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 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

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

BRIEF FOR THE FEDERAL APPELLANTS

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SUMMARY OF THE CASE AND STATEMENT RE ORAL ARGUMENT

Defendants-Appellants challenge the judgment of the United States District Court for the Southern District of Iowa reversing and vacating a December 31, 2007 decision of the National Indian Gaming Commission ("NIGC"). The NIGC had decided that the Ponca Tribe's 5-acre parcel of land in Carter Lake, Iowa was eligible for gaming under the Indian Gaming Regulatory Act as land taken into trust as part of the restoration of lands for an Indian tribe restored to federal recognition, 25 U.S.C. § 2719(b)(1)(B)(iii). In making its decision, the NIGC had concluded that an agreement between the Ponca Tribe's attorney and the State of Iowa acknowledging that the parcel was not eligible for gaming under this provision, documented in a December 6, 2002 Notice published by the Bureau of Indian Affairs Regional Director, was not a relevant factual circumstance. The district court held that NIGC had erred in concluding that the agreement and Notice were not relevant. Federal Appellants argue in this appeal that, once the district court corrected the NIGC's legal error, the district court should have remanded the case to the NIGC to allow it to make a new decision based on all relevant factors.

The Federal Appellants believe oral argument could assist the Court and request 15 minutes per side.

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JURISDICTIONAL STATEMENT

The States of Iowa and Nebraska and the City of Council Bluffs, Iowa sought review in the district court of a Final Decision and Order of the National Indian Gaming Commission ("NIGC") dated December 31, 2007 ("NIGC Decision") pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 704. The district court had jurisdiction under 28 U.S.C. § 1331. On November 28, 2008, the district court issued an order reversing the NIGC Decision and entered a declaratory judgment for the plaintiffs. On January 23, 2009, the district court denied the Federal Defendants' motion for reconsideration. The Federal Defendants filed a timely notice of appeal on March 23, 2009. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291, which provides for jurisdiction over a final judgment from a U.S. District Court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that NIGC had no "authority" in the unique circumstances of this case to conclude that the Ponca Tribe's Carter Lake Parcel was eligible for gaming under the Indian Gaming Regulatory Act ("IGRA") as land taken into trust as part of the restoration of lands for an Indian tribe restored to Federal recognition, 25 U.S.C. § 2719(b)(1)(B)(iii).

Most Apposite Authority:

25 U.S.C. § 2710(b)(2).

2. Whether the district court erred in failing to remand this case to the NIGC (a) to consider all relevant facts and weigh the three factors of a restored lands determination, and (b) to determine whether the Ponca Restoration Act, 25 U.S.C. §§ 983-983h, limits restored land status to land taken into trust under the Restoration Act in Boyd and Knox Counties, Nebraska.

Most Apposite Authority:

Negusie v. Holder, ___ U.S. ___, 129 S.Ct. 1159, 1167 (2009)

INS v. Orlando Ventura, 537 U.S. 12, 16 (2002)

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)

STATEMENT OF THE CASE

On October 22, 2007, the Chairman of the NIGC disapproved the Ponca Tribe's request for approval of a site-specific gaming ordinance, concluding that the parcel at issue in Carter Lake, Iowa was not eligible for gaming under any of the exceptions to IGRA's prohibition on gaming on lands acquired after October 17, 1988, 25 U.S.C. § 2719. App. 63. On administrative appeal by the Tribe, the full three-member NIGC reversed on December 31, 2007, concluding that the Carter Lake Parcel was eligible for gaming as land taken into trust as part of the restoration of lands for an Indian tribe restored to Federal recognition, 25 U.S.C. § 2719(b)(1)(B)(iii). App. 100. The States of Iowa and Nebraska and the

City of Council Bluffs, Iowa sought record review of that decision under the APA in the U.S. District Court for the Southern District of Iowa. After briefing and oral argument by the parties and *amicus curiae* Ponca Tribe, the district court concluded that the grounds on which the NIGC reversed the Chairman's Decision were legally erroneous. Rather than remanding to the NIGC for decision after correcting these legal errors, the district court proceeded to enter judgment for the Plaintiffs.

