

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

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

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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ARGUMENT

The appropriate disposition of this case is a remand to the National Indian Gaming Commission (“NIGC”) to address, in consultation with the Department of the Interior, the Ponca Tribe’s administrative appeal of the NIGC Chairman’s decision concluding that the Carter Lake Parcel was not eligible for gaming. Contrary to the assertion of the States of Iowa and Nebraska and City of Council Bluffs (the “States”), such a remand would not be improper or futile.

Consistent with the Supreme Court’s articulation of the “ordinary remand rule” discussed in the opening Brief for Federal Appellants (at 22-24), this Court has acknowledged that once a court corrects a legal error made by an agency with respect to a matter that a statute places “primarily in agency hands” (like this matter), remand to the agency is appropriate even where a court may regard facts as clearly supporting one party. *Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 641 (8th Cir. 2007). Nor can this Court conclude “with assured confidence” that NIGC, in consultation with Interior, could permissibly resolve all relevant legal questions in only one way. *See, e.g., Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 170 (2nd Cir. 2006).

In reliance on a legal opinion by the NIGC Office of General Counsel (“OGC”), concurred in by the Interior Office of the Solicitor, the NIGC Chairman

concluded that the Carter Lake Parcel was not eligible for gaming under the “restored lands exception” of the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. § 2719(b)(1)(B)(iii). That opinion considered as a relevant factual circumstance the Ponca tribal attorney’s agreement with the Iowa Assistant Attorney General, memorialized in the BIA Regional Director’s December 6, 2002 Notice, disclaiming any right to have the Carter Lake Parcel treated as restored land. The Ponca Tribe filed an administrative appeal, arguing, among other things, that the agreement and Notice postdated Interior’s decision to take the land into trust and were thus irrelevant. The NIGC accepted that argument (although it considered the operative decision to be the August 7, 2002 decision of the Interior Board of Indian Appeals on administrative appeal, not the September 15, 2000 decision of the Regional Director as urged by the Tribe). Once the NIGC excluded the agreement and Notice from consideration, it concluded that the Carter Lake Parcel was eligible for gaming as restored land under IGRA.

The district court held that the NIGC Commission improperly excluded the agreement and Notice from consideration, and Federal Appellants do not challenge that holding on appeal. But that holding does not resolve the question whether the Carter Lake Parcel is eligible for gaming under IGRA’s restored lands exception. The legal effect and weight to be given the agreement and Notice, and

the separate issue whether the Ponca Restoration Act limits the “restoration of lands” to the Ponca Tribe to Boyd and Knox Counties, Nebraska, must also be decided. On remand, the NIGC Commission, in consultation with Interior, would decide in the first instance these remaining issues that have been raised by the Tribe and States.

A. Procedure on Remand

The starting point on remand would be the October 22, 2007 decision of the NIGC Chairman, which relied on OGC’s legal opinion concurred in by the Interior Office of the Solicitor. The Tribe would be permitted to submit to the NIGC Commission a new administrative appeal brief presenting its arguments as to (1) why the Carter Lake Parcel qualifies for gaming under IGRA’s restored lands exception despite the agreement and Notice and (2) why the Ponca Restoration Act should not be construed to limit the “restoration of lands” to Boyd and Knox Counties. The States would also be permitted to submit an administrative appeal brief presenting their arguments as to (1) why the Carter Lake Parcel does not qualify for gaming under IGRA’s restored lands exception and (2) why the Ponca Restoration Act should be construed to limit the “restoration of lands” to Boyd and Knox Counties. These issues have been fully briefed in this litigation, and all parties could readily prepare these submissions.

The Interior Office of the Solicitor would prepare the legal opinion on the Ponca Restoration Act issue, as Interior has been charged with implementing the Ponca Restoration Act.

OGC would prepare the legal opinion evaluating whether the Carter Lake Parcel was taken into trust as part of the restoration of lands to the Ponca Tribe (assuming without deciding that the Ponca Restoration Act allowed the restoration of lands outside of Boyd and Knox Counties). This was the subject addressed in OGC's October 22, 2007 legal opinion concurred in by Interior, and the legal opinion prepared in connection with the administrative appeal need not repeat the analysis of any issue not requiring further explication. Pursuant to paragraph 8 of the 2009 Memorandum of Agreement (App. 124), OGC would consult with Interior's Office of the Solicitor in preparing its legal opinion.

The legal opinions of the Interior Office of the Solicitor and OGC would then be submitted to the NIGC Commission for its decision of the Tribe's administrative appeal. Under paragraph 8 of the 2009 MOA, these opinions would become part of the record considered by the Commission. As the States point out (States Br. at 35), these opinions would be reviewed by a court in any challenge to the decision of the NIGC Commission under the Administrative Procedure Act.

