

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION**

CITY OF COUNCIL BLUFFS, IOWA)	No. 1:17-cv-00033-SMR-CFB
)	
Plaintiff,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
THE INTERIOR; RYAN K. ZINKE, in his official)	
capacity as Secretary of the United States)	STATE OF IOWA'S
Department of the Interior; NATIONAL INDIAN)	COMPLAINT IN INTERVENTION
GAMING COMMISSION; JONODEV OSCEOLA)	
CHAUDHURI, in his official capacity as Chairman)	
of the National Indian Gaming Commission; and)	
KATHRYN ISOM-CLAUDE, in her official)	
capacity as Vice Chair of the National Indian)	
Gaming Commission,)	
)	
Defendants.)	
_____)	
STATE OF IOWA)	
)	
Plaintiff-Intervenor,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
THE INTERIOR; RYAN K. ZINKE, in his official)	
capacity as Secretary of the United States)	
Department of the Interior; NATIONAL INDIAN)	
GAMING COMMISSION; JONODEV OSCEOLA)	
CHAUDHURI, in his official capacity as Chairman)	
of the National Indian Gaming Commission; and)	
KATHRYN ISOM-CLAUDE, in her official)	
capacity as Vice Chair of the National Indian)	
Gaming Commission,)	
)	
Defendants.)	
_____)	

COMES NOW the Plaintiff-Intervenor State of Iowa and files this complaint against the above-named defendants, stating in support as follows:

NATURE OF THE CASE

1. This is a challenge to the November 13, 2017 final decision (Agency Decision) of the United States Department of Interior (DOI) and the National Indian Gaming Commission (NIGC) approving an amended gaming ordinance submitted by the Ponca Tribe of Nebraska (Tribe). A true copy of the Agency Decision is attached to this complaint as Exhibit 1.

2. The Agency Decision concluded that lands in Carter Lake, Iowa taken into trust by the United States for the Tribe in approximately February 2003 were eligible for tribal gaming under the Indian Gaming Regulatory Act (IGRA).

3. IGRA generally prohibits gaming on Indian lands acquired after October 17, 1988, unless an exception applies. 25 U.S.C. § 2719(a).

4. The Agency Decision concluded the Carter Lake parcel qualified for the “restored lands” exception codified at 25 U.S.C. § 2719(b)(1)(B)(iii).

5. The Agency Decision represented the second time NIGC and DOI had the opportunity to decide the issue, after a previous decision on December 31, 2007 that was challenged and ultimately reversed in this Court, appealed by NIGC and DOI to the United States Court of Appeals for the Eighth Circuit, and remanded to NIGC for consultation with DOI and other further proceedings. *See* 5 U.S.C. § 706(2)(A); *Nebraska ex rel. Bruning v. U.S. Dep’t of Interior*, 625 F.3d 501, 503, 513 (8th Cir. 2010).

6. However, despite receiving “yet another chance to ‘get it right,’ ” *Nebraska ex rel. Bruning*, 625 F.3d at 513 (Kornmann, J., dissenting), and taking more than six years even to issue a decision, the Agency Decision here merely restated a legally incorrect determination that

the Carter Lake parcel is eligible for tribal gaming and included boilerplate language reciting DOI's purported agreement.

7. Accordingly, the Agency Decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, authorizing the Court to grant relief under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

PARTIES, JURISDICTION, & VENUE

8. The State of Iowa is a sovereign state of the United States of America, whose residents and citizens are affected by the Agency Decision for the reasons described below.

9. The Carter Lake parcel is in Pottawattamie County, Iowa, within the state's borders.

10. DOI is the federal agency that holds the Carter Lake parcel in trust for the Tribe, and that purportedly concurred in the Agency Decision.

11. Ryan K. Zinke is the Secretary of DOI, sued in his official capacity.

12. NIGC is the federal agency established within DOI to administer and enforce IGRA, including by approving or denying proposed tribal gaming ordinances. 25 U.S.C. §§ 2704–2706.

13. Jonodev Osceola Chaudhuri is the Chairman of NIGC, sued in his official capacity.

14. Kathryn Isom-Clause is the Vice-Chair of NIGC, sued in her official capacity.

15. The Court has jurisdiction under 28 U.S.C. § 1331 (federal question) because this case involves the meaning of the laws of the United States. The Court also has jurisdiction under 5 U.S.C. §§ 701–706 to conduct judicial review of the Agency Decision.

16. The State of Iowa seeks declaratory and other relief authorized by 28 U.S.C. §§ 2201–2202, for purposes of determining a question of actual controversy between the parties as set forth herein.

17. The Southern District of Iowa is the appropriate venue under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e)(1) because the Carter Lake property at the heart of the dispute is in the Southern District of Iowa.

PONCA TRIBE TERMINATION AND SUBSEQUENT RESTORATION

18. Congress terminated the federal trust relationship with the Tribe on September 5, 1962. Pub. L. No. 87–629, § 10, 76 Stat. 429, 431 (Sept. 5, 1962).

