, in *Wyandotte Nation*, the court underscored that the location factor is "arguably [the] most important [] component of the test," as it "relates to the location of the land in relation to the tribe's historical location." In this amendment, we reiterate our affirmation of the Chair's findings that "[t]he Tribe has historical and modern ties to its Carter Lake land and to the surrounding area that weigh in favor of finding that the land is restored."[195] Importantly, as to this factor, "[s]cholars have identified the aboriginal territory of the Ponca, and it includes Carter Lake."[196]

And, our reassessment of the factual circumstances factor shows that it too supports the conclusion that the Carter Lake parcel was taken into trust as part of the restoration of lands for a restored tribe. Given the above, we find that the test set forth in *Grand Traverse* establishes that the Carter Lake parcel is restored lands. The Department of the Interior, Office of the Solicitor, concurs.[197]

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[194] *Grand Traverse II*, 198 F. Supp. 2d at 936.
[195] Chair Disapproval at 23.
[196] *Id.* at 24.
[197] *See* Letter from Eric Shepard, Associate Solicitor Indian Affairs, Department of Interior, Office of the Solicitor, to Michael Hoenig, NIGC General Counsel (November 1, 2017).

IV. Conclusion

We affirm the Commission's December 31, 2007, decision as set forth herein, affirming in part and reversing in part the Chair's decision.

It is so ordered by the National Indian Gaming Commission.

Jonodev Osceola Chaudhuri
Chairman

Kathryn Isom-Clause
Vice Chair

CERTIFICATE OF SERVICE

I hereby certify on this 14th day of November, 2017, I served the Amendment to Final Decision and Order In Re: Gaming Ordinance of the Ponca Tribe of Nebraska by Certified U.S. Mail, Return Receipt Requested, to the following:

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Dena Wynn
Legal Staff Assistant

EXHIBIT 2

National Indian Gaming Commission

In Re: Gaming Ordinance of The Ponca Tribe of Nebraska

December 31, 2007

FINAL DECISION AND ORDER

Appeal to the National Indian Gaming Commission ("NIGC" or "Commission") from a disapproval of a site specific gaming ordinance submitted by the Ponca Tribe of Nebraska ("Tribe"). This appeal is brought pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et. seq.*, and NIGC regulations at 25 C.F.R. Part 524.

Appearances

Michael Rossetti, James Meggesto, for the Ponca Tribe of Nebraska
Michael Gross for the Chairman, National Indian Gaming Commission
John Lundquist, Assistant Attorney General, for the State of Iowa, a limited participant pursuant to 25 C.F.R. § 524.2

DECISION AND ORDER

After careful and complete review of the agency record and pleadings filed by both the Tribe and the Chairman, as well as the State of Iowa, a limited participant pursuant to NIGC regulations at 25 C.F.R.§ 524.2, the Commission finds and orders that:

1. We affirm the Chairman's decision that the Carter Lake land meets the location and temporal factors of the restored lands analysis.

2. We reverse the Chairman's decision with respect to the factual circumstances factor for the following reasons:

(a) The Chairman's disapproval improperly relied on the Tribe's intended use of the land;

(b) The Chairman's disapproval improperly relied on events that occurred after the Department of the Interior's (DOI) final agency decision was made; and

(c) The factual circumstances of the acquisition weigh in favor of restoration.

3. We reverse the Chairman's disapproval of the ordinance because we find that the Carter Lake land meets the restored lands exception.

PROCEDURAL AND FACTUAL BACKGROUND

The factual background of the Tribe's history, including its termination and restoration to federal recognition, are well set forth in the Carter Lake Lands Opinion Memorandum (Disapproval Memo), which is incorporated by reference into the NIGC Chairman's (Chairman) disapproval of the ordinance. We see no need to revisit those facts here. The following events, however, are of particular significance to our decision.

The Tribe was restored to federal recognition in 1990 by virtue of the Ponca Restoration Act, 25 U.S.C. §§ 983 – 983h.

On September 24, 1999, the Tribe purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa. Shortly thereafter, on January 10, 2000, the Tribe passed a resolution seeking to have the DOI place the land into trust. The Tribe's stated intent was to place a healthcare facility on the land. (Ponca Tribe of Nebraska, Resolution 00-01.)

On September 15, 2000, the Great Plains Regional Director for the Bureau of Indian Affairs (BIA) within DOI wrote to relevant state and local officials in Iowa and stated her "intent to accept the land into trust for the benefit of the Ponca Tribe of Nebraska." (Letters from Cora L. Jones, Great Plains Regional Director, BIA, to Carter Lake Mayor, Iowa Governor,

Pottawattamie County Supervisors, September 15, 2000.) Both the State of Iowa and Pottawattamie County appealed the September 15 decision to the Interior Board of Indian Appeals (IBIA). They contended, in part, that the Tribe really intended to use the land for a casino and that the Regional Director erred in not considering this use. *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002).

The IBIA rejected the argument, finding that the land "was purchased ... and is currently used for health care facilities" and that any possible gaming use was speculative. *Id.* The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

Sometime following the IBIA decision in the Tribe's favor, the Tribe, the State of Iowa, and Pottawattamie County reached an agreement that avoided further litigation. Although there is no evidence to show that the agreement was reduced to writing, it was acknowledged through correspondence both by the Tribe and the State. On November 26, 2002, the Tribe's then attorney sent the BIA an e-mail message requesting that a notice of intent to take the land into trust be published and requested that the following language be included:

> The trust acquisition of the Carter Lake lands has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000, decision under the Regional Director's analysis of 25 CFR 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. sec. 2719(b)(1)(B). There may be no gaming or gaming-related activities on the land unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained.

(November 26, 2002, e-mail, from Michael Mason, Esq.)

On December 3, 2002, the Regional Director published in a newspaper of general circulation in Carter Lake a notice of intent to take the Carter Lake land into trust but omitted the additional language requested by the Tribe. On December 6, BIA published a "corrected notice of intent to take land into trust" this time including the language. (Council Bluffs Daily Nonpareil, December 6, 2002). An internal BIA e-mail noting the incorrect publication described the additional language as follows:

> The attached Notice of Intent was published in the Council Bluffs, Iowa, newspaper yesterday, December 2 [sic, December 3], 2002. You will recall that the last paragraph in the Notice was a compromise reached by the Ponca Tribe and the State of Iowa as well as Pottawatomie County, Iowa. The Solicitor's office had no problem including the appended paragraph. If we did not include the last paragraph, Iowa would have litigated the matter in Federal Court. Also, the last paragraph was agreed upon by the Ponca's attorney....

(December 3, 2002, e-mail from Tim Lake to various BIA recipients.)

On December 13, 2002, Jean M. Davis, an Iowa Assistant Attorney General, wrote a confirming letter to the Tribe's attorney, stating:

> As you are aware, the Corrected Notice of Intent to take Land in Trust was published in the Council Bluffs *Daily Nonpareil*. The corrected Public Notice makes clear that lands to be taking into trust in this case will be taken for non-gaming related purposes. The corrected Public Notice also contains the acknowledgement by the Ponca Tribe of Nebraska that the lands are not eligible for any of the exceptions found under 25 U.S.C. sec. 2719(b)(1)(B).
>
> This corrected Public Notice is consistent [with] your repeated representations to me and to Pottawattamie County, made on behalf of the Ponca Tribe of Nebraska, that the Tribe intends to use the lands for the purpose stated in the original application, not for gaming activities. Based upon our agreement that the lands will be used in a manner consistent with the original application and the corrected Public Notice and not for gaming purposes, you have requested that the State of Iowa and Pottawatamie County forego judicial review and further appeals. Inasmuch as the corrected Public Notice now filed in this case contains the non-gaming purpose restriction to which we have agreed, the State of Iowa has agreed not to pursue judicial review or further appeals of the final decision of the United States Department of the Interior in this case.

(December 13, 2002, letter from Jean M. Davis.)

On January 28, 2003, following the publication of the corrected notice, the Tribe executed a deed conveying the Carter Lake land to the United States, and the BIA completed the acquisition in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

On July 23, 2007, the Tribe submitted a site specific class II gaming ordinance amendment (ordinance) to the Chairman for review and approval. In this ordinance, the Tribe defined a parcel of trust land in Carter Lake, Iowa (Carter Lake land) as "Indian lands" meeting the restored lands exception to the general prohibition on gaming on lands acquired after October 17, 1988. 25 U.S.C.§ 2719(b)(1)(B)(iii). By letter dated October 22, 2007, the Chairman found that the Carter Lake land is not restored lands within the meaning of 25 U.S.C. § 2719 (b)(1)(B)(iii) and disapproved the ordinance. The Tribe filed a Notice to Appeal on November 9, 2007. Furthermore, on November 16, 2007, the Tribe and the Chairman filed a Joint Motion for Expedited Decision, requesting that the Commission issue a final decision on the appeal within 35 days or prior to the December 31, 2007 scheduled departure of Vice-Chairman Cloyce V. Choney.

The Commission issued a decision on the Joint Motion stating that it would do all in its power to issue a decision prior to the departure of Vice-Chairman Choney, but that circumstances may require additional time to review the matter and issue a decision, and that the Commission could not agree to be bound by an earlier deadline than that which is set forth in its regulations. [1] Under NIGC regulations, the Commission has ninety (90) days to decide an appeal of an ordinance disapproval.

[1] The Commission was able to accommodate the Joint Motion and this Decision and Order is issued prior to the departure of Vice-Chairman Choney.

In addition, the Commission invited the State of Iowa to file a Request to Participate pursuant to 25 C.F.R. § 524.2. The State filed its Request to Participate on November 29 and the Commission granted the request on November 30. Pursuant to a briefing deadline established by the Commission, both the Tribe and the Chairman replied to the State's filing on Dec. 7.

DISCUSSION

Legal Framework

Tribal ordinances or resolutions governing the conduct or regulation of Class II gaming on Indian lands are reviewed and approved by the Chairman under 25 U.S.C. § 2710(b)(2). Amendments to a tribe's gaming ordinance are submitted for approval by the Chairman in accordance with 25 C.F.R. § 522.3. A tribe may appeal a disapproval of a gaming ordinance, resolution, or amendment within 30 days after the Chairman serves notice of his determination of disapproval. 25 C.F.R. Part 524. The Tribe's appeal here was filed in a timely manner.

