No. 09-1657

In The United States Court Of Appeals For The Eighth Circuit

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 the State of Iowa, CITY OF COUNCIL BLUFFS, IOWA, Plaintiffs-Appellees

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, KEN SALAZAR, Secretary of the United States Department of the Interior, NATIONAL INDIAN GAMING COMMISSION, PHILIP N. HOGEN, Chairman of the National Indian Gaming Commission, and NORMAN H. DESROSIERS, Commissioner of the National Indian Gaming Commission, Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Consolidated Brief of Plaintiffs-Appellees

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

On judicial review of a decision of the National Indian Gaming Commission ("NIGC"), the District Court granted judgment in favor of the plaintiffs-appellees, the State of Nebraska, the State of Iowa, and the City of Council Bluffs, Iowa, holding that a parcel of land in Carter Lake, Iowa, was not "restored lands" of the Ponca Tribe of Nebraska, and was thus not exempted from the usual process for approving gaming activities on post-enactment trust acquisitions under the Indian Gaming Regulatory Act ("IGRA"). In concluding that the parcel was "restored lands," NIGC had disregarded the critical fact that at the time the Department of the Interior ("DOI") took the parcel into trust, all parties -- the Ponca Tribe, the State of Iowa, and the DOI -- had agreed that the was not part of the Tribe's "restoration of lands" under IGRA. This agreement was memorialized in DOI's public notice of the acquisition, and it was entirely consistent with the unambiguous text of the Ponca Restoration Act, which specifies two Nebraska counties for Ponca restored lands and thus precludes any finding that the Carter Lake, Iowa, parcel could qualify as "restored lands." Appellants seek remand, but remand here is unnecessary and futile because, as a matter of law, the parcel cannot possibly qualify as Ponca restored lands.

Plaintiffs-Appellees believe that the Court can resolve this appeal without oral argument.

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STATEMENT OF ISSUES

1. Whether the District Court properly determined that the NIGC lacked authority to unilaterally revisit the question of the legal status of the Carter Lake parcel as "restored lands."

Most Apposite Authority:

25 U.S.C. § 2719(b)(1)(B)

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1998)

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986)

2. Whether, in the alternative, the District Court's judgment should be affirmed because the unambiguous provisions of the Ponca Restoration Act expressly limit Ponca restored lands to two counties in Nebraska and thus preclude any finding that the Carter Lake, Iowa, parcel can be Ponca "restored lands."

Most Apposite Authority:

25 U.S.C. 983b

STATEMENT OF THE CASE

In 2002, the Ponca Tribe, the State of Iowa and the Department of the Interior ("DOI") agreed and acknowledged that a parcel of land in Carter Lake, Iowa ("the Carter Lake parcel") was not "restored lands" of the Ponca within the meaning of the Indian Gaming Regulatory Act ("IGRA"). That agreement and acknowledgment, memorialized in DOI's public notice of the trust acquisition of the parcel, further provided that none of the other IGRA exceptions applied to the parcel, so if the Tribe ever sought to conduct gaming on the site, it would be subject to IGRA's two-part Secretarial determination process under U.S.C. § 2719(b)(1)(A). Under that process, the States of Iowa and Nebraska and surrounding communities, such as Council Bluffs, would have a say in whether Indian gaming could occur on the Carter Lake Parcel, and the Governor of Iowa would have the right to ban gaming there altogether.

Several years later, the Tribe abandoned its unequivocal acknowledgement that the Carter Lake parcel is not restored lands and sought to have it declared to be just that. The matter was presented to the Chairman of the National Indian Gaming Commission ("NIGC"), who determined that the Carter Lake parcel is not restored lands, just as the Tribe originally agreed. DOI concurred in that decision.

Then, on December 31, 2007, the NIGC reversed all that. Disrupting the settled expectations and understandings among the Tribe, the State, and DOI's Bureau of Indian Affairs ("BIA"), and disregarding DOI's position on the question, the NIGC purported to hold that the Carter Lake parcel was "restored lands" under IGRA after all. Although the NIGC recognized that the governing standard for determining whether lands are "restored" requires consideration of the factual circumstances of the land acquisition, it reached its decision by completely ignoring – literally, holding irrelevant – the prior agreement and acknowledgement of both DOI and the Tribe that the Carter Lake parcel is not restored lands and the reliance on that position by the State of Iowa and others in the process leading up to DOI's acquisition of the parcel in trust for the Tribe. The NIGC also failed to give any consideration, let alone deference, to DOI's two prior determinations – first in the Public Notice and second in its concurrence in the Chairman's determination – that the Carter Lake parcel was not restored lands under IGRA. And the NIGC never addressed the question of whether the Carter Lake parcel was disqualified as restored lands under the Ponca Restoration Act because it lies a hundred miles away and in a different State from the two Nebraska counties Congress specified for Ponca restored lands.

Nebraska, Iowa and Council Bluffs brought consolidated actions in the District Court for the Southern District of Iowa challenging the NIGC decision

under the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq. After briefing and oral argument by the parties and by the Ponca Tribe, participating as amicus curiae, the District Court entered judgment for the plaintiffs. First, the District Court held that the NIGC exceeded its authority by declaring the Carter Lake parcel restored lands "when the Tribe deeded the property to the [United States] in trust, subject to the agreement that it would not be deemed restored lands." Slip. Op. at 7. 1/ DOI "made the initial decision taking the Carter Lake parcel into trust but not as restored lands and not for gaming." Id. at 7-8. NIGC "had no authority to override" that agreed-upon outcome. Id. at 9.

The District Court also held, in the alternative, that the NIGC decision was "without rational basis on the law and facts of record, and therefore arbitrary and unlawful" because it failed to consider "events [that] were crucial to the completion of the conveyance[.]" Id. at 9-10. The "crucial events" 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 lands status and gaming on the Carter [L]ake parcel; and the Secretary's execution of the deed in trust in February 2003." Id. at 10. The District Court granted judgment in favor of the plaintiffs and reversed and vacated the NIGC decision.

1/ The District Court's Order and Opinion is found in the Addendum to the Brief for the Federal Defendants.

The Federal Defendants subsequently moved for reconsideration, which the District Court denied in a written decision on January 23, 2009, and thereafter filed their Notice of Appeal.

STATEMENT OF FACTS AND STATUTORY BACKGROUND

This appeal concerns a parcel of land in Carter Lake, Iowa, that is held in trust by the United States for the benefit of the Ponca Tribe of Nebraska.

A. Statutory Background

1. Overview of the Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA, 25 U.S.C. §§ 2701-2721, to provide a statutory basis for the lawful operation of gaming by Indian tribes. Under IGRA, Congress defined three classes of gaming, established the NIGC, and allocated authority and specific responsibilities over Indian gaming among the Secretary of the Interior, the NIGC, the tribes, and the states.

IGRA exempts Indian gaming from state regulation, but only under carefully crafted limitations depending on the type of gaming at issue. IGRA divides Indian gaming into three classes. Class I gaming refers to social and traditional games with prizes of minimal value. When conducted on Indian lands, Class I gaming is subject to the exclusive authority of the relevant tribes, and it is not subject to IGRA. 25 U.S.C. §§ 2703(6), 2710(a)(1).

Class II gaming includes bingo and certain "non-banking" card games. Id. § 2703(7). It is allowed on Indian lands when (i) the state in which the tribe is located permits "such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by

federal law)," and (ii) the Indian tribe adopts an ordinance or resolution for gaming that is approved by the NIGC Chairman. Id. § 2710(b)(1)(A), (B). Under those circumstances, Class II gaming can be conducted on Indian lands pursuant to the tribal ordinance and subject to regulation and oversight by the NIGC. Id. §§ 2710, 2711, 2712, 2713. Class III gaming includes slot machines, roulette, poker, blackjack, and similar games, and can be conducted on qualifying Indian lands only pursuant to a tribal-state "compact." Id. §§ 2703(8), 2710(d). When conducted on qualifying Indian lands, Class III gaming activities are regulated under IGRA by the NIGC. Id. §§ 2706(b), 2710(b).