19. Congress restored federal recognition to the Tribe by passing the Ponca Restoration Act on October 31, 1990. 25 U.S.C. § 983a. The Ponca Restoration Act was previously codified but has been removed from the United States Code in an effort to improve organization. Nonetheless, the Act remains in effect, and so citing its previous codification ensures ease of reference.

20. In restoring the Tribe’s rights and lands, Congress provided for “1,500 acres of any real property located in Knox or Boyd Counties, Nebraska” to be “transferred to the Secretary [of DOI] for the benefit of the Tribe.” *Id.* § 983b(c); *see id.* § 983(2).

21. Congress also permitted the Secretary of the Interior to accept “additional acreage in Knox or Boyd Counties.” *Id.* § 983b(c).

THE CARTER LAKE PARCEL: ACQUISITION AND TRUST DECISION

22. On September 24, 1999, the Tribe purchased approximately 4.8 acres of land in Carter Lake, Iowa, in fee.

23. On January 10, 2000, the Tribe passed a resolution seeking to have DOI take the Carter Lake parcel into trust for the Tribe's benefit.

24. The resolution provided the land's primary purpose would be for health services and central government functions.

25. On September 15, 2000, the Great Plains Regional Director for the Bureau of Indian Affairs issued a preliminary decision agreeing to accept the Carter Lake parcel into trust for the Tribe's benefit.

26. The State of Iowa and Pottawattamie County brought an appeal before DOI's Interior Board of Indian Appeals challenging the preliminary trust decision, in part because Iowa asserted the Regional Director "had knowledge and information that the Tribe actually intends to use the land for gaming." *Iowa v. Great Plains Reg'l Dir.*, 38 IBIA 42, 52 (Aug. 7, 2002).

27. The trust decision was affirmed, and the appeal decision concluded there existed "nothing other than pure speculation to suggest that the Tribe intends to use this property for gaming purposes." *Id.*

28. The State of Iowa and the Tribe, through its legal counsel, subsequently reached an agreement under which Iowa agreed to forego judicial review of the trust decision and the Tribe acknowledged that the Carter Lake parcel was not eligible for gaming under IGRA.

29. In December 2002, a notice of intent to take land into trust was published in newspapers of general circulation, and the notice expressly included the Tribe's acknowledgement that the Carter Lake parcel was to be taken into trust for non-gaming purposes and was not eligible for gaming under any IGRA exceptions.

30. On January 28, 2003, the Tribe executed a warranty deed conveying the Carter Lake parcel to the United States in trust for the benefit of the Tribe.

31. DOI accepted the deed and took the land into trust in February 2003.

“PURE SPECULATION” BECOMES OBJECTIVE REALITY

32. On July 23, 2007, despite its resolution years earlier expressing other intended uses for the Carter Lake parcel, the Tribe submitted an application to NIGC for an “Indian lands” determination, along with a request that NIGC approve the Tribe’s amended gaming ordinance for the Carter Lake parcel.

33. NIGC invited the State of Iowa to respond to the application, and the State of Iowa did so, opposing the Tribe’s renewed request.

34. In a memorandum dated October 22, 2007, NIGC Associate General Counsel Michael Gross recommended that the amendment to the Tribe’s gaming ordinance be disapproved because the Carter Lake Parcel did not qualify as gaming-eligible “restored lands” under IGRA. A true copy of Associate General Counsel Gross’ October 22, 2007 memorandum is attached to this complaint as Exhibit 2. NIGC and DOI counsel concurred in this initial analysis recommending disapproval of the Tribe’s ordinance.

35. The Chairman of NIGC at the time issued a decision concluding the Carter Lake parcel is not restored lands within the meaning of IGRA. A true copy of then Chairman Philip N. Hogen’s October 22, 2007 decision letter is attached to this complaint as Exhibit 3.

36. The decision also disapproved the Tribe’s gaming ordinance.

37. The Tribe filed an appeal to the full NIGC, and NIGC again invited the State of Iowa’s participation.

38. On December 31, 2007, NIGC reversed the Chairman’s earlier ruling, concluding the Carter Lake parcel is restored land eligible for gaming under IGRA and approving the

Tribe's gaming ordinance. A true copy of the NIGC's December 31, 2007 decision is attached to this complaint as Exhibit 4.

39. Although it lacks independent authority to issue "Indian lands" determinations, NIGC nonetheless did so through its December 31, 2007 decision without the concurrence or agreement of DOI.

FIRST JUDICIAL REVIEW PROCEEDING

40. The State of Iowa and State of Nebraska sought judicial review of NIGC's 2007 decision in this Court.

41. The City of Council Bluffs, Iowa intervened in the action alongside Iowa and Nebraska. *See Nebraska ex rel. Bruning*, 625 F.3d at 503.

42. The Court concluded NIGC lacked authority to declare the Carter Lake parcel to be restored lands.

43. The Court declined to decide whether the Ponca Restoration Act limits restorable tribal lands to Knox and Boyd Counties in Nebraska.

44. The Court entered judgment in favor of Iowa, Nebraska, and the City, reversing NIGC's decision because it was arbitrary, capricious, and not in accordance with law.