Federal Appellants acknowledge that it would have been preferable had

there been an MOA in place at an earlier date that would have facilitated consultation between OGC and the Interior Office of the Solicitor at the administrative appeal stage. Without that agreement reached on January 14, 2009, the district court's concern about unilateral decision by the NIGC, given the unique factual circumstances presented here, could not be addressed through a remand. But remand would now address the district court's concern and properly respect the role of the agencies as the primary decisionmakers, subject to judicial review under the Administrative Procedure Act.

B. The Issues Presented By Amicus Curiae Ponca Tribe

The States contend that it is not appropriate for this Court to decide the issues presented by the Ponca Tribe in its amicus curiae brief concerning the legal effect and weight to be given the tribal attorney's agreement with the Iowa Assistant Attorney General memorialized in BIA's land-into-trust Notice. These issues have not been presented to this Court by any party. In addition, some or all of these issues have been raised by the Tribe in its suit filed on December 5, 2008 in the United States District Court for the District of Columbia. In that suit, the Tribe asserts that the Regional Director's inclusion of its tribal attorney's requested language in the December 6, 2002 Notice was unlawful, and seeks declaratory and injunctive relief. *Ponca Tribe of Nebraska v. U.S. Dep't of the*

Interior, et al., Case 1:08-cv-02110-RMU (D.D.C.). That case has been stayed pending the resolution of this case.

The Tribe may present these arguments in its administrative appeal brief on remand, with the exception of the argument that the agreement and Notice are irrelevant because they post-date the IBIA's decision. *See Amicus Curiae Brief* at 23-24. That argument was necessarily decided by the district court in reversing the NIGC's decision, is not challenged by Federal Appellants on appeal, and would thus not be open to decision by the NIGC Commission on remand.

Many of these arguments were made by the Tribe and implicitly rejected in the October 22, 2007 OGC legal opinion concurred in by Interior's Office of the Solicitor. On remand, however, OGC and the Office of the Solicitor may reconsider these issues in light of the additional briefing and in light of Interior's 2008 regulations (whether the regulations are applicable or persuasive, *see States Br.* at 44-45 n.15).

C. The Ponca Restoration Act

The States sought review of the NIGC's decision under the Administrative Procedure Act, 5 U.S.C. § 702 (review of agency action). But there is no agency decision that can be reviewed in this case on the issue whether the Ponca Restoration Act limits the land that may be considered "restored" for purposes of

IGRA. The district court correctly recognized that this issue should be decided by Interior in the first instance. Order at 3 n.2. The States cite (States' Brief at 41) two cases applying the rule that a court of appeals may affirm a district court judgment on any ground supported by the record whether or not addressed by the district court. But this Court has recognized that "[j]udicial review of administrative agencies is approached differently." *Palavra v. I.N.S.*, 287 F.3d 690, 693 (8th Cir. 2002) (expressly stating that the rule relied on by the States does not apply when the decision of an administrative agency is reviewed). Where an agency is found to have erred, remand to the agency is the proper remedy. *Id.*

Interior might ultimately conclude that the States' analysis is correct. But the text of the Ponca Restoration Act does not expressly address the meaning of the phrase "restoration of land" in IGRA, and does not compel the States' interpretation. It is true that the Act directs the Secretary to take into trust 1,500 acres in Boyd and Knox Counties, Nebraska. 25 U.S.C. § 983b. But the Act also provides (in 25 U.S.C. § 983a) that the Tribe may benefit from the Indian Reorganization Act, under which the Secretary has general authority to acquire land in trust for the Tribe elsewhere, and provides (in 25 U.S.C. § 983c) that members of the Ponca Tribe residing in many different counties in Nebraska, Iowa and South Dakota shall be deemed to be residing on or near a reservation for

purposes of receiving federal services. In addition, Interior did not have the opportunity to address the effect of the Ponca Restoration Act in light of its 2008 regulations. Interior should thus be allowed to decide in the first instance whether the Ponca Restoration Act limits “restored land” status under IGRA to Boyd and Knox Counties, Nebraska, particularly because that decision will determine the eligibility for gaming of all land that may be taken into trust for the Tribe outside of these two counties, not just the five-acre parcel at issue in this case.

CONCLUSION

For all of these reasons, remand to the agencies would be the appropriate disposition of this appeal.

Respectfully submitted,

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90-6-21-00970

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 1,715 (excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

The digital PDF version of the brief has been scanned for viruses with the most recent version of Microsoft Forefront Client Security (Version 1.67.848.0), last updated October 15, 2009, and according to the program, is free of viruses.

Date: October 16, 2009

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CERTIFICATE OF SERVICE

I certify that I caused two copies of the foregoing Reply Brief for the Federal Appellants, along with a digital PDF version of the brief on a virus-free CD-ROM, to be served by U.S. mail, as indicated below, this 16th day of October, 2009, to the following:

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