STATEMENT OF FACTS

A. Statutory Background

The Secretary of the Interior ("Secretary") has authority to take land into trust for tribes under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. In its request to have land taken into trust, a tribe states the purpose for which the land will be used. *See* 25 C.F.R. §§ 151.10, 151.11. If the tribe proposes a non-gaming use, the responsible Bureau of Indian Affairs ("BIA") Regional Director evaluates the request and makes a decision. If the tribe proposes a gaming use, Department of the Interior ("Interior") policy requires that the Assistant Secretary - Indian Affairs evaluate the request and make a decision. In both cases, prior to taking land into trust, Interior regulations require it to publish a notice in the Federal Register or in a local newspaper informing the public "that a final agency

determination to take land into trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." 25 C.F.R. § 151.12(b). The purpose of the notice is to provide any interested person an opportunity to seek an injunction to prevent the Secretary from taking the land into trust pending any judicial review that that person may seek. If an injunction is not obtained and the Secretary takes the land into trust, the sovereign immunity provision of the Quiet Title Act, 28 U.S.C. § 2409(a), precludes any further judicial review. *See* 61 Fed. Reg. 18082 (Apr. 24, 1966).

IGRA § 20, 25 U.S.C. § 2719, prohibits gaming on trust land acquired by an Indian tribe after October 17, 1988 unless an exception applies. One exception allows gaming under the so-called "Two-Part Determination" procedure wherein (1) the Secretary of the Interior determines that gaming would be in the best interest of the tribe and would not be detrimental to the surrounding community, and (2) the governor of the state concurs. 25 U.S.C. § 2719(b)(1)(A). Another exception, the "restored lands exception" – which is the IGRA provision at issue in this case – does not require state concurrence. Rather, it provides that IGRA's gaming prohibition does not apply when "lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to federal recognition."

Section 2719(b)(1)(B)(iii).

Interior and NIGC originally interpreted the restored lands exception to apply only where the restoration of a parcel was expressly referenced in a statute restoring a tribe's federal recognition status. Several district courts rejected this interpretation, and articulated a three-factor test to determine whether a parcel was taken into trust as part of the restoration of land to a tribe: (1) temporal proximity of the trust acquisition to the tribe's restoration, (2) the location of the acquisition (*i.e.*, historical and modern connection to the land), and (3) the factual circumstances of the trust acquisition. *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 46 F.Supp.2d 689, 700 (W.D. Mich. 1999) ("*Grand Traverse I*"); *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney*, 198 F.Supp.2d 920, 935-36 (W.D. Mich. 2002) ("*Grand Traverse II*"), *aff'd*, 369 F.3d 960 (6th Cir. 2004); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F.Supp.2d 155, 164 (D.D.C. 2000). Interior and NIGC subsequently adopted this three-factor test when applying IGRA § 20 in their Indian lands opinions, including in this case.[1/]

[1/] "Indian lands opinions" are legal opinions analyzing whether gaming is allowed on a particular parcel, including whether gaming is authorized under 25 U.S.C. § 2719. Interior thereafter promulgated a Final Rule interpreting Section 20 of IGRA, 25 U.S.C. § 2719: "Gaming on Trust Lands Acquired After October 17, 1988," 73 Fed. Reg. 29354 (May 20, 2008).

