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

CITY OF COUNCIL BLUFFS, IOWA,

Plaintiff,

STATE OF NEBRASKA ex rel. DOUGLAS J. PETERSON, Attorney General of the State of Nebraska; STATE OF IOWA

Intervenor-Plaintiffs

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-CLAUSE, in her official capacity as Vice Chair of the National Indian Gaming Commission,

Defendants.

No. 1:17-cv-00033-SMR-CFB

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The United States Department of the Interior ("Interior"), Ryan K. Zinke, in his official capacity as Secretary of the Interior, the National Indian Gaming Commission ("NIGC"), Jonodev Osceola Chaudhuri, in his official capacity as Chairman of NIGC, and Kathryn Isom-Clause, in her official capacity as Vice Chair of NIGC, (collectively, "Federal Defendants"), by undersigned counsel, hereby submit this memorandum in support of their motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

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## INTRODUCTION

Plaintiff City of Council Bluffs, Iowa, and Intervenor-Plaintiffs States of Iowa and Nebraska ("Plaintiffs"), challenge an Amendment to Final Decision and Order ("2017 Decision") issued on November 13, 2017, by NIGC. The 2017 Decision is an amendment to the NIGC's December 31, 2007 Final Decision and Order in re: Gaming Ordinance of the Ponca Tribe of Nebraska ("2007 Decision"). The 2007 Decision approved a site-specific Class II gaming ordinance submitted by the Ponca Tribe of Nebraska ("Ponca Tribe" or "Tribe") in July 2007 pursuant to the Indian Gaming Regulatory Act ("IGRA"). The 2017 Decision, on the grounds set forth therein, affirms the 2007 Decision and concludes that the Tribe may lawfully conduct gaming under IGRA on a parcel of trust land in Carter Lake, Iowa ("Carter Lake Parcel"). NIGC's 2017 Decision concludes that the Carter Lake Parcel meets IGRA's "restored lands" exception to the statute's general prohibition on gaming on lands taken into trust for an Indian tribe after October 17, 1988. *See* 25 U.S.C. § 2719(b)(1)(B)(iii).

The 2017 Decision is the culmination of a judicial challenge and subsequent appeal of NIGC's 2007 Decision by the same Plaintiffs in this action. The Eighth Circuit remanded the matter back to NIGC and Interior: (1) to determine whether a newspaper announcement published by the Bureau of Indian Affairs ("BIA") prior to the United States' trust acquisition of the Carter Lake Parcel, which reports that the Tribe purportedly agreed to not pursue gaming on the land under IGRA's restored lands exception, now "estop[s] the Tribe from raising the 'restored lands' exception," and if not, (2) to reconsider its restored lands analysis. *Nebraska ex rel. Bruning v. Dep't of Interior*, 625 F.3d 501, 512 (8th Cir. 2010); *see also* Order, Case No. l-08-cv-6 (S.D. Iowa) (Jan. 24, 2011). A review of the 2017 Decision and the administrative

record demonstrates that NIGC gave careful consideration to each of these issues, providing rational bases for its decision.

Plaintiffs seek review of NIGC's 2017 Decision pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, disagreeing with NIGC's determination that the newspaper announcement, and the purported agreement reported therein, does not preclude the Tribe from requesting that NIGC approve the site-specific gaming ordinance under a restored lands analysis. But Plaintiffs cannot escape the fact that NIGC took into account the relevant circumstances surrounding the purported agreement, including thorough consideration of submissions by Plaintiffs as well as the Tribe.

Plaintiffs next contend that the Carter Lake Parcel does not qualify as "restored lands," but the crux of their argument rests on a misreading of the scope of the Ponca Restoration Act, Pub. L. 101-484, *amended* Pub. L. 104-109, 25 U.S.C. §§ 983-983h (omitted 1990) ("PRA" or "Act"), the congressional enactment that restored the Tribe's previously-terminated federal recognition status and set forth the terms by which Interior is authorized to acquire land in trust for the Tribe. Contrary to Plaintiffs' assertions, Interior properly interpreted the PRA, and NIGC considered all relevant facts, circumstances, and legal standards in rendering its determination that the Carter Lake Parcel constitutes restored lands. NIGC's 2017 Decision is consistent with its own prior decisions, with prior decisions by Interior, and with the existing case law. Plaintiffs have failed to meet their burden under the APA of establishing that NIGC's 2017 Decision was arbitrary and capricious or contrary to law. For these reasons, and the reasons set forth below, Federal Defendants are entitled to summary judgment upholding NIGC's 2017 Decision.

Plaintiffs filed a motion for expedited consideration after briefing along with their motion for summary judgment. ECF No. 22. On September 20, 2018, the Court denied Plaintiffs'

request. ECF No. 32. As a result, Federal Defendants do not respond herein to Plaintiffs' arguments in their summary judgment briefing related to that request. However, Plaintiffs also appended to their motion for summary judgment two newspaper articles. ECF Nos. 22-2, 22-3. Neither of these documents are found in the administrative records relating to NIGC's 2017 Decision. And these articles, like the newspaper articles attached to Plaintiffs' supplement to their motion for expedited consideration, ECF No. 23, are also inadmissible hearsay. *See* ECF No. 30 at 4-5. Therefore, the Court should strike or disregard ECF No. 22-2 and 22-3.

