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, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. 1:08-cv-00006-CRW-CFB **BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION**

INTRODUCTION

On November 28, 2008, this Court issued an Order reversing the National Indian Gaming Commission's ("NIGC") December 31, 2007 Final Decision and Order, which had approved a gaming ordinance amendment for the Ponca Tribe of Nebraska ("Tribe"). Dkt. No. 56. The Court found that "[t]he DOI and BIA, not the NIGC, had the sole authority to allow tribal gaming under the unique circumstances of this case," and that the NIGC's Final Decision "was unlawful, arbitrary, and not well reasoned." Order at 2. Pursuant to Federal Rules of Civil Procedure 59(a) and 59(e), the United States now respectfully moves for reconsideration of the Order.

STANDARD OF REVIEW

Although the Federal Rules of Civil Procedure do not explicitly provide for motions for reconsideration, Rules 59(a) and 60(b) "do give the district court the discretion to vacate a judgment or order and to reopen a case in certain limited circumstances." Anthony v. Runyon, 76 F.3d 210, 215 (8th Cir. 1996). A motion for reconsideration may serve, among other purposes, "to correct manifest errors of law or fact." Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413-14 (8th Cir. 1988) (quoting Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251, amended by 835 F.2d 710 (7th Cir. 1987)).

ARGUMENT

The Court's Order rests on several factual and legal errors about the nature of the restored lands determination process; the specific determinations, or lack thereof, that were made in this case; and the respective responsibilities of the NIGC, the Department of the Interior ("Interior" or "DOI"), and the Bureau of Indian Affairs ("BIA"). Both the Court's primary holding – that the NIGC exceeded its authority in making a restored lands determination about the Carter Lake Parcel even though it acted pursuant to its Memorandum of Agreement ("MOA") with Interior[1/] – and the Court's alternate holding – that the NIGC's determination was arbitrary and capricious – rely on these erroneous conclusions. If the errors are corrected, the Court's initial holding would not stand and the NIGC's Final Decision should be affirmed.

[1/]The MOA sets forth the agreement between the two agencies as to their division of responsibilities when either the Secretary or the NIGC Chairman seeks "legal advice for certain actions requiring action under IGRA dependent upon the determination of Indian lands." MOA ¶ 3.

A. The Court errs in holding that Interior or the BIA decided, at the time the Carter Lake Parcel was taken into trust, that the parcel was not restored lands, because in fact the Agency made no such decision.

The Court bases its Order in part on the erroneous finding that "DOI and BIA . . . made the initial decision taking the Carter Lake parcel into trust but not as restored lands and not for gaming." Order at 8. See also id. (referring to the "BIA and DOI decision" that the parcel is not restored lands); id. at 7 (stating that "the no-gaming decision was made by the parties, through counsel, and approved by counsel representing BIA and DOI"). In fact, no one at the BIA or anywhere in Interior decided, when the Carter Lake Parcel was approved for trust acquisition in 2002, that the Tribe would never be allowed to game on the land or that the parcel did not constitute restored lands for purposes of the Indian Gaming Regulatory Act ("IGRA"). See 25 U.S.C. § 2719(b)(1)(B)(iii).

The Amended Notice, which stated that the Tribe acknowledged that the restored lands exception would not apply to the Carter Lake Parcel, AR 000627, arose from an apparently informal agreement between the attorney for the Tribe and the State of Iowa. See AR 000632. It was not a decision by the Secretary or anyone else at Interior that the Carter Lake Parcel did not qualify as restored lands.[2/] This fact is proven by reviewing the Administrative Record. The record contains no opinion by the Interior Solicitor or any other Interior official regarding whether the Carter Lake Parcel constituted restored lands at the time the land was acquired. It contains no affirmative decision or analysis by any Interior official formally reviewing,

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[2/]Nor was the language in the Amended Notice the result of any written or enforceable agreement between the Tribe and Iowa. Had those parties wished to enter into a legally binding agreement that no gaming would occur on the parcel, they could have drafted such a binding agreement. The parties evidently chose not to enter into a binding agreement.

approving, or adopting the language in the Amended Notice.

The only item in the record indicating any action on the part of the BIA regarding the language in the Amended Notice is an internal BIA email which merely states that the field (regional) "Solicitor's office had no problem including the appended paragraph." AR 000016, AR 000628. This is not a restored lands analysis or determination. A restored lands determination is heavily dependent on facts and the application of a legal standard to those facts. Moreover, the authority to make restored lands determinations at the time of trust acquisition lies with the Assistant Secretary for Indian Affairs, delegated from the Secretary. In such cases, the Office of Indian Gaming Management and the Regional Director both make a recommendation to the Assistant Secretary regarding the applicability and requirements of Section 2719 of IGRA and the land acquisition regulations of 25 C.F.R. Part 151. See, e.g., St. Croix Chippewa Indians of Wis. v. Kempthorne, 2008 U.S. Dist. LEXIS 76103, at *5 (D.D.C. Sept. 30, 2008). Here, at the time the Carter Lake Parcel was taken into trust, the record provides absolutely no analysis of the relevant facts or whether the parcel satisfied the law regarding restored lands, much less an analysis by an official authorized to make such a decision. As the NIGC observed in its Final Decision, a regional official at Interior "simply accepted certain language to be appended to the . . . notice without independently determining whether it concurred with the substance . . . ." AR 000016 (citation omitted). This action merely noted the view of the tribe's counsel and the State, and was superfluous to Interior's decision to take the land into trust.