Federal regulations and policies do not require a tribe at the time it applies to have Interior take land into trust to make a binding choice as to whether the land would be used for gaming purposes. When a tribe seeks to have land taken into trust for gaming purposes, the Assistant Secretary - Indian Affairs makes the decision whether the land is eligible for gaming under any of the exceptions in IGRA § 20 as part of the decision whether to take the land into trust. But if the stated purpose of the land-into-trust application is for non-gaming purposes, the BIA Regional Director does not determine whether the land is eligible for gaming under IGRA. If a tribe does not otherwise have authorization under IGRA to conduct gaming, and it later wishes to change the use of the trust land to gaming purposes, the tribe may submit a site-specific gaming ordinance to NIGC for the Chairman's review and approval. 25 C.F.R. Part 522; *see North County Community Alliance v. Salazar*, ___ F.3d ___, 2009 WL 2032342 (9th Cir. 2009). To approve the site-specific gaming ordinance, the NIGC Chairman determines in the first instance whether the trust parcel at issue constitutes Indian lands eligible for gaming under IGRA. A tribe may appeal a disapproval to the full three-member Commission. 25 C.F.R. Part 524.

B. Factual Background

The Ponca Tribe was terminated by Congress in 1962, and was restored by

the Ponca Restoration Act of October 31, 1990, Pub. L. No. 101-484, 25 U.S.C. §§ 983-983h (Restoration Act).

In 1999, the Ponca Tribe purchased about five acres in Carter Lake, Iowa, located on the west bank of the Missouri River across from Council Bluffs, Iowa and surrounded on three sides by Omaha, Nebraska.[2/]

C. Land-into-Trust Administrative Proceedings

The Tribe applied to the BIA in 2000 to take the Carter Lake Parcel into trust, stating that it intended to use the land to provide tribal services, primarily health services. App. 26. Invoking her general authority under the IRA, the BIA Regional Director approved the Ponca Tribe's application on September 15, 2000 after considering the factors at 25 C.F.R. § 151.11 (Off-Reservation Acquisition). App. 29.

Iowa (and Pottawattamie County, Iowa) appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA"), presenting two arguments: (1) the Restoration Act prohibited the Secretary from taking land into trust outside of Boyd and Knox Counties, Nebraska, and (2) the Tribe really intended to use the parcel for gaming and the Tribe's application should be

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[2/] Carter Lake was cut off from the remainder of Iowa through an avulsion of the Missouri River but remained part of Iowa. *Nebraska v. Iowa*, 143 U.S. 359, 370 (1892).

evaluated on that basis. On August 7, 2002, the IBIA affirmed the Regional Director (38 IBIA 42), holding that the Restoration Act did not establish a limit on the Secretary's general authority under 25 U.S.C. § 465 to take land into trust for tribes. App. 34, 38-43. The IBIA also rejected the argument that the Regional Director had to address potential future gaming as there was no evidence in the record that showed the Tribe intended to use the parcel for gaming. App. 44-45.

In the face of Iowa's threat to challenge the IBIA decision, Michael Mason, the attorney who had represented the Tribe in the IBIA proceeding, reached an oral accord with the Iowa Assistant Attorney General that the Tribe would only undertake gaming on the property pursuant to IGRA's "Two-Part Determination" procedure and that the land would not be eligible for the exceptions under 25 U.S.C. § 2719(b)(1)(B). On November 26, 2002, Mr. Mason sent an email to the BIA requesting that certain language be included in the Regional Director's land-into-trust notice of decision, which was to be published in a local newspaper. App. 49. Although the requested language was not a required part of the public notice under Interior's notification regulation, the BIA Regional Director agreed to include the requested language in the notice. App. 50. However, neither the BIA Regional Director nor the Assistant Secretary - Indian Affairs analyzed the relevant facts and law to determine whether or not the parcel was eligible for the

restored lands exception, or any of the other exceptions under 25 U.S.C. § 2719(b)(1)(B) (settlement of a land claim and initial reservation exceptions).

