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

CITY OF COUNCIL BLUFFS, IOWA Plaintiff, STATE OF NEBRASKA, ex rel. DOUGLAS J. PETERSON, Attorney General of the State Nebraska STATE OF IOWA Intervenor-Plaintiffs v. UNITED STATES DEPARTMENT OF INTERIOR, *et al.,* Defendants	)	Civ. No. 1:17-cv-00033-SMR-CFB **BRIEF OF *AMICUS CURIAE* PONCA TRIBE OF NEBRASKA IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Thirty years after terminating the federal relationship with the Ponca Tribe of Nebraska (Tribe) and stripping it of its land base, the U.S. Government restored the Tribe to federal recognition in 1990 and gave it the right to control and regulate any parcels of land that may be acquired by the Tribe in the future and held in trust by the United States. In September 1999 the Tribe purchased 4.8 acres of land in Carter Lake, Iowa. Three years later, in September 2002, the Department of the Interior (DOI) decided to place this parcel into trust over the objections of the State of Iowa, which expressed concern that the Tribe might seek to conduct gaming on the parcel. In 2007 the Tribe sought approval from the National Indian Gaming Commission (NIGC) to conduct gaming on the Carter Lake parcel, asserting that it qualifies as "restored lands" under the Indian Gaming Regulatory Act (IGRA). The NIGC agreed and issued a decision to that effect in December 2007. The States of Iowa and Nebraska and the City of Council Bluffs sought judicial review of the NIGC decision and, in 2010, the Eighth Circuit ruled that the matter should be remanded to the NIGC to address several issues. After a lengthy remand process, the NIGC issued an amended decision in November 2017 which again found that the Carter Lake parcel constitutes "restored lands" on which gaming may be conducted.

The same group of plaintiffs now challenge the NIGC's 2017 decision under the Administrative Procedure Act (APA), which provides for "deferential" review of agency decisions. *Mercier v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 850 F.3d 382, 387-88 (2017). They contend that the NIGC's decision violates the plain language of the Ponca Restoration Act (PRA), an argument that DOI has twice rejected. They contend that the NIGC erred by not applying its 2008 regulations in deciding whether the Carter Lake parcel is "restored lands," although the NIGC concluded that a grandfather provision in those regulations excludes this matter. They contend

that the Tribe should be estopped from seeking to qualify the parcel as "restored lands" based on an alleged agreement between the Tribe's former outside attorney and an Iowa Assistant Attorney General which the NIGC found was unauthorized and that Iowa did not rely on to its detriment. Finally, plaintiffs contend that the NIGC erred in assessing the facts of this case and concluding that the Carter Lake parcel qualifies as "restored lands" under the applicable three-factor test. As demonstrated below, all of these contentions are meritless. Accordingly, plaintiffs' motion for summary judgment should be denied and defendants' cross-motion for summary judgment should be granted.

FACTUAL BACKGROUND

A. The Ponca Restoration Act and the Carter Lake Parcel

The Ponca Tribe has deep historic ties to land in Iowa, Nebraska, and South Dakota, where it lived peaceably until the Tribe's forcible removal by the federal government in 1877. AR 001632. In 1962, the federal government terminated its relationship with the Tribe, ending all federal services, including health and social services, and stripped the Tribe of its land base. 25 U.S.C. § 974 (2012). Almost three decades later, the Tribe was restored to federal recognition through the 1990 Ponca Restoration Act, Pub. L. No. 101-484, 104 Stat. 1167 (1990) (codified at 25 U.S.C. §§ 983-983h).

The governmental privileges restored to the Tribe by the PRA included "the right of self-governance and the right to control and regulate any parcels of land that may be acquired by the Tribe in the future and held in trust for them [*sic*] by the United States." H.R. Rep. No. 101-776, at 4 (1990). The PRA mandated that the Secretary of the Interior shall accept not more than 1,500 acres of real property located in Knox or Boyd Counties, Nebraska, in trust for the Tribe. 25 U.S.C. § 983b(c). The PRA also provided that the Indian Reorganization Act (IRA), 25 U.S.C. 461, *et seq.*, which contains a provision permitting the Secretary to place land into trust for a

recognized tribe, would apply to the Tribe. 25 U.S.C. § 983a. In 1996, Congress amended the PRA to expand the "service area" of the Tribe to include additional counties in Nebraska and Iowa, including Pottawattamie County, Iowa. Pub. L. No. 104-109, § 12, 110 Stat. 763, 765 (1996).

In September 1999 the Tribe purchased approximately 4.8 acres of land in Carter Lake, Iowa, in Pottawattamie County, for the purpose of economic development, including the operation of a health care facility. AR 000324. In January 2000, a Tribal Council resolution formally requested that the Secretary of Interior acquire the Carter Lake Parcel in trust. AR 000568-69. The Bureau of Indian Affairs (BIA) considered this request under 25 U.S.C. § 465, the section of the IRA that authorizes the acquisition of land into trust for recognized tribes. The BIA Regional Director advised the relevant State and local officials that the Secretary was considering whether to place the land into trust. AR 000892-98. No State or local official objected. AR 000652. After seven months of consideration, the Regional Director decided to place the land into trust on September 15, 2000.

B. The 2002 IBIA Appeal and Its Aftermath

At that point, for the first time, Iowa and Pottawattamie County objected and appealed to the Interior Board of Indian Appeals (IBIA). They contended that the PRA prohibits any trust acquisitions for the Tribe outside Knox and Boyd Counties, Nebraska. They also alleged that, although the Tribe's current plan was to use the land for a healthcare facility, the Tribe intended to use the land for gaming purposes and that the Regional Director had not sufficiently factored that consideration into her trust decision. On August 7, 2002, the IBIA affirmed the Regional Director's decision. It concluded that the PRA "did not restrict the Secretary's discretionary authority to accept land in trust for the Tribe." *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 48 (2002). The IBIA further explained that the parcel "was purchased * * * and is currently used for health care facilities," and that speculation over prospective gaming in the future "does

not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust." *Id.* at 52-53.