45. NIGC and DOI filed a "limited appeal" to the Eighth Circuit, seeking only a remand to NIGC so that NIGC could consult with DOI and perform additional restored lands analysis. The Eighth Circuit remanded the case, ordering NIGC to consider both (A) whether the Ponca Restoration Act limits restorable tribal lands to Knox and Boyd Counties; and (B) whether the Tribe's agreement with Iowa—made through its counsel—that the Tribe would not seek to use the Carter Lake parcel for gaming affected the restored lands determination. *Nebraska ex rel. Bruning*, 625 F.3d at 513.

46. After remand, in March 2011, the State of Iowa submitted briefing to both NIGC and DOI in opposition to the Tribe's gaming ordinance.

YEARS LATER, THE CASE REAWAKENS

47. On November 13, 2017—more than six years after briefing was submitted to NIGC and DOI, and more than seven years after the Eighth Circuit's decision—NIGC issued the Agency Decision challenged here.

48. The Agency Decision concludes the Carter Lake parcel is gaming eligible restored lands for a restored tribe.

49. The Agency Decision further concludes the Tribe's 2002 agreement with Iowa not to use the Carter Lake parcel for gaming was not binding on the Tribe because its counsel at the time had no authority to enter it on behalf of his sovereign client and because in any event, the Tribe repudiated it by 2005.

50. The Agency Decision further concludes the Ponca Restoration Act does not limit the Tribe's restored lands to Knox and Boyd Counties in Nebraska.

51. The Agency Decision further refuses to apply DOI rules promulgated in 2008 which unambiguously provide that specific geographical locations in a tribe's restoration act limit eligibility for restored lands to those specified locations. 25 C.F.R. § 292.11(a)(1).

52. The Agency Decision refuses to apply the relevant NIGC rules because the Tribe's initial application was submitted in July 2007, before the rules went into effect. In other words, the Agency Decision's practical effect is to establish that the current meaning of the Ponca Restoration Act is somehow exactly the opposite of its former meaning.

53. The Agency Decision further faults Iowa for not challenging DOI's initial 2002 trust decision when the Tribe invoked IGRA's restored lands exception in 2005—yet the

Government was immune from challenges to trust decisions involving tribal gaming until 2012. *See Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 224, 132 S. Ct. 2199, 2209–10 (2012).

54. In weighing the totality of circumstances, the Agency Decision gives insufficient consideration to the Tribe’s initial non-gaming resolution, its non-gaming agreement with Iowa in which the tribal council acquiesced, and its later reversal of position toward submitting a gaming ordinance for approval after all.

55. If the Agency Decision is allowed to stand, the State of Iowa will become subject to provisions of IGRA that require good faith negotiation of a Class III gaming compact with the Tribe for the Carter Lake parcel. 25 U.S.C. § 2710(d)(3)(A); *see* Iowa Code § 10A.104(10) (delegating power to enter and implement IGRA compacts to the Iowa Department of Inspections and Appeals).

56. The Agency Decision injures Iowa because it interferes with Iowa’s governmental authority to carry out its policies and oversee the development and conduct of gaming enterprises within the State.

57. The State of Iowa also possesses and asserts *parens patriae* authority to protect the interests of its citizens who are or will be injured by the Agency Decision.

COUNT I: DECLARATORY JUDGMENT

58. Iowa realleges paragraphs 1–57 as though fully set forth herein.

59. The Agency Decision is final agency action subject to judicial review. 5 U.S.C. § 702; 25 U.S.C. § 2714.

60. By participating in briefing before NIGC and DOI, and receiving the Agency Decision signed by two commissioners, Iowa has exhausted all administrative remedies available to challenge the restored lands determination.

61. The Agency Decision is contrary to law because the Carter Lake parcel does not qualify as restored lands eligible for tribal gaming under IGRA and the Ponca Restoration Act.

62. The Agency Decision unreasonably and arbitrarily fails to consider all relevant facts and circumstances known to NIGC and DOI.

63. The Agency Decision is contrary to DOI's rules explaining its application of the restored lands exception and other applicable agency rules, precedent, policies, and procedures.

64. The Agency Decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and without observance of procedure required by law.

65. There exists a present justiciable controversy between the parties.

PRAYER FOR RELIEF

WHEREFORE, the State of Iowa respectfully requests the following relief:

A. A declaratory judgment establishing that the Carter Lake parcel does not qualify as restored land under 25 U.S.C. § 2719(b)(1)(B)(iii);

B. A declaratory judgment reversing or vacating the Agency Decision because NIGC's findings and conclusions are arbitrary, capricious, an abuse of discretion, or not in accordance with law; in excess of jurisdiction, authority, limitations, or short of statutory right; and without observance of procedure required by law. *See* 5 U.S.C. § 706(2);

C. An order remanding the case to NIGC with instructions that NIGC deny the Tribe's request for approval of a gaming ordinance specific to the Carter Lake parcel;

- D. Costs and reasonable attorney fees, to the extent permitted by law; and
- E. Any other relief the Court deems equitable and proper.

Respectfully Submitted,

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