The Regional Director first published a Notice of Intent without the requested language (apparently an inadvertent omission) on December 2, 2002. A "Corrected" (Amended) Notice of Intent was then published on December 6, 2002. App. 51. The Corrected Notice included verbatim the language requested by the tribal attorney, as follows:

> THE TRUST ACQUISITION OF THE CARTER LAKE LANDS HAS BEEN NAMED FOR NON-GAMING RELATED PURPOSES, AS REQUIRES [should be "requested"] BY THE PONCA TRIBE AND DISCUSSED IN THE SEPTEMBER 15, 2000, DECISION UNDER THE REGIONAL DIRECTORS ANALYSIS OF 25 CFR 151.10(c). 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. SEC. 2719. IN 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). 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.

By letter dated December 13, 2002 to Mr. Mason, the Iowa Assistant Attorney General confirmed that the Corrected Notice satisfied their agreement

and that the State of Iowa would not pursue judicial review of Interior's land-into-trust decision. App. 52. On February 10, 2003, the United States formally took the Carter Lake Parcel into trust for the Tribe. App. 54.

D. Gaming Ordinance Administrative Proceedings

After operating a health care facility on the parcel for a few years, the Tribe determined that that use was not economically viable and concluded that gaming on the parcel could provide revenue needed to support the Tribe's economic development. Under IGRA, NIGC is responsible for reviewing tribal requests for approval of gaming ordinances on trust land. The Tribe submitted to the NIGC on October 7, 2005 a request for an Indian lands opinion for the Carter Lake Parcel, asserting that gaming was allowed under IGRA's restored lands exception. App. 23 (AR001278). The Tribe subsequently submitted to the NIGC a site-specific gaming ordinance for the Carter Lake Parcel. App. 21 (AR000987). Iowa opposed these requests, relying principally on its agreement with the tribal attorney documented in the December 6, 2002 Notice. App. 21 (AR000990, AR000952). NIGC and Interior officials then asked the Tribe's representatives to address whether, under the Restoration Act, only land in Boyd and Knox Counties, Nebraska could be taken into trust as part of the restoration of land to the Tribe within the meaning of IGRA. The tribal representatives responded (App. 20

(AR000933)), but then withdrew the Tribe's requests on August 9, 2006 (App. 20 (AR000931)).

On July 23, 2007, the Tribe submitted to the NIGC a new request for approval of a site-specific ordinance to use the Carter Lake Parcel for Class II gaming, again stating that the parcel was eligible for gaming under IGRA's restored lands exception. App. 16 (AR000279). Iowa again opposed the request, reasserting its prior arguments. App. 16 (AR000267).

Under a Memorandum of Agreement ("MOA") between Interior and NIGC, the NIGC Office of General Counsel issues restored lands legal opinions, if necessary, in consultation with Interior.[3/] The NIGC Chairman and Commission may rely on these legal opinions in rendering their Indian lands decisions associated with the approval of site-specific ordinances and management contracts and the issuance of enforcement actions.

[3/] NIGC and Interior first entered into an MOA in March 2000. NIGC and Interior then entered into an amended MOA on May 31, 2006, which was renewed on February 26, 2007. App. 59. While that MOA expired in August 2007, NIGC and Interior expressed a willingness to continue to follow its procedures. App. 119-20. NIGC and Interior further amended their MOA as of January 14, 2009. App. 123. The current MOA was not presented to the district court because it was not finalized until after the Federal Defendants submitted their Reply in Support of Defendants' Motion for Reconsideration (Dkt. No. 61, filed Jan. 6, 2009). This Court may take judicial notice of the January 14, 2009 MOA which is provided to explain the current administrative procedure that would be followed on remand.