The IBIA's ruling was final for DOI. 43 CFR § 4.312. DOI regulations required public notice of this final trust decision and a waiting period of at least 30 days before the U.S. acquired title, to provide an opportunity for court challenges. 25 CFR § 151.12.[1] Prior to publication of this notice, an Iowa Assistant Attorney General, Jean Davis, contacted Michael Mason, the outside attorney whom the Tribe had retained for the IBIA proceedings, and threatened to file suit against DOI challenging the decision to take the land into trust. AR 000963. To avoid such a lawsuit, Ms. Davis proposed that the public notice about taking the land into trust be amended to include an acknowledgement by the Tribe that the Carter Lake parcel was not "restored lands" and thus not gaming-eligible under IGRA, absent Iowa's express approval. *Id.*[2]

The Tribe's Constitution authorizes the Tribal Council to negotiate and contract with the Federal, State, and local governments on behalf of the Tribe and to approve any encumbrance of tribal lands. Ponca Const Art. V, §§ 1(a), 1(c), AR 001461. Yet Mr. Mason—without a Tribal Council resolution or any other official tribal authorization, and without notifying the Tribe or any tribal official—agreed to Ms. Davis's proposal. On November 26, 2002, he emailed the local BIA office requesting the addition of Iowa's proposed language to the notice. AR 000632. That email stated:

[1] Land Acquisitions, 61 Fed. Reg. 18,082 (Apr. 24, 1996) (purpose of notice is "to ensure the opportunity for judicial review of administrative decisions to acquire title to lands in trust for Indian tribes" before transfer of title to the United States, which triggers the Quiet Title Act, 28 U.S.C. 2409a).

[2] IGRA prohibits gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988" unless an exception to the general prohibition applies. 25 U.S.C. § 2719. One exception is for "restored lands." By disclaiming this exception, the only other exception potentially applicable to the Carter Lake parcel would be for lands where the Secretary determines that a gaming establishment "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." § 2719(b)(1)(A).

> 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 Asst Attorney General Jean Davis of the State of Iowa and County Attorney Richard Crowl of Pottawattamie County, Iowa.
>
> * * *
>
> On behalf of the Ponca Tribe of Nebraska, I request publication of the decision to take the Tribe's Carter Lake lands in trust as soon as possible.

There is no evidence that the Tribe itself or its Council ever considered or authorized any such agreement with Iowa. In fact, the Tribal Council was entirely unaware of the amended Notice's content or publication until four years after the fact. AR 000965; AR 000949.

On December 3, 2002, the BIA Regional Director published notice of the Secretary's trust decision in the local newspaper, but that notice omitted the language that Mr. Mason had transmitted in his email. Three days later, an amended notice was published which included this language. The amended notice stated that the trust acquisition had been made "for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000 decision." AR 000627. It further recited that, "[i]n 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. § 2719(b)(1)(B)" [which includes the restored lands provision] and that "[t]here may be no gaming or gaming relating 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 [*i.e.* approval from both the Secretary and the Governor of Iowa]." AR 000627.

Thereafter, on December 13, 2002, Ms. Davis wrote a letter to Mr. Mason in which she stated, in pertinent part:

> This corrected Public Notice is consistent 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 Pottawattamie 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 review or further appeals of the final decision of the United States Department of the Interior in this case. AR 000595-596.

DOI proceeded to finalize the trust acquisition in February, 2003. AR 000613.

Notably, Ms. Davis did not seek, or enter into, a formal written agreement with the Tribe on the "restored lands" issue, nor did she seek any confirmation that Mr. Mason was authorized to bind the Tribe with respect to the language added to the BIA notice. Nor did Ms. Davis obtain the written approval of DOI, which is a statutory precondition for any agreement that encumbers Indian lands for more than seven years.[3] Indeed, Ms. Davis "admitted that no written settlement agreement between the Tribe, the State and the County was ever drafted because it was her understanding that the BIA would not allow a formal opinion or agreement to contain any language restricting the use of the Carter Lake parcel." AR 000968 (Letter from Vanya Hogen, attorney for the Tribe, to Michael Gross, Associate General Counsel, NIGC (July 14, 2006)).

C. The Tribe's Decision to Pursue Gaming on the Carter Lake Parcel

For the next several years, the Tribe struggled to succeed in its use of the Carter Lake parcel for a healthcare facility and, when that failed, for other economic development initiatives, such as a for-profit pharmacy. AR 001287. When those years of efforts failed and alternative uses proved

[3] 25 U.S.C. § 81(b) provides that "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary." *See Bear v. U.S.*, 810 F.2d 153, 157 (8th Cir. 1987) (lack of federal approval invalidated settlement agreement between Iowa and an Indian tribe).

unsustainable, the Tribal Council decided to explore the Tribe's legal right to conduct gaming on the parcel.

On October 7, 2005, counsel for the Tribe requested that the NIGC issue an opinion that the Carter Lake parcel constitutes "restored lands" eligible for gaming under IGRA. AR 001278-1303. The NIGC invited Iowa to provide information relevant to the Tribe's request, and Iowa did so by a letter of April 21, 2006, in which it accused the Tribe of "seek[ing] to repudiate its earlier assurances that the lands in question are not restored lands within the meaning of IGRA." AR 000992. Counsel for the Tribe responded to the Iowa letter on June 15, 2006, explaining to the NIGC why the Tribe was not estopped. AR 000976-984. The NIGC forwarded the Tribe's letter to Iowa for comment. AR 000974. Counsel for the Tribe made a further submission to the NIGC on July 14, 2006, AR 000959-973, which the NIGC also forwarded to Iowa. AR 000957. Ultimately, on August 9, 2006, the Tribe withdrew its request for a restored lands opinion and a related request for approval of a gaming ordinance for the Carter Lake parcel. AR 000931.

On July 23, 2007, the Tribe submitted an amended gaming ordinance for the Carter Lake parcel to the Chairman of the NIGC. The Tribe asserted that the Carter Lake parcel qualified for gaming under the "restored lands" exception because of the Tribe's contemporary, historic, and temporal relationship to the land. AR 000279-319. Iowa promptly opposed the Tribe's request. AR 000267-270.