## BACKGROUND

### A. Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA to "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), and to ensure Indian gaming remained "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* § 2702(1). IGRA applies only to federally recognized tribes, *id*. § 2703(5), which may conduct gaming only on "Indian lands" within their jurisdiction. *Id*. § 2710(b)(1) (Class II); *id*. § 2710(d)(3)(A) (Class III). The term "Indian lands" includes land in which the United States holds in trust for the benefit of any Indian tribe and over which an Indian tribe exercises governmental authority. *Id*. § 2703(4).[1] IGRA classifies gaming activities on Indian lands in three ways: Class I gaming involves "social games" or traditional forms of gaming held in connection with tribal ceremonies or celebrations, *id.* § 2703(6); Class II gaming includes bingo and "non-banking" card games that are permitted by the state law, *id.* § 2703(7); and Class

[1] The Carter Lake Parcel is currently held in trust by the United States and Plaintiffs agree that the Parcel is Indian lands. *See* ECF No. 22-1 at 28.

III gaming covers all other types of gaming. The relevant gaming activity here is Class II gaming. To conduct Class II gaming on Indian lands, a tribe must, among other requirements, enact a tribal gaming ordinance and obtain approval from the NIGC. 25 U.S.C. § 2710; 25 C.F.R. § 522.

IGRA generally prohibits gaming activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. 25 U.S.C. § 2719(a). There are several exceptions to this general prohibition. One exception permits gaming under a "Two-Part Determination" procedure if "the Secretary . . . determines that a gaming establishment on newly acquired land would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community" and "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). Another exception—the one relied upon here—permits gaming activity on land that is acquired in trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id*. § 2719(b)(1)(B)(iii). The idea behind the restored lands exception is that tribes, like Ponca, that lost their lands through termination of their government-to-government relationship with the United States should not be penalized for actions that were largely outside their control.

**B. Ponca Restoration Act**

The government-to-government relationship between the United States and the Ponca Tribe was terminated by the Act of September 5, 1962, Pub. L. No. 87-629, 25 U.S.C. §§ 971-980 ("Termination Act"). Congress restored the relationship in the PRA of October 31, 1990, Pub. L. No. 101-484, 25 U.S.C. §§ 983-983h, and also elaborated on the rights being restored for

the Tribe, the services available to the Tribe and its members, and the terms of an economic development plan to promote the self-sufficiency of the Tribe. *Id*.

Section 983a restores Federal recognition and provides that "[a]ll Federal laws of general application to Indians and Indian tribes (including the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. § 461 et seq.), popularly known as the Indian Reorganization Act ["IRA"]) shall apply with respect to the Tribe and to the members." 25 U.S.C. § 983a. Section 983b(a) of the Restoration Act restores all of the Tribe's rights and privileges which were abrogated or diminished by the Tribe's termination. Subsection 983b(c) directs the Secretary of the Interior to accept in trust not more than 1,500 acres of real property located in Knox or Boyd Counties, Nebraska, pursuant to the Act and directs that any additional acreage be acquired pursuant to the IRA. The Secretary has the discretion to accept additional land in trust for the Tribe.

However, Subsection 983b(e) provides that "[r]eservation status shall not be granted any land acquired by or for the Tribe." Because the PRA prevents the Ponca Tribe from having any land acquired be declared a reservation, the Act designates a service area for the Tribe and its members, which includes "members of the Tribe residing in Sarpy, Burt, Platte, Stanton, Holt, Hall, Wayne, Knox, Boyd, Madison, Douglas, or Lancaster Counties of Nebraska, Woodbury or Pottawattomie [sic] Counties of Iowa, or Charles Mix County of South Dakota . . . ." 25 U.S.C. § 983c (*as amended* Pub. L. No. 104-109 (Feb 12, 1996)). The Carter Lake Parcel is located in Pottawattamie County, Iowa, within the designated service area.

## STATEMENT OF FACTS

### A. Carter Lake Trust Acquisition

On September 24, 1999, the Ponca Tribe purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa, located in Pottawattamie County, Iowa. AR000324.[2] On January 10, 2000, the Ponca Tribe passed a resolution, requesting that the BIA place the land into trust in order to allow the Tribe to provide services to its members. AR000922-23. Therefore, the BIA considered the request under Interior's discretionary authority to acquire land into trust for tribes pursuant to the IRA, 25 U.S.C. § 465,[3] and its implementing regulations, 25 C.F.R. Part 151. AR000892, AR000895, AR000897, AR000918.

Pursuant to its land acquisition regulations, on February 23, 2000, the BIA notified the State of Iowa ("Iowa"), Pottawattamie County, Iowa, and the City of Carter Lake that it was considering the Tribe's trust acquisition request and solicited comments from each entity. AR000892, AR000895, AR000897. Iowa and Pottawattamie County did not submit comments; however, the City of Carter Lake did negotiate a cooperative agreement with the Ponca Tribe regarding civil and criminal jurisdiction over the parcel. AR000707, AR000734, AR000814. On September 15, 2000, the Regional Director of the BIA granted the Tribe's request to have the Carter Lake Parcel taken into trust. AR000729-733. Iowa and Pottawattamie County timely appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA"). AR000693, AR000725; *Iowa and Bd. of Supervisors of Pottawattamie County, Iowa v. Great*

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[2] Citations to the administrative record for NIGC's 2007 Decision contain the prefix AR, and the administrative record is available at ECF No. 19. Citations to the administrative record for the 2017 Decision, which is an amendment to the 2007 Decision, contain the prefix 2017AR, and the 2017 administrative record was filed with the Court at ECF No. 18.