On October 22, 2007, NIGC Chairman Hogen disapproved the ordinance, based on the analysis in a memorandum by Michael Gross, NIGC Associate General Counsel (App. 65-98), which the Chairman incorporated into his decision and with which Interior had concurred (App. 99).[4] The Chairman applied the three-factor test developed by the courts. He concluded that the Tribe had sufficient geographic ties to the parcel (App. 88-90) and that the timing of the trust acquisition was sufficiently close to the time of the Ponca's restoration (App. 90-92). The Chairman concluded, however, that the Carter Lake Parcel did not qualify as restored land because the Tribe had affirmatively stated its intent at the time the Parcel was taken into trust in 2003 that the Parcel would not be treated as restored land, which the Chairman concluded was a relevant "factual circumstance surrounding the trust acquisition." App. 92-98. The Chairman rejected the Tribe's argument that the agreement with Iowa was not a relevant factual circumstance because it postdated the BIA Regional Director's decision on September 15, 2000 to take the land into trust, and concluded that all circumstances up to February 10, 2003 when Interior actually accepted the deed were relevant. App. 95-96.

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[4] Interior orally concurred and then sent a confirming letter signed by the Associate Solicitor - Indian Affairs, dated November 1, 2007. App. 99.

The Tribe appealed to the full Commission. *See* 25 C.F.R. § 524.1. The NIGC (including the Chairman) reversed the Chairman's Decision, and approved the ordinance on December 31, 2007. The NIGC's decision interpreted Interior's regulations to state that IBIA decisions are final agency decisions (43 C.F.R. § 4.312) and concluded that any events that occurred after the IBIA decision – notably the Notice – are not part of the trust acquisition decision and should not be considered. App. 112. Considering facts through the date of the IBIA's decision, the NIGC concluded that the Carter Lake Parcel was eligible for gaming under the restored lands exception. The NIGC further stated that, even if the agreement between the Tribe and Iowa were within the appropriate time-frame, it was not a relevant factual circumstance because the "Department simply accepted certain language to be appended to the . . . notice without independently determining whether it concurred with the substance . . . ." App. 115. The NIGC did not address whether the Restoration Act limited the application of IGRA's restored lands exception to Boyd and Knox Counties, Nebraska.

E. District Court Proceedings

The State of Nebraska filed its Complaint seeking review of the NIGC Decision on January 30, 2008. The State of Iowa filed its Complaint on August 22, 2008. The City of Council Bluffs, Iowa filed its motion to intervene in

Nebraska's suit on September 11, 2008, which motion was granted on September 16, 2008. The cases were consolidated for briefing and oral argument. The Ponca Tribe participated in briefing and oral argument as *amicus curiae*.

In its Order Reversing Decision of the National Indian Gaming Commission, issued November 28, 2008 ("Order"), as clarified and reaffirmed in its Order denying the motion for reconsideration on January 23, 2009 ("Reconsideration Order"), the district court held that the NIGC had improperly rejected the analysis underlying the Chairman's initial decision that the Carter Lake Parcel was not eligible for the restored lands exception. The district court declared that (1) "NIGC had no authority to override the agreed outcome of the IBIA proceedings that gave notice the Carter Lake parcel was not eligible for gaming," and (2) even if the NIGC had "authority to make the gaming decision, this court now in the alternative declares the NIGC decision to be without rational basis on the law and facts of record, and therefore arbitrary and unlawful." Order at 9.

Both conclusions turned on the tribal attorney's agreement with Iowa, memorialized in the BIA Regional Director's December 6, 2002 Notice. The district court rejected all the arguments made by the Federal Defendants and Tribe as to why that agreement and Notice should be disregarded, including that the

record before the NIGC did not contain a tribal council resolution authorizing the attorney to make the relevant representation on behalf of the Tribe,[5] the agreement with the Iowa Attorney General was not documented in the form of an independently enforceable contract executed by the Tribe and the State, the State assertedly gave up nothing in reliance on the agreement, no Interior official undertook an analysis of IGRA § 20, the BIA Regional Director did not have delegated authority from the Secretary to determine whether the parcel was eligible for gaming under IGRA, and the BIA Regional Director did not follow the procedures required by 25 U.S.C. § 81 for authorizing encumbrances to Indian lands.