D. The 2007 NIGC Decision

On October 22, 2007, the NIGC Chairman issued a decision finding that (i) the Carter Lake parcel is "Indian land"; (ii) the Ponca Tribe "is an 'Indian tribe that is restored to Federal recognition'"; (iii) the Tribe "has historical and modern ties to its Carter Lake land and to the surrounding area"; and (iv) the timing of the trust acquisition "weighs in favor of a finding of restored lands" because it was proximate to the Tribe's restoration. AR 000219-253. The

Chairman nevertheless held that the parcel was not "restored lands" on the sole ground 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." AR 000250. This decision relied on, and incorporated, an opinion by the NIGC Associate General Counsel. AR 000221-253.

The Tribe appealed to the full Commission, which unanimously (including the Chairman) reversed the initial decision in a Final Decision and Order issued on December 31, 2007. AR 000001. The full NIGC agreed that the Carter Lake Parcel satisfied the traditional criteria for "restored lands" status because the Carter Lake Parcel "meets the location and temporal factors of the restored lands analysis." *Id.* The NIGC held that the Tribe's intended use of the land four years earlier was not dispositive of the parcel's statutory status under IGRA as "restored lands." AR 000018. It explained that settled decisional law had found that lands qualified as restored, notwithstanding contrary subjective intentions at the time of the trust decision. AR 000009. The NIGC further explained that the newspaper statement lacked sufficient legal significance to override the traditional "restored lands" criteria because it postdated DOI's final decision to take the land into trust, and thus could not have formed part of, or materially influenced, the agency's decision to take the land into trust. AR 000016. The NIGC stated that "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." AR 000011.

E. Judicial Review of the 2007 NIGC Decision

Iowa, Nebraska, and the City of Council Bluffs filed suits, that were later consolidated, challenging the NIGC's decision approving the Tribe's gaming ordinance. The district court reversed. Order Reversing Decision of the NIGC, Case No. l-08-cv-6 (S.D. Iowa) (Nov. 28, 2008). The court ruled that the NIGC lacked authority to decide whether the Carter Lake parcel is restored lands. It reasoned that, because DOI personnel had approved the 2003 public notice, the DOI, and

not the NIGC, should have made this decision. Alternatively, the court ruled that the NIGC's decision was arbitrary in holding that the Tribe was not bound by its agreement with Iowa. The court noted, but did not decide, plaintiffs' alternative argument that the PRA precluded the parcel from being taken into trust. The district court subsequently denied the United States' motion for reconsideration, holding that the NIGC failed to "recognize and enforce" what the court called the "no-gaming agreement the Ponca Tribe made with the State of Iowa." Order Den. Mot. for Recons, and Reaffirming the Final Decision, Case No. l-08-cv-6 (S.D. Iowa) (Jan. 23, 2009).

The United States appealed and the Eighth Circuit reversed. *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior*, 625 F.3d 501, 512 (8th Cir. 2010). The Eighth Circuit held that "the district court erred in concluding the DOI has already made a 'restored lands' determination [because] [t]he purpose of the notice was not to analyze the facts and law to determine whether the Carter Lake land was eligible for the restored lands exception." *Id.* at 510-11. The court further held that a remand was necessary because the Government conceded that the NIGC had improperly excluded from consideration the purported agreement between the Tribe and Iowa, and the "record [is] inadequate to make a conclusive determination as to the Corrected Notice's validity as an agreement and its legal effect." *Id*. at 512. The Eighth Circuit did not decide whether the DOI or NIGC possesses the authority to make a restored lands determination because the NIGC averred that, upon remand, it would not issue a "restored lands" opinion without obtaining the concurrence of the DOI. *Id.* at 511.

Accordingly, the Eighth Circuit instructed that the case be remanded to the NIGC to consider: (1) whether there is a valid agreement between the Tribe and Iowa that estops the Tribe from raising the "restored lands" exception; and (2) if not, whether the Carter Lake land is eligible for gaming as "restored lands" under the three- factor test set out in *Grand Traverse Band of*

Ottawa and Chippewa Indians v. U.S. Att'y for the W. Dist. of Michigan, 198 F.Supp.2d 920, 935 (W.D. Mich. 2002). *See* 625 F.3d at 512. In considering the second issue, a determination was to be made whether the PRA limits the Tribe's "restored lands" to two counties in Nebraska. The Eighth Circuit noted that the impact of the PRA should be decided by the DOI (as the agency charged with administering the PRA), but concluded that a remand to the NIGC would accomplish this because the NIGC must have the concurrence of DOI to issue a restored lands opinion. *Id.* at 513.

F. The 2017 NIGC Decision

After a lengthy remand process, on November 13, 2017, the NIGC issued an Amendment to its 2007 Final Decision and Order. 2017AR 0000001. The NIGC concluded that: (1) the agreement between Iowa and the Tribe's attorney is invalid and does not estop the Tribe from gaming under IGRA's restored lands exception; (2) the PRA does not limit the Tribe's "restored lands" to Knox and Boyd Counties, Nebraska; and (3) the temporal, geographic, and factual circumstances factors of the restored lands analysis support the conclusion that the Carter Lake parcel constitutes restored lands. Accordingly, the NIGC affirmed its original conclusion approving the Tribe's gaming ordinance on the grounds that the Carter Lake parcel is restored lands for a restored tribe. 2017AR 0000003.

The NIGC found that the Tribe's attorney in 2002, Mr. Mason, lacked authority to bind the Tribe to the agreement. The NIGC reasoned that, as a sovereign, the Tribe can only be bound by the acts of an agent with actual authority. 2017AR 0000016-17. The burden was on Iowa to demonstrate that Mr. Mason had express or implied actual authority to enter into the agreement. *Id.* at 0000017-18. There was no evidence of express authority. The Tribe's Constitution authorizes the Tribal Council to negotiate and contract with the Federal, State, and local

governments on behalf of the Tribe. Nothing in the Tribe's Constitution authorizes a private attorney retained for a specific matter to enter into agreements on behalf of the Tribe and the record does not contain any evidence of such an extraordinary delegation of authority from the Tribal Council to Mr. Mason. *Id.* at 0000018-19. Nor was there implied actual authority. This doctrine does not ordinarily extend to government contractors and, in any event, negotiating an agreement with another government was not an integral part of Mr. Mason's duties in representing the Tribe with respect to the IBIA proceeding. *Id.* at 0000019-20. Iowa "was certainly well aware of the unique nature of contracting with federally recognized Indian tribes." *Id.* at 0000022. By entering into an agreement with Mr. Mason, Iowa accepted the risk of inaccurately assessing his authority to bind the Tribe. *Id.* at 0000020-22. Thus, "the alleged agreement between Iowa and Mr. Mason is invalid." *Id.* at 0000023.