[3] 25 U.S.C. § 465 has been re-codified as 25 U.S.C. § 5108.

*Plains Reg'l Dir., BIA*, 38 IBIA 42 (Aug. 7, 2002). On August 7, 2002, the IBIA affirmed the Regional Director's decision. *Id*. at 55.

Subsequent to the IBIA's decision and to avoid further litigation, Iowa and the Ponca Tribe's attorney reached a verbal agreement that the Carter Lake Parcel could only be used for gaming if the Tribe obtained a "two-part determination" under 25 U.S.C. § 2719(b)(1)(A). 2017AR0000004. On November 26, 2002, the Tribe's attorney, Michael Mason, sent an email to the BIA requesting that it include in the published notice of intent to take the Carter Lake Parcel into trust the following language:

> The trust acquisition of the Carter Lake lands has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000 decision under the Regional Director's analysis of 25 C.F.R. 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. Sec 2719(b)(1)(B). There may be no gaming or gaming-related activities on the lands unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions [sic] and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained.

2017AR0000803. In the email, Mason stated that the language "was negotiated with Ass't Attorney General Jean Davis of the State of Iowa and County Attorney Richard Crowl of Pottawattamie County, Iowa." *Id*.

On December 3, 2002, the BIA published a Notice of Intent to Take Land in Trust in the Council Bluffs Daily Nonpareil newspaper. AR000947-50. The original notice did not include the above-mentioned language requested by the Tribe's attorney. On December 6, 2002, in light of the November 26th request of the Tribe's attorney, a Corrected Notice of Intent to Take Land in trust ("Amended Notice") was published in the same newspaper. 2017AR0000219-220, 2017AR0000223-224. That Amended Notice contained the language above. There is no formal

written agreement between the Tribe and Iowa regarding the land's gaming eligibility, and the trust deed does not contain a restriction against gaming on the land, AR001155. On January 28, 2003, the Tribe executed a deed conveying the land to the United States, AR000328, and the BIA completed the trust acquisition in February 2003. AR000326.

The Ponca Tribe built and began operating a health care facility on the site in 2000. AR000230. For budget reasons, however, the Tribe discontinued providing health care services at the site. *Id*.

**B. 2007 NIGC Decision**

In October 2005, the Tribe, through its then attorneys Faegre and Benson, requested that NIGC issue a legal opinion determining that the Carter Lake Parcel constitutes restored lands for a restored tribe. 2017AR0000006. The Tribe then submitted a request for approval of a site specific-gaming ordinance in February 2006, which was later withdrawn by the Tribe in May, 2006. *Id.* After Iowa sent a letter in April 2006 stating that the Tribe may be estopped from claiming the restored lands exception applies to the Carter Lake Parcel, the Tribe's attorney responded in a June 2006 letter that "any statements made by Michael Mason after the IBIA decision . . . were not authorized by the Tribe." 2017AR0000006-7. In August 2006, the Ponca Tribal Council passed a resolution, wherein it declared that the "Tribal Council was not aware of and did not approve the language that was added to the amended notice." 2017AR0000007.

On July 23, 2007, the Ponca Tribe petitioned for NIGC's approval of its site-specific ordinance. AR000276; AR000279-602. On October 22, 2007, the Chairman of NIGC issued a decision disapproving the ordinance on the grounds that although the Ponca Tribe was a restored tribe, the Carter Lake Parcel was after-acquired lands not eligible for gaming. AR000219, 2017AR000007. The Ponca Tribe appealed the Chairman's decision to the full Commission,

pursuant to 25 C.F.R. § 524.1. AR000206, 2017AR000007. On December 31, 2007, the full Commission reversed the Chairman's prior determination and approved the site-specific ordinance. *In Re: Gaming Ordinance of The Ponca Tribe of Nebraska, Final Decision and Order of the NIGC* (Dec. 31, 2007); AR000001-18. The NIGC found that: (a) the Chairman's disapproval improperly relied on the Tribe's intended use of the land; (b) the Chairman's disapproval improperly relied on events that occurred after Interior's final agency decision was made; and (c) the factual circumstances of the acquisition weigh in favor of restoration. AR000002.

**C. Prior Judicial Proceedings**

The States of Iowa and Nebraska, and the City of Council Bluffs, Iowa appealed the NIGC's 2007 determination in the Southern District of Iowa, arguing that NIGC lacked authority to make a restored lands determination, that the 2007 decision was arbitrary and capricious, and that NIGC's 2007 decision was contrary to the PRA. *Nebraska ex rel. Bruning*, 625 F.3d at 507. The district court ruled in favor of Plaintiffs, determining that NIGC lacked the authority to declare the Carter Lake land "restored lands" based on the 2002 agreement between the Ponca Tribe and Iowa. *Id*. at 508. The district court declined to address whether the NIGC's decision was contrary to the PRA because "[t]he DOI or BIA should be the agency initially deciding whether the Ponca Tribe's Carter Lake, Iowa acquisition went beyond what Congress intended in seeming to limit to Knox and Boyd Counties, Nebraska, real property transferred to the Secretary for the benefit of the Tribe." *Id*. at 507.