Assessing the "unique circumstances" in this case – "a BIA and DOI decision and public notice supporting the parties' agreement that a parcel is not restored land eligible for gaming" – the court declared that "NIGC had no authority to override the agreed outcome of the IBIA proceedings that gave notice the Carter Lake parcel was not eligible for gaming." Order at 8-9.

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[5] The district court stated that "the defendants' briefs contend that the Iowa-Ponca agreement was not authorized by the Tribe itself, only by the Ponca Chief." Order at 8. The district court was incorrect. Defendants did not inform the district court that the Chairman of the Ponca Tribal Council actually authorized the tribal attorney's representation. Nor did the NIGC Chairman or the full three-member NIGC make any factual finding in their Decisions as to the actual authority of the tribal attorney.

The district court's alternative holding similarly was based on the agreement and Notice. The court held that NIGC erred in concluding that events occurring after the IBIA's decision – including the agreement and Notice – were not relevant factual circumstances. Order at 9-10. The district court stated that the Chairman's initial decision (which analyzed the three factors of the restored lands determination) was well-reasoned and correct. Order at 9. While the district court's reasoning is not entirely clear, it appears that the court treated the agreement and Notice as dispositive and thus did not proceed to weigh these factual circumstances along with the factors favoring restored lands status – temporal proximity of the trust acquisition to the tribe's restoration, and historical and modern connection to the location.

The district court did not decide the Restoration Act argument, stating that Interior should first construe the Act and that neither the NIGC Decision nor the Federal Defendants' briefs had adequately addressed the issue of statutory intent.[6] Order at 3 n.2.

SUMMARY OF ARGUMENT

The Federal Appellants bring this limited appeal seeking remand to the full

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[6] In reviewing whether to appeal, the Federal Appellants have concluded that the district court was correct that this issue should have been addressed by NIGC in its December 31, 2007 Final Decision, in consultation with Interior.

three-member NIGC for two limited purposes. First, the NIGC, in consultation with Interior, must weigh the three factors that are relevant to the determination whether the Carter Lake Parcel is eligible for gaming under IGRA's restored lands exception: (1) temporal proximity of the trust acquisition to the tribe's restoration, (2) historical and modern connection to the location, and (3) the factual circumstances of the trust acquisition, including the tribal attorney's agreement with Iowa memorialized in the BIA Regional Director's December 6, 2002 Notice. Although the Chairman purported to undertake this kind of assessment, the full Commission did not. Second, NIGC, in consultation with Interior, must determine whether the Ponca Restoration Act limits restored lands status to parcels taken into trust in Boyd and Knox Counties, Nebraska.

The district court's holding that NIGC had no "authority" to decide that the parcel is eligible for gaming is wrong, and should not be a bar to the Commission evaluating these issues on remand. The district court did not decide the scope of the NIGC's jurisdiction as a general matter, but only concluded that, in the "unique circumstances in this case," NIGC could not disregard the tribal attorney's agreement with Iowa given Interior's role in publishing the agreement. On remand, NIGC would consider the agreement in consultation with Interior.

Once the district court concluded that the NIGC had improperly disregarded

the tribal attorney's agreement with Iowa, because of erroneous legal conclusions as to the relevance of that agreement, the district court's work was at an end. When a court finds that an agency failed to consider all relevant factors, the court must remand to the agency for further proceedings consistent with the law as explained by the court.

ARGUMENT

A. NIGC Had "Authority" to Determine Whether the Parcel Was Eligible for Gaming Under the Restored Lands Exception

On appeal, this Court reviews *de novo* a district court's judgment following record review under the APA, applying the legal standard mandated by the APA. *Voyageurs National Park Association v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004). Under the APA, a court may only set aside an agency action if, based on the administrative record, the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The district court first held that the NIGC's Final Decision was unlawful because, in the unique circumstances of this case, NIGC had no "authority" to decide that the Carter Lake Parcel was eligible for gaming. Order at 7-9. The district court erred in stating that NIGC did not have "authority" to make a restored lands determination in this case. The district court could not have meant