In order to conduct Class II or Class III gaming on Indian lands, a tribe must enact a tribal gaming ordinance and obtain approval from the NIGC. The decision to approve or disapprove a tribal gaming ordinance or amended gaming ordinance is made by the Chairman of the NIGC. 25 U.S.C. § 2710(b)(2); 25 C.F.R. § 522.3. A tribe may appeal a disapproval of a gaming ordinance, resolution, or amendment to the full Commission within 30 days after the Chairman serves notice of his determination of disapproval. 25 C.F.R. Part 524.

To conduct Las Vegas-style Class III gaming, a tribe also must have a tribal-state gaming compact approved by the Secretary of the Interior. 25 U.S.C. §§ 2710(d)(1), (d)(3)(B). Under IGRA, upon the request of a tribe, a state "shall negotiate with the Indian tribe in good faith to enter into [ ] a compact." Id.

§ 2710(d)(3)(A). The statute identifies specific subjects that a compact may include, and allows negotiations to include "any other subjects that are directly related to the operation of gaming activities[,]" id. § 2710(d)(3)(C)(vii), but it does not allow a state to prevent gaming on the tribe's gaming-eligible Indian lands. Indeed, if a state fails or refuses to enter into compact negotiations within 180 days of a tribe's request, the tribe nonetheless may obtain authorization to conduct Class III gaming on Indian lands either by enforcing IGRA's compact provisions in an action against the state in federal court, see id. § 2710(d)(7), or, if the state invokes its sovereign immunity from suit, by proceeding under the Class III Gaming Procedures regulations in 25 C.F.R. Part 291 to have the Secretary promulgate gaming procedures. 2/

2. Statutory Limitations on Lands Eligible for Indian Gaming

Under IGRA, gaming of any class must be conducted on "Indian lands." IGRA defines "Indian lands" as:

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

2/ A recent Fifth Circuit decision held that the Secretary's regulations in 25 C.F.R. Part 291are unconstitutional. See Texas v. United States, 497 F.3d 491 (5th Cir. 2007), cert. denied Kickapoo Traditional Tribe v. Texas, 129 S. Ct. 32 (2008).

Id. § 2703(4). Since 2003, the Carter Lake parcel has been held in trust by the United States for the benefit of the Ponca Tribe. Gov't App. 53-57.

Section 20 of IGRA generally prohibits gaming activities on land, like the Carter Lake parcel, that is placed into trust for a tribe after October 17, 1988, the date IGRA was enacted. 25 U.S.C. § 2719(a). 3/ Subject to three exceptions, discussed below, gaming may occur on such land only with the concurrence of the state where it would occur. Specifically, a tribe may conduct gaming on Indian lands acquired in trust after October 17, 1988 if the Secretary determines that the gaming establishment "would be in the best interests 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[.]" Id. § 2719(b)(1)(A) (emphasis added). This procedure is often referred to as the Secretarial two-part determination. Under this procedure, the Secretary must consult "with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," to ensure that the proposed gaming "would not be detrimental to the surrounding community[.]" Id.

3/ This prohibition does not apply to certain other Indian lands not relevant here. See 25 U.S.C. § 2919(a)(1)-(2).

In addition, Section 20(b)(1)(B) contains three narrow exceptions to the general prohibition against gaming on lands acquired after October 17, 1988. Gaming is permitted on such lands if the land was taken into trust "as part of":

> (i) a settlement of a land claim,
>
> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process, or
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

Id. § 2719(b)(1)(B). If the trust land at issue qualifies as gaming-eligible under one of these exceptions, the Secretarial two-part determination procedure does not apply. There is no consideration of the question of whether the proposed gaming would be "detrimental to the surrounding community," and the affected state governor has no power to concur with or object to the proposed gaming. In this case, no one argues that the first or second exceptions apply: the Carter Lake parcel was not part of a land claim settlement, and it is not reservation land, 25 U.S.C. § 983b(e) – indeed, it lies over a hundred miles from the Tribe's historic reservation lands in Knox County, Nebraska.

This case involves the Tribe's prior agreement that the Carter Lake parcel does not qualify under the third exception, "the restoration of lands for an Indian tribe that is restored to Federal recognition," and its present claim to the contrary. Id. § 2719(b)(1)(B)(iii). In ordinary cases, where the tribe has not

previously conceded the point, the question whether trust lands qualify as "restored lands" depends on (1) whether the tribe is a tribe that has been "restored to Federal recognition" (not disputed here) and (2) whether the lands at issue are part of the "restoration of lands" for the restored tribe. Id.; see also Wyandotte Nation v. NIGC, 437 F. Supp. 2d 1193, 1213 (D. Kan. 2006).

As discussed in greater detail below, the Ponca Restoration Act explicitly provided for restored lands for the Tribe, mandating that "the Secretary shall accept [in trust] not more than 1500 acres of any real property located in Knox or Boyd Counties, Nebraska . . . for the benefit of the Tribe[.]" 25 U.S.C. § 983b. Here, the Tribe seeks to call a parcel they purchased in Carter Lake, Iowa, over a hundred miles away from those counties, "restored lands." The Department of the Interior, carrying out its responsibility to interpret and enforce Section 20, has promulgated regulations that speak directly to this question. Indeed, a rule published on May 20, 2008, and effective in August 2008 articulated the straightforward interpretation of restoration statutes with such geographic limitations, namely that acquired property can be "restored lands" only if they lie within the area specified in the act of Congress:

> For newly acquired lands to qualify as "restored lands" . . . the tribe acquiring the lands must meet the requirements of paragraph (a), (b), or (c) of this section.
>
> (a) If the tribe was restored by a Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming,

> or restoring the government-to-government relationship between the United States and the tribe, the tribe must show that either:
>
> > (1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or
> >
> > (2) If the legislation does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of § 292.12. 4/

25 C.F.R. § 292.11 (emphasis added); see 73 Fed. Reg. 29354-380 (May 20, 2008) (final rule); 73 Fed. Reg. 35579-80 (June 24, 2008) (technical correction to final rule). Thus, DOI's rule ensures that if Congress directed or authorized the Secretary to acquire trust lands for a restored tribe within a specific geographic area, only lands within the specific area can qualify as "restored lands."

3. The Respective Roles of the Secretary and the NIGC Under IGRA

The Secretary of the Interior has general authority over Indian affairs. See 25 U.S.C. § 2; Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 5.03[1]-[2] (Nell Jessup Newton et al. eds., 2005). Among the specific powers of

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4/ Subsections (b) and (c) are inapplicable to the Tribe because they relate respectively to tribes restored pursuant to the administrative acknowledgement process and to tribes restored pursuant to a proceeding in the Federal courts. See 25 C.F.R. § 292.11(b), (c). Section 292.12, applicable only when Congress did not direct or authorize DOI to acquire trust lands for a restored tribe within a specific geographic area, generally incorporates the three-factor test developed initially in Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney for W. Dist. of Mich., 46 F. Supp. 2d 689 (W.D. Mich. 1999).

the Secretary is the authority to take lands into trust for tribes or individual tribe members pursuant to the Indian Reorganization Act, see 25 U.S.C. § 465, and other federal statutes. Like other tribal restoration statutes, the Ponca Restoration Act specifically assigns to the Secretary the power and responsibility to acquire trust lands for the Tribe. 25 U.S.C. § 983b(c). For nearly two centuries, DOI, primarily through the BIA, has maintained responsibility for the management, oversight and regulation of Indian trust lands and property. Cohen's Handbook § 5.03[1].