Next the NIGC considered whether the Tribe subsequently ratified the invalid agreement and is bound by it. The NIGC concluded that "the Tribe had actual or constructive knowledge [of the agreement] at some point during the period between 2002 and 2005 and for a limited period of time acquiesced in the agreement." 2017AR 0000025. But the NIGC found that Tribe clearly repudiated the agreement beginning with its October 7, 2005 letter to the NIGC seeking an opinion that Carter Lake parcel constitutes "restored lands." *Id.* at 0000026. When the Tribe repudiated the agreement, Iowa was free to challenge DOI's 2002 land-into-trust decision and could have done so as the relevant statute of limitations, 28 U.S.C. 2401(a), was six years. *Id.* at 0000027. The NIGC concluded 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." *Id.* at 0000028. The NIGC found that "Iowa has suffered no detrimental reliance or injury by the Tribe's repudiation

of the unauthorized agreement" and so "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." *Id.* at 0000028-29.

The NIGC next considered whether the PRA limits the Tribe's "restored lands" to Knox and Boyd Counties in Nebraska. In conformance with the circuit court's direction, the NIGC referred this issue to DOI, and the DOI Solicitor issued an opinion that the PRA allows additional land outside those two counties to be taken into trust and to qualify as restored land. 2017AR 0000030, 0000055-70. The Solicitor concluded that "[t]he PRA clearly provides two different provisions for trust acquisitions—the mandatory trust acquisition authority for Knox and Boyd Counties, plus the general discretionary trust acquisition authority provided by the PRA's cross-reference to the IRA." *Id.* at 0000064. She noted that the PRA does not explicitly circumscribe the Secretary's authority to take land into trust for the Tribe, in contrast to other restoration acts which do establish explicit geographical limits or explicitly limit the authority of the restored tribe to game on its restored lands. *Id.* Further, the legislative history of the PRA shows that the designation of the two counties for trust acquisitions came about at DOI's suggestion due to its concern that the original bill would have required the Secretary to acquire into trust any land the Tribe offered anywhere in the United States. Thus, the intent was to limit the scope of mandatory acquisitions but not discretionary acquisitions. And no language in the PRA designates the two counties as the exclusive area in which lands taken into trust may be considered restored under IGRA. *Id.* at 0000066. The Solicitor noted two additional factors that weigh in favor of interpreting the PRA as permitting land outside the two counties to qualify as "restored land": (1) the Indian canon of construction that requires statutes for the benefit of Indians to be construed liberally in their favor; and (2) Congress's general intent of providing restitution to tribes in

restoring their federal recognition, which counsels a broad interpretation of restored lands. *Id.* at 0000068-70.

Finally, the NIGC revisited the issue that it had decided in 2007: whether the Carter Lake parcel qualifies as restored land under IGRA. At the outset, the NIGC rejected the contention that its analysis of this issue should now be governed by the "after-acquired lands" regulations at 25 C.F.R. Part 292, which took effect on August 25, 2008. These regulations altered the common law test for "restored lands" -- which the NIGC had applied in its 2007 decision -- by imposing a bright line rule that, where a restoration act requires or authorizes the Secretary to take land into trust within a specific geographic area, only lands within that area can qualify as restored lands. 25 CFR § 292.11. The NIGC noted that a grandfather clause made the 2008 regulations inapplicable to this case for two reasons. 2017AR 0000032-33. First, the regulations "do not alter final agency decisions made … before the date of enactment of these regulations." 25 CFR § 292.26(a). Second, the regulations do not apply to agency actions when, before the effective date of the regulations, the NIGC had issued a written opinion about whether the land could be used for a particular gaming establishment. 25 CFR § 292.26(b).

The NIGC proceeded to again apply the three-factor, common law test for restored lands, analyzing the acquisition's temporal proximity to restoration (temporal factor), the tribe's historical and modem nexus to the location (geographic factor), and the factual circumstances surrounding the acquisition (factual circumstances factor). 2017 AR 0000032. The NIGC concluded that the Carter Lake parcel is restored lands. *Id.* at 0000040. Accordingly, the NIGC affirmed its December 31, 2007, decision. *Id.* at 0000041. The DOI Solicitor concurred with the NIGC's analysis that the Carter Lake parcel constitutes restored lands. *Id.* at 0000050-51.

ARGUMENT

A. The Ponca Restoration Act Does Not Limit The Tribe's Restored Lands

Plaintiffs' lead argument is that the PRA limits the Tribe's "restored lands" to Knox and Boyd Counties in Nebraska. DOI has twice rejected the argument that plaintiffs now make to this Court. The IBIA ruled in 2002 that the PRA does not preclude the Carter Lake parcel from being taken into trust for the Tribe. *Iowa v. Great Plains Regional Director*, 38 IBIA 42 (2002). And, when this matter was remanded to the NIGC, the DOI Solicitor concluded that the PRA does not limit "restored lands" under IGRA to the two Nebraska counties. Plaintiffs' argument to the contrary finds no support in the language or history of the PRA.

In reviewing the DOI's decisions, this Court applies the two-step framework of *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council,* 467 U.S. 837 (1984). First, it uses traditional tools of statutory construction to determine if Congress has unambiguously spoken to the question at issue. If the statute is unambiguous, it simply applies the statute. If the statute is ambiguous, the Court proceeds to the second step of *Chevron* and applies the agency's interpretation if it is based on a permissible construction of the statute. *See Andrade-Zamora v. Lynch*, 814 F.3d 945, 951 (8th Cir. 2016). In conducting this review, the IBIA's decision is entitled to *Chevron* deference, *see Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007), and the Solicitor's opinion is entitled to respect as a well-reasoned, formal, signed, opinion that is thorough in its consideration and ultimately persuasive. *See McMaster v. U.S.*, 731 F.3d 881, 892 (9th Cir. 2013).