that NIGC had no "jurisdiction" to approve or disapprove the Tribe's ordinance, as IGRA expressly directs the NIGC to determine whether to approve tribal gaming ordinances, 25 U.S.C. § 2710(b)(2), and the district court endorsed the Chairman's initial decision disapproving the ordinance. *See also* Consolidated Plaintiffs' Resistance to Defendants' Motion for Reconsideration (Dkt. No. 60, filed Dec. 29, 2008) at 6 ("Plaintiffs agree that IGRA assigns the approval of gaming ordinances to the NIGC, not to DOI or BIA.").

It appears that the district court, in considering the "unique circumstances in this case" (Order at 8) – specifically, the BIA Regional Director's Notice memorializing the tribal attorney's agreement with Iowa – concluded that Interior, rather than NIGC, should make the restored lands decision. The BIA Regional Director did not object to the tribal attorney's request to document the agreement with Iowa in the Notice. That limited decision by Interior to publish the agreement as part of a notice that it issues for other purposes (*see, supra*, at 4) must be considered by the NIGC, but it does not wrest "authority" from the NIGC. While we do not challenge on appeal the district court's conclusion that the Notice was a relevant factual circumstance that NIGC should have considered, the district court improperly stated that NIGC had no "authority" to determine that the parcel was eligible for gaming under the restored lands exception.

Plaintiffs did argue in the district court that Interior, not NIGC, has the authority to determine the applicability of the exceptions in IGRA § 20, citing to a June 13, 2008 letter from the Solicitor of the Interior to the Chairman of the NIGC relating to a disagreement concerning the restored lands status of a site proposed for gaming by the Poarch Band of Creek Indians (App. 118). And the district court was plainly troubled by the lack of consultation between NIGC and Interior at the administrative appeal stage under the MOA dated February 23, 2007. But those concerns may be addressed on remand through consultation between Interior and NIGC. The current MOA, executed by the Solicitor of the Interior on January 14, 2009 (App. 123), expressly acknowledges NIGC's shared authority to determine whether land is eligible for gaming under IGRA § 20 in the context of reviewing a tribal gaming ordinance, and provides for consultation with Interior by the NIGC Office of General Counsel with respect to legal opinions drafted both for the Chairman and full Commission on appeal. On remand, NIGC would exercise its now undisputed authority in consultation with Interior.

B. The Case Should Be Remanded to the NIGC

As explained above, the Federal Appellants seek remand to the full three-member NIGC for two limited purposes: (1) to weigh, after consultation with Interior, the three factors that are relevant to the determination whether the Carter

Lake Parcel is eligible for gaming under IGRA's restored lands exception;[7] and (2) to determine, after consultation with Interior, whether the Restoration Act limits restored lands to Boyd and Knox Counties, Nebraska.

The district court held in the alternative that the NIGC's Final Decision was arbitrary and unlawful because, even if NIGC had authority, NIGC incorrectly disregarded the agreement between the tribal attorney and Iowa, documented in the tribal attorney's November 26, 2002 email and the BIA Regional Director's Notice. Order at 9-11. Having corrected the legal errors that had led NIGC to conclude that the agreement and Notice were not relevant factual circumstances, the district court was required to remand the matter back to the NIGC for consideration of all relevant facts. This includes contested matters that the NIGC had expressly stated in the administrative proceedings it had no need to decide:

> Because we find that the Tribe's expressed intentions and reliance thereon are not relevant because they occurred after the DOI final decision, we need not reach the question whether the subjective intent of a tribe and reliance thereon are proper factual circumstances to be considered in a restored lands analysis nor do we reach the question of the enforceability of the agreement between the Tribe and the State.

App. 115. These are questions that must now be addressed on remand.

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[7] The three factors are (1) temporal proximity of the trust acquisition to the tribe's restoration, (2) historical and modern connection to the location, and (3) the factual circumstances of the trust acquisition.

