

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)
 Nebraska,)
)
 and)
 STATE OF IOWA,)
)
 Intervenor-Plaintiffs)
)
 UNITED STATES DEPARTMENT OF)
 THE INTERIOR, RYAN K. ZINKE, in his)
 official capacity as Secretary of the United)
 States Department 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.)
)

Civ. No. 1:17-cv-00033-SMR-CFB

**PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT AND
EXPEDITED CONSIDERATION
AFTER BRIEFING**

PLEASE TAKE NOTICE, that the Plaintiffs, by and through undersigned counsel, pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully move the Court to grant the Plaintiffs summary judgment as a matter of law. The Plaintiffs are entitled to summary judgment as a matter of law because there are no genuine issues of material fact regarding the National Indian Gaming Commission’s (NIGC’s) “Amendment to Final Decision and Order”

dated November 13, 2017. Pursuant to applicable law, including the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, and the Ponca Restoration Act, Pub. L. No. 101-484 (Oct. 31, 1990), Plaintiffs are entitled to judgment as a matter of law.

The NIGC Opinion should be reversed because the plain language of the Ponca Restoration Act requires reversal, as supported by the agency's regulations. Alternatively, if the Court finds that the language of the Ponca Restoration Act is not sufficient to justify reversal of the NIGC, the NIGC's determination that the Carter Lake parcel is restored land is still arbitrary and capricious. The NIGC found that the Tribe acquiesced to an agreement with Iowa not to seek to game on the Carter Lake parcel except with Iowa's agreement under a Two-Part Determination. According to the NIGC, the Tribe later repudiated this agreement. Nevertheless, the agreement was validated by the Tribe and was relied upon by Iowa. Even if the agreement does not estop the Tribe from arguing that they should be able to conduct Class II gaming at the Carter Lake site without Iowa's agreement, the agreement is a factual circumstance that the NIGC should have weighed against the tribe under the common law test for "restored lands" status. The NIGC failed to consider the Tribe's agreement and Iowa's reliance, and this failure and the subsequent conclusion is arbitrary and capricious.

Plaintiffs request that the Court issue an expedited decision on this motion after the parties complete briefing because the Tribe is proceeding to construct gaming facilities on the parcel of land at issue. Gaming on the Carter Lake parcel is contrary to law and will cause harm to Plaintiffs. The Tribe should not be allowed to make further investments in this illegal gaming enterprise to the detriment of the surrounding communities. The Plaintiffs have conferred with the Federal Defendants with respect to this request for this Court to issue an expedited decision

at the conclusion of all briefing. The Federal Defendants do not oppose this request, but do not agree with the reasoning laid out by the Plaintiffs in this Motion and accompanying Brief. The Federal Defendants will explain their response in their response brief.

The aforesaid grounds are more fully set forth in the Memorandum in Support of Plaintiffs' Motion for Summary Judgment and Expedited Consideration at the Conclusion of Briefing, filed concurrently herewith, and are further supported by the Plaintiffs' Statement of Material Facts Not in Dispute, also filed concurrently herewith, and by the administrative record filed on June 22, 2018, by the Federal Defendants.

WHEREFORE, Plaintiffs, the City of Council Bluffs, Iowa, and the States of Iowa and Nebraska, respectfully request that the Court issue an Order granting the relief requested, including:

- (1) a declaratory judgment that the Carter Lake Tract does not qualify as restored lands under 25 U.S.C. § 2719(b)(1)(B)(iii) and the Ponca Restoration Act, Pub. L. No. 101-484 (Oct. 31, 1990);
- (2) a declaratory judgment 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 Plaintiffs costs and reasonable attorney fees to the extent permitted by law; and

(5) an order awarding Plaintiffs such other relief as the Court deems equitable and just.

Respectfully Submitted August 3, 2018.

<p><u>/s/ Richard Wade</u></p> <p>Richard Wade, City Attorney for Council Bluffs 209 Pearl Street Council Bluffs, Iowa 51503 Tel. (712) 328-4620 Fax. (712) 322-9255</p> <p><i>Counsel for Plaintiff</i></p>	<p>Thomas J. Miller, Iowa Atty. General Jeffrey S. Thompson, Solicitor General</p> <p><u>/s/ David M. Ranscht</u></p> <p>David M. Ranscht John R. Lundquist Assistant Attorneys General Hoover Building, 2nd Floor Des Moines, IA 50319 Tel. (515) 281-7175 Fax. (515) 281-4209 Jeffrey.thompson@ag.iowa.gov david.ranscht@ag.iowa.gov john.lundquist@ag.iowa.gov</p> <p><i>Counsel for the State of Iowa</i></p> <p>AND</p> <p>Douglas J. Peterson, Attorney General of Nebraska</p> <p><u>/s/ David A. Lopez</u></p> <p>David A. Lopez, Deputy Solicitor General Ryan S. Post (pro hac vice pending) Asst. Atty. General and Civil Litigation Bureau Chief Office of the Attorney General 2115 State Capitol Lincoln, Nebraska 68509 Tel. (402) 471-2682 dave.lopez@nebraska.gov ryan.post@nebraska.gov</p> <p><i>Counsel for the State of Nebraska</i></p>
--	--

17154234