The PRA addresses the issue of taking lands into trust for the Tribe but it does not purport to address the separate issue of which of those lands will qualify as "restored lands" within the meaning of IGRA. As the DOI Solicitor observed, "no language on the face of the statute

designates Knox and Boyd Counties as the exclusive area in which lands taken into trust may be considered restored under IGRA." 2017AR 0000066.

Two different sections of the PRA relate to taking lands into trust. One section provides that:

> The Secretary shall accept not more than 1,500 acres of any real property located in Knox or Boyd Counties, Nebraska, that is transferred to the Secretary for the benefit of the Tribe. Such real property shall be accepted by the Secretary … in trust for the benefit of the Tribe …. The Secretary may accept any additional acreage in Knox or Boyd Counties pursuant to his authority under the [IRA].

25 U.S.C. § 983b(c). Another section provides that "[a]ll Federal laws of general application to Indians and Indian tribes (including … the Indian Reorganization Act) shall apply with respect to the Tribe and to the members." 25 U.S.C. § 983a. The IRA broadly authorizes the Secretary, in his discretion, to acquire and take into trust any lands within or without existing reservations for the purpose of providing land for Indians. 25 U.S.C. § 5108. Thus, as the DOI Solicitor found, "[t]he PRA clearly provides two different provisions for trust acquisitions—the mandatory trust acquisition authority for Knox and Boyd Counties, plus the general discretionary trust acquisition authority provided by the PRA's cross-reference to the IRA." 2017AR at 0000064. The PRA, by its terms, does not restrict trust acquisitions for the Tribe to the two Nebraska counties.

The legislative history confirms this conclusion. As originally introduced, the legislation required the Secretary to accept into trust "any real property that is transferred to the Secretary for the benefit of the Tribe." S. 1747, 101st Cong. § 4(c) (1990). The DOI objected to the lack of any geographical limitation on this mandatory provision, noting that it "would limit the Secretary's discretion to take land into trust under existing law." *Iowa v. Great Plains Regional Director*, 38 IBIA at 47. Accordingly, the legislation was amended to limit mandatory trust acquisitions to 1,500 acres in Knox and Boyd Counties, while preserving the Secretary's discretion to make

additional trust acquisitions. Congressman Bereuter of Nebraska explained the amended provision as follows during floor proceedings in the House of Representatives:

> [T]he measure before us today, as amended in the Interior Committee, permits the Tribe to acquire 1,500 acres of land for economic development, agricultural, and ceremonial and tribal purposes. Beyond that, the Secretary of the Interior will have the discretion, as he does currently for all other federally recognized tribes, to acquire additional lands to be designated as trust lands on behalf of the tribe.

136 Cong. Rec. 28339, 28341 (Oct. 10, 1990).

Further, in contrast to the PRA, other restoration acts do impose explicit geographic limits on the Secretary's authority to take land into trust for the restored tribe. The Solicitor cited three examples that pre-date the PRA,[4] and reasoned that Congress knows how to impose a geographic limitation on trust acquisitions when it wants to do so and the language of the PRA does not reveal any such intent. 2017AR 0000064. This reasoning is unimpeachable. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 384 (2013) (Congress's "use of explicit language in other statutes cautions against inferring a limitation in [this statute]. These statutes confirm that Congress knows how to [impose a limitation] when it so desires.").

Likewise, Congress has frequently inserted express gaming restrictions in tribal restoration legislation, both before and after the enactment of IGRA and the PRA.[5] Although Congress knows

[4] These are: (1) the Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, § 7(d)(3), 91 Stat. 1418 (1977) (codified at 25 U.S.C. § 711e(d)(3)) ("the Secretary shall not accept any real property in trust for the benefit of the tribe or its members unless such real property is located within Lincoln County, State of Oregon"); (2) the Grand Ronde Restoration Act, Pub. L. No. 98-165, § 8(c)(3), 97 Stat. 1064 (1983) (codified at 25 U.S.C. § 713f(c)(3)) ("the Secretary shall not accept any real property in trust for the benefit of the tribe or its members which is not located within the political boundaries of Polk, Yamhill, or Tillamook County, Oregon"); and (3) the Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 7(e)(2), 94 Stat. 320 (1980) (codified at 25 U.S.C. § 766(e)(2)) ("the Secretary shall not accept any real property in trust for the benefit of the tribe or bands unless such real property is located either within Beaver, Iron, Millard, Sevier, or Washington Counties, State of Utah").

[5] The Solicitor cited: (1) legislation restoring the Ysleta del Sur Pueblo Tribe and the Alabama and Coushatta Indian Tribes of Texas, Pub. L. No. 100-89, § 107(a), 101 Stat. 668 (1987) (codified at 25 U.S.C. § 1300g-6(a)); Pub. L. No. 100-89, § 207, 101 Stat. 672 (1987) (codified at 25 U.S.C. § 737(a)) ("All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."); (2) legislation involving tribes in the town of Gay Head, Massachusetts, Pub. L. No. 100-95, § 9, 101 Stat. 709 (1987) (codified at 25 U.S.C. § 1771g) ("the settlement lands and any other land that may now or hereafter be owned by or held in trust

how to impose gaming restrictions, "it did not expressly include a gaming restriction on any lands in the PRA." 2017AR 0000064.

The Solicitor correctly concluded that "[n]othing in the plain language of the PRA limits the Secretary's ability under the IRA to acquire lands outside of the two counties or precludes such land from qualifying as restored land under IGRA." 2017AR 0000063. As she noted, the statute on its face provides that all laws of general application to tribes apply to the Tribe, which would include the restored lands exemption in IGRA. Further, the PRA states that, '[e]xcept as otherwise *specifically* provided in any other provision of this Act …, nothing in this Act may be construed as altering or affecting - (1) any rights or obligations with respect to property.' 25 U.S.C. § 983b(d) (emphasis added)." No provision in the PRA places any limits on Tribal lands that are taken into trust from qualifying as "restored lands" under IGRA.