Whether the district court was obligated to remand once it corrected the NIGC's legal errors is a legal issue subject to *de novo* review on appeal. Under the "ordinary remand rule," a court "should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002). The role of courts in cases involving judicial review of agency action "is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles." *Port of Portland v. United States*, 408 U.S. 811, 842 (1972) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943)). "[T]he guiding principle" in cases such as this "is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Only in "rare circumstances" is remand not the appropriate course. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Once the district court determined that the full three-member NIGC should have considered the agreement and Notice as relevant factual circumstances of the trust acquisition, it should have remanded to it to conduct the balancing of the three factors of the restored lands analysis in the first instance. Congress has placed in the hands of NIGC and Interior the determination whether a parcel is

eligible for gaming under IGRA, including whether it is eligible for the restored lands exception. As in *Ventura*, "every consideration that classically supports the law's ordinary remand requirement does so here. The agency can bring its expertise to bear upon the matter: it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 17.

The Supreme Court has reaffirmed the importance of the ordinary remand rule in two other immigration cases, *Gonzales v. Thomas*, 547 U.S. 183 (2006), and most recently *Negusie v. Holder*, ___ U.S. ___, 129 S.Ct. 1159 (2009). In *Negusie*, the Court explained that an important reason for the rule is that "'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.'" 129 S.Ct. at 1167 (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005)). Relevant to this case, Congress entrusted NIGC and Interior to "fill the gap" and provide specific content to the phrase "land taken into trust as part of the restoration of lands" for a restored tribe. NIGC and Interior have done this

through a process of case-by-case resolution.[8] Congress has also entrusted Interior with interpreting the Ponca Restoration Act, and on remand, NIGC would seek Interior's interpretation of that Act.

It is true that a court need not remand an issue to an agency for determination in the first instance where only one conclusion is legally permissible. *Id.* But in this case, the law does not compel the conclusion that the Carter Lake Parcel does not qualify as restored land under the three factor test. The three-factor test is a balancing test; no factor is necessarily dispositive and the factors need not be given equal weight. *Grand Traverse II*, 198 F.Supp.2d at 936 (parcel at issue could be considered restored lands "on the basis of timing alone"); *Wyandotte Nation v. National Indian Gaming Commission*, 437 F.Supp.2d 1193, 1214 (D. Kan. 2006) (location factor is "arguably most important"). Here, the temporal and geographic proximity factors weigh strongly in favor of restored lands status and the NIGC could conclude that they outweigh the factual circumstance of the tribal attorney's representation memorialized in the Notice. Nor is the Restoration Act so clear as to allow no possibility of the conclusion that it permits restored status for lands located outside of Boyd and Knox Counties,

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[8] As noted above, Interior also promulgated regulations in 2008 interpreting IGRA § 20.

Nebraska. If it were unambiguous, the district court would have decided the question. Instead, it expressly concluded that that issue should be decided by an agency in the first instance. Order at 3 n.2.

While this case was pending in the district court, Interior promulgated its Final Rule interpreting Section 20 of IGRA, providing that agency's first interpretation of IGRA's "restored lands" provision through notice and comment rulemaking. On remand, NIGC and Interior can determine whether these regulations apply in a remand situation (*see* 25 C.F.R. § 292.26), and if so, whether the Carter Lake Parcel qualifies as restored lands under these regulations.

CONCLUSION

This Court should remand this case to the district court with instructions to remand to the NIGC for the limited purpose of weighing the three factors relevant to a restored lands determination and determining whether the Ponca Restoration Act limits restored lands status to lands acquired in Boyd and Knox Counties, Nebraska.

Respectfully submitted,

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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 Brief for the Federal Appellants 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. The word processing version used to prepare this brief is Word Perfect version X3. According to the word processing system's tally the word count for the brief is 5,696 (excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

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CERTIFICATE OF SERVICE

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