The Secretary also has specific powers and authority under IGRA, including approval of gaming revenue allocation plans and approval of tribal-state compacts. In addition, pursuant to Section 20, "the Secretary may, in certain circumstances, acquire land in trust for [a tribe] after the effective date of IGRA, October 17, 1988, and determine whether gaming can occur on that land." Cohen's Handbook § 12.03[3][b].

In contrast to the Secretary, the NIGC is a creation of modern times, established under IGRA just twenty years ago. 25 U.S.C. § 2704(a). Its sole authority derives from and is specified in IGRA. See 25 U.S.C. §§ 2705, 2706. In general, NIGC's authority relates to oversight and regulation of the conduct of gaming operations, including the approval of tribal gaming ordinances, approval of

management contracts, and authority to issue notices of violations relating to gaming operations. See 25 U.S.C. §§ 2712, 2713.

In past years, the Secretary and the NIGC have cooperated in preparing legal opinions addressing the eligibility for gaming of newly-acquired lands under an exception to Section 20 of IGRA, 25 U.S.C. § 2719. Pursuant to successive Memorandums of Agreement, the Secretary and the NIGC allocated responsibility for preparing initial drafts of such opinions and set out procedures for NIGC to obtain DOI's concurrence prior to issuing any legal opinion under Section 20. As discussed below, in October 2007, the Secretary concurred in the NIGC Chair's determination that the Carter Lake parcel is not "restored lands" under IGRA.

B. The Carter Lake Parcel

1. Federal Restoration of the Ponca Tribe of Nebraska

On October 31, 1990, Congress reversed an action it had taken 28 years earlier and restored the Ponca Tribe of Nebraska's status as a federally recognized Indian tribe. See Pub. L. No. 101-484 (Oct. 31, 1990) (Ponca Restoration Act, codified at 25 U.S.C. §§ 983-983h); see also Pub. L. No. 87-629 (Sept. 5, 1962) (terminating federal recognition of the Ponca Tribe of Nebraska, codified at 25 U.S.C. § 971). In the interim, the Department of the Interior had, with limited exceptions, sold the lands the Department held in trust for the benefit

of the Ponca Tribe, including the Tribe's reservation in Knox County, Nebraska. See 25 U.S.C. §§ 973, 974.

In an effort to restore a portion of those land assets of the Ponca Tribe, Congress expressly instructed the Secretary of the Interior to place up to 1,500 acres of land into trust for the Tribe's benefit. See 25 U.S.C. § 983b(c). 5/ Congress, however, unambiguously directed the Secretary under the Ponca Restoration Act to "restore" only land that is located in Knox and Boyd Counties, Nebraska. See 25 U.S.C § 983b(c). 6/

2. The Carter Lake Parcel

By the late 1990s, the Ponca Tribe of Nebraska owned some 747 acres in Knox County, Nebraska, the area of its former reservation, with approximately 150 acres held in trust. Pls.' App. 17; Gov't App. 91. In September 1999, the Tribe purchased in fee approximately 4.8 acres of land located in Carter Lake,

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5/ The Ponca Restoration Act, however, expressly precludes the Ponca Tribe from obtaining reservation status for any land "acquired by or for the Tribe." 25 U.S.C. § 983b(e).

6/ Because the Ponca population was dispersed over a wide region, the Act also designated a number of service areas for Ponca Members. The list of service areas was expanded in a 1996 amendment to the Act. See 25 U.S.C. § 983c (designating, as amended, Sarpy, Burt, Platte, Stanton, Holt, Hall, Wayne, Knox, Boyd, Madison, Douglas, or Lancaster Counties of Nebraska, Woodbury or Pottawatomie [sic] Counties of Iowa, or Charles Mix County of South Dakota). These statutory service areas enable tribe members residing therein to obtain various federal benefits notwithstanding the lack of a formal reservation.

Iowa, over a hundred miles away from Knox or Boyd County, Nebraska. Gov't App. 68; Pls.' App. 21. 7/ Then, in early 2000, the Ponca's Tribal Counsel passed a resolution requesting that the BIA take the Carter Lake parcel into trust. See Pls.' App. 19-20 (Tribal Resolution 00-01 dated Jan. 10, 2000). The Resolution provided that the land should be taken into trust for the express purposes of providing health services to tribal members and to provide for central government functions. Pls.' App. 20; see also Pls.' App. 21-22. 8/

As part of its evaluation of the Tribe's trust application, the BIA focused specifically on the use to which the lands would be put and sought clarification from the Tribe as to the "governmental purposes" envisioned for the Carter Lake parcel. In its August 23, 2000 response, the Tribe again represented to the BIA that the requested trust acquisition was to enable the Tribe to provide

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7/ A small community approximately two square miles in size, Carter Lake historically lay east of the Missouri River with the rest of Iowa. A hundred and thirty-one years ago, flooding caused the Missouri River to change course right where Carter Lake is located, so that the river now runs along an altered course with Carter Lake to its west. As a result, Carter Lake is the only Iowa community on the Nebraska side of the Missouri River. Although Carter Lake is indisputably in the State of Iowa, it is now surrounded on three sides by Omaha, Nebraska, and is very much a part of the integrated fabric of the greater Omaha area. Indeed, anyone traveling from Carter Lake to any other location in Iowa must pass through Nebraska to cross a bridge over the Missouri River into Iowa. See AR Pls.' App. 1 (map depicting Omaha, Carter Lake, and portions of Council Bluffs).

8/ The Tribe reiterated its stated intention to develop the Carter Lake parcel as a health care clinic and pharmacy for the benefit of both Tribal members and the Carter Lake community in its "Cooperation and Jurisdictional Agreement" with the City of Carter Lake, Iowa. See Pls.' App. 28-39 (Agreement dated Apr. 27, 2000).

health care services and consolidate governmental services. Pls.' App. 21-22. On September 15, 2000, the BIA gave Iowa notice of its preliminary decision to take the Carter Lake parcel into trust for the benefit of the Ponca Tribe of Nebraska. See Pls.' App. 23-27. The notice explained that BIA had considered each of the factors required by the governing regulations (25 C.F.R. §§ 151.10, 151.11), and found that, inter alia, the purpose for the land was to provide health care and pharmaceutical services for its members and other Native Americans in the area, and "to administer services contracted from the BIA, and the Indian Health Service[.]" Pls.' App. 23, 25. The BIA also found that no Environmental Assessment was required under the National Environmental Policy Act because "there will not be any change in land use." Pls.' App. 26. The Tribe was then using the parcel for a health care facility serving members in the greater Omaha area, and that use would continue. Gov't App. 44 (IBIA Decision, 38 IBIA 52).

The State of Iowa and Pottawattamie County appealed the BIA's preliminary decision to take the Carter Lake parcel into trust to the Interior Board of Indian Appeals ("IBIA"). Gov't App. 34. Among the issues raised on appeal was the concern that the Tribe's real purpose for seeking trust status for the Carter Lake parcel was to conduct Class III gaming on the property – a purpose that DOI had not evaluated in its consideration of the Tribe's trust application. Iowa's concern was not the mere product of imagination. On the contrary, just a year

before the Tribe purchased the Carter Lake parcel in September 1999, it had written to the Iowa Department of Inspections and Appeals informing Iowa that it intended to ask the State to enter into negotiations for a gaming compact, and asserting the Tribe's view that any lands it acquired in Pottawattamie or Woodbury Counties would qualify as "restored lands" under IGRA. Pls.' App. 9-10.

In response, the Tribe took pains to refute Iowa's argument, stating that while it had "attempt[ed] to explore the possibility of gaming development in 1998," the Tribe "abandoned this" in the face of the State's objections "and has not pursued it since." Pls.' App. 41 (Ponca Brief before IBIA). The Tribe also asserted that after Pottawattamie County "stated its opposition to the use of tribal land for gaming[,]" the Tribe "honored this and has not pursued such use." Pls.' App. 42.