IGRA permits gaming only on Indian lands, 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2), which it defines as:

> (A) all lands within the limits of any Indian reservation; and
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

There is no dispute that the Carter lake land meets this definition. However, there is a general prohibition on gaming on trust land acquired after October 17, 1988, unless the land meets one of several exceptions. 25 U.S.C. § 2719(a). Because the Carter Lake land was acquired after this date, the question then becomes whether the Carter Lake land meets any of the exceptions in § 2719. The Tribe contends that the land meets the restored lands exception, which requires land to be "taken into trust as part of . . . the

restoration of lands for an Indian tribe that is restored to federal recognition."[2] 25 U.S.C. § 2719(b)(1)(B)(iii).

Courts apply a three-factor test to determine whether lands are "restored" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii): (1) temporal proximity to restoration; (2) historical and modern nexus to the location; and (3) factual circumstances. *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Atty.,* 198 F. Supp. 2d 920, 935 (W.D. Mich., 2002). Applying these criteria to the restored lands exception places "belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion." *Id.* Courts apply the factors in a balancing test, and not all factors must weigh in a tribe's favor for the land to meet the restored lands exception. *Grand Traverse,* 198 F. Supp. 2d 920 at 936; *Wyandotte Nation v. National Indian Gaming Comm'n*, 437 F.Supp. 2d 1193, 1214 (D.Kan. 2006). In fact, the court in *Grand Traverse* found that "the land may be considered part of a restoration of lands on the basis of timing alone" 198 F. Supp. 2d 920 at 936, and the *Wyandotte* court found that the location factor is "arguably the most important component of the test for the restoration of land exception." *Wyandotte*, 437 F.Supp 2d 1193, 1214.

The Chairman's Decision and the Issues Presented by the Tribe's Appeal

Because the Tribe's ordinance was site-specific and defined the Carter Lake land as Indian land that meets the restored lands exception, the Chairman had to determine the validity of this assertion in the process of deciding whether to approve or disapprove the ordinance. *See*

[2] There is no dispute that the Tribe is a restored tribe.

e.g. Citizens Against Casino Gambling in Erie County, et. al. v. Kempthorne, et. al., 471 F. Supp. 2d 295, 323 (W.D. N.Y., 2007.

The Chairman found that the Carter Lake parcel meets both the temporal and location factors of the restored lands analysis, and there has been no challenge to these findings. We agree with the Chairman's findings in this regard and affirm those findings. What is in dispute, then, is the Chairman's application of the factual circumstances element and his resultant disapproval of the ordinance on the grounds that it purported to authorize and regulate gaming on lands upon which the Tribe could not lawfully game.

The Chairman found the following facts to be determinative in disapproving the ordinance: (1) the Tribe did not contemplate a gaming use for the land when it applied for trust status; (2) Iowa and Pottawattamie County challenged the Regional Director's decision to take the land into trust; (3) The Tribe represented before the IBIA that the land would not be used for gaming; (4) the IBIA affirmed the Regional Director's decision, finding it only speculative that the Tribe intended to game on the land; (5) the Tribe and the State reached agreement that the State would forgo litigation in Federal court and the Tribe acknowledged the land did not meet the restored lands test; (6) the Tribe's attorney requested that BIA's public notice contain language to the effect that the Tribe acknowledged that the lands are not restored lands; (7) the BIA published the requested language; and (8) the State wrote a confirming letter to the Tribe in which it agreed not to pursue judicial review of the IBIA's decision. These events, the Chairman found, show that "at the time of the acquisition, no one involved intended the Carter Lake land to be used for gaming or, more importantly, to be restored land." Disapproval Memo at 27-30. Each of these factors fall into one of the following three categories: (1) the Tribe's expressions of

intent as to its use of the land; (2) the Tribe's expressions of intent regarding the restored lands status of the land; and (3) reliance by third parties upon those expressions of intent.

The Tribe argues that the Chairman erred in considering these facts for several reasons. First, prior agency opinions show that a tribe's intended use of the land at the time it is taken into trust is not relevant to the restored lands analysis. Tribe's Notice of Appeal at 5-6. Second, the Tribe's expressions of its intent that the Carter Lake parcel was not restored lands occurred outside the relevant period for consideration. *Id.* at 10-12. Third, case law does not support subjective intent as a factual circumstance, *Id.* at 7, and even if it did, the expressions of intent do not outweigh the overwhelmingly positive analysis of the location and temporal factors. *Id.* at 8. Finally, reliance by third parties was not within the Commission's authority to consider in a gaming ordinance review. Tribe's Response to Submission of the State of Iowa at 3-8.

The State argues, in part, that the Commission should affirm the Chairman's decision because the Tribe "previously repudiated any claim it may have had that the Carter lake trust holdings constitute restored land eligible for class III gaming under IGRA." Request to Participate in Appeal at 5 and that "[b]oth the State of Iowa and the BIA acted in reliance on [the Tribe's] representations." *Id.* at 7. [3]

Tribe's Intended Use of the Land is Not Relevant to a Restored Lands Analysis

The Chairman based his disapproval in part on the Tribe's representations that it intended to use the land for a health care facility and the IBIA ruling that gaming was only a speculative use. Disapproval Memo at 27-28. Reliance on these facts was error. Prior agency decisions

[3] Pottawattamie County was invited to submit information to the NIGC relative to the status of the Carter Lake land but did not do so. See Letter to Pottawattamie County Board of Supervisors from Michael Gross, NIGC Senior Attorney, dated March 10, 2006.

instruct that intended use at the time of the trust acquisition has no place in a restored lands analysis.

The question of whether lands are restored is, in fact, quite distinct from the question of whether a tribe intends to conduct gaming on those particular lands. In other words, the focus of the analysis is whether the land was acquired as part of the Tribe's restoration, not on what the Tribe planned to do with the land at the time. Most restored lands determinations are made through the DOI's trust acquisition process in cases where a tribe has expressed intent to game. However, there are also a number of cases, such as this one, where tribes acquire trust land for another purpose, and later, often within only a few years, receive a positive restored lands determination so that they may conduct gaming. Regardless of when the tribe expresses its intent to game, the analysis is the same.

On remand from the District Court in *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000), the DOI found that the land at issue was restored lands. It noted that the land "was taken into trust for historical, cultural and economic self-sufficiency" and that "[a]t the time of the land being taken into trust, the Tribes were not considering it for gaming purposes" but changed their intended purpose "to maximize their economic development opportunities." DOI Memorandum from Philip Hogen, Associate Solicitor, Division of Indian Affairs to Assistant Secretary – Indian Affairs Re: *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000) in regard to proposed gaming on the Hatch Tract in Lane County, Oregon (Dec. 5, 2001) (*Coos Opinion*). Only 22 months after the land was taken into trust for another purpose, the Tribes announced their intent to game and requested a restored lands opinion.

Similarly, the Commission's Office of General Counsel (OGC) has issued two opinions in favor of restored lands for tribes that originally expressed their intent to use the property for another purpose. The Bear River Band of Rohnerville Rancheria sought a restored lands decision in much the same way the Tribe does here – by way of a site-specific ordinance. The land the Bear River Band sought to game on was land it had purchased through a Community Development Block Grant from the U.S. Department of Housing and Urban Development and with the assistance of the BIA. The Secretary accepted the land into trust, and only one year later, the Bear River Band began to seek a restored lands determination. Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Bear River Band of Rohnerville Rancheria at 2 (August 5, 2002). The OGC found that the land was restored lands under the IGRA. *Id.* at 14.

More recently, our OGC found that the land upon which the Mooretown Rancheria wished to conduct gaming was restored land despite that the land had been originally acquired for housing purposes and, like the Bear River Band land, was also purchased with HUD money. Memorandum from John R. Hay, NIGC Staff Attorney, through Penny J. Coleman, NIGC Acting General Counsel to Philip N. Hogen, NIGC Chairman Re: Mooretown Rancheria Restored Lands at 9-10 (October 18, 2007). Again, only two years had passed before the Tribe announced its intent to game and sought a restored lands opinion. *Id.*

As is shown by these earlier restored lands opinions, the Tribe's intended use of the land is not relevant to a restored lands finding and tribes are free to change their intended use of the land to take advantage of gaming opportunities if the land otherwise meets the relevant factors. Here, the Tribe took more than twice as long as other tribes to change course and pursue gaming. Like Coos, Bear River, and Mooretown, the Tribe is free to do so. It was error for the Chairman

to consider that the Tribe did not contemplate a gaming use for the land when it applied for trust status; that it represented before the IBIA that the land would not be used for gaming; and that the IBIA relied on that representation.

The Trust Decision was Made When the IBIA Issued its Final Agency Decision and Events Which Post-Date this Decision Were Improperly Considered

Although we have found the intended use of the land is not relevant, we still must determine whether the Tribe's expressed intention with regard to the restored status of the land, and reliance thereon, are factual circumstances appropriately considered in the restored lands analysis. Before we can do so, however, we must address whether the Tribe's expressions of that intent were timely considered; i.e. were they present at the time the land was taken into trust?

The core question of any restored lands analysis is whether the land at issue was "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." *Grand Traverse* at 934. Whether the lands are taken into trust as part of a restoration of lands necessarily depends on the facts present at the time of the acquisition, or, more precisely, the facts present when the decision to acquire the land was made. Any facts which were not present at the time of the decision are not part of the trust acquisition, and, therefore, are not properly considered.

At issue is exactly when the acquisition occurred. There are three views expressed here:

1. The Tribe argues that the decision was made on September 15, 2000, when the Regional Director issued the decision to take the land into trust. Tribe's Notice of Appeal at 11.
2. The Chairman stated that the earliest the decision could have been final was in August 2002 when the IBIA decision was issued. Disapproval Memo at 27-30.

3. The Chairman then expanded the time frame to the date the Secretary signed the deed in February 2003, and relied on this later date and events which occurred up and until this date, in his disapproval of the ordinance. *Id.* The State agrees with the Chairman's reliance on this later date. State of Iowa's Request to Participate at 6.

We believe the correct view, first expressed by the Chairman, is that the land to trust decision was made when it became a final agency decision, i.e. upon the IBIA's decision. Consequently, events that occurred after that were not considered as part of the trust decision. Support for this view rests in DOI's regulations that govern both IBIA appeals and land acquisitions. Interior's regulations provide that the IBIA decides "finally for the Department appeals to the head of the Department pertaining to administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR chapter I."[4] 43 C.F.R. § 4.1(b)(2). Additionally, 25 C.F.R. § 4.312 states, "rulings by the [IBIA] are final for the Department and must be given immediate effect." Finally, 43 C.F.R. § 4.21(d) provides, in pertinent part:

> No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor.

These regulations unequivocally demonstrate that the IBIA decision is a final agency decision.

BIA regulations requiring public notice that a final decision has been made are also instructive here. Section 151.12(b) of 25 of C.F.R. requires public notice "that a final agency determination to take land into trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." 25 C.F.R.