On appeal, the Eighth Circuit reversed the district court's ruling and ordered the matter remanded back to the agencies for the following: (1) NIGC to consider whether there was a valid agreement in place between the Ponca Tribe and Iowa precluding the Tribe from seeking to

game on the Carter Lake Parcel based on the restored lands exception; and (2) Interior to address whether the PRA limits the Tribes restored lands for the purposes of IGRA to Knox and Boyd Counties, Nebraska. The Eighth Circuit noted "[i]f the NIGC concludes that no valid agreement exists estopping the Tribe from raising the 'restored lands' exception, then it may proceed to reexamine whether the Carter Lake land is eligible for gaming under the IGRA's 'restored lands' exception." *Id.* at 512. On January 24, 2011, the district court ordered the case remanded to NIGC for reconsideration of its restored lands analysis in accordance with the Eighth Circuit opinion. *Nebraska v. U.S. Dep't of Interior*, No. 1:08-cv-6 (S.D. Iowa).

**D. Remand and NIGC's 2017 Decision**

In accordance with the remand order, on February 15, 2011, Interior invited the Tribe, States, and Council Bluffs to submit legal memoranda and supporting material on whether the PRA limits the Tribe's restored lands to Knox and Boyd Counties, Nebraska. 2017AR0000466. Plaintiffs and the Ponca Tribe submitted legal memoranda and responses. 2017AR0000071, 2017AR0000086, 2017AR0000115, 2017AR0000121. On March 13, 2012, Interior issued a 16-page letter response, concluding that the PRA "does not limit the designation of restored lands for gaming purposes to lands located within Knox and Boyd Counties." 2017AR0000055. That opinion did not address whether the Carter Lake Parcel qualified as restored lands. *Id.*

Additionally, NIGC issued a briefing order on May 21, 2012, inviting the parties to submit legal memoranda on the following issues:

> (1) The authority of Michael Mason to enter into the agreement on behalf of the Tribe;
> (2) The legal effect and weight of the Tribe's purported agreement with the State of Iowa as memorialized in the Corrected Notice; and
> (3) The legal effect and weight of the Corrected Notice.

2017AR000127. After careful consideration and consultation with Interior, NIGC issued an amended decision on November 13, 2017, upholding its 2007 Decision to approve the site-specific ordinance. In making this decision, NIGC concluded that the 2002 agreement between Iowa and the Tribe's attorney was not valid and therefore did not estop the Tribe from seeking approval of the site-specific ordinance based on the restored lands exception to IGRA. 2017AR000003. NIGC also concluded that the Carter Lake Parcel was restored lands for the Ponca Tribe because the land met the temporal, geographic, and factual circumstances of the restored analysis. *Id.* On December 13, 2017, the City of Council Bluffs, Iowa filed this action challenging NIGC's 2017 Decision. ECF No. 1. On June 1, 2018, the States of Iowa and Nebraska intervened as plaintiffs. ECF Nos. 13, 14.

## STANDARD OF REVIEW

### A. Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial."). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

**B. Standard of Review Under the Administrative Procedure Act**

Plaintiffs seeks judicial review under the APA of NIGC's 2017 Decision amending the grounds for its 2007 Decision that the Carter Lake Parcel constitutes restored lands for a restored tribe. As such, this challenge is governed by the APA and its accompanying standard of review.

Under the APA, the reviewing court may only set aside an agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review "gives agency decisions a high degree of deference." *Sierra Club v. EPA*, 252 F.3d 943, 947 (8th Cir. 2001) (citation omitted). Accordingly, "[i]f an agency's determination is supportable on any rational basis," a court must uphold it, rather than substituting its judgment for that of the agency. *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004) (citing *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1184 (8th Cir. 2001)). Even a decision of "less than ideal clarity" should be upheld if "the agency's path may reasonably be discerned." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (citations and internal quotation marks omitted). Review is based on an examination of the agency's administrative record. 5 U.S.C. § 706; *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) ("APA review of agency action is normally confined to the agency's administrative record."). "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Agency interpretations of its own implementing regulations are typically accorded heightened deference and are controlling unless clearly erroneous or inconsistent with relevant regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (agency's construction of its own regulation is entitled to substantial deference). And in reviewing an agency's interpretation of a statute it administers, a court is tasked with a two-step inquiry. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "First, always, is the question whether Congress has directly spoken to the precise question at issue."

*Id.* And, "to prevail under *Chevron* step one, [Plaintiffs] . . . must show that the statute unambiguously forecloses [Defendants'] interpretation." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011). If statutory analysis does not clearly resolve textual ambiguity, then courts proceed to *Chevron* step two. There, "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see also In re Lyon Cty. Landfill, Lynd, Mn.*, 406 F.3d 981, 983 (8th Cir. 2005) ("The court will defer to an agency's reasonable interpretation of a statute it is charged with administering if the statute is ambiguous, or the interpretation is consistent with the plain meaning of the statute"). The underlying presumption is that Congress "'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

## ARGUMENT

### A. NIGC Rightly Determined that the Agreement Between Iowa and the Tribe Was Timely Repudiated

On remand, NIGC was first tasked with determining whether there was a valid agreement in place between the Ponca Tribe and Iowa and if so, whether such an agreement would preclude the Tribe from seeking to game on the Carter Lake Parcel based on the restored lands exception of IGRA. *Nebraska ex rel. Bruning*, 625 F.3d at 512. NIGC accepted opening submissions, supporting material, and responses from Plaintiffs and the Tribe on whether the Tribe's attorney possessed the authority to enter into such an agreement and the legal effect and weight of the purported agreement and BIA's Corrected Notice. 2017AR0000071-126.

