

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

STATE OF NEBRASKA, ex rel.
JON BRUNING, Attorney General
of the State of Nebraska;

STATE OF IOWA, ex rel.
THOMAS J. MILLER, Attorney
General of Iowa;

Plaintiffs,

CITY OF COUNCIL BLUFFS, IOWA

Intervenor-Plaintiff,

No.1-08-cv-6-CRW-CFB

ORDER REVERSING
DECISION OF THE NATIONAL INDIAN
GAMING COMMISSION

v.

UNITED STATES DEPARTMENT
OF INTERIOR; DICK KEMPTHORNE,
in his capacity as Secretary of the United
States Department of the Interior; NATIONAL
INDIAN GAMING COMMISSION;
PHILIP N. HOGEN, in his official capacity as
Chairman of the National Indian Gaming
Commission; CLOYCE V. CHONEY,
in his official capacity as Vice Commissioner
of the National Indian Gaming Commission;
and NORMAN H. DESROSIERS, in his
official capacity as commissioner of the
National Indian Gaming Commission,

Defendants.

PONCA TRIBE OF NEBRASKA,

Amicus.

This judicial review proceeding lies at the intersection of laws governing
authority of the U.S. Department of Interior (DOI) through the Bureau of Indian Affairs (BIA) to

take restored lands into trust for an Indian tribe, and laws enabling the National Indian Gaming Commission (NIGC) to govern gaming once rooted on tribal land. The court here decides not whether gaming should ever be allowed on the Carter Lake, Iowa site, but whether the NIGC had authority to make the decision to allow gaming there and whether its reasoning may be upheld. The DOI and BIA, not the NIGC, had the sole authority to allow tribal gaming under the unique circumstances of this case. The court reverses the NIGC decision that was unlawful, arbitrary, and not well reasoned.

I. Background. The parties in this consolidated lawsuit are several plaintiffs: the States of Nebraska and Iowa, with intervenor City of Council Bluffs, Iowa; and several defendants: the DOI, the NIGC and its three Commissioners as of December 31, 2007; and the amicus Ponca Tribe of Nebraska (Ponca Tribe). The Ponca Tribe sought and on December 31, 2007 obtained from NIGC approval of a proposed amendment to an existing ordinance that added a provision to allow casino gaming (a.k.a. gambling) on its small Carter Lake parcel of land.¹ The Ponca Tribe purchased in fee that 4.8 acres in 1999, and the Tribe deeded it to the BIA in trust for non-gaming purposes in February of 2003.

II. Issues. Plaintiffs contend the NIGC decision was wrong in several respects and seek, by review of that agency action, a declaratory judgment holding: (1) the NIGC lacked jurisdiction to make a restored lands determination necessary to allow gaming; (2) the NIGC decision was arbitrary and capricious in lacking a fact-based well-reasoned analysis; and (3) the

¹ The town of Carter Lake, a geographic anomaly, is located on the only Iowa land west of the Missouri River. Created by an avulsion along the river in the nineteenth century, Carter Lake borders Omaha, Nebraska, and is the site of the Omaha International Airport.

NIGC decision was contrary to the 1990 Ponca Restoration Act.² Defendants seek to uphold the NIGC decision and dismiss this consolidated judicial review lawsuit.

The court now reverses the December 31, 2007 decision of the NIGC. The court declares that the circumstances of this case required the NIGC to acknowledge its lack of authority to make the restored lands decision. The court also declares that the NIGC decision as written was arbitrary and unlawful when it by-passed and ruled irrelevant the circumstances that led to the BIA receiving and the conveyance of land in trust in 2003. To the contrary, those circumstances gave notice to the public unequivocally that the Carter Lake parcel as conveyed to the BIA was not restored lands eligible for gaming within the meaning of 25 U.S.C. §2719 (b)(1)(B)(iii).