The Solicitor's construction of the PRA is also supported by the Indian canon of construction, which requires statutes to be construed liberally in favor of Indians, with any ambiguous provisions interpreted to their benefit. As the Solicitor noted, the D.C. Circuit applied this canon in determining that tribal lands obtained pursuant to another restoration act constituted "restored lands" under IGRA. 2017AR 0000068 (citing *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003)). Finally, the Solicitor found that Congress's general intent of

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for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)"); (3) the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, Pub. L, No. 106-568, § 606(b), 114 Stat. 2868, (2000) (codified at 25 U.S.C. § 1778d(b)) ("Tribe may conduct gaming on only one site within the lands acquired pursuant to subsection 6(a)(1) as more particularly provided in the Settlement Agreement."); (4) the Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. No. 105-256, § 9, 112 Stat. 1896 (1998) (codified at 25 U.S.C. § 712e) ("Real property taken into trust pursuant to this section shall not be considered to have been taken into trust for gaming (as that term is used in the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.))."); (5) the Rhode Island Indian Claims Settlement Act, Pub. L. No. 104-208, § 330(3), 110 Stat. 3009 (1996) (codified as amended at 25 U.S.C. § 1708(b)) ("For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands."); and (6) the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, § 14(a), 107 Stat. 1118 (1993) (codified at 25 U.S.C. § 941l(a) ("The Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the Tribe.").

providing restitution to tribes in restoring their federal recognition weighs in favor of interpreting the PRA to permit land outside of Knox and Boyd Counties to qualify as restored lands under IGRA. 2017AR 0000069.

In summary, both the 2002 IBIA decision and the Solicitor's opinion are well-reasoned, thorough, and persuasive in concluding that the PRA does not preclude the Carter Lake parcel from being taken into trust or qualifying as "restored lands." Plaintiffs have not shown, and cannot show, that DOI's consistent interpretation of the PRA contravenes the plain language of the statute. Thus, there is no basis for this Court to overturn the agency's decision.

B. The NIGC's 2008 Regulations Are Inapposite and Irrelevant

"Before 2008, the Secretary assessed whether lands qualify as 'restored lands' by considering three factors first set out in *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the Western District of Michigan*—namely, (i) 'the factual circumstances of the acquisition,' (ii) 'the location of the acquisition,' and (iii) 'the temporal relationship of the acquisition to the tribal restoration.'" *Butte County, California v. Chaudhuri*, 887 F.3d 501, 507 (D.C. Cir. 2018). On August 25, 2008, the DOI implemented new regulations at 25 C.F.R. Part 292 which altered this common law test by imposing a bright line rule that, where a restoration act requires or authorizes the Secretary to take land into trust within a specific geographic area, only lands within that area can qualify as restored lands. 25 CFR § 292.11.

Plaintiffs argue that DOI and the NIGC should have considered this regulation in construing the PRA and that their failure to do so was arbitrary and capricious. This contention is specious. The 2008 regulations shed no light on the meaning of the PRA, which was enacted 18 years earlier.

Plaintiffs also argue that the NIGC should have applied the 2008 regulations, rather than the common law test, in determining whether the Carter Lake parcel constitutes restored lands. They dispute NIGC's conclusion that the grandfather provision, 25 CFR § 292.26, makes the regulations inapplicable to this matter. But courts defer to an agency's interpretation of its own regulations "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (citation omitted). The agency's interpretation "need not be the only possible reading of a regulation—or even the best one—to prevail." *Id.* Plaintiffs fail to demonstrate that the NIGC's interpretation of the grandfather provision is plainly erroneous or inconsistent with the regulation.

The grandfather provision establishes two distinct exemptions, both of which the NIGC found to be applicable here. First, it provides that the 2008 regulations cannot be used to alter final agency decisions on restored lands made before August 25, 2008, when the regulations became effective. 25 CFR § 292.26(a). The NIGC's final decision in this case was made on December 31, 2007. Plaintiffs contend that, "[i]n light of the remand from the federal court, the NIGC decision cannot be viewed as final before the regulations went into effect in 2008." (Br. at 26). This does not follow. The NIGC reasonably construes the grandfather provision to preclude invocation of the 2008 regulations to alter a previous final decision if that decision is revisited, for whatever reason, after the 2008 regulations became effective. Indeed, an agency can violate the prohibition against retroactive rulemaking[6] by applying new regulations to a matter that is remanded from the courts if those new rules would have a substantive impact on a party's rights. *See U.S. v. Gutierrez*, 443 F. App'x 898, 905-08 (5th Cir. 2011); *Kokal v. Massanari*, 163

[6] Agencies cannot adopt retroactive regulations "unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

F.Supp.2d 1122, 1129-34 (N.D. Cal. 2001). Because of retroactivity concerns, the Eighth Circuit has cautioned that "if an agency makes a policy change during the pendency of a claimant's appeal, the reviewing court should remand for the agency to determine whether the new policy affects its prior decision." *Ingram v. Barnhart*, 303 F.3d 890, 893 (8th Cir. 2002). Thus, the NIGC's construction of this section of its grandfather regulation is entirely sound.[7]

The grandfather provision further provides that the 2008 regulations do not apply to matters where the NIGC has issued a written opinion regarding whether a parcel constitutes restored lands before the effective date of the regulations. 25 CFR § 292.26(b). (The regulation caveats that the NIGC is not bound by the prior written opinion). The NIGC found that this exemption also applies here because a legal opinion about the Carter Lake parcel had been issued by the NIGC Office of General Counsel in October 2007. 2017 AR 0000033. Plaintiffs contend that it is "nonsensical" for NIGC to apply this exemption because the October 2007 opinion concluded that the Carter Lake parcel does not qualify as restored lands. (Br. at 25-26). But the grandfather clause does not depend on the substance of the previous opinion. The NIGC's interpretation of this exemption is neither plainly erroneous nor inconsistent with the language of the regulation.[8]

Plaintiffs also contend, in conclusory fashion, that "[t]he [Carter Lake] parcel does not qualify as 'restored land' under the common law test for restored land." (Br. at 2). But the burden is on plaintiffs to demonstrate that the NIGC misapplied the common law test of restored lands, *see South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir. 2005), and they fail to do

[7] Furthermore, it is noteworthy that the NIGC's 2007 decision in this matter was not vacated. The district court purported to vacate it but the Eighth Circuit reversed this ruling and directed that the matter be remanded to the NIGC to consider two issues that were not addressed in the 2007 decision and reexamine whether the Carter Lake parcel satisfies the common law test for restored lands. The NIGC did so and reaffirmed its prior conclusion. Thus, the 2017 NIGC decision amended the 2007 decision but did not supplant it.