On August 7, 2002, the IBIA issued a decision affirming the BIA's original decision to take the Iowa land into trust. See AR at 641 (Order Affirming Decision dated Aug. 7, 2002). In dismissing the State's and County's fears that the Tribe might attempt to use the Carter Lake parcel for Class III gaming, the IBIA found credible the Tribe's repeated and consistent statements that it would use the Carter Lake parcel only for health care facilities and other governmental operations. See Gov't App. 44. See also Gov't App. 42 (IBIA specifically finds that the

Tribe's only proposed use of the Carter Lake parcel was for "governmental services," not "business purposes").

3. Resolution of the Dispute Over the Carter Lake Parcel

The Tribe's representations and assurances continued unabated after the IBIA decision, as the Tribe continued to seek trust status for the Carter Lake parcel. The State of Iowa had the right to seek judicial review of the IBIA decision, but ultimately the Tribe negotiated an agreement with the State under which the State agreed to forego judicial review of the IBIA's decision in exchange for the Tribe's express concession and assurance that the Carter Lake parcel is not "restored lands" – and indeed, that none of the exceptions detailed in 25 U.S.C. § 2719(b)(1)(B) were applicable to the Carter Lake parcel. See Gov't App. 52-53 (Dec. 13, 2002 letter of Jean Davis detailing agreement). The Tribe represented and agreed that it would use the lands only for the purposes stated in its original application for trust acquisition, "not for gaming activities." Gov't App. 52. And the Tribe agreed that if it were to seek permission to game on the parcel, it would do so only pursuant to the Secretarial two-part determination.

This assurance was memorialized in the Department of the Interior's Public Notice for the trust acquisition, which stated the Tribe's acknowledgment that the Carter Lake parcel was not part of its "restored lands," and would not qualify for gaming under IGRA as restored lands or under either of the other

exceptions stated in 25 U.S.C. § 2719(b)(1)(B) . See Gov't App. 51 (Public Notice published Dec. 6, 2002, in the Council Bluffs Daily Nonpareil). Specifically, the public notice stated that:

> As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the two part determination under 25 U.S.C. § 2719. In making it's [sic] request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. § 2719(b)(1)(B). There may be no gaming or gaming-related activities on the land unless and until approval under the October 2001 checklist for gaming acquisitions, gaming-related acquisitions and two-part determinations under section 20 of the Indian Gaming Regulatory Act has been obtained.

Gov't App. 52 (emphasis added).

The Tribe's attorney submitted this acknowledgement language to the BIA "on behalf of the Ponca Tribe of Nebraska." Gov't App. 49; see also Gov't App. 50. BIA personnel reviewed the Tribe's acknowledgement and disclaimer internally, sought consultation from the DOI's Office of the Solicitor, and approved its publication. Gov't App. 50.

Relying on the Tribe's admission that the Carter Lake parcel was "not eligible [for] any of the exceptions found under 25 U.S.C. § 2719(b)(1)(B)" published in the Public Notice, the State of Iowa did not seek judicial review of the IBIA's August 7, 2002 ruling. See Gov't App. 52-53 (Dec. 13, 2002 letter of Jean

Davis detailing the agreement). Six weeks later, on January 28, 2003, the Tribe executed a warranty deed conveying the Carter Lake parcel to the United States of America in trust for the benefit of the Tribe. Gov't App. 56-57. The Acting Regional Director of the BIA's Great Plains Region completed the trust conveyance of the Carter Lake parcel on February 10, 2003, by accepting the deed from the Tribe. Gov't App. 57.

4. The NIGC's Restored Lands Opinion

In the fall of 2005, the Tribe reneged on its previous position that the Carter Lake parcel was not part of its restored lands and sought an "Indian lands" determination from the NIGC on the ground that the Carter Lake parcel was restored lands after all. Pls.' App. 61. Before the NIGC made any decision on the Tribe's request, in February 2006, the Tribe submitted to the NIGC a proposed amendment to its previously-approved gaming ordinance pursuant to 25 U.S.C. § 2710 that sought to make the ordinance site-specific by identifying the Carter Lake parcel as "Indian lands" eligible for gaming under IGRA. Pls.' App. 64, 65.

In response to an invitation from the NIGC's Office of General Counsel, the State of Iowa submitted written responses to the NIGC on April 21, 2006, and July 19, 2006, opposing the Tribe's new claim that the Carter Lake parcel qualified as "restored lands" (and was thus eligible for gaming) under IGRA. See Pls.' App. 72. In the face of imminent denial, the Tribe withdrew its

request to amend its gaming ordinance from the NIGC's consideration in August 2006. Gov't App. 66 n.1 (Oct. 22, 2007 M. Gross Memorandum, noting "[t]he Tribe submitted the same site-specific ordinance in February 2006 but withdrew it in August 2006 in the face of an impending disapproval").

A year later, the Tribe renewed its request for approval of the Tribe's site-specific amended gaming ordinance pursuant to 25 U.S.C. § 2710. Pls.'s App. 70. Once again, NIGC's General Counsel invited response by the State of Iowa, and the State submitted a written response opposing the Tribe's renewed request that NIGC determine that the Carter Lake parcel is gaming-eligible "restored lands" under IGRA. Pls.' App. 72.

This time, the denial came. On October 22, 2007, NIGC Associate General Counsel Michael Gross recommended to the NIGC's Chairman that the amendment to the Tribe's gaming ordinance be disapproved because the Carter Lake parcel does not qualify as gaming-eligible "restored lands" under IGRA. Gov't App. 66-98. Mr. Gross found that although the Ponca Tribe could demonstrate an historical and contemporary connection to the Carter Lake parcel and that a relatively short period of time had elapsed from the Tribe's restoration in 1990 and the placement of the parcel into trust in 2003, the facts and circumstances of the trust acquisition demonstrated that the land was not acquired in furtherance of the Tribe's restoration. Gov't App. 66. Pursuant to the MOA, the DOI Office

of the Solicitor reviewed Associate General Counsel Gross' opinion, and it concurred in the conclusion that the Carter Lake parcel does not qualify as "restored lands" for IGRA purposes. Gov't App. 99.

Chairman Hogen thereafter issued his decision holding that the Carter Lake parcel does not qualify for IGRA's "restored lands" exception and disapproving the amendment to the Tribe's gaming ordinance. Gov't App. 63. Chairman Hogen's October 22, 2007 decision expressly incorporated the memorandum prepared by Associate General Counsel Gross, in which DOI had concurred. Id.

The Tribe filed an appeal pursuant to 25 C.F.R. § 524.1 of Chairman Hogen's October 22, 2007 disapproval of the Tribe's proposed amended gaming ordinance. Gov't App. 100. The State of Iowa was allowed to submit a written response in support of Chairman Hogen's October 22, 2007 decision. Id. See 25 C.F.R. § 524.2.

On December 31, 2007, the NIGC reversed the Chairman's decision, holding that the Carter Lake parcel does qualify as "restored lands" after all. Gov't App. 100-17. In doing so, the NIGC expressly refused to consider the Tribe's acknowledgement that the parcel is not part of its restored lands or any of the other events that occurred between the IBIA's appeal decision on August 7, 2002, and the time the land was actually taken into trust in February 2003. Gov't App. 115.

Thus, the NIGC considered irrelevant the Tribe's acknowledgement that the parcel is not part of its restored lands, the Tribe's negotiations and settlement with the State of Iowa on that basis, and the BIA's own review and agreement to publish the Tribe's public acknowledgment, all making clear the Carter Lake parcel is not restored lands. See Gov't App. 49, 50, 51, 52-53. The NIGC's final decision was entered without further consultation with DOI, and was directly contrary to the DOI Office of the Solicitor's concurrence in the Chairman's earlier analysis and determination.