[4] The land into trust process is governed by 25 C.F.R. Part 151, which falls within chapter I of 25 C.F.R, and is therefore appropriately within the jurisdiction of IBIA.

§ 151.12(b). When the BIA amended its regulation regarding land acquisitions, it added this notice requirement to facilitate judicial review of decisions by the Secretary to take land into trust. *See* 61 Fed. Reg. 18082 (Apr. 24, 1996); S*ee also*, *McAlpine v. United States*, 112 F.3d 1429, 1433 (10th Cir. 1997). The preamble to the BIA regulation explains that the rule:

> establishes a 30-day waiting period after final administrative decisions to acquire land in trust under the [IRA]. The Department is establishing this waiting period so that parties seeking review of final decision by the [IBIA]…will have notice of administrative decisions to take land into trust before title is actually transferred. This notice allows interested parties to seek judicial or other review under the [APA]…

61 Fed.Reg. 18082 (Apr. 24, 1996). The preamble further explains:

> following consideration of the factors in the current regulations and completion of the title examination, the Department, through Federal Register notice, or other notice to affected members of the public, will announce any final administrative determination to take land in trust. The Secretary will not acquire title to the land in trust until at least 30 days after publication of the announcement. This procedure permits judicial review before transfer of title to the United States. The Quiet Title Act (QTA), 28 U.S.C. § 2409(a), precludes judicial review after the United States acquires title. (citations omitted).

The timing and purpose of the public notice shows that it was not considered as part of the trust decision. The purpose of the notice is to advise the public that a land to trust decision has been made so that affected parties may sue in federal court to prevent the trust acquisition before the land is formally acquired because the Quiet Title Act precludes judicial review after the United States acquires title. See 28 U.S.C. § 2409(a). See also, *Governor of Kansas, et. al. v. Kempthorne*, 505 F.3d 1089 (10th Cir. 2007). The agreement entered into between the Tribe and the State, and the written documentation of that agreement, all occurred after, and as a result of, the land to trust decision. It was *because* the IBIA issued a final decision that the State sought the agreement with the Tribe that it would not pursue its remedies in federal district court so long as the Tribe "acknowledged that the lands are not eligible for the exceptions under 25 U.S.C.

§ 2719(b)(1)(B)."[5]

Finally, and importantly, the IBIA acts under authority delegated to it by the Secretary. See 43 C.F.R. 4.1, which provides that "[t]he Office of Hearings and Appeals, [of which the IBIA is a board] is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings and appeals and other review functions of the Secretary." *Id*. Because the IBIA acts for the Secretary and decides matters finally as the Secretary would, the IBIA decision here was, in effect, the Secretary's decision. The actions that followed that decision, i.e. the publication of the notice and the signing of the deed were not part of the decision whether to take the land into trust, but were actions the Secretary was required to take following a decision to take land in trust. This conclusion is supported by the use of the word "shall" in 25 C.F.R. § 151.12(b). Once the waiting period has expired and there is no challenge to the decision or request for reconsideration, the Secretary must acquire the land into trust.

We are not persuaded by the Tribe's argument that the decision-making process ended with the Regional Director and any events that occur after that point are not properly considered. Had the State not appealed, the Tribe would be correct in its timing analysis; however, where an appeal is timely filed and further documents may be submitted for consideration,[6] the Regional Director's decision cannot be said to have been final. While the Regional Director expressed intent to take the land into trust, that decision was timely appealed to IBIA and it is the IBIA decision that constitutes final agency action. DOI was not, as the Tribe suggests, "simply defending its decision by following the process set forth by law." Tribe's Notice of Appeal at 11.

[5] As discussed at pages 16-17, *infra*, the question of restoration is a legal one not affected by a tribe's acknowledgement that the land is or is not restored.
[6] *See* 43 C.F.R. § 4.22 for regulations regarding submissions to IBIA.

It was still actively engaged in the decision-making process up and until the final agency decision.

The Chairman considered events that occurred up until the Secretary signed the deed. Even if this were the appropriate time-frame for considering evidence, we agree with the Tribe that "there is no evidence that Interior 'reviewed, analyzed, or considered whether to approve or endorse whatever 'agreement' that may have given rise to the notice before publishing it in the local newspaper. Rather, the Department simply accepted certain language to be appended to the . . . notice without independently determining whether it concurred with the substance…'" Tribe's Request for Indian Lands Opinion at 33 (July 23, 2007). See also, internal BIA e-mail referencing the language in the notice as a "compromise reached by the Ponca Tribe and the State of Iowa … [and that] the Solicitor's office had no problem including the appended paragraph. If we did not include the last paragraph, Iowa would have litigated the matter in Federal Court." December 3, 2002, e-mail from Tim Lake, Superintendent, BIA, Yankton Agency, to various BIA recipients.

Consequently, we find that the IBIA decision is the point at which the decision was made by the agency, and any relevant events that occur up and until this point are properly considered as part of that decision. Events occurring after the decision are not properly considered. As such, the Chairman erred in relying on events that occurred after DOI's decision was final.[7]

[7] Because we find that the Tribe's expressed intentions and reliance thereon are not relevant because they occurred after the DOI final decision, we need not reach the question whether the subjective intent of a tribe and reliance thereon are proper factual circumstances to be considered in a restored lands analysis nor do we reach the question of the enforceability of the agreement between the Tribe and the State.

The Carter Lake Land Meets the Location, Temporal Proximity, and Factual Circumstances Factors and is Therefore Restored Land under the IGRA

The Chairman set forth a strong positive analysis of the location and temporal factors, which we affirm. Because the test for restored lands is a balancing test, we weigh as well the factual circumstances prong of the analysis. As discussed at pages 12-16, *supra,* the factual circumstances on which the Chairman relied occurred after IBIA's final decision and were therefore improperly considered. When we evaluate, however, the factual circumstances that occurred within the relevant time period, we find one fact in particular that weighs in favor of restoration, and no facts which weigh against it. Whether a tribe has significant intervening trust parcels is a fact that we have previously considered as part of the factual circumstances analysis. See Memorandum to Philip N. Hogen, Chairman, from Penny J. Coleman, Acting General Counsel, Re: Cowlitz Tribe Restored Lands Opinion, November 22, 2005 at 9; Memorandum to Philip N. Hogen, Chairman, through Penny J. Coleman, Acting General Counsel, from John R. Hay, Staff Attorney, Re: Mooretown Rancheria Restored Lands, October 18, 2007. Here, we note that the Carter Lake land is among the first trust acquisitions of the Tribe ("[t]he Tribe owned in trust only an office building in Lincoln, Nebraska . . . and approximately 150 acres in Niobrara, Nebraska, for a community building and bison grazing land." Disapproval Memo at 26.). We find that the factual circumstances prong, as well as the location and temporal prongs, weighs in favor of a finding that the Carter Lake land is restored.

Despite the clear direction of the law, we are troubled by the inequities worked in this case. We do not "diminish the importance of [the Tribe's] concession to the State of Iowa." State's Request to Participate at 9. It seems the Tribe led the State down the primrose path with promises it never intended to keep. Yet, the law here prevents us from granting either a remedy

to the State or imposing a consequence on the Tribe. Without a consequence for those who so boldly promise whatever suits them, we are concerned by the tarnish the Ponca's actions may leave on the credibility and good faith of other tribes that attempt to have land taken into trust.

CONCLUSION

We affirm in part and reverse in part the Chairman's decision. We affirm the Chairman's determination that the land meets the location and temporal factors of the restored lands analysis. We reverse the Chairman's decision with respect to the factual circumstances factor because it improperly relied on the Tribe's intended use of the land and events that occurred after the Department of Interior's final agency decision was made. Because the Chairman relied on the factual circumstances findings to disapprove the ordinance, we reverse the Chairman's disapproval of the ordinance. The Carter Lake land meets the restored lands exception. The ordinance is therefore hereby approved.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

Philip N. Hogen Chairman	Cloyce V. Choney Vice-Commissioner	Norman H. DesRosiers Commissioner

EXHIBIT 3

NATIONAL INDIAN GAMING COMMISSION

MEMORANDUM

To: Chairman Hogen

From: Michael Gross, Associate General Counsel, General Law MG

Date: October 22, 2007

Re: Ponca Tribe of Nebraska, site-specific gaming ordinance

On July 23, 2007, the Ponca Tribe of Nebraska submitted an amended gaming ordinance for approval. The single amendment makes the ordinance site specific by defining as "Indian lands" a piece of land in Carter Lake, Iowa, taken into trust in February 2003. With the submission of its amended ordinance, the Tribe supplied a detailed submission contending that the Carter Lake land is restored lands within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).[1] The Office of General Counsel has reviewed in detail the Tribe's submission, as well as supplemental material supplied both by the Tribe and the State of Iowa. We conclude that though the Ponca Tribe of Nebraska is itself a "restored" tribe, the factual circumstances surrounding the acquisition of the Carter Lake land show that it was not taken into trust as part of the Tribe's restoration. Accordingly, the Carter Lake land is not "restored land." We therefore recommend that you disapprove the ordinance.

---

[1] This is actually the Tribe's second such submission. The Tribe submitted the same site-specific ordinance in February 2006 but withdrew it in August 2006 in the face of an impending disapproval. You were recused from that determination because the Tribe was then represented by Faegre & Benson. The Tribe has retained Akin Gump to represent its interests in this submission.