[8] In addition, the NIGC's Final Decision and Order issued on December 31, 2007, which concluded that the Carter Lake parcel does qualify as restored lands, also constitutes "a written opinion regarding the applicability of 25 U.S.C. 2719" which would trigger this section of the grandfather provision.

so. They merely assert that "the cases cited to support the NIGC's application of the common law test for restored lands here are factually distinguishable." (Br. at 28). This does not begin to establish that the NIGC's decision is arbitrary and capricious or contrary to law. "[T]he NIGC [is] the agency authorized by Congress to interpret and enforce IGRA." *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153-54 (8th Cir. 2013). *Chevron* requires deference to the NIGC's interpretation of the "restored lands" provision in this case so long as it is "permissible." *Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1441 (8th Cir. 1993) (*en banc*). The court does not substitute its judgment for that of the agency, even if the evidence would have also supported the opposite conclusion. *See South Dakota v. U.S. Dep't of Interior*, 423 F.3d at 799.

C. The Invalid 2002 Agreement Between Iowa and the Tribe's Attorney Does Not Estop the Tribe From Utilizing the Restored Lands Provision

The NIGC found that the alleged 2002 agreement between Iowa and the Tribe's attorney, Mr. Mason, was invalid because Mr. Mason lacked authority to bind the Tribe, and Iowa accepted the risk of inaccurately assessing his authority. This ruling, which plaintiffs do not challenge, dooms their effort to rely on the agreement. "As with any contract, parties entering into [a Tribal-State compact] must assure themselves that each contracting party is authorized to enter into the contract. There are familiar, and well-established, methods for obtaining such assurance." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997). An unauthorized agreement between a tribe and a state is void. *See id.* at 1559; *Narragansett Indian Tribe of Rhode Island v. State of Rhode Island*, 1996 WL 97856 (D.R.I. 1996) (gaming compact was void where governor lacked authority to bind the State by executing it). Iowa's unauthorized agreement with the Tribe was void and that is the end of the matter.

The NIGC found that the Tribe subsequently ratified the unauthorized agreement, under the theory of "institutional ratification," because the Tribal Council – the body with authority to ratify the agreement – "had actual or constructive knowledge [of it] at some point during the period between 2002 and 2005 and for a limited period of time acquiesced in the agreement." 2017AR 0000025. But the doctrine of institutional ratification is inapplicable here. It has been applied to the federal government with respect to procurement contracts for goods and services, but it has never been applied to ratify agreements between two sovereigns. Agreements between sovereigns must be ratified explicitly or by the enactment of legislation that gives binding force to them. *See Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986). There is no precedent for finding that one sovereign has implicitly ratified an agreement with another sovereign by acquiescence or inaction. To the contrary, the D.C. Circuit recently reversed a ruling that a tribe was estopped by its silence in contractual dealings with the federal Government. *See Navajo Nation v. U.S. Dep't of Interior*, 852 F.3d 1124, 1129-30 (D.C. Cir. 2017). The Supreme Court has refused to infer a waiver of a tribe's sovereign power from silence, ruling that sovereign power "will remain intact unless surrendered in unmistakable terms." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 & n. 14 (1982). Likewise, the Eighth Circuit has rejected the proposition that a tribe's sovereign immunity can be waived by implication. *See Am. Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985).

In any event, the NIGC concluded that the Tribe was not bound by its supposed ratification because it clearly repudiated the agreement in 2005 and Iowa could still have challenged the 2002 land-into-trust decision since the six-year statute of limitations had not yet run. Thus, Iowa suffered no injury based on the Tribe's ratification and "the Tribe is not estopped from asserting

that the [Carter Lake parcel] is eligible for gaming pursuant to IGRA's exception for restored lands of a restored tribe." 2017AR 0000028-29.

Plaintiffs contest this reasoning and assert that, as of 2007, all of the parties to this dispute assumed that the Quiet Title Act (QTA) precluded judicial review once the Carter Lake parcel was taken into trust. It is true that three circuits -- the Ninth, Tenth and Eleventh – had ruled that the QTA bars judicial review.[9] But the Eighth Circuit had not addressed this issue. And the D.C. Circuit subsequently concluded that the QTA does not bar review. *Patchak v. Salazar*, 632 F.3d 702, 711-12 (D.C. Cir. 2011). The Supreme Court affirmed the D.C. Circuit. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215-24 (2012). Thus, the NIGC's analysis is based on the Supreme Court's authoritative construction of the law.

Plaintiffs' contention that the Tribe is estopped because the parties were laboring under a mutual mistake of law must be rejected. Acts performed in reliance upon a mutual mistake of law do not create an estoppel. *See Shamrock Development Co. v. City of Concord*, 656 F.2d 1380, 1386 (9th Cir. 1981); *Uinta Livestock Corp. v. U.S.*, 355 F.2d 761, 766 (10th Cir. 1966); 31 C.J.S. *Estoppel and Waiver* § 111.

Further, if the estoppel issue is analyzed based on the allegedly shared, but mistaken, assumption that the QTA precluded judicial review once the Carter Lake parcel was taken into trust in February 2003, then there would be no basis to find that the Tribe ever ratified the unauthorized agreement. "[I]nstitutional ratification occurs when the Government seeks and receives the benefits from an otherwise unauthorized contract" after "officials with ratifying authority [] know of the unlawful promise." *Gary v. U.S.*, 67 Fed.Cl. 202, 216 (2005). The

[9] *See Fla. Dep't of Bus. Regulation v. Dep't of Interior,* 768 F.2d 1248, 1253–55 (11th Cir. 1985); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961–63 (10th Cir. 2004); *Metro. Water Dist. of S. Cal. v. U.S.*, 830 F.2d 139, 143–44 (9th Cir. 1987).

rationale is that the government ratifies an unauthorized contract by continuing to seek and receive the contractual benefits. *See Janowsky v. U.S.*, 133 F.3d 888, 892 (Fed. Cir. 1998) (trial court should have considered "whether the agency ratified the proposed contract with the Janowskys by allowing the sting operation to continue and by receiving the benefits from it."). There is no basis for finding ratification if the unauthorized contract has already been fully performed by the time officials with ratifying authority learn of it.