SUMMARY OF ARGUMENT

This Court should affirm without remand for two independent reasons. First, the District Court properly held that NIGC lacks authority to alter the basis on which the Department of the Interior took the parcel into trust. Nothing in IGRA grants the NIGC the power to render unilateral "restored lands" determinations, much less to issue unilateral decisions overriding the prior determination of DOI, announced in connection with the trust acquisition, that the Carter Lake parcel was not restored lands. The restored land exception is one of several narrow exceptions to IGRA's general bar on gaming for Indian lands acquired after the enactment of IGRA in 1988. These exceptions are all found in Section 20 of IGRA and all relate to the legal circumstances of the Secretary's decision to take the land into trust. 25 U.S.C. § 2719(b)(1)(B) (the gaming

prohibition on after-acquired lands "will not apply when . . . (B) lands are taken into trust as part of . . . (iii) the restoration of lands for a Indian tribe that is restored to Federal recognition."). Indisputably, the Department took the parcel into trust on the premise, acknowledged by the Ponca, that it was not part of the Tribe's restored lands. The District Court was entirely correct to hold that NIGC exceeded its authority when it purported to reverse the basis on which the parcel was taken into trust in the first place. No remand is appropriate to an agency that lacks authority to reverse the basis on which the parcel was taken into trust.

Second, the unambiguous terms of the Tribe's Restoration Act provide that restored lands for the Ponca Tribe must be located in Knox and Boyd Counties, Nebraska, not in Carter Lake, Iowa, over a hundred miles away. That is what the statute clearly says, for it explicitly references Knox and Boyd Counties as the areas where the Department must accept up to 1,500 acres (and may accept more) into trust as Ponca restored lands. Even if the Act's language were not clear, the Act's legislative history makes this limitation evident. Indeed, the legislative history reveals not only that Congress intended to impose a geographic limitation to these two counties, but also that the limitation was added at the request of the Department of the Interior itself. And if that were not enough, the Department of the Interior has even promulgated a regulation stating the way restoration acts are to be interpreted. In that regulation, the agency has made clear that when a

restoration act specifies the geographic area for restored lands, as the Ponca's does, a tract must be within the specified area in order to qualify. So even if NIGC had authority to alter the basis on which the parcel was taken into trust, the land cannot qualify as restored lands as a matter of law because it lies outside the two-county area stipulated by Congress at the time it enacted the Ponca Restoration Act.

ARGUMENT

I. The District Court Correctly Held That NIGC Did Not Have Jurisdiction Over The Restored Lands Issue Under The Unique Circumstances Of This Case.

The District Court properly held that "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 restored lands." Slip Op. at 7. Pointing to DOI's review and approval of the language of the published Public Notice, the District Court concluded that DOI "made the initial decision taking the Carter Lake parcel into trust but not as restored lands" and that NIGC had no authority "to override DOI decisions[.]" Id. at 7-8 (emphasis added). That holding was correct and should be affirmed.

A. DOI, Not NIGC, Has Primary Jurisdiction Over Restored Lands Determinations

Nothing in IGRA grants the NIGC the power to render unilateral "restored lands" determinations, much less to issue unilateral decisions overriding the prior determination of DOI, made in connection with the trust acquisition, that

the Carter Lake parcel was not restored lands. Like all federal agencies, the NIGC is vested with only those powers and functions Congress gave it. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1998); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it."). NIGC cannot claim general authority to administer the entire Act. As discussed above, IGRA vests authority over different aspects of Indian gaming variously to the Secretary of the Interior, the States, and tribes, as well as to NIGC. Instead, the NIGC is empowered to interpret IGRA and issue regulations only to the extent that it is carrying out its powers granted to it by Congress. See U.S. ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1254 (8th Cir. 1998).

The restored land exception is one of several narrow exceptions to IGRA's general ban on gaming for Indian lands acquired after the enactment of IGRA in 1988. 9/ These exceptions are all found in Section 20 of the Act and all relate to the legal circumstances of the Secretary's decision to take the land into trust. 25 U.S.C. § 2719(b)(1)(B) (the gaming prohibition on after-acquired lands "will not apply when . . . (B) lands are taken into trust as part of (i) a settlement of a land claim; (ii) the initial reservation of an Indian tribe acknowledged . . . under the Federal acknowledgement process, or (iii) the restoration of lands for a Indian

9/ Section 20 also provides that the bar on gaming on after-acquired lands does not apply to certain other qualifying lands not relevant to the issues in this case.

tribe that is restored to Federal recognition.") (emphasis added). Section 20 refers to only one federal officer, the Secretary of the Interior, and it speaks directly to the nature of the Secretary's trust acquisition. Whether lands qualify as restored lands is a question IGRA firmly placed in the hands of DOI.

DOI's authority and control over restored lands and similar questions derives from and is consistent with its general authority over Federal-tribal relations, and its specific authority over Indian lands held in trust by the United States. See, e.g., 25 U.S.C. § 2 (providing general authority over "management of all Indian affairs and of all matters arising out of Indian relations"), § 465 (authorizing the Secretary to acquire and hold interests in lands for the benefit of tribes and individual Indians). In this case as in all cases involving restored lands questions, the fundamental and only question is whether the lands at issue were "taken into trust" by the Secretary "as part of" a tribe's restoration. 25 U.S.C. § 2719(b)(1)(B) (emphasis added). Plainly that is a question only DOI can definitively answer, and equally plainly it is not a task assigned by IGRA (the sole source of NIGC's authority) to NIGC.

Consistent with the Secretary's authority under Section 20, DOI developed and promulgated regulations to govern the procedure for and resolution of restored lands and other issues under Section 20, publishing proposed rules in 2005 and issuing the Final Rule in 2008. DOI has also asserted its jurisdiction

over Section 20 issues in other ways. In 2008, the Solicitor of the Interior, the Department's chief legal officer, clearly affirmed DOI's authority in a letter to the NIGC Chairman, asserting that "NIGC has no statutory mandate to issue Indian land opinions independently." Gov't App. 118 (June 13, 2008 D. Bernhardt Letter to P. Hogen). The Solicitor noted that under IGRA "resolution of [certain] issues has not been delegated to NIGC[,] including "whether gaming is authorized under 25 U.S.C. § 2719 [Section 20]." Id., Gov't App. 122 (emphasis added).

To be sure, NIGC has authority to approve and disapprove Indian gaming ordinances, and in some instances a decision on a gaming ordinance cannot be resolved without also resolving whether a parcel of land falls within one of the exceptions set out in Section 20. 25 U.S.C. § 2710(b). In order to address this circumstance, DOI and NIGC have entered into successive Memorandums of Agreement, outlining their respective roles in drafting legal opinions concerning Section 20 and certain other legal questions. In the MOA in place when NIGC reached the decision at issue, NIGC specifically recognized the Secretary's authority over Section 20 issues, agreeing that "whether a tribe meets one of the exceptions in [Section 20] (i.e. settlement of a land claim, restored lands for a restored tribe, or an initial reservation for a tribe acknowledged through the Part 83 process) is a decision made by the Secretary when he or she decides to take land into trust for gaming." Gov't App. 59 (Feb. 27, 2007 MOA ¶ 1). The 2007 MOA

also plainly stated that the parties would follow the established procedure in order to reach concurrence on such legal questions. Id.

DOI and NIGC have since entered into a revised MOA. The Federal Appellants contend that the current agreement "expressly acknowledges NIGC's shared authority to determine whether land is eligible for gaming under [Section 20] in the context of reviewing a tribal gaming ordinance[.]" Gov't Br. at 20. On the contrary: the present MOA, signed this year, even more clearly recognizes DOI's primary jurisdiction over Section 20 issues, expressly providing that "the Solicitor must concur in any opinion that provides legal advice relating to: . . . the exceptions in 25 U.S.C. § 2719 [Section 20]," among other issues. Gov't App. 123-24 (Jan. 6, 2009 MOA ¶ 4). Thus, the present MOA confirms that Section 20 decisions are legal questions that fall within the authority of DOI and that are specifically delegated within DOI to its Solicitor. Indeed, under the current MOA (and unlike the former), DOI never seeks NIGC's concurrence on Section 20 issues, but NIGC must seek DOI's concurrence on all Section 20 questions that come before it. Gov't App. 123-24 (MOA ¶¶ 3-4, 8). That is as it must be, since DOI is the agency with sole jurisdiction and authority to take lands into trust for Indian tribes, and it is the agency charged with carrying out the Ponca Restoration Act. See 25 U.S.C. § 983-983h.