THE LAND IN CARTER LAKE, IOWA

Carter Lake, Iowa, incorporated 1930, sits on 1,236 acres of land (approx.) in Pottawattamie County and is the only city in Iowa west of the Missouri River. (www.cityofcarterlake.com/history.html.) The city is surrounded almost completely by Omaha, Nebraska, and the river makes up its small southern boundary and separates it from Council Bluffs, Iowa. Carter Lake's peculiar location is best grasped visually. Figure 1 provides a map:

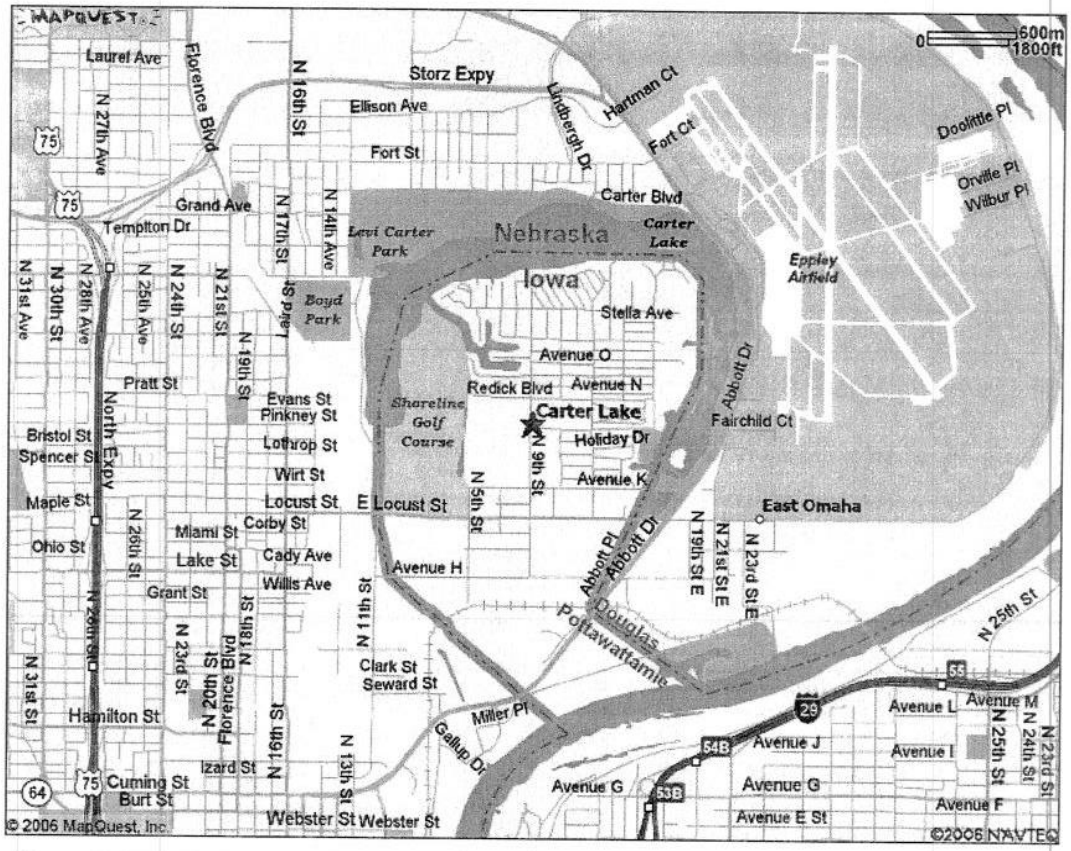

Figure 1: Carter Lake, Iowa. (Source: MapQuest Inc.)

Back before 1877, the Missouri River flowed around what is now the city and defined the border between Iowa and Nebraska. *Nebraska v. Iowa*, 143 U.S. 359, 370 (1892); *Nebraska v. Iowa*, 406 U.S. 117, 118 (1972). That year, however, the Missouri flooded and abandoned its ox-bow course for its present course, leaving the 323-acre

Carter Lake – then called Cut-Off Lake – to cradle the city's northern end. (*See, The History of Carter Lake, at* www.cityofcarterlake.com/history.html; Figure 1.)

With the change in the river's channel, the State of Nebraska claimed the land, arguing that the border between Nebraska and Iowa moved along with the river. The Supreme Court rejected the claim in 1892. Under well-settled riparian law, it held that when a river or stream marks the boundary of property, the boundary moves with the river when the river gradually changes its course through accretion. When, however, a river changes course by avulsion, when it "suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary;... the boundary remains as it was, in the center of the old channel, although no water may be flowing therein." *Nebraska v. Iowa*, 143 U.S. at 360; *Nebraska v. Iowa*, 406 U.S. at 118.

The 1877 flood, the Court found, changed the Missouri's course by avulsion, not accretion, and thus the boundary between the two states remained unchanged:

> [I]n 1877, the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel;... unless the waters of the river returned to their former bed, [such center line] became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

Nebraska v. Iowa, 143 U.S. at 370. The Court thus charged the two states to designate a boundary consistent with its opinion, which they did by compact, and Carter Lake remains in Iowa today. *Id.*; *Nebraska v. Iowa*, 406 U.S. at 118.

On September 24, 1999, the Ponca of Nebraska purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa, commonly known as 1001 Avenue H, Carter Lake, Iowa. Its legal description is:

Parcel A-1 (West; Iowa Property)

A parcel of land being part of lots 20, 21, and 22, together with part of the abandoned railroad right-of-way located north of the existing Illinois Central spur track in said lots 21 and 22, all in the Auditor's subdivision of section 21, township 75, range 44, West of the 5th P.M., Pottawattamie County, Iowa, said parcel described as follows:

Beginning at the northwest corner of said lot 20; thence along the northerly line of said lot 20, north 88° 28' 27" east, 69.05 feet; thence south 00°18' 05" east, 228.93 feet; thence north 89° 36' 57" east, 224.92 feet; thence north 00° 30' 42" west, 230.45 feet to a point on the northerly line of said lot 22; thence along said northerly line and along said northerly extended easterly, north 89° 11' 28" east, 221.33 feet to a point on the easterly line of said abandoned railroad right-of-way; thence along said easterly line and said easterly line extended southerly, south 00° 48' 32" east, 579.95 feet to a point on the northerly right-of-way line of the Illinois Central Railroad; thence along said northerly right-of-way line the following six (6) courses:

(1) South 89° 09' 18" west, 220.09 feet;
(2) North 64° 27' 01" east, 12.10 feet;
(3) North 61° 31' 11" west, 126.58 feet;
(4) North 46° 53' 25" west, 102.08 feet;
(5) North 38° 46' 37" west, 146.92 feet;
(6) North 50° 47' 51" west, 38.80 feet to a point on the westerly line of said Lot 20; thence along said westerly line, north 01° 03' 32" west, 301.52 feet to the point of beginning.

Said parcel of land contains an area of 4.81 acres, more or less.

(Trustees deed, recorded at Book 100 Page 15532, Pottawattamie County, Iowa.)

Shortly thereafter, on January 10, 2000, the Tribe passed a resolution seeking to have the Bureau of Indian Affairs place the land into trust. The Tribe's stated intent was to place a healthcare facility on the land:

> WHEREAS: The property will be utilized to provide services to our tribal members, primarily health services. Those services consist of Indian Health Service 638 contracted programs and Bureau of Indian Affairs P.L. 93-638 contract programs....

(Ponca Tribe of Nebraska, resolution 00-01.)

Three months later, in April 2000, the Tribe negotiated a "Cooperation and Jurisdictional Agreement" with the city of Carter Lake. The parties agreed that it would be to their mutual benefit for the Tribe to operate a medical clinic and a pharmacy on its land there. ("Cooperation and Jurisdictional Agreement," p. 1.) Among other things, the parties also agreed that they would exercise concurrent jurisdiction over civil actions involving tribal members, that they would exercise joint powers of arrest, and that the Tribe would provide law enforcement on the land. *Id.* at § II, ¶¶ A1, C; § III.

On September 15, 2000, the BIA Great Plains Regional Director wrote to relevant state and local officials in Iowa and stated her "intent to accept the land into trust for the benefit of the Ponca Tribe of Nebraska." (Letters from Cora L. Jones, Great Plains Regional Director, BIA, to Carter Lake Mayor, Iowa Governor, Pottawattamie County Supervisors, September 15, 2000.) Though neither Pottawattamie County nor the State of Iowa had responded to the Regional Director's previous, February 23, 2000 notice that she was considering the trust acquisition, both appealed her September 15 decision. They contended, in part, that the Tribe really intended to use the land for a casino and that the Regional Director erred in not considering this use. *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002).

The IBIA rejected the argument, finding that the land "was purchased ... and is currently used for health care facilities" and that any possible gaming use was speculative. The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

In December 2002, the Tribe, the State of Iowa, and Pottawattamie County apparently reached an agreement that avoided further litigation, though we have no evidence to show it was reduced to a writing. Iowa agreed to forego litigation in Federal

district court, and the Tribe agreed that the land would be used for the provision of governmental services and not for gaming. (November 26, 2002, e-mail from Michael Mason, Esq.; December 13, 2002, letter from Jean M. Davis, Assistant Attorney General, to Michael Mason, Esq.) On December 6, 2002, the BIA published in newspapers of general circulation in the Carter Lake area a "corrected notice of intent to take land into trust." The language of that notice was provided by the Tribe's attorney, (November 24, 2002, e-mail), and stated:

> The Regional Director of the Great Plains, Bureau of Indian Affairs, United States Department of the Interior has made a final determination that the United States will accept: [formal description of the Carter Lake land], which is located in the City of Carter Lake, Iowa, in the name of the United States for the benefit of the Ponca Tribe of Nebraska. The United States shall acquire title no sooner than thirty days from December 6, 2002. This notice was published in accordance with Title 25, Code of Federal Regulations, Seciton 151.12(b)....
>
> THE TRUST ACQUISITION OF THE CARTER LAKE LANDS HAS BEEN NAMED FOR NON-GAMING RELATED PURPOSES, AS REQUIRES (sic) BY THE PONCA TRIBE AND DISCUSSED IN THE SEPTEMBER 15, 2000, DECISION UNDER THE REGIONAL DIRECTORS ANALYSIS OF 25 CFR 151.10(c). AS AN ACQUISITION OCCURRING AFTER OCTOBER 17, 1988, ANY GAMING OR GAMING-RELATED ACTIVITIES ON THE CARTER LAKE LANDS ARE SUBJECT TO THE TWO PART DETERMINATION UNDER 25 U.S.C. SEC. 2719. IN MAKING IT'S (sic) REQUEST TO HAVE THE CARTER LAKE LANDS TAKEN INTO TRUST, THE PONCA TRIBE HAS ACKNOWLEDGED THAT THE LANDS ARE NOT ELIGIBLE FOR THE EXCEPTIONS UNDER 25 U.S.C. SEC. 2719(b)(1)(B). THERE MAY BE NO GAMING OR GAMING-RELATED ACTIVITIES ON THE LAND UNLESS AND UNTIL APPROVAL UNDER THE OCTOBER 2001 CHECKLIST FOR GAMING ACQUISITIONS, GAMING-RELATED ACQUISITIONS AND TWO-PART DETERMINATIONS UNDER SECTION 20 OF THE INDIAN GAMING REGULATORY ACT HAS BEEN OBTAINED.

(December 6, 2002, corrected public notice. Emphasis in original.)

On January 28, 2003, following the publication of this corrected notice, the Tribe executed a deed conveying the Carter Lake land to the United States, and the BIA finished the acquisition in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

The Carter Lake land is the land identified in the Ponca of Nebraska's amended gaming ordinance as "Indian lands," and it is the land where the Tribe now intends to offer gaming under the theory that the Carter Lake land is "restored land."