The agreement between the Tribe's attorney and Iowa was never reduced to writing and there is no indication in the record that the Tribe delegated the authority to Mason to enter into such an agreement. 2017AR0000019. NIGC concluded that while the Tribe's attorney did not possess actual authority, express or implied, to bind the Tribe to such an agreement, 2017AR0000010, the totality of the circumstances demonstrated that the Tribe later possessed actual or constructive knowledge of the agreement between the Tribe's attorney and Iowa. 2017AR0000026. NIGC went on to conclude that "even if the Tribe became aware of and acquiesced to the agreement for a limited period of time from 2002 to 2005, it clearly repudiated that agreement beginning with the October 7, 2005 Faegre and Benson letter." *Id.* NIGC also concluded that Iowa suffered no detrimental reliance or injury by the Tribe's repudiation of the agreement. Because the Tribe seasonably repudiated, Iowa could have still sought judicial review of the IBIA's decision affirming the Regional Director's decision to acquire the Carter Lake Parcel in trust for the Tribe because the statute of limitation had not run for a challenge to Interior's trust acquisition decision. 2017AR0000027-28; *see* 28 U.S.C. § 2401(a) ("every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

While Plaintiffs agree with NIGC's conclusions that the Tribe may have acquiesced to Mason's agreement, ECF No. 22-1 at 36, Plaintiffs take issue with the NIGC's conclusion that the Tribe timely repudiated the agreement and that Iowa suffered no reliance interest in the agreement. But Plaintiffs have failed to demonstrate that NIGC's determinations are arbitrary and capricious. A review of NIGC's 2017 Decision shows that the agency considered the factual—and legal— circumstances surrounding the agreement and subsequent repudiation of the agreement by the Tribe.

In concluding that the Tribe repudiated the agreement, NIGC looked to several instances between 2005 and 2007 in which the Tribe expressly stated its repudiation of the agreement, of which Iowa would have been aware. NIGC determined that the repudiation first occurred when the Tribe, through its attorneys Faegre and Benson, requested that NIGC issue an opinion concluding that the Carter Lake Parcel constituted Indian lands and restored lands for purposes of IGRA. 2017000026, AR001278. NIGC also found that the Tribe restated the repudiation in two subsequent letters to NIGC, again through Faegre and Benson, on June 15, 2006 and July 14, 2007. 2017AR0000026; *see* AR000959 ("[T]he Tribe's ability to game on the parcel is not restricted, because the Terms of the agreement were never authorized by the Tribal Council."); AR000976. NIGC also noted that the Tribal Council passed two resolutions, on August 6, 2006 and April 2, 2007, which NIGC concluded "made clear that the Tribal Council did not believe any sort of agreement was binding." The record indicates that Iowa was aware of the Tribe's repudiation of the agreement and subsequent request to NIGC to conclude that the Carter Lake Parcel was restored lands, as demonstrated by a letter sent from Iowa's Assistant Attorney General to NIGC on April 3, 2006. AR001077.

Because the land was acquired in trust in February 2003, the statute of limitations to challenge the trust acquisition would not have run for six years, until February 2009. Given the Tribe's repudiation occurred prior to the conclusion of the limitation period, NIGC reasonably concluded that there was no time-bar to Iowa challenging Interior's trust-acquisition decision. 2017AR0000027. Plaintiffs, in an effort to circumvent this reasonable conclusion, point out that, at that time, Iowa as well as the United States believed that the Quiet Title Act precluded APA review of a decision to acquire land in trust for a tribe after the trust acquisition occurred. They thus argue that Iowa relied to its detriment on the agreement by forgoing a challenging to the

IBIA's decision before the land was taken into trust. ECF 22-1 at 37. But nothing prevented Iowa from challenging the IBIA's decision under the APA once the Tribe repudiated the agreement. Brian Patchak challenged a completed land-into-trust acquisition in 2008 and prevailed on his argument, over the United States' opposition, that such a claim could be brought under the APA. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012), *aff'g Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011). Plaintiffs could have done the same. Instead, Plaintiffs failed to preserve their right to challenge the Carter Lake trust acquisition, even though they were on notice that the Tribe had repudiated the agreement. *See Menominee Indian Tribe of Wisconsin v. United States*, 764 F.3d 51, 61 (D.C. Cir. 2014), *aff'd*, 136 S. Ct. 750 (2016) (internal quotations, brackets, and citations omitted) ("A party is not excused from timely filing its claim because the agency's view of the law might be inhospitable. The federal courts . . . are the final word on federal law, and the only sure way to determine whether a suit can be maintained is to try it."); *E.J.R.E. v. United States*, 453 F.3d 1094, 1098 (8th Cir.2006) (rejecting application of doctrine of equitable tolling because the "mere fact" that a change in law "made it more likely . . . to be successful does not change the reality that Appellants were free, at any time, to file" their petition).

Plaintiffs' assertion that it was impossible for Iowa to challenge the trust acquisition, therefore, is incorrect and cannot serve as the basis for Iowa's purported injury or detrimental reliance. To be sure, if Iowa had sought judicial review of the trust acquisition of the Carter Lake Parcel after it was acquired in trust, the United States likely would have argued that the suit was barred by the Quiet Title Act, but the anticipated defense by the United States does not excuse Iowa's failure to seek judicial review in the first place. Nor does mistake of law assist Plaintiffs, who offer no rationale to depart from "the general rule that mistake of law is

presumptively no sufficient ground of equitable interference." *Snell v. Atl. Fire & Marine Ins. Co. of Providence, Ill.*, 98 U.S. 85, 91 (1878).

NIGC's determination that Iowa did not suffer injury or detrimental reliance on the Tribe's timely repudiation was reasonable and should be upheld.