III. Standards of Review. The plaintiffs' complaints and combined briefs contain clear, straightforward assertions about the factual background for this declaratory judgment proceeding, the underlying administrative proceedings, and precisely what relief is sought. Similarly, the United States, as representative of the named defendants, and the amicus Ponca Tribe make very similar arguments in their briefs seeking summary judgment upholding the NIGC decision. The lengthy certified administrative record (citations are to "AR") demonstrates that the parties agree about how the Ponca Tribe of Nebraska was restored by Act of Congress in 1990 and brought its gaming plans to the NIGC in 2006. But they vigorously disagree about whether the NIGC could properly decide that the Carter Lake parcel constitutes "restored lands"

² The court passes, without deciding, the Ponca Restoration Act alternative argument plaintiffs present. The 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. Neither the defendants in their briefs nor the NIGC Decision adequately addressed that question of statutory intent. See 25 U.S.C. §§983-983h.

on which casino gaming may be allowed. Plaintiffs contend, pursuant to the Administrative Procedure Act, that the NIGC decision was “in excess of its authority,” and also “unlawful,” “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706 (2)(A) and (C). The court now applies that deferential scope of review of the full administrative record submitted by the United States. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 US 402, 420 (1971). In reviewing the record and interpreting federal law in this case, the court has also accepted the principle of liberal construction of statutes and administrative rulings in favor of the Ponca Tribe. See Confederated Tribes v. Babbitt, 116 F. Supp.2d 155, 164 (D.D.C.2000). But the court is also mindful that the agency decision being reviewed must have a satisfactory explanation based on relevant data. See Mutual Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 41-43 (1983).

IV. Brief History of Ponca Tribe Status and Lands. On September 5, 1962, Congress terminated the tribal status of the Ponca Indian Tribe of Nebraska and commenced selling its reservation in Knox County, Nebraska, and its other tribal lands; but on October 31, 1990, Congress reversed course and restored the Ponca Tribe’s status as a federally recognized Tribe. See P.L. 101-484 (Oct. 31, 1990), 25 U.S.C. §983-983h. Section 983b (c) authorized the Secretary of the DOI to place in trust up to 1,500 acres of land in Knox and Boyd Counties of Nebraska.

In September of 1999, the Ponca Tribe purchased in fee the land here at issue: 4.8 acres of land in Carter Lake, Iowa. The next year, the Tribe requested that the BIA take that parcel in trust, stating the purpose was to use the property for health services and central governmental functions for tribal members. Satisfied these were the purposes, the BIA on September 15, 2000 gave Iowa notice of its preliminary decision to take the parcel in trust, with

no Environmental Assessment needed because there would be no change in land use. Both Iowa and Pottawattamie County appealed the BIA's preliminary decision, expressing concern that the Ponca Tribe's real purpose was to conduct casino gaming on the property. The Tribe in responding maintained and repeatedly represented to the Interior Department appeals board, the Interior Board of Indian Appeals (IBIA), that it would only use the land for governmental and health care services. Convinced, the IBIA issued its decision affirming the BIA's preliminary determination to take the Iowa parcel in trust for the Tribe but not as restored lands, only as a normal trust acquisition that would not open the door to gaming. See Iowa and Board of Supervisors of Pottawattamie County, Iowa v. Great Plains Reg'l Dir., BIA, 38 IBIA 42 (Aug. 7, 2002) AR 651-52. Iowa was leery about the Tribe's assurances and prepared to file a lawsuit in federal court.

V. Iowa and The Tribe Make a Deal. Iowa and the Ponca Tribe then forestalled the expected federal court lawsuit to challenge the IBIA decision. Within the time permitted for filing suit, counsel for the Ponca Tribe, its Tribal Chief, and the Office of the Iowa Attorney General reached an agreement: Iowa agreed not to seek judicial review, and the Tribe expressly conceded and gave official public notice, that the Carter Lake parcel was not to be taken in trust as restored lands that might permit casino gambling on the land. Instead the BIA then took the land in trust only for the Tribe's stated public health and governmental function purposes, "not for gaming activities." See Tribe Attorney Michael Mason's December 12, 2002 letter to Jean M. Davis, Iowa Assistant Attorney General, and Davis's Letter of December 13, 2002, both letters detailing the agreement. AR 248. Importantly, the DOI public written Notice for the trust acquisition, as amended, stated in pertinent part:

The Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. § 2719 (b)(1)(B). There may be no gaming or

October gaming-related activities on the land unless and until approved under the 2001 checklist for gaming acquisitions. . . has been obtained.

AR 627. The referenced exception was never obtained. The DOI, through its Office of the Solicitor, approved publication of the agreed amended Notice language that disclaimed restored land basis for the BIA to accept the land in trust. The Tribe then conveyed the parcel to the BIA in trust for the Tribe on February 10, 2003.