LEGAL ANALYSIS

I. Indian lands, generally.

IGRA permits gaming only on Indian lands, 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2), which it defines as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). The National Indian Gaming Commission's implementing regulations clarify:

> Indian lands means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either --
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
>
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. It is the opinion of the Office of General Counsel that the Ponca of Nebraska's land in Carter Lake is "Indian lands" under these definitions. It is trust land over which the Tribe exercises governmental power, and thus it satisfies § 502.12(b)(1).

A. Trust land

The Carter Lake land is, without question, now trust land. Again, the Tribe purchased the land in fee in 1999, and the BIA finished its fee-to-trust acquisition in February 2003. (February 10, 2003, letter from Great Plains Acting Regional Director to Superintendent, Yankton Agency.)

B. Governmental Power

The Carter Lake land is also land over which the Ponca of Nebraska exercise governmental power. In order to exercise governmental power over land, a tribe, like any other government, must first have jurisdiction to do so. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), *superseded by statute on other grounds as stated in Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (in addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D. Kan. 2000), *aff'd and remanded*, *Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (a tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (a tribe must first have jurisdiction in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4)).

Tribes are presumed to have jurisdiction over their members and lands. Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *see also*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978). There are no treaties or statutes applicable here that would limit the Tribe's jurisdiction.

Accordingly, when, as here, lands are held in trust for a tribe off-reservation, the analysis looks to whether the tribe is exercising governmental authority over the land. How exactly a tribe does this IGRA does not say, though there are many possible ways in many possible circumstances. For this reason, NIGC has not formulated a uniform definition of "exercise of governmental power," but rather decides that question in each case based upon all the circumstances. *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

The courts provide useful guidance. The First Circuit found that exercising governmental power involves "the presence of concrete manifestations of … authority." *Narragansett Indian Tribe*, 19 F.3d at 703. Examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.* Here, the Ponca of Nebraska exercise governmental authority over the Carter Lake land in a variety of concrete ways: through its constitution and legislation, through an inter-governmental jurisdictional agreement, and through the provision of governmental services to its members.

The tribal constitution extends the Tribe's governmental jurisdiction to all of its trust lands:

> The territorial jurisdiction of the Ponca Tribe of Nebraska under this Constitution shall extend to all trust or tribal lands as described by metes and bounds in the Treaties heretofore ratified by the Congress of the United States of America and shall cover all future additions that are within or without said boundary lines that may be acquired by the Ponca Tribe of Nebraska, or by the United States of America and held in trust for the Ponca Tribe of Nebraska or its members....

Ponca Tribe of Nebraska Constitution, Art I.

Similarly, the Ponca Law and Order Code establishes a tribal court and gives jurisdiction over all tribal lands, including trust land:

> The general jurisdiction of the Tribal Court ... shall be all territory of the Ponca Tribe of Nebraska, including ... those lands held in trust by the United States for the benefit of the Tribe and members of the Tribe....

Ponca Law and Order Code §§ 1-2-1, 1-4-1.

In April 2000, the tribe exercised this jurisdiction, entering into a government-to-government "Cooperation and Jurisdictional Agreement" with the city of Carter Lake. Among other things, the agreement gave the parties concurrent jurisdiction over civil actions arising on the land and involving tribal members, and it gave them concurrent criminal jurisdiction over offenses committed by tribal members or members of other Federally recognized Indian tribes. (Cooperation and Jurisdiction Agreement, § II, ¶¶ A1, B.) Further, the parties have joint powers of arrest on the land, and the Tribe agreed to provide law enforcement there. *Id.* at § II, ¶C; § III.

Beyond this, the Tribe was only partially successful in making healthcare available on the land. In 2000, at a cost of $161,000, the Tribe placed a small modular building and paved parking lot on the land. The building was used to house a staff of four to provide health and social services. For budget reasons, the Tribe discontinued these services within a few years, but it still maintains offices there.

These things taken together, then, are concrete manifestations of the Tribe's exercise of governmental authority in Carter Lake.

Indian Lands, generally: conclusion

Given the foregoing, the Ponca Tribe of Nebraska exercises governmental authority over its Carter Lake land; it has jurisdiction to exercise that authority; and the land is held in trust for the tribe by the United States. The Carter Lake land, in short, is "Indian land" within the meaning of IGRA. 25 U.S.C. § 2703(4)(B).

II. GAMING ON AFTER-ACQUIRED TRUST LAND

Meeting the definition of "Indian lands" does not finish the analysis, however. The United States took the Carter Lake land into trust in February 2003, and thus the land falls within IGRA's general prohibition against gaming on trust land acquired after October 17, 1988. 25 U.S.C. § 2719(a). The question thus becomes whether the Carter Lake land meets any of the exceptions in § 2719. The Tribe contends that the land is restored land under 25 U.S.C. § 2719(b)(1)(B)(iii). It is the opinion of the Office of General Counsel that it is not. Though the Ponca Tribe of Nebraska was itself restored to Federal recognition, the land was not restored to the Tribe as part of that restoration, and thus the land is not restored lands.

To meet this "restored lands" exception, a tribe must be an "Indian tribe that is restored to Federal recognition," and the acquisition of the land into trust must be part of a "restoration of lands" for the tribe. These terms are not defined in IGRA or the NIGC's implementing regulations, but there is precedent.

A. The Ponca Tribe of Nebraska was restored to Federal recognition

To be an "Indian tribe that is restored to Federal recognition," a tribe must demonstrate a period of recognition by the United States, a period of non-recognition, and reinstatement of recognition by the United States. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 369 F.3d 960, 967 (6th Cir. 2004). The Ponca of Nebraska satisfy all three conditions.

1. Recognition by the United States

The Ponca are culturally and linguistically related to the Osage, Kaw, Quapaw, and the Omaha, and together these tribes comprise the Dhegiha language group within the Siouan language family. Beth R. Ritter, *Piecing Together the Ponca Past: Reconstructing the Degiha Migrations to the Great Plains*, 22 GREAT PLAINS QUARTERLY, 271, 272 (2002); Elizabeth S. Grobsmith and Beth R. Ritter, *The Ponca Tribe of Nebraska: The Process of Restoration of a Federally Terminated Tribe*, HUMAN ORGANIZATION, Spring 1992, at 3. Together these tribes migrated from the east into the Great Plains and eventually separated. The Ponca and the Omaha, being the last to split, settled together near what is now Niobrara, Knox County, Nebraska. Accounts differ as to when that split occurred, some dating it as early as 1390 and others as late as 1715. Grobsmith and Ritter, *The Ponca Tribe*, at 3-4.

In any event, the first definitively Ponca villages in the Niobrara area date from about 1750. Ritter, *Piecing Together*, at 279. While most historic Ponca villages cluster in the Niobrara area, villages have been found as far south as the confluence of the Platte and Missouri Rivers south of Omaha in Nebraska; as far west in Nebraska as Cherry County, near the confluence of the Niobrara and Snake Rivers; as far north and west as Hughes County, South Dakota, east of Pierre; and as for north and east as Pipestone,

Minnesota. Ritter, *Piecing Together*, at 274; James H. Howard, *Known Village Sites of the Ponca*, PLAINS ANTHROPOLOGIST 15, NO. 48, 109-134 (1970). The range of the Ponca villages is best shown visually. Figure 2 provides a map:

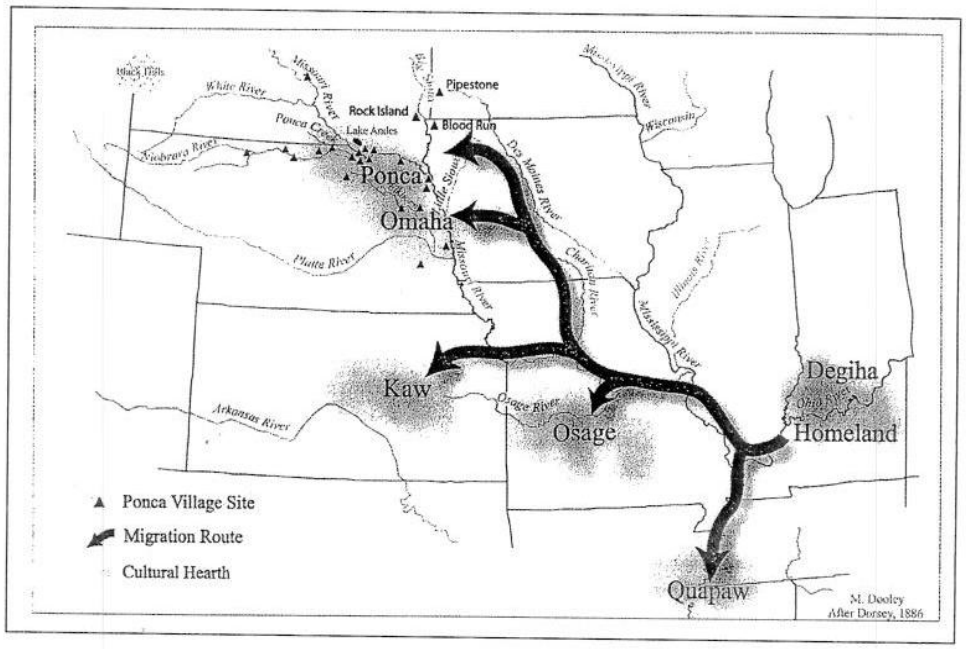

Figure 2: Ponca migration and village sites. (Reproduced from Ritter, *Piecing Together the Ponca Past:*, 22 GREAT PLAINS QUARTERLY, 271, 274 (2002)

On June 25, 1817, following the War of 1812, the Ponca struck the first of four treaties with the United States. This first treaty forgave any prior injuries or acts of hostility that might have existed, renewed in perpetuity the friendly relations between the two nations that existed before the war, and placed the Ponca under the protection of the United States. 7 Stat. 155 (1817).

In June 1825, the nations struck a second treaty. This one again acknowledged the protection and supremacy of the United States, and it permitted the United States to regulate commerce with the Ponca, which was to be conducted exclusively with American citizens. 7 Stat. 247, Articles 1 - 4 (1825). This last was important, apparently, because the Ponca were active traders and had traded with both the French and the

Spanish back into the 18th Century. Each of those nations, at one time or another, tried to monopolize the Ponca trade. Ritter, *Piecing Together*, at 279.

The Ponca ceded no land in either the 1817 or the 1825 treaty. This changed, however, with the treaty of March 12, 1858. In that treaty, the Ponca ceded "all the lands now owned or claimed by them, wherever situate," except for a reservation that was, more or less, a 25-mile square between the Niobrara and Ponca Rivers. The Ponca agreed to relocate there within one year. In consideration for the land and for the Ponca relocation, the United States agreed to pay various annuities and to provide money, over various periods of years, for the Poncas' subsistence – to purchase stock and agricultural implements, break up and fence land, build houses, establish schools, build mills, etc. 12 Stat. 997, Articles I and II (1858).