### B. As Interior Concluded on Remand, Nothing in the Ponca Restoration Act Prevents a Finding that the Carter Lake Parcel Qualifies as Restored Lands

In accord with the district court's remand order, Interior issued an opinion on March 13, 2012, as to whether the PRA "limits restored land status under [IGRA] to property located solely within Knox and Boyd Counties, Nebraska." 2017AR0000055. After a careful analysis of the statutory language and legislative history, and also taking into account the submissions of Plaintiffs, the Tribe, and Judge Kornmann's dissent in the Eighth Circuit appeal, Interior concluded that the plain meaning of the PRA did not limit trust lands that may be considered "restored" under IGRA to land in Knox and Boyd Counties. *Id.*

While it is true that the PRA states that the Interior Secretary "shall accept not more than 1,500 acres of any real property located in Knox or Boyd Counties, Nebraska" in trust for the Tribe, 25 U.S.C. § 983b(c), the Act also specifically states that "all Federal laws of general application to Indians and Indian tribes… shall apply with respect to the Tribe and its members." *Id.* § 983a. One such law of general application—which is specifically referenced in the Act—is the IRA, which, among other things, gives the Secretary general authority to acquire land in trust for Indians, as defined in the IRA. *Id.*; *see* 25 U.S.C. § 5108. Another statute of general application to Indians and Indian tribes is IGRA, which was enacted two years prior to the passage of the PRA. In addition, the Act identifies a "service area" within which tribal members should be treated as living on or near a reservation; Pottawattamie County, where the Carter

Lake Parcel is located, is one of the specifically listed counties. *Id*. § 983c (as amended Feb. 12, 1996).

With respect to § 983(b) requirement that the Secretary acquire land in trust for the Tribe, "the inclusion of the geographic component in the [Act] was simply a way for Congress to provide for some mandatory trust acquisitions in a limited area." AR0000066. Interior noted that the "shall accept not more than" language in § 983b(c) relied upon by the States was prompted by and consistent with its request that a geographic specification be included "in order to lessen the scope of [mandatory trust acquisitions for the Tribe]." AR0000060.[4] The added language sought by Interior was meant to distinguish between mandatory trust acquisitions and those lands over which the Secretary had discretion to acquire.

The language was not, however, intended to limit Interior's discretion to acquire land in trust outside of Knox and Boyd Counties. Nor was the phrase included to define, limit, or address in any capacity what constitutes restored lands for purposes of IGRA. Rather, Interior was concerned that, without the geographic specification, "the bill would limit the Secretary's discretion under existing law by *requiring* the Secretary to acquire land located anywhere in the United States offered by the Tribe." *Id*. (emphasis added). So, by its express terms, the PRA provides for "the acquisition of land through both mandatory and discretionary mechanisms," and "[n]othing in the plain language of the [Act] limits the Secretary's ability under the IRA to

[4] Interior's testimony stated that "[w]e object to any requirement that the Secretary accept land in trust without geographic limitation. This would limit the Secretary's discretion to take land in trust under existing law. We recommend that such requirement as it appears in Sections 4(c) and 10(c)(1) be limited to the Tribe's original reservation in Boyd and Knox Counties, Nebraska as it existed at the time of enactment of [the Termination Act]." Statement of Ronal[d] Eden, Deputy to the Assistant Secretary, Indian Affairs, to the Interior and Insular Affairs Committee, U.S. House of Representatives, regarding S. 1747, A Bill "To Provide for the Restoration of Federal Recognition to the Ponca Tribe of Nebraska, and for Other Purposes, at 3 (Sept. 13, 1990).

acquire lands outside of the two counties or precludes such land from qualifying as restored lands under IGRA."[5] 2017AR0000063.

Interior emphasized that in proposing language, both it and Congress were aware of prior restoration acts, which "demonstrate Congress's awareness and aptitude for restricting trust acquisitions," AR0000064, and the principles courts have stated in reviewing them. Identification of "a specific geographic area for either mandatory or discretionary trust acquisitions", AR0000063, does not establish "the exclusive areas where new trust lands can be considered restored for gaming purposes, absent express limitations in the statute." *Id*. (citing and discussing *Oregon v. Norton*, 271 F. Supp. 2d 1270 (D. Or. 2003)). Interior did not propose such express limitations on gaming, nor did Congress incorporate any in the legislation.

Further, Congress knows how to establish exclusive limitations, and the language it uses in such cases is quite different. Interior's opinion references three such instances that "[i]n contrast to the [PRA]…geographically circumscribe the Secretary's authority to take land into trust for the restored tribe." AR0000064 (citing restoration acts for the Siletz, Grand Ronde, and Paiute Indian Tribes). All of these acts pre-date the passage of the PRA. In the Siletz Indian Tribe Restoration Act, Congress expressly stated: "the Secretary shall not accept any real property in trust for the benefit of the tribe or its members unless such real property is located within Lincoln County, State of Oregon." Pub. L. No. 95-195, 91 Stat. 1415 (1977). Similarly

[5] The PRA also states that, "The Secretary may accept any additional acreage in Knox or Boyd Counties pursuant to his authority under the Act of June 18, 1934 (25 U.S.C. 461 et seq.)." 25 U.S.C. § 983b(c). Interior aptly concluded that the inclusion of this language is "best understood as a clarification that 1,500 acres is not intended to be a statutory cap on the Secretary's ability to take more land into trust within those counties." 2017AR0000066. And should the Secretary, in his discretion, decide to take land into trust for the Tribe outside of those Counties, as was done with respect to the Carter Lake Parcel, Interior reasoned that the reference to the IRA in the Act makes clear that the Secretary maintains such authority. *Id*.

restrictive language is also found in the Grande Ronde Restoration Act, Pub. L. No. 98-165, 97 Stat. 1064 (1983), and the Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (1980), where Congress expressly limited which counties the Secretary may acquire land in trust for the respective tribe. No such restrictive language is present in the PRA.