VI. Tribe Changes Its Proposed Use. In February of 2006, the Ponca Tribe filed with the NIGC, not with the BIA or DOI, a proposed amended ordinance, seeking to transform the Carter Lake trust parcel into restored Indian lands eligible for gaming under the Indian Gaming Regulation Act. Iowa objected in writing, so in August 2006 the Tribe withdrew its request.

Just one year later, however, the Tribe resubmitted to NIGC its request for approval of an amended ordinance that would permit gaming based on a restored Indian lands determination. At first the request was denied. An NIGC Associate General Counsel, in a thorough recitation of the background facts and applicable law (AR 221-53), recommended to the NIGC chairman, defendant Philip N. Hogen, that the parcel not be deemed restored lands, the requirement for approval of gaming. The DOI concurred in that advice. AR 253, 951. Chairman Hogen then issued his decision disapproving the amended ordinance by letter to the Ponca Tribe's counsel dated October 22, 2007. AR 219. The Tribe appealed to the full Commission; Iowa stood its ground. Then in a remarkable turn-around by Chairman Hogen, and concurrence by the other two defendant Commissioners on December 31, 2007, the NIGC approved the amended ordinance, overriding the DOI earlier decision and its counsel's opinion that the Carter Lake parcel is not restored Indian lands. That Decision is the subject of this

consolidated judicial review action.

VII. NIGC Role and Authority. Plaintiffs contend the NIGC had no authority to declare the Carter Lake site restored Indian lands when the Tribe deeded the property to the BIA in trust, subject to the agreement it would not be deemed restored lands. This court agrees, based on the circumstances of the 2003 conveyance in trust that followed the Tribal Chief's deal made with the State of Iowa, with the concurrence of counsel for the DOI. DOI personnel, not the NIGC, approved the public notice that disclaimed gaming and preceded conveyance of the parcel into trust. Perhaps the IBIA would have approved gaming on the parcel in 2003, leading Iowa and Pottawattamie County to seek judicial review of the IBIA authorized decision at that time. Or perhaps the BIA or DOI would have rejected the settlement agreement Iowa and the Tribe, through counsel, achieved before the public notice was issued, again leading to judicial review of an authorized agency decision in federal court. Those events did not happen. Instead, the no-gaming decision was made by the parties, through counsel, and approved by counsel representing BIA and DOI. The NIGC was not then involved in the proceedings.

Plaintiffs persuasively blunt each and all the points defendants and the Ponca Tribe make in defending the NIGC Decision. First, on the authority of NIGC, defendants contend a Memorandum of Agreement (MOA) provided NIGC the authority to make an independent restored lands analysis and judgment that went beyond the decision made by the IDOI, even though the DOI approved the legal opinion recommending denial of the gaming ordinance and notice to the public reflecting the Iowa-Ponca Tribe agreement. The MOA, carefully read, does not provide NIGC that broad authority to override DOI decisions, nor explicit authority to make initial restored land decisions. Plaintiffs convincingly argue that the

DOI and BIA, not NIGC, made the initial decision taking the Carter Lake parcel into trust but not as restored lands and not for gaming. To avoid agency forum shopping, the amended ordinance should have been submitted for final approval to the DOI or BIA, not to the NIGC. The NIGC should have deferred to BIA and DOI to decide whether to transform the Carter Lake parcel into restored lands.

Defendants and the Ponca Tribe also contend that several decisions of other United States District Courts support NIGC authority to issue restored land opinions involving trust land and gaming requests. See e.g. Grand Traverse Board v. U.S. Attorney, 46 F. Supp. 2d 689, 707 (W.D. Mich. 1999); Citizens Against Casion Gambling v. Kempthorne, 471 F. Supp.2d 295, 322 (W.D.N.Y. 2007). But none of the cases defendants and the Ponca Tribe cite involve the unique circumstances in this case: a BIA and DOI decision and public notice supporting the parties' agreement that a parcel is not restored land eligible for gaming, followed by a Tribe's attempt to have NIGC, not BIA or DOI, change that decision. Unlike all the cases defendants and the Ponca Tribe cite, here all the factual circumstances surrounding the Carter Lake purchase and conveyance into BIA trust prove the acquisition was not part of a restoration of land that would support gaming.