On March 10, 1865, the third treaty was "supplemented" with a fourth, by which the Ponca ceded an additional 30,000 acres, and the United States returned burial grounds and corn fields, various portions of townships around old village sites, and islands in the Niobrara River. This resulted in a Ponca reservation of some 96,000 acres. 14 Stat. 675, Articles I and II (1865); Grobsmith and Ritter, *The Ponca Tribe*, at 5. These four treaties *per se* demonstrate recognition of the Ponca by the United States.

Before the modern era of Federal Indian law, one way the United States recognized the governmental status of Indian tribes was by negotiating and entering into treaties with them. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and

sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."); *United States v. Washington*, 898 F. Supp. 1453, 1458 n.7 (W.D. Wash. 1995), *aff'd in part, rev'd in part on other grounds*, 157 F.3d 630 (9th Cir. 1998) (treaty rights are "the result of the negotiation between two sovereigns, the United States and the Tribes."); *NIGC Karuk Lands Opinion* at 3 (Oct. 12, 2004) ("Based on the fact that the Tribe negotiated treaties with the United States it can clearly be stated that there existed a government-to-government relationship at one time").

As of 1865, then, the Ponca Tribe was recognized by the United States. Thereafter, however, the tribe split into the Ponca of Nebraska (or Northern Ponca) and the Ponca of Oklahoma (or Southern Ponca). The question thus arises whether the United States recognized the Ponca of Nebraska after the split, and the answer to that question is "yes."

The split was the culmination of a sequence of events that began in 1868, when the United States struck the Fort Laramie treaty with the Great Sioux Nation. 15 Stat. 635 (1868). Incredibly, the land that treaty set aside for the Sioux included all of the Ponca reservation. 15 Stat 635, Article II. This made the Ponca intruders in their own homes, and for eight years the more numerous and more powerful Sioux raided and attacked them. *Ponca Restoration Act etc. Hearing on S. 1747 et al. Before the Senate Select Committee on Indian Affairs*, 101st Congress, 2nd Sess. 221 (1990) (testimony of Dr. Elizabeth S. Grobsmith, professor, University of Nebraska, and sources cited therein). (Hereafter, "*Ponca Restoration Hearings*.") The United States' solution to the problem it created was to relocate the Ponca.

Congress appropriated money to do so in 1876, and in 1877, the government informed the Ponca chiefs that the tribe must relocate to the Indian Territory. Eight chiefs were selected to visit and select a new reservation, but when they went, they found the land inhospitable and asked to return home. The request was denied, but they returned anyway, journeying some 500 miles in 40 days. *Ponca Restoration Hearings* at 222.

After denying repeated requests by the Ponca to reverse its removal decision, and because the Ponca refused to go to the Indian Territory voluntarily, the government issued an order for removal on April 12, 1877. Removal began for some of the Ponca on April 30, 1877, and for others in May. The journey, known as the "Ponca Trail of Tears," was made without adequate provision or preparation and encountered horrible weather. Many died, and the Ponca arrived "discouraged, homesick and hopeless ... on the lands of strangers, in the middle of a hot summer, with no crops or prospects for any." *Ponca Restoration Hearings* 222-223.

In early 1879, Chief Standing Bear, whose son had died and had asked to be buried in the Ponca homeland, set out for Nebraska with 66 others. Having reached the Omaha Tribe's reservation that spring, Standing Bear and his company were arrested by General George Crook for the purpose of returning them to the Indian Territory. *United States ex. Rel. Standing Bear v. Crook*, 25 F. Cas. 695, 686 (D. Neb. 1879). With the support of many outraged citizens, including prominent attorneys and newspapermen, Standing Bear applied for a writ of habeas corpus. *Ponca Restoration Hearings*, 223-224. Finding for the first time that Indians were "persons" under American law, and finding no lawful grounds to relocate Standing Bear and his companions, District Court Judge Elmer S. Dundy ordered their freedom. *Standing Bear*, 25 F. Cas. at 700-701.

The treatment of the Ponca and Judge Dundy's decision received national attention. In 1880, a committee was appointed by the Senate to investigate, and it made a report to President Hayes in 1881 condemning the government's mismanagement of Ponca affairs. *Ponca Restoration Hearings*, 225-226.

In an Act of March 2, 1889, Congress made some reparation for giving the Ponca reservation to the Sioux Nation. It provided that Ponca members "now occupying a part of the old Ponca Reservation, within the limits of the said Great Sioux Reservation..." were to be allotted land there. 25 Stat. 892. Under this authority, 27,236 acres were allotted to 168 people. H. REP. No. 2076, *Providing for the Division of the Tribal Assets of the Ponca Tribe of Native Americans of Nebraska Among the Members of the Tribe*, 87th Cong., 2d Sess. at p. 15 (1962) ("H. Rep. 2076"); S. Rep. No. 1623, *Providing for the Division of the Tribal Assets of the Ponca Tribe of Native Americans of Nebraska Among the Members of the Tribe, and for Other Purposes*, 87th Cong., 2d Sess. at p. 14 (1962) ("S. Rep. 1623.") From this point forward, the Northern Ponca were established in Nebraska.

That the United States recognized the Ponca of Nebraska, as distinct from the Ponca of Oklahoma and the Ponca before 1868, is evident from the tribe's reorganization under the Indian Reorganization Act. In the modern era of Indian law, Federal recognition of an Indian tribe requires both a legal basis for recognition, *i.e.* Congressional or executive action, and some empirical indicia of recognition, namely, a "continuing political relationship with the group...." *Grand Traverse*, 369 F. 3d at 968, *quoting* Cohen, *Handbook of Federal Indian Law*, at 6 (1982); *Mashpee Tribe v. Sec'y of the Interior*, 820 F.2d 480, 484 (1st Cir. 1987). Both criteria are met here.

Among its various provisions, the Indian Reorganization Act of 1934 grants any Indian tribe the right to adopt a constitution, which must be done by majority vote at a

special election called for the purpose and which must then be approved by the Secretary of the Interior:

> Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when –
>
> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
>
> (2) approved by the Secretary pursuant to subsection (d) of this section.

25 U.S.C. § 476(a). The Act likewise permits the Secretary to issue, upon petition, a charter of incorporation to a tribe. 25 U.S.C. § 477.

The IRA itself, in short, provides both a legal basis for the United States' recognition of an Indian tribe and a basis for a continuing political relationship with the tribe. Under the IRA, a tribe may adopt a constitution or corporate charter, or both, recognized by the United States, and the approval by the Secretary of the Interior is the beginning of Federal supervision of the tribe's legal affairs. Subsequent tribal elections under a tribal constitution, for example, are subject to Federal regulation. 25 C.F.R. §§ 81.1-81.24.

The Ponca of Nebraska approved a constitution and by-laws on February 29, 1936, and these were approved by the Secretary of the Interior five weeks later on April 3. H. Rep. 2076 at 11; S. Rep. 1623 at 11. A corporate charter for the Ponca Tribe of Native Americans of Nebraska was ratified on August 15, 1936. H. Rep. 2076 at 11; S. Rep. 1623 at 11. From 1936 forward, then, until termination in 1966, the United States recognized the Ponca of Nebraska.

2. Termination or non-recognition by the United States

The second condition for demonstrating that a tribe is restored to Federal recognition is the loss of prior recognition by the United States. Such a loss may occur through legislative action – *e.g.* by statute or treaty – or by administrative action. *Grand Traverse,* 369 F.3d at 968-72; *TOMAC v. Norton,* 193 F. Supp. 2d 182, 193-94 (D.D.C. 2002); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 705-07 (W.D. Mich. 1999), *vacated on other grounds*, 288 F.3d 910 (6th Cir. 2002). The Ponca of Nebraska lost Federal recognition forty years ago, after the passage of a termination act, 25 U.S.C. §§ 971 – 980.

During the mid-20th Century, the "Termination Era," Congress promoted an end to the trust relationship between the United States and the Indian tribes and aimed instead at assimilation:

> it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship.

H.C.R. 108, *Termination of Federal Supervision: The Removal of Restrictions Over Indian Property and Person*, 83rd Cong., 2nd Sess. (1953).

On September 23, 1958, the Ponca of Nebraska adopted a resolution and petition noting that only eight adult members participated in the last regular tribal election – held in November 1949, with none held between then and 1958 – and that only 23 adult Indians, not all of them Ponca, resided on the reservation. H. Rep. 2076 at 9; S. Rep. 1623 at 9. The resolution and petition then sought

> the Bureau of Indian Affairs, the county commissioner [sic] of Knox County [Nebraska], and the State of Nebraska to cooperate with us in the

> development of a program leading to disposal of property owned by the Ponca Tribe and the distribution of proceeds and any other assets of the of the Ponca Tribe to those members who may be determined to be entitled to participate in such distribution. We further petition that the Congress of the United States enact legislation to accomplish the purposes of this program, developed pursuant to the petition, and to dissolve the corporation known as the Ponca Tribe of Native Americans of Nebraska.

H. Rep. 2076 at 10; S. Rep. 1623 at 9.

On September 17, 1959, the Knox County Board of Supervisors adopted a resolution "favoring the introduction and passage in the U.S. Congress of a proposal [sic] legislative bill providing for emancipation of the Ponca Tribe of Native Americans of Nebraska...." H. Rep. 2076 at 10; S. Rep. 1623 at 10.

In April 1962, Idaho's Senator Church introduced S. 3174, a bill "to provide for the division of the tribal assets of the Ponca Tribe of Native Americans of Nebraska among the members and to terminate Federal supervision and control over the tribe." S. Rep. 1623 at 1. Enacted on September 5, 1962, this act provided, in brief, for the Secretary of the Interior first to establish a roll of tribal members and then to distribute all tribal assets, both personal property and real property (including trust land), to those members. Members were also eligible to select and purchase as much as five acres of land for a homesite. Any lands not so selected would be sold at auction. 25 U.S.C. §§ 971- 975.

At the time, 691.11 acres of land were held in trust for the Tribe by the United States, and 2,180.39 acres of allotted trust land – all that remained in Ponca hands after the allotment of 27,236 acres in 1889 – were held in fractionated ownership. An additional 152.5 acres was owned by the United States. S. Rep. 1623 at 14-15; H. Rep. 2076 at 15.