B. NIGC Exceeded Its Authority When It Chose To Override DOI's Repeated Determinations That the Carter Lake Parcel Was Not Restored Lands

In this case, the District Court correctly held that NIGC went too far and exceeded its jurisdiction when it overrode the prior determinations of DOI. It was the DOI that reviewed and approved the trust acquisition of Carter Lake parcel and issued the Public Notice making clear the circumstances of that acquisition. Here, in the course of taking the Carter Lake parcel into trust, DOI announced that the parcel is not "restored lands" – in fact, it did so twice – and NIGC had no authority to say otherwise.

DOI's first pronouncement on the issue was in BIA's Public Notice of the trust acquisition, which indisputably contained a statement that the parcel was not acquired as restored lands. Gov't App. 51. It is also undisputed that the statement was provided on behalf of the Ponca Tribe by its counsel. Gov't App. 49. AR 632. As agreed between the parties, the Public Notice communicated the Tribe's acknowledgement, and DOI's concurrence, that the Carter Lake parcel does not qualify as restored lands on which gaming could be conducted. Gov't App. 51; see also Gov't App. 50.

Now, appellants seek to minimize the significance of the Public Notice, with the Federal Appellants claiming it is only one factual circumstance to be weighed among other factors, see Gov't Br. at 21, and the Ponca Tribe labeling

the Public Notice a "misstep." Ponca Br. at 14. But the Public Notice is not just one fact among many. It serves a critical function: as the Federal Appellants are forced to admit, the publication of trust acquisition notices is designed to put interested parties on notice of the nature of the upcoming trust acquisition so that they may challenge the acquisition by seeking judicial review. Gov't Br. at 3-4; see, e.g., Santee Sioux Nation v. Gale Norton, No. 8:03CV133 (D. Neb. July 29, 2004) (slip op., Pls.' App. 47-60). That is exactly what happened here, for it is undisputed that Iowa agreed to forego its appeal based on the stipulation in the Public Notice that the parcel was not being taken into trust as restored lands.

Nor did DOI heedlessly accede to the Tribe's proposed language. On the contrary, BIA sought and obtained the approval of the DOI Solicitor's Office before allowing the Public Notice to be published. Gov't App. 50. Moreover, as the agency charged with responsibility for trust acquisitions, DOI was intimately familiar with the basis for and circumstances of the acquisition. Clearly, DOI would not have allowed the Public Notice to be published if it did not concur with the Tribe's acknowledgement that the Carter Lake parcel does not constitute restored lands.

The Tribe also argues that the Notice language can be ignored because DOI approved it without a formal decision issued by the Assistant Secretary for Indian Affairs. See Ponca Br. at 24-25. True, when tribes seek to have DOI

declare that a parcel of land is eligible for gaming under Section 20, the final decision is issued by the Assistant Secretary. But the Tribe points to no regulation or policy requiring (or even any reason to require) such formal decision-making when, as here, a tribe acknowledges the tract is not restored lands and seeks to disclaim any eligibility for gaming under the exceptions in Section 20. Here, no one was claiming the lands qualified for a Section 20 exception, so there was nothing to analyze. It would make no sense for DOI to adhere to the full decision-making process it employs in order to approve a tribe's right to game on a tract when the tribe in question is disclaiming that right.

DOI's second pronouncement on the issue came when DOI Solicitor's Office considered and concurred in the rigorous analysis by NIGC Associate General Counsel Michael Gross, whose lengthy Memorandum concluded that the parcel was not restored lands. By giving its assent to Associate General Counsel Gross' memorandum, the DOI affirmed the statement in its Public Notice that the Carter Lake parcel does not constitute gaming-eligible restored lands. See Gov't App. 99. Indeed, by concurring in that Memorandum, the DOI also concurred in its recognition that the Public Notice was not just a ministerial act of publication, but a substantive ratification of the Tribe's position that the Carter Lake parcel is not restored lands. See Gov't App. 65, 92-95.

In the face of these two determinations by Interior, the full NIGC had no authority to recast the Carter Lake parcel as restored lands when they were taken into trust on exactly the opposite basis. The Federal Appellants' only argument against the District Court's holding is to point to NIGC's jurisdiction to issue decisions on tribal gaming ordinances. See Gov't Br. at 18-20. Plaintiffs do not dispute NIGC's general authority to approve or disapprove tribal gaming ordinances. But in doing so, NIGC has no authority to revisit and reverse the basis on which the relevant land was taken into trust. Many tribal gaming ordinances are not even specific to a particular site, but merely provide a legal code governing a tribe's gaming operations. See 25 U.S.C. § 2710(b). Here, the Tribe submitted a proposed gaming ordinance specific to the Carter Lake parcel. The question of whether the parcel was taken into trust as restored lands was thus presented to NIGC. But since the record of DOI's trust acquisition resolved that question, that was the end of the matter. NIGC had no authority to revisit the basis on which Cater Lake was taken into trust and transform the parcel into restored lands years later.

The Federal Appellants claim that the 2009 MOA between DOI and NIGC supports NIGC's action here, but if anything the new MOA confirms that the original basis for taking the land into trust governs subsequent proceedings

before NIGC. 10/ To be sure, there are times when NIGC must determine the status of particular parcels under Section 20. Because DOI sometimes takes lands into trust for tribes without making any determination under Section 20, there are occasions when a tribe's submission of a site-specific gaming ordinance to NIGC is the first time either agency is called upon to determine whether a post-IGRA trust acquisition qualifies for gaming under Section 20. DOI and NIGC developed their successive MOAs to provide procedures to address that situation. Even then, NIGC issues the decision on the gaming ordinance, but the fundamental question of whether the proposed site qualifies for gaming under Section 20 remains a question for DOI. The current MOA makes that clear: under the MOA, DOI's Solicitor must concur in NIGC's draft decision before it can be released. Gov't App. 123-24 (MOA ¶ 4). In other words, NIGC cannot issue an initial decision on Section 20 issues unless DOI agrees with its conclusion. This provision makes clear that Section 20 decisions are legal questions firmly within the jurisdiction and

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10/ Even if the MOA supported NIGC's action, it would be insufficient as a matter of law, because DOI and the NIGC cannot shift around the powers given each by Congress simply by agreement. Even if viewed as a delegation of authority by the Secretary (something the Secretary has never asserted he was doing), such a delegation of authority would be unlawful. See U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004) (holding that "while federal agency officials may subdelegate their decision-making authority to subordinates . . . , they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so"; a federal agency may turn to an outside entity for advice and recommendations, provided the agency makes the final decision itself).

expertise of DOI and its chief legal officer. 11/ The current MOA also addresses the thorny question of how to reconcile NIGC's regulation allowing tribes to appeal ordinance disapprovals to the full commission, see 25 C.F.R. § 524.1, with DOI's jurisdiction over issues falling within Section 20. In that case, the MOA recognizes NIGC's regulatory authority to resolve an appeal but provides that the same concurrence procedures must be followed: the Commission's legal advisor must provide a draft legal opinion to the DOI Solicitor to obtain concurrence and "the Solicitor's response to the proposed advice to the Commission shall become part of the record considered by the Commission." Gov't App. 124 (MOA ¶ 8) (emphasis added). This provision virtually assures that NIGC's appeal decisions will be consistent with DOI's determination because any NIGC decision in conflict with DOI's determination will be highly vulnerable to a legal challenge under the APA.