Congress also knows how to expressly include gaming restrictions, a limitation likewise not present in the Act. 2017AR0000064-65 (contrasting the Act with restoration acts for the Ysleta del Sur Pueblo and Alabama and Coushatta Tribes, the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, the Cow Creek Band of Umpqua Tribe of Indians Recognition Act, the Rhode Island Claims Settlement Act, and the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993).

### C. The Plain Language of the PRA Does not Geographically Limit What Lands May be Considered Restored Lands for Purposes of IGRA

Plaintiffs ask the Court to read into the distinction between mandatory and discretionary trust acquisitions made in the PRA an unspoken intent by Congress that only mandatory trust acquisitions could be "restored lands" for purposes of IGRA. The only language they point to in making this argument is § 983b(c), which says the Secretary "shall accept not more than 1,500 acres of any real property located in Knox or Boyd Counties, Nebraska." But we know the genesis of this language: as explained above, Interior requested it to limit the scope of the Secretary's mandatory trust acquisition duty, not in order to limit the scope of discretionary acquisition or to modify IGRA.

Plaintiffs also fail to address the prior restoration and gaming eligibility acts, disregard the Act's references to the IRA and other statutes of general applicability, and instead summon

the canon *expressio unius est exclusio alterius*. But the canon is a particularly "poor indicator of Congress' intent" where, as here, the statute includes a "broad grant of authority" to an agency, thus leaving "to reasonable agency discretion questions that it has not directly resolved." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) (declining to imply a limit on Congress's grant of authority to the Secretary); *see also Bailey v. Federal Intermediate Credit Bank of St. Louis*, 788 F.2d 498, 500 (8th Cir. 1986) ("'[E]xpressio unius' should not prevail when a nonexclusive reading ... allows the exercise of incidental authority necessary to an expressed power or right."). The Eighth Circuit, in particular, has cautioned against a broad use of the canon, holding that it is properly "'invoked only [if] other aids to [statutory language] suggest that the language at issue was meant to be exclusive' "—namely the statutory text itself. *U.S. v. Basin Elec. Power Corp*., 248 F.3d 781, 803-04 (8th Cir. 2001) (citation omitted), cert. denied, 534 U.S. 1115 (2002).

As Interior notes, the language it proposed was not to restrict discretionary authority to acquire land under the IRA or to specify which land constitutes restored lands under IGRA, and there is no reason to believe that Congress impliedly restricted its broad grant of authority to the Secretary to do so. *See N.L.R.B. v. S.W. Gen., Inc.*, 137 S. Ct. 929, 940 (2017) ("The expressio unius canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded.") (internal quotation marks and citation omitted). First, Congress expressly applied the IRA and all federal laws of general applicability, including IGRA, to the Tribe. 25 U.S.C. § 983(a). At the same time, it distinguished between mandatory and discretionary trust acquisitions. Because Congress was addressing issues arising from the restoration of a tribe, it was natural to identify both lands that the Secretary *must* acquire in trust as well as address those that the Secretary *may*, in his discretion, acquire in trust. This natural,

parallel construction provides no basis for inferring that Congress foreclosed other trust acquisitions—something even Plaintiffs do not argue—or precluded designation of those lands as restored. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."). Rather, Congress's decision to identify 1,500 acres in Knox and Boyd Counties served to remove any doubt that mandatory acquisition of land, as is frequently the case with restoration acts, was to occur.

Second, Plaintiffs' strained interpretation relies on an extraordinarily narrow reading of the statute and succeeds only if this Court were to *add* qualifying or limiting language, such as "only" or "solely", a function that courts should not undertake. *See Overseas Educ. Ass'n Inc. v. Fed. Labor Relations Auth.*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring). One of the maxims of statutory construction is that courts should not add words—particularly words that restrict or limit—to statutes to give a particular meaning. That is precisely what Plaintiffs seek to accomplish here.

Third, Plaintiffs' inference would produce a result that flatly contradicts the purpose of the Act, and of the restored land provision of IGRA, a provision that predated the Act by two years. As the Eighth Circuit has explained, "'expressio unius' should not prevail when a nonexclusive reading serves the purposes for which the statute was enacted." *Bailey*, 788 F.2d at 500. As discussed above, Interior's interpretation directly advances the purpose of the tribal restoration, while Plaintiffs' interpretation would undermine it. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (rejecting application of expressio unius canon where the "purposes of the Acts would be undermined by a presumption of exclusivity").

Finally, and relatedly, a negative inference is inconsistent with the surrounding statutory text, and would render it superfluous, "a result we typically try to avoid." *N.L.R.B.*, 137 S. Ct. at 941 (citing *Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). If the 1,500 acre reference was indeed meant to strictly limit lands restored, there would have been no need for Section 983a, acknowledging the application of the IRA to the Tribe. Section 983b(c) cannot be construed in isolation, without comparing it to the other subsections of the Act. *See United States v. Johnson*, 703 F.3d 464, 468 (8th Cir. 2013). Plaintiffs' response is apparently that the Act might not limit trust acquisitions, but that it does limit what lands are considered "restored lands" under IGRA, an interpretation that finds no basis either in the language of the PRA or its purpose. The more reasonable interpretation of the Act is that when the Secretary exercises his discretion to acquire land in trust for the Tribe, as authorized by the PRA, it is then up to Interior—or as in this case, NIGC with the concurrence of Interior—to determine whether the lands being acquired satisfy that "restored lands" exception of IGRA.