In any event, the termination act provided three years for the distribution of assets, 25 U.S.C. § 973(a). Following that, "the Secretary of the Interior shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated," 25 U.S.C. § 980, which the Secretary did on October 18, 1966. 31 Fed. Reg. 13810. From that point, until the restoration of the Ponca of Nebraska by statute in 1994:

> the tribe and its members [were] not ... entitled to any of the special services performed by the United States for Indians or Indian tribes because of their Indian status, [and] all statutes of the United States that affect Indians or Indian tribes because of their Indian status [were] inapplicable to them, and the laws of the several States [applied] to them in the same manner they apply to other persons or citizens....

25 U.S.C. § 980.

In short, by the passage of the termination act, Congress removed the legal basis for the United States' recognition of the Ponca of Nebraska, and the Secretary then removed all indicia of any continuing political relationship with the Tribe. The United States no longer dealt with the Ponca of Nebraska as a political entity, and the Tribe thus lost its prior recognition.

3. Reinstatement of recognition

Like the loss of recognition, a reinstatement of recognition, the third and final condition for being "a tribe that is restored to recognition," may occur through legislative or administrative action, *i.e.* the Federal acknowledgement process. *Grand Traverse*, 369 F.3d at 967, 969-72. Congress reinstated recognition of the Ponca of Nebraska by statute in 1994.

In 1988, Congress formally repudiated H.C.R. 108 and its policy of termination: "Congress repudiates and rejects House Concurrent Resolution 108 of the 83d Congress

and any policy of unilateral termination of Federal relations with any Indian nation." 25 U.S.C. § 2501(f).

On October 11, 1989, Senators Exon and Kerry, both of Nebraska, introduced S. 1747, the "Ponca Restoration Act." S. REP. 101-330, *Providing for the Restoration of Federal Recognition to the Ponca Tribe of Nebraska, and for Other Purposes*, 101st Cong., 2nd Sess. (1990). ("S. Rep. 101-330.") The legislative history clearly and unambiguously states the purpose of the bill: "to restore Federal recognition to the Northern Ponca Tribe of Indians in the State of Nebraska." S. Rep. 101-330 at 1.

Signed into law on October 31, 1990, the Ponca Restoration Act, 25 U.S.C. §§ 983 – 983h, did exactly that: "Federal recognition is hereby extended to the Ponca Tribe of Nebraska." 25 U.S.C. § 983a. The Act also states:

> All rights and privileges of the Tribe which may have been abrogated or diminished before the date of enactment of this Act by reason of any provision of Public Law 87-629 [25 U.S.C. §§ 971 – 980] are hereby restored and such law shall no longer apply with respect to the Tribe or the members.

25 U.S.C § 983b(a).

In sum, over its history, the Ponca Tribe of Nebraska was recognized by the United States, lost this recognition, and was reinstated to Federal recognition. Therefore the Tribe is an "Indian tribe that is restored to Federal recognition" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

B. Land taken into trust as part of the restoration

Given that the Ponca Tribe of Nebraska is a restored tribe, its land in Carter Lake, Iowa, only satisfies the requirements of § 2719(b)(1)(B)(iii) if it was taken into trust as part of the Tribe's restoration. Nothing in IGRA requires that this be done by Congressional action or in the very same transaction that restored the Tribe. Lands may

be restored to a tribe through the administrative fee-to-trust process. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 689, 699-700 (W.D. Mich. 1999).

Still, not every trust acquisition for a restored tribe meets this exception. There must be some limiting condition – something that ties the trust acquisition to, or shows it to be a part of, the tribe's restoration. *Grand Traverse*, 198 F. Supp. 2d 920 at 935. Accordingly, both the NIGC and the courts that have considered the question find the necessary limiting condition in the factual circumstances of the trust acquisition, the location of the trust acquisition, and the temporal relationship of the trust acquisition to the tribal restoration. *See, e.g., Coos,*116 F. Supp. 2d at 164; *Grand Traverse*, 198 F. Supp. 2d at 935; *In Re Sault Ste. Marie Tribe of Chippewa Indians, Resolution No. 2006-101, amendment to Tribal Code § 42.801, Gaming Ordinance* (restored lands opinion, September 1, 2006); *In Re Karuk Tribe of California*, (restored lands opinion, October 12, 2004). Here, while the Tribe has historical and modern ties to the Carter Lake land, and while the trust acquisition process at least began not long after the Tribe's restoration, the facts surrounding the acquisition show conclusively that the Carter Lake land was not restored land.

1. The Tribe's ties to Carter Lake, Iowa.

The Tribe has historical and modern ties to its Carter Lake land and to the surrounding area that weigh in favor a finding that the land is restored.

a. Historic ties.

Scholars have identified the aboriginal territory of the Ponca, and it includes Carter Lake. The eastern boundary of the Ponca territory was, approximately, the Missouri River, and the southern boundary was the Platte River. Figure 2, above, for example, shows that while most Ponca villages were concentrated around what is now Niobrara, Nebraska, Ponca villages have been found as far north and east as Pipestone, Minnesota, and almost as far south as the Platte, further south in Nebraska than present-day Omaha, which surrounds Carter Lake. Ritter, *Piecing Together*, at 274.

Scholars have also written:

> The eastern boundary of the Ponca territory ran *roughly* from the from the west bank of the Missouri, opposite the present-day Sioux City, Iowa, down to the mouth of the of the Platte River.... The North Platte River formed the southernmost boundary of the Poncas. Directly south of that boundary lived the Pawnee, who traditionally hunted to the south....

Joseph H. Cash and Gerald W. Wolff, *The Ponca People* (1975). And see, James H. Howard, *The Ponca Tribe*, 130-131 (1965) (noting that the eastern boundary of the Ponca territory "was a line extending south to the Platte River from a place on the Missouri called *Ni-agatsatsa*," and the "southern boundary of the Ponca domain was the Platte (North Platte west of the fork)").

As a rough marker, however, the Missouri River was not an impassable boundary. Living memory – in the form of deposition testimony from Ponca elders in 1912 in support of a claim before Indian Claims Commission, *Omaha Tribe v. United States*, No. 21,002 (1911-1912) – is consistent with the writings of the scholars. It establishes the Ponca territory, their travels and their hunts east of the Missouri and south to the Platte.

For example, Louis Le Roy, age 70 in 1912, Howard, *Known Village Sites*, at 114, testified as to boundaries:

> They commence east of Omaha city on the other side of the River Wasabte (Black Bear's Den). From there they went to Pipestone, and from Pipestone to Choteau Creek. From there they went up where Crow Creek Agency is, somewhere near there. From there they went to what they call "Dry wood" or "Dry timber." From there they went to what they call "Fork of the Missouri." Then the crossed and went south. From there they went over to the South of the Platte River. They followed the Platte River east and went down as far as the mouth of the Platte. From there they went to Ponca City – where Ponca City now is.

(Le Roy OLC 1912:35.)

Similarly, Chief Yellow Horse, brother of Chief Standing Bear and himself 67 in 1912, testified:

> Even in my time I knew that they went as far [south] as the Platte and as far east as the old Ponca village and even across the Missouri River to kill deer, buffalo, and elk.

(Yellow Horse, OLC 1912:146).

b. Modern ties

The tribe has modern ties to the Carter Lake land. The Tribe had a direct relationship with the Carter Lake land itself before it was taken into trust. The tribe purchased the land in fee in November 1998. In 2000, it finished negotiating and then executed the jurisdiction and cooperation agreement with the City of Carter Lake. The Tribe also erected a small modular building on the land and paved the attendant parking lot. The tribe housed a staff in the building to provide health services and social services. Though the tribe ceased those services because there was not enough money to fund them, it nonetheless still maintains an office there.

2. The timing of the Carter Lake trust acquisition.

This factor too could weigh in favor of a finding that the Carter Lake land is restored land. There were a total of 13 years between Congress's restoration of the Tribe and the acquisition of the Carter Lake land into trust, but the Tribe did not acquire

within that time a significant land base separate and apart from Carter Lake. In fact, what it did acquire represents only a fraction of what it could acquire under its restoration act and of what its Congressionally mandated economic plan call for.

In *In Re Sault Ste. Marie Tribe of Chippewa Indians*, above, for example, the NIGC found that a parcel of land that that tribe acquired in 2000 was not restored lands because of the great length time that passed between the tribe's recognition and the 2000 acquisition and because of the large amount of other property the tribe had otherwise acquired in that time. Specifically, there were 28 years between the Sault Ste. Marie tribe's restoration and the trust acquisition. Further,

> the Tribe had its first reservation parcel by 1975, and three reservation parcels by 1984 as well as an additional 184.21 acres in trust. These parcels were taken into trust three and nine years after Tribal restoration. By the time the St. Ignace parcel was placed into trust in 2000, the Tribe had acquired 50 parcels totaling nearly another 1000 acres into trust. These trust parcels have given [the Tribe] significant acreage devoted to member housing, community services, and economic development that might better be determined part of the Tribes first systematic effort to restore its land base.

In Re Sault Ste. Marie Tribe of Chippewa Indians, restored lands opinion at p. 16. Accordingly, the NIGC found that the 2000 parcel was not restored lands.

Here, there was no such long passage of time and there were no significant intervening land acquisitions. The Tribe owned in trust only an office building in Lincoln, Nebraska (Ponca Tribe of Nebraska resolution 96-101) and approximately 150 acres in Niobrara, Nebraska, for a community building and bison grazing land. (Submission, p. 24; May 27 and June 22, 2003 trust deeds). Though Congress restored the Ponca of Nebraska in 1990, the Tribe only had a constitution approved in 1994. (Ponca Tribe of Nebraska resolution 00-01). The Tribe purchased the Carter Lake land in September 1999, only five years later, and it filed its application to take the Carter

Lake land into trust in January 2000. The trust acquisition would have been complete in September 2000, but for the litigation with Pottawatamie County and the State of Iowa, which postponed the acquisition to the beginning of 2003.

Accordingly, the timing of the Carter Lake acquisition weighs in favor of a finding of restored lands.

3. **Factual circumstances surrounding the trust acquisition.**

Notwithstanding the foregoing two factors, however, the facts immediately surrounding the trust acquisition show that the Carter Lake land is not restored land.

To begin with, the Tribe did not contemplate a gaming use for the land when it applied to have the land taken into trust. Instead, the Tribe sought to have the land taken into trust so that it might place a healthcare facility on the land:

> WHEREAS: The property will be utilized to provide services to our tribal members, primarily health services. Those services consist of Indian Health Service 638 contracted programs and Bureau of Indian Affairs P.L. 93-638 contract programs....

(Ponca Tribe of Nebraska, resolution 00-01.) This is not to suggest that a tribe's representations of use in a fee-to-trust application will be determinative. Rather, this is one fact among many others that speaks to the circumstances surrounding the trust acquisition.