Thus, DOI remains the agency with authority over Indian lands determinations even when the issue is not resolved at the time a tract is taken into trust. But here, it was clearly resolved. At the time it took the Carter Lake parcel

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11/ DOI's authority – and NIGC's lack of authority – over Section 20 questions is also confirmed by other terms of the MOA. For example, the MOA expressly provides that DOI alone – without any consultation with NIGC – makes Section 20 and other "Indian lands" determinations in connection with any decision to take lands into trust (or restricted fee status) and any decision approving or disapproving tribal-state compacts. See Gov't App. 123 (MOA ¶ 3). NIGC plays absolutely no role in such decision-making.

into trust, DOI spoke directly to the question whether it was restored lands and made crystal clear it was not. NIGC had no authority to change that.

C. The Ponca Tribe's Efforts To Undermine The Public Notice Are Futile.

In an attempt to muddy the waters, the amicus brief of the Ponca Tribe presents two unavailing efforts to escape the Public Notice. First, it claims that the Tribe's lawyer lacked authority to reach the agreement with Iowa and to ask BIA to include the Tribe's acknowledgement in the Public Notice. Second, it claims that the agreement with Iowa is invalid under 25 U.S.C. § 81 because Iowa and the Tribe did not obtain DOI's approval of their agreement. This Court should "decline to consider [either] issue because [they were] raised to this Court by the amic[us] and not by the parties." Solis v. Summit Contractors, Inc., 558 F.3d 815, 826 n.6 (8th Cir. 2009) (citations omitted). In any event, both contentions are without merit.

1. The Ponca Tribe Is Bound By Acts Of Its Counsel Taken On Its Behalf.

Even though it chose not to offer argument on this issue before the District Court, the Ponca Tribe now claims in this Court that the lawyer representing it in 2002 lacked authority to communicate the Tribe's acknowledgment that the Carter Lake parcel was not taken into trust as restored lands under IGRA and to request the BIA include language to that effect in the

Public Notice. That contention fails. See Pueblo of Santo Domingo v. United States, 647 F.2d 1087 (Ct. Cl. 1981). " 'An attorney employed for purposes of litigation has the general implied or apparent authority to enter into such stipulations or agreements, in connection with the conduct of the litigation, as appears to be necessary or expedient for the advancement of his client's interest or to accomplishment of the purpose for which the attorney was employed.' " Id. at 1088 (quoting 7A C.J.S. Attorney and Client § 205, at 341 (1980)). "Such stipulations or agreements are binding on the client, without regard to the client's actual knowledge or consent." 7A C.J.S. Attorney and Client § 205 at 341-42 (1980).

That presumption is critical to the litigation process, else parties, agencies, and courts could rely on nothing said to them by parties' counsel. It is a presumption that may be rebutted only if the client shows that the adverse party knew of relevant restrictions on the attorney's authority. Pueblo of Santo Domingo, 647 F.2d at 1088-89. Nothing in the fully developed record below remotely suggests that the State of Iowa or DOI was on notice in 2002-03 of any alleged limitation on the authority of the Ponca Tribe's attorney. Indeed, the Tribe points only to a tribal resolution dated August 6, 2006 (Pls.' App. 66, 68), nearly four years after the Public Notice was published in the Council Bluffs Daily Nonpareil. Despite the public dissemination of the Notice, the Tribe allowed years to go by

without attempting to repudiate the statements in the Notice. In the absence of any contemporaneous evidence showing any limit on the authority of the Tribe's counsel and that Iowa or DOI was aware of any such limitation, the argument that the Tribal Council did not authorize the contents of the Notice fails. See, e.g. Turner v. Burlington N. R.R., 771 F.2d 341, 346 (8th Cir. 1985) (party challenging the settlement bears the "heavy burden to establish that [the attorney] acted without any kind of authority in agreeing to [the settlement]") (quotation and citation omitted).

The Tribe also argues that it can escape its own acknowledgment in the Public Notice because its own Tribal Council had not issued a formal resolution authorizing the Notice or its contents. This contention likewise fails. First, compliance with Tribal rules was up to the Tribe. Second, even if the Tribe could escape its own actions by pointing to its own procedural failures, there was no such failure here. The only tribal law the Ponca's current lawyer cites is a constitutional provision that requires a Tribal Council resolution for the approval of agreements encumbering land. As discussed below, the Notice merely states fact; it does not encumber the Carter Lake parcel.

2. Section 81 Is Plainly Inapplicable To The Agreement Memorialized In The Notice.

The Tribe – but not the Federal Appellants – contends that the Public Notice is invalid because it constitutes an agreement to encumber Indian lands that

must be approved by DOI in order to bind the Tribe. See Ponca Br. at 19-20 (discussing 25 U.S.C. § 81). This Court's general rule declining to consider issues raised only by amici, see Solis, 558 F.3d at 826 n.6, should have even greater force here, where the Tribe's argument relates to the supposed authority of the very federal agencies that have chosen not to advance the argument.

The Tribe's argument also fails on its merits. The Public Notice does not "encumber" Indian land; it speaks only to the status of the Carter Lake parcel under IGRA, and it does not give Iowa or any other third party any legal interest in the Carter Lake parcel. Indeed, the Public Notice does not even bar gaming on the Carter Lake parcel. It just states that the land in question does not qualify for any of the IGRA exceptions including the restored lands exceptions, so that the Tribe must follow the Secretarial two-part determination process if it wishes to conduct gaming activities at Carter Lake.

Section 81 provides that "[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless" it is approved by DOI. 25 U.S.C. § 81. The origins of Section 81 date back to the 19th century, but in 2000, Congress substantially revamped the statute in order to "emphatically narrow[ ] its scope . . . ." GasPlus L.L.C. v. U.S. Department of the Interior, 510 F. Supp. 2d 18, 33 (D.D.C. 2007); see also S. Rep. No. 106-150 at 9 ("The amendment eliminates the overly-broad [sic] scope of

[Section 81] by replacing the phrase 'relative to Indian lands' with the phrase 'encumbering Indian lands': [it] will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands."). The Tribe cites GasPlus, but completely misunderstands it. 12/ "The statute and regulations could not be more clear that an encumbrance under Section 81 means a legal interest in land. GasPlus, 510 F. Supp. 2d at 33 (holding that Section 81 did not apply to contract providing plaintiff with day-to-day management control of gas distribution business located on Indian lands) (emphasis in original). See also 25 C.F.R. § 84.002 ("Encumber means to attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances)."). Nothing in the Public Notice gives any third party any legal interest – a claim, lien, charge, right of entry or liability – in the Carter Lake parcel, and there is simply no rational way to stretch the Public Notice into an agreement encumbering Indian lands.

For similar reasons, the Tribe's argument that only the Tribal Council could authorize the Public Notice also fails. Like Section 81, the provision of the Tribe's constitution requires Tribal Council approval of agreements "encumbering" tribal land. But "encumbrance" is a term of art that has the same

12/ Apart from GasPlus, the Tribe relies on irrelevant citations to cases interpreting the pre-2000 statute that encompassed a far broader universe of agreements, see Ponca Br. at 20.

meaning in law as that provided in Section 81 and its regulations. See Black's Law Dictionary 207 (6th Ed. 1990) (an encumbrance is "any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee by conveyance[;] a claim, lien, charge, or liability attached to and binding real property; e.g., a mortgage, judgment lien, mechanics lien, lease, security interest, easement to right of way, accrued and unpaid taxes[.]). There is no way to transform the Public Notice into a conveyance to any third party of an interest in the Carter Lake parcel such that a Tribal Council resolution would have been needed.

II. The Ponca Restoration Act Bars Any Finding That The Carter Lake Parcel Is "Restored Lands."

Although the District Court declined to reach the issue, its judgment should also be affirmed on the ground that as a matter of law the Carter Lake parcel cannot qualify as restored lands under the plain terms of the Ponca Restoration Act. Hanson v. FDIC, 113 F.3d 866, 869 (8th Cir. 1997) (Court of Appeals may affirm on any ground supported by the record); O'Hagan v. United States, 86 F.3d 776, 779 n.2 (8th Cir. 1996) (Court of Appeals "review[s] judgments, not the text of opinions, and thus may affirm on any ground supported by the record") (emphasis in original).