The Ponca Tribe as amicus also argues that the NIGC decision correctly stated the agreement made in 2002 could not be a legally enforceable agreement "through a mere notice published in a local newspaper." Ponca Tribe Amicus Brief at 15. The Ponca Tribe argues the notice's sole purpose was "to give simple procedural notice," not to state terms of the transfer. Id. at 17. And the defendants' briefs contend that the Iowa-Ponca agreement was not authorized by the Tribe itself, only by the Ponca Chief. The record as a whole shows counsel for all

parties—Iowa, the Ponca Tribe, and DOI/BIA-- had authority to make the no-gaming decision in 2002 and approve the agreed published notice in 2003.

This court now declares that NIGC had no authority to override the agreed outcome of the IBIA proceedings that gave notice the Carter Lake parcel was not eligible for gaming.

VIII. NIGC Commissioners' Decision. Plaintiffs also contend that the December 31, 2007 Decision of the NIGC was arbitrary and not well reasoned. Even if this court has incorrectly declared the NIGC without authority to make the gaming decision, this court now in the alternative declares the NIGC decision to be without rational basis on the law and facts of record, and therefore arbitrary and unlawful.

The first part of the NIGC decision mirrored the Associate General Counsel's well-reasoned recommendation that the Ponca Tribe's amended ordinance not be approved. But the NIGC Commissioners, to approve the amended ordinance and allow casino gaming, then rejected the final part of counsel's reasoning and recommendation. Counsel's October 22 Memorandum to the NIGC Chairman had recited in detail the facts surrounding the late 2002 IBIA proceedings, followed by the Tribe's agreement with Iowa not to use the Carter Lake land for gaming, and the published public notice, corrected on December 13, 2002, to make clear "no one involved intended the Carter Lake land to be used for gaming or, more importantly, to be 'restored land.'" AR 250. Counsel's opinion also stated correctly that the preliminary BIA decision to take the Carter Lake land into trust could not be final until September 15, 2000, when the time would run for parties to appeal to the IBIA; Iowa and Pottawattamie County did appeal, and the decision to take the land into trust for the Ponca Tribe, in accordance with the terms of

the Iowa-Ponca agreement and public notice, was not finalized until conveyance by warranty deed in 2003. AR 250-51. Counsel's lengthy opinion, very well documented, concluded:

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.

AR 253.

The three NIGC Commissioners' decision rejected counsel's and its Chairman's initial conclusion about the facts surrounding the Carter Lake conveyance in trust, holding without adequate explanation that "the Chairman erred in relying on events that occurred after DOI's decision was final." But those events were crucial to the completion of the conveyance: they included the deal the Ponca Tribe made with Iowa; the Iowa decision not to challenge the conveyance by judicial review; the public notice disavowing restored land status and gaming on the Carter lake parcel; and the Secretary's execution of the deed in trust in February 2003.

Almost as an afterthought, the NIGC Commissioners concluded their Decision by acknowledging "inequities" worked in the case, "the importance of [the Tribe's] concession to the State of Iowa," and then adding two candid comments:

It seems the Tribe led the State down the primrose path with promises it never intended to keep.

. . . .

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.

AR 17-18. Perhaps the Chairman, defendant Hogen, wrote those concluding comments as an

apology for joining the other two Commissioners in the NIGC decision, notwithstanding he had correctly as Chairman initially accepted counsel's recommendation to reject the amended ordinance. BIA counsel's opinion was correct, as was the Chairman's initial decision following and adopting that opinion. The subsequent rejection of that opinion was without factual and legal basis.

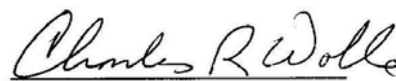
The NIGC decision is declared arbitrary, contrary to law, and invalid.

IX. Judgment. The clerk of court shall enter declaratory judgment in favor of the plaintiffs and against the defendants, declaring that the December 31, 2007 Final Decision and Order of the National Indian Gaming Commission is reversed and vacated because: (1) the Commission lacked authority to approve the Ponca Tribe's site-specific amended gaming ordinance; and (2) even if it had authority, the Commission's final Decision was unreasoned and arbitrary in holding that the Ponca Tribe was not bound by its agreement with Iowa to have no gaming on its Carter Lake site.

The plaintiffs may file a motion and brief by December 15, 2008, seeking costs, including attorney fees, as requested in their complaints. If that motion is filed, defendant may respond in writing by December 29, 2008.

IT IS SO ORDERED.

Dated this 28th day of November, 2008.


CHARLES R. WOLLE, JUDGE
U.S. DISTRICT COURT