Next, the State of Iowa and Pottawatomie County challenged the September 15, 2000 decision of the BIA Great Plains Regional Director to take the Carter Lake land into trust. They appealed to the IBIA and contended, in part, that the Tribe really intended to use the land for a casino and that the Regional Director erred in not considering this use. *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002). In its brief before the IBIA, the Tribe again represented that the land would not be used for

gaming but "is to be used for administrative services, including health care, and for health care facilities." (*Iowa v. Great Plains Region Director*, Brief of Ponca Tribe of Nebraska, April 30, 2001, p. 4.)

On August 7, 2002, the IBIA decided in favor of the Tribe, finding that the land "was purchased ... and is currently used for health care facilities" and that any possible gaming use was speculative. The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

Rather than continuing to litigate, attorneys for the Tribe and the State reached an agreement – acknowledged in writing, but never formally memorialized – under which Iowa agreed to forego litigation in Federal court, and the Tribe agreed that the Carter Lake land would not be used for gaming. (November 26, 2002, e-mail, from Michael Mason, Esq.; December 12, 2002, letter from Jean M. Davis, Assistant Attorney General, to Michael Mason, Esq.)

Accordingly, on November 26, 2002, the Tribe's then-attorney sent an e-mail to the BIA requesting that a notice of intent to take the Carter Lake land into trust be published as soon as possible. (November 26, 2002, e-mail from Michael Mason.) He requested further that the notice contain the following language, which was substantially identical to what was eventually published:

> The trust acquisition of the Carter Lake lands has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000, decision under the Regional Director's analysis of 25 CFR 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. sec. 2719(B)(1)(B). There may be no gaming or gaming-related activities on the land unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-

> Related Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained.

(November 26, 2002, e-mail, from Michael Mason, Esq.)

On December 3, 2002, the Regional Director published in a newspaper of general circulation in Carter Lake a notice of intent to take the Carter Lake land into trust but omitted this additional language. On December 6, BIA published a "corrected notice of intent to take land into trust" this time including the language. (December 6, 2002, corrected public notice.) An internal BIA e-mail noting the incorrect publication described the additional language as follows:

> The attached Notice of Intent was published in the Council Bluffs, Iowa, newspaper yesterday, December 2 [sic, December 3], 2002. you will recall that the last paragraph in the Notice was a compromise reached by the Ponca Tribe and the State of Iowa as well as Pottawatomie County, Iowa. The Solicitor's office had no problem including the appended paragraph. If we did not include the last paragraph, Iowa would have litigated the matter in Federal Court. Also, the last paragraph was agreed upon by the Ponca's attorney....

(December 3, 2002, e-mail from Tim Lake to various BIA recipients.)

On December 13, 2002, Jean M. Davis, an Iowa Assistant Attorney General, wrote a confirming letter to the Tribe's attorney, stating:

> As you are aware, the Corrected Notice of Intent to take Land in Trust was published in the Council Bluffs *Daily Nonpareil*. The corrected Public Notice makes clear that that lands to be taking into trust in this case will be taken for non-gaming related purposes. The corrected Public Notice also contains the acknowledgement by the Ponca Tribe of Nebraska that the lands are not eligible for any of the exceptions found under 25 U.S.C. sec. 2719(b)(1)(B).
>
> This corrected Public Notice is consistent [with] your repeated representations to me and to Pottawattamie County, made on behalf of the Ponca Tribe of Nebraska, that the Tribe intends to use the lands for the purpose stated in the original application, not for gaming activities. Based upon our agreement that the lands will be used in a manner consistent with the original application and the corrected Public Notice and not for gaming purposes, you have requested that the State of Iowa

> and Pottawatamie County forego judicial review and further appeals. Inasmuch as the corrected Public notice now filed in this case contains the non-gaming purpose restriction to which we have agreed, the State of Iowa has agreed not to pursue judicial review or further appeals of the final decision of the United States department of the Interior in this case.

(December 13, 2002, letter from Jean M. Davis.) The trust acquisition of the Carter Lake land followed in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

In and of themselves, these facts are determinative. They culminate in the language of the corrected notice, and they unambiguously indicate that at the time of the acquisition, no one involved intended the Carter Lake land to be used for gaming or, more importantly, to be restored land. Only the opposite appears. Every government involved in the acquisition regarded the Carter Lake land as land that was not restored within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii), a characterization that the Tribe has not, until now, disputed.

The Tribe contends that the above facts are not properly considered here because they do not surround the trust acquisition. Rather, the Tribe contends, these facts all post date the acquisition of the Carter Lake lands, which occurred upon the September 15, 2000 decision of the Regional Director. This is not persuasive. The trust acquisition was not, in fact, complete on that date.

There are a number of ways to see this. First and foremost, the record shows that the Regional Director's decision to take the Carter Lake land into trust was not final on September 15, 2000. By its own terms, the decision states that it may be appealed to the IBIA within 30 days, and "if no appeal is timely filed, *this decision will become final for the Department of the Interior at the expiration of the appeal period.*" (September 15, 2000,

Letters from Cora L. Jones, Great Plains Regional Director, BIA, to Carter Lake Mayor, Iowa Governor, Pottawattamie County Supervisors.) (Emphasis added.)

The State of Iowa and Pottawattamie County in fact did appeal to the IBIA, which did not render its decision until August 2002. That is the earliest date in which the trust acquisition might be final because then and only then could an action on the decision be heard in Federal district court. Prior to that, the suit would have been stayed or dismissed under the doctrine of primary jurisdiction. *Reiter v. Cooper,* 507 U.S. 258, 268 (1993); *Grand Traverse Band*, 46 F. Supp. 2d at 706 (primary jurisdiction doctrine permits Federal courts to stay or dismiss actions over which they have jurisdiction pending resolution of issues within the special competence of an administrative agency.) The earliest, then, that the decision was final was in August 2002.

Another indication that the final decision did not occur in September 2000 is found in Department of the Interior land-into-trust regulations. Before land may be taken into trust, these regulations require the publication of a notice, either in the *Federal Register* or in a newspaper of general circulation, stating that "a final agency determination to take land into trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." 25 U.S.C. § 151.12(b). That notice was published here for the first time on December 3, 2002, and the deed transferring the Carter Lake land to the United States in trust for the tribe was not executed until early 2003.

With the exception of the Tribe's statements of intent as to the use of the Carter Lake land, both to the BIA and before the IBIA, all of the above events surround the taking of the Carter Lake land into trust in the latter half of 2002 and early 2003. They are, therefore, properly considered here.

That said, the Tribe also contends in various ways that the limiting language of the corrected notice can of itself have no legal effect. It contends that neither the corrected notice nor the apparent settlement agreement with the State of Iowa was authorized by the tribal government. It contends that in any event, an agreement limiting the use of the Carter Lake lands would require approval by the Secretary under 25 U.S.C. § 81. In sum, it contends that none of the usual mechanisms for limiting uses of land – a deed restriction or covenant or a binding settlement agreement – are present here. Whether or not that is so, it is, ultimately, irrelevant to the determination here.

As to the settlement agreement, the NIGC Chairman need take no position on whether the notice was properly authorized by the tribal government or whether there was a binding settlement agreement between the Tribe and the State of Iowa. It certainly appears from the facts in the record that both the State of Iowa and the BIA regional office believed that the tribal attorney had the apparent authority to act on behalf of the Tribe. It appears as well that Iowa did not pursue litigation further because it struck an agreement with the Tribe that the Carter Lake land would only be used for gaming under a 2-part determination. If that agreement was never valid or binding, Iowa, presumably, is still free to seek judicial review of the IBIA's decision. That action, presumably, could also address the applicability of 25 U.S.C. § 81 and the determination by the Secretary that that law requires. In passing, it should be noted that there does not appear to be any evidence in the record of such a determination after the Tribe entered into a separate 1999 settlement agreement with the City of Lincoln, Nebraska, that prohibited gambling on the Tribe's trust lands there. (*See* May 19, 1999 letter from Chairman Fred LeRoy to Mayor of Lincoln; May 28, 1999 intergovernmental agreement regarding tribal land.)

Be all of that as it may, the question is whether the Carter Lake land is or is not restored land, given the facts that surround the trust acquisition. The question is not whether the notice, or any alleged agreement based upon it, is legally enforceable or whether there is a legally binding document restricting the use of the Carter Lake land in such a way as that the land must perforce cease to be restored lands under IGRA. The facts surrounding the trust acquisition, as set out above and detailed in the corrected notice of intent to take land into trust, demonstrate that the Carter Lake land was not part of a restoration of the Tribe's lands at the time it was taken into trust.

Given all of the foregoing, it is the opinion of the Office of the General Counsel that the land in Carter Lake, Iowa, though "Indian lands" within the meaning of IGRA, is not restored land under 25 U.S.C. § 2719(b)(1)(B)(iii). Gaming is therefore not permissible on the Carter Lake land under IGRA. The Department of the Interior, Office of the Solicitor, concurs in this analysis.

RECOMMENDATION

Disapprove the ordinance.

EXHIBIT 4

NATIONAL INDIAN GAMING COMMISSION

October 22, 2007

Via facsimile: 202-887-4288
and First Class mail

Michael Rosetti, Esq.
James Meggesto, Esq.
Akin Gump et al.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036-1564

Re: Ponca Tribe of Nebraska, amended gaming ordinance

Dear Messrs. Rosetti and Meggesto:

This is in reply to your July 23, 2007 letter seeking review and approval of a newly amended tribal gaming ordinance, enacted pursuant to tribal council resolution No. 07-36. The amended ordinance makes one change to the Tribe's existing ordinance, defining as "Indian lands" a parcel of trust land in Carter Lake, Iowa. The amendment was specifically enacted to authorize gaming on that land.

Your submission argues that the Carter Lake land is restored lands within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii) and thus eligible for gaming. After careful consideration, however, I find that though the Ponca Tribe of Nebraska is itself a restored tribe, the Carter Lake land is not restored land. In brief, I find that the factual circumstances surrounding the acquisition of the Carter Lake land show that it was not taken into trust as part of the Tribe's restoration. A detailed explanation is set out in the accompanying memorandum, which I hereby incorporate by reference.

Because I find that the Carter Lake land is not restored land within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii), the amended ordinance is inconsistent with IGRA and is hereby disapproved.

If you have any questions, please feel free to contact Michael Gross, Associate General Counsel, General Law, at 202-632-7003.

Sincerely,

Philip N. Hogen
Chairman

Rosetti and Meggesto

cc: Larry Wright Jr., Chairman, Ponca Tribe of Nebraska
Penny Coleman, Acting General Counsel
Michael Gross, Associate General Counsel
Jonathan Damm, DOI Office of the Solicitor