Under plaintiffs' view, Iowa fully performed its side of the unauthorized agreement by not seeking judicial review before the Carter Lake parcel was taken into trust in February 2003. In that event, however, the Tribe never ratified the agreement. The NIGC could not and did not find that the Tribal Council knew of the unauthorized agreement and acquiesced in it before the parcel was taken into trust. Instead, the NIGC concluded the Tribal Council gained actual or constructive knowledge of the agreement at some point during the next several years. The NIGC's finding of ratification is based on the premise that, during this ensuing period, Iowa retained the right to seek judicial review and the Tribe acquiesced in having Iowa continue to stay its hand. But, this same premise supports the NIGC's further conclusion that, when the Tribe repudiated the agreement, Iowa suffered no detriment because it still could have sought judicial review at that time. Plaintiffs cannot logically embrace one finding (ratification) while attacking the other (repudiation caused no detriment to Iowa).

D. The NIGC Properly Disregarded the Unauthorized Agreement In Analyzing Whether the Carter Lake Parcel Constitutes Restored Lands

Finally, plaintiffs argue that, even if the Tribe's short-lived ratification of the unauthorized agreement does not estop the Tribe from seeking "restored lands" status for the Carter Lake parcel, it should have been considered by the NIGC as a relevant factual circumstance in applying the three-factor common law test of restored lands. This argument is flawed on several scores.

First, the Eighth Circuit directed the NIGC to determine whether there was a valid agreement between the Tribe and Iowa in order to decide whether the Tribe is estopped from invoking the restored lands exception, not for the distinct purpose of analyzing whether the Carter Lake parcel constitutes restored lands. The circuit court instructed 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." 625 F.3d at 512 (emphasis added). The court limited the NIGC's consideration of the alleged agreement to the issue of estoppel.

Second, the unauthorized agreement is irrelevant to the common law test of restored lands, regardless of whether it was later ratified and repudiated. That test focuses on "(i) 'the factual circumstances of the acquisition,' (ii) 'the location of the acquisition,' and (iii) 'the temporal relationship of the acquisition to the tribal restoration.'" *Butte County, California v. Chaudhuri*, 887 F.3d at 507.[10] Plaintiffs contend that the Tribe's ratification of the unauthorized agreement is one of the factual circumstances of the acquisition. But the acquisition occurred in 1999, years before the agreement was made. The circumstances of the acquisition were considered by the BIA Regional Director when he decided to take the Carter Lake parcel into trust on September 15, 2000 and by the IBIA when it affirmed that decision on August 7, 2002. The unauthorized agreement did not come into existence until some four months later, in December 2002, and the Tribe's supposed ratification of the agreement, as found by the NIGC, did not occur until long after that.

Third, plaintiffs fail to explain how the Tribe's supposed ratification of the agreement long after the parcel was taken into trust is not counterbalanced by its subsequent repudiation of the

[10] The three-factor test is a balancing test; no factor is necessarily dispositive and the factors need not be given equal weight. *See Grand Traverse*, 198 F.Supp.2d at 936 (parcel at issue could be considered restored lands "on the basis of timing alone"); *Wyandotte Nation v. Nat'l Indian Gaming Comm.*, 437 F.Supp.2d 1193, 1214 (D. Kan. 2006) (location factor is "arguably most important").

agreement and the absence of any harm to Iowa. In fact, neither of these later developments is relevant to the test of restored lands but there is no basis for plaintiffs to assert that the NIGC erred by failing to consider one but not the other.[11]

CONCLUSION

Indian gaming is one of the few success stories in the long and tortured history of relations between the United States and sovereign Indian tribes. Gaming supports tribal self-determination and promotes the health and welfare of tribal members, in accordance with federal policy. In this case, the Tribe has patiently waited for more than a decade to move forward with gaming on its trust land in Carter Lake in order to provide critically needed social services (health care, education, child and family services, elder care, housing) for its more than 4,000 tribal members. The Ponca Tribe has been forced to wait longer than most other tribes in order to exercise its sovereign rights over its tribal land.

In 2007 the NIGC concluded that the Carter Lake parcel constitutes "restored lands" which are eligible for gaming. Plaintiffs have tenaciously fought that conclusion ever since for motives that are primarily pecuniary. Council Bluffs, for example, simply seeks to prevent competition with its own casinos. Now, after one round of judicial review and an agency remand process that spanned seven years, the NIGC has reaffirmed its initial decision and plaintiffs have launched another round of judicial review.

The NIGC, with the assistance and concurrence of DOI, carefully addressed and resolved each of the issues that was remanded to it by the Eighth Circuit. The NIGC correctly concluded that: (1) the PRA does not limit the Tribe's "restored lands" to Knox and Boyd Counties, Nebraska;

[11] *Amici curiae* Gallup, Inc. and Owen Industries, Inc. also contend that the NIGC erred by failing to consider the impact of a casino on their interests and the cities of Carter Lake and Omaha. But none of their allegations was placed into the administrative record on which the NIGC based its decision. And, as a matter of fact, the city of Carter Lake publicly supports the construction of a casino.

(2) the 2008 regulations at 25 C.F.R. Part 292 are inapplicable to deciding whether the Carter Lake parcel constitutes restored lands; (3) the alleged 2002 agreement between Iowa and the Tribe's former attorney was unauthorized, and Iowa suffered no detriment even if the Tribe later ratified and then repudiated it; and (4) under the three-factor common law test, the Carter Lake parcel is part of the Tribe's restored lands. Plaintiffs have not demonstrated that any of these conclusions is arbitrary and capricious or contrary to law. Accordingly, the NIGC's decision should be upheld by this Court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of *Amicus Curiae* Ponca Tribe of Nebraska in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment was served upon counsel through the Court's CM/ECF electronic filing system on September 28, 2018.

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