The proper time for a restored lands determination is when a tribe seeks to game on the land. Absent a tribe's seeking to game on land, there is no reason for the United States to make

such a determination (or to determine whether any other Section 2719 exception applies).[3/] Since the Tribe did not seek to game on the Carter Lake Parcel at the time it was taken into trust, no one – at the BIA or elsewhere in Interior – made a restored lands determination about the parcel at that time. The Court's contrary holding is erroneous and therefore does not support a reversal of the NIGC's Final Decision.

The Court held that the NIGC exceeded its authority by "overriding the DOI earlier decision." Order at 6. In the alternative, the Court held that the NIGC's action was arbitrary and unlawful because it reversed the Chairman's earlier conclusion that, at the time the land was acquired in trust, no one intended that it be restored lands. Id. at 9-11. Since there was no "DOI earlier decision," and no restored lands determination was made at the time the land was taken into trust, both of the Court's stated bases for reversing the NIGC's action are invalid.

B. The Court errs in holding that the IBIA affirmed the BIA's ostensible 2002 determination that the Carter Lake Parcel was not restored lands.

Having erroneously held that the BIA determined at the time the Carter Lake Parcel was taken into trust that the parcel was not restored lands, the Court goes on to hold that the Interior Board of Indian Appeals ("IBIA"), which heard the appeal brought by Iowa and Pottawattamie County from the BIA's initial decision to take the land into trust, "affirm[ed] the BIA's

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[3/]The Memorandum of Agreement discusses the two common scenarios in which a tribe might seek to game, and lays out the responsibilities for making a restored lands determination in each case. If a tribe applies to have land taken into trust for gaming purposes, Interior's Division of Indian Affairs will make the restored lands determination and seek the concurrence of the NIGC's Office of General Counsel. MOA ¶¶ 1, 3-4. If, however, a tribe already has land in trust, and subsequently seeks to game on the land by submitting a management contract or gaming ordinance for NIGC approval, then the NIGC's Office of General Counsel makes the restored lands determination and seeks the concurrence of Interior's Division of Indian Affairs. MOA ¶¶ 3-4. The latter is what happened in this case.

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." Order at 5. This, too, is incorrect.

The IBIA did affirm the BIA Regional Director's decision to acquire the Carter Lake Parcel in trust, but the IBIA did not hold that the parcel was not restored lands, that it could never be considered restored, or that gaming would never be allowed on the parcel. Rather, the IBIA rejected the claim, raised by the State and County, that the trust acquisition was unlawful simply because they suspected that the Tribe intended to pursue gaming rather than its stated purpose of a health-care facility. See Iowa v. Great Plains Reg'l Dir., 38 IBIA 42, 52 (Aug. 7, 2002); AR 000651. The IBIA reiterated its established position that "mere speculation that a tribe might, at some future time, attempt to use trust land for gaming purposes 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 (citations omitted); AR 000651-52.[4/]

If anything, the IBIA's opinion emphasizes that no decision was made, at the time the Carter Lake Parcel was taken into trust, about whether the parcel would constitute restored lands on which the Tribe could lawfully conduct gaming, because the IBIA points out that the BIA did not consider possible future gaming on the property when making the trust acquisition decision. Id. The Court's contrary finding compounds its misstatements about the restored lands

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[4/]Indeed, a tribe is well within its rights to change its mind about its land use goals. Nothing in IGRA or the Indian Reorganization Act precludes a tribe from changing its intended use of the land to take advantage of gaming opportunities if the land otherwise meets the relevant legal factors. See City of Lincoln City v. U.S. Dep't of Interior, 229 F. Supp. 2d 1109, 1124 (D. Or. 2002) (noting that the Secretary "does not have the authority to impose restrictions on a Tribe's future use of property taken into trust, or to acquire fee-to-trust property conditionally").

decisionmaking process and, again, cannot support a reversal of the NIGC's Final Decision. The Court held that "NIGC had no authority to override the agreed outcome of the IBIA proceedings." Order at 9. Because the IBIA said nothing at all about whether the parcel constituted restored lands, and in fact observed that the question was irrelevant because the Tribe was not seeking to game at the time, the Court's stated basis for declaring that the NIGC exceeded its authority is invalid. Accordingly, the Court's holding should be reconsidered.

C. The Court errs as a matter of law in holding that the Tribe should have submitted its gaming ordinance amendment to DOI or the BIA instead of the NIGC, because such ordinances are required by federal statute to be approved by the NIGC Chairman.

Finally, the Court mistakenly states that the Tribe engaged in "agency forum shopping" by submitting its amended gaming ordinance to the NIGC for approval, and states that "the amended ordinance should have been submitted for final approval to the DOI or BIA." Order at 8. These statements are incorrect as a matter of law. IGRA requires that the NIGC Chairman approve gaming ordinances and any amendments thereto. 25 U.S.C. § 2710(d)(1). Moreover, gaming ordinances are required if a tribe wishes to engage in Class III gaming:

> Class III gaming activities shall be lawful on Indian lands only if such activities are —
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> (A) authorized by an ordinance or resolution that —
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> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
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> (ii) meets the requirements of subsection (b) of this section, and
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> (iii) is approved by the Chairman.

Id. See also id. § 2705(a) ("The Chairman, on behalf of the Commission, shall have power,

subject to an appeal to the Commission, to . . . approve tribal ordinances or resolutions regulating class II gaming and class III gaming"). The Court wrongly characterizes the NIGC's statutory authority and then relies on this error of law to support its holding that "[t]he NIGC should have deferred to BIA and DOI" for the restored lands determination. Order at 8. Because the holding relies on an erroneous reading of the law, it should be reconsidered.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court reconsider its Order of November 28, 2008 reversing the Final Decision of the NIGC.

Dated: December 12, 2008

Respectfully submitted,

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/s/

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