The Ponca Restoration Act is the act of Congress that restored the Tribe to Federal recognition. It directly and unambiguously limits the Ponca's

restored lands to Boyd and Knox Counties, Nebraska. The language could not be clearer. The Restoration Act expressly directs 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." Pub. L. No. 101-484, § 4 (Oct. 31, 1990) (25 U.S.C. § 983b(c)). The same provision also permits the Secretary, at his discretion, to acquire additional acreage in the same two counties. Id. This provision can only be read as a clear expression of Congress' intent to provide restored lands of at least 1,500 acres to the Tribe in the identified counties and not elsewhere.

The statute is clear, so that is the end of the matter. But there is more. The Act's legislative history and the Department of the Interior's own rules for interpreting restoration statutes both confirm that in order to qualify as "restored lands" for the Ponca, a parcel must be in Boyd or Knox County, Nebraska.

As originally introduced, the legislation contained no geographic limitation on the lands that could qualify as Ponca restored lands. S. Res. 1747, 101st Cong. (1990). The limitation came in the House, and it was requested by the Department of the Interior itself. As the House Committee on Interior and Insular Affairs noted, "[u]ntil termination, tribal population and activity centered around Ponca Creek and the Niobrara River in Knox County, Nebraska." See H. Rep. No. 101-776, at 2 (1990). Knox County was also the location of the Tribe's late

nineteenth century reservation. Id. The House amendment was purposeful and explicit: "[t]he first amendment is based on a suggestion from the Interior Department. It limits the geographical area within which the Secretary can accept land in trust to two Nebraska counties." Id. at 4 (emphasis added). 13/ The Senate concurred in the amendments and passed the amended S. 1747, 101st Cong., 136 Cong. Rec. S15432. (daily ed. Oct. 16, 1990). 14/

And even if the language were not clear and the legislative history not dispositive, DOI's own rule for interpreting restoration acts requires exactly the reading Plaintiffs set forth here, notwithstanding the view advanced by the Federal Appellants in this appeal. See Gov't Br. at 24-25. It is not litigation counsel but the agency whose position is entitled to deference, and DOI has adopted a rule addressing the precise interpretive question at hand. Under that rule, when a

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13/ In the District Court, the Tribe argued that its Economic Development Plan, submitted to Congress pursuant to the Restoration Act called for the acquisition of trust lands in Pottawattamie County. See 25 U.S.C. § 983h. Not only is the economic development provision distinct and separate from the restoration provision, it too contains the very same statutory limit to Knox and Boyd Counties. Id. As with the restored lands provision, the Department of the Interior recommended this limitation so as to "restrict [ ] the land the Secretary can acquire for the economic development plan to Knox and Boyd Counties in Nebraska." H. R. Rep. No. 101-776, at 4. That limitation remains as enacted. So even if the Tribe has devised an Economic Development Plan calling for trust acquisitions elsewhere, that certainly does not trump the statute's limitations for restored lands to Knox or Boyd County.

14/ The Tribe's Nebraska lands are subject to significant restriction on gaming because casino style gaming is not allowed in Nebraska. 25 U.S.C. §§ 2710(b)(1)(A), (d)(1)(B).

restoration act specifies a geographic area, then lands must be within that area in order to qualify as restored lands. Thus, under DOI's own rule, lands taken into trust for restored tribes are restored lands only if:

> (1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or,
>
> (2) If the legislation does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of [25 C.F.R.] § 292.12.

25 C.F.R. § 292.11(a); Final Rule, 73 Fed. Reg. 29,354, 29,377 (May 20, 2008). There is nothing even remotely new in this; it was the rule announced three years ago when the agency first proposed the rule in question. 71 Fed. Reg. 58,769, 58,774 (proposed Oct. 5, 2006). Addressing public comments in the Final Rule, the Department explained that it included a regulation to govern "restored lands" issues where "legislation [ ] requires or authorizes the Secretary to take land into trust for . . . a tribe within a specific geographic area because in such scenarios, Congress has made a determination which lands are restored." 73 Fed. Reg. at 29,364 (emphasis added). 15/

15/ The Federal Appellants suggest there is a question as to whether DOI's 2008 regulations on Section 20 determinations would be applied if the case were remanded to NIGC. See Gov't Br. at 25. Presumably, the regulations now in effect would apply. See Landgraf v. USI Film Prods., 511 U.S. 244, 245 (1994) (A court or administrative agency must normally apply the law "in effect at the time it renders its decision."); Pine Tree Medical Associates v. Sec'y of Health and

Here, the legislation clearly authorized the Secretary to take land into trust for the benefit of the Tribe within a specific geographic area, two counties in Nebraska. The Carter Lake parcel is not located in either of those two counties. Consequently, under the DOI's own interpretation of the meaning of "restored lands" under IGRA, the Carter Lake parcel simply does not qualify. 16/

The Federal Defendants argue on appeal that for some reason, remand is appropriate so that NIGC can consider how the Ponca Restoration Act's Knox/Boyd limit should apply here. See Gov't Br. at 24-25. But even NIGC could not find that Carter Lake, Iowa, is somehow located in Knox or Boyd

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Human Servs., 127 F.3d 118, 122 (1st Cir. 1997) ("[W]e find [no] support for the proposition that filing an application with an agency essentially fixes an entitlement to the application of those substantive regulations in force on the filing date."). But there is no need to reach a decision on that question because the regulations are powerful persuasive authority on DOI's interpretation of the statute. Even if DOI's interpretation were not binding, it would be due substantial deference, compelling the conclusion that the Carter Lake Parcel is not restored lands.

16/ The Secretary abided by this reading of the statute in this very case. When the Secretary originally took the Carter Lake parcel into trust, he did so under his general trust acquisition authority pursuant to 25 U.S.C. § 465, not pursuant to the Ponca Restoration Act. Gov't App. 34, 38 (IBIA Decision). And the agency has indisputably agreed with this view when the tract in question was in one of the two designated counties. See Santee Sioux Nation v. Gale Norton, No. 8:03CV133, Slip Op. (D. Neb. July 29, 2004) (in case arising under the Ponca Restoration Act, DOI defended a trust acquisition for the Tribe as restored lands on the ground that it was in Knox County, Nebraska) (slip op. at 4, Pls.' App. 47-60. See also Pls.' App. 43-46 (2002 DOI memorandum finding that trust acquisition for Tribe in Knox County qualifies as restored lands under Restoration Act).

County, Nebraska. Remand is therefore entirely unnecessary on this issue. See Fogg v. Ashcroft, 254 F.3d 103, 111 (8th Cir. 2001) (declining to remand where "[o]nly one conclusion would be supportable"); Sioux Valley Hosp. v. Bowen, 792 F.2d 715, 724 (8th Cir. 1986) (declining to remand where "remand would serve little purpose other than to delay the inevitable result this court would reach"). The terms of the Ponca Restoration Act are crystal clear. Congress left no ambiguity for an agency to interpret. And even if it had, the agency with authority to do so has interpreted restoration statutes like this one to require that a tract must be within the designated area to qualify as restored lands. That is the end of the matter.

CONCLUSION

For all the foregoing reasons, the District Court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), I certify that the foregoing Consolidated Brief for the Plaintiffs-Appellees is printed in proportionately spaced typeface of 14 points. The brief is double-spaced except for quotations and footnotes. The side, top and bottom margins are one inch. According to the word processing program, Microsoft Word 2003, the word count for the brief is 11,641 (excluding the portions of the brief exempted from the word-count limitation in Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 29, 2009

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CERTIFICATE OF SERVICE

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