Equally unavailing is Plaintiffs' lengthy suggestion, ECF No. 22-1 32-36, that Interior should have considered the 25 C.F.R. part 292 regulations, without the grandfather clause included therein at *id*. § 292.26, in interpreting the Act. Beyond the fact that the clause is, of course, part of the Part 292 regulations, Plaintiffs point to no maxim of statutory interpretation for their convoluted argument both that a separate regulation should have been specifically examined as to the plain meaning of the Act and that part of that regulation should have been

disregarded.[6] And the application of the grandfather clause does not contradict Interior's interpretation of the Restoration Act. Plaintiffs do not substantively challenge the grandfather clause, other to offer what amount to policy criticisms. Instead, they offer arguments about the plain meaning of the Act, claiming that the grandfather clause is inapplicable. ECF No. 22-1 at 31. As discussed below, it does apply.

Alternatively, and as Interior also discussed, if the statute does not have a plain meaning, for many of the same reasons this Court should give deference to the agency's interpretation of it. Under *Chevron*, if a statutory provision has not "unambiguously spoken to the question at issue," courts will apply "[the agency's] interpretation if it is based on a permissible construction of the statute." *Andrade-Zamora v. Lynch*, 814 F.3d 945, 951 (8th Cir. 2016). That is true even if the interpretation arises outside of notice and comment rulemaking. *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). *Chevron* deference is bolstered here by application of the canon of construction that statutory ambiguity is resolved in favor of Indian interests. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Interior reasonably and permissibly construed the statute, and Plaintiffs offer no meaningful response except to broadly criticize deference. *See* ECF No. 221-1 at 25 n.5.

### D. NIGC Reasonably Concluded that the Carter Lake Parcel is Restored Lands for Purposes of IGRA

Congress enacted IGRA in 1988 to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and "to ensure that the Indian tribe is the

[6] Plaintiffs cite to *Redding Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015), but nothing about that ruling concerns, much less mandates, application of Plaintiffs' approach to ascertaining the plain meaning of a statute.

primary beneficiary of the gaming operation," *id*. § 2702(2). "A tribe may conduct gaming only on 'Indian lands' within the tribe's jurisdiction." *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 462 (D.C. Cir. 2007) (quoting 25 U.S.C. § 2710(b)(1), (d)(1)(A)(I)). IGRA generally prohibits a tribe from conducting gaming on Indian lands that the Secretary acquired in trust after October 17, 1988—the date Congress passed the Act—unless one of the statutory exceptions applies. *See* 25 U.S.C. § 2719(a).

Relevant here, one exception allows gaming on lands taken into trust after Congress enacted the Act as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id*. § 2719(b)(1)(B)(iii). This exception, along with the other statutory exceptions, "ensur[es] that tribes lacking reservations when [the Act] was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). Congress did not define "restoration of lands" or explain how the Secretary should restore lands to an Indian tribe. *See Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att'y for W. Dist. of Mich.*, 369 F.3d 960, 967 (6th Cir. 2004). In the *Grand Traverse Band* litigation, the district court reasoned that the term restoration, "may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion." *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney For W. Dist. of Michigan*, 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002), *aff'd sub nom. Grand Traverse Band*, 369 F.3d 960; *see also City of Roseville v. Norton*, 219 F. Supp. 2d 130, 161 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 ("By providing an exception for restored lands of restored Indian groups, Congress intended to provide some sense of parity between tribes that had been disbanded and those that had not.").

In *Grand Traverse Band*, the district court analyzed IGRA and held, "if a tribe is a restored tribe under the statute, any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under § 2719." 198 F. Supp. 2d at 935. To determine whether a parcel is restored land under IGRA, the Michigan district court considered three factors: (1) "the factual circumstances of the acquisition;" (2) "the location of the acquisition;" and (3) "the temporal relationship of the acquisition to the tribal restoration." *Id*. The Sixth Circuit adopted this three-factor analysis, *Grand Traverse Band*, 369 F.3d at 966-67, and so did Interior and the NIGC. *See Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1214 (D. Kan. 2006).

Applying this test, NIGC's 2017 Decision analyzed each factor on its own, and additionally considered the factors in total, concluding that the three factors establish Carter Lake as restored lands. 2017AR0000030-40. In their briefing, Plaintiffs do not challenge the manner in which NIGC applied the "temporal relationship of the acquisition to the tribal restoration" or "location of the acquisition" *Grand Traverse* factors. And their only contention with respect to NIGC's analysis under the factor termed "factual circumstances of the trust acquisition" is that NIGC should have considered the 2002 agreement as a balancing factor in the restored lands analysis, not just as a threshold question of estoppel. ECF 22-1 at 39. This argument lacks merit.

NIGC correctly followed the Eighth Circuit's remand instructions. The Eighth Circuit expressly directed that if NIGC concluded that "no valid agreement existed estopping the Tribe from raising the 'restored lands' exception, then it may proceed to reexamine whether the Carter Lake land is eligible for gaming under IGRA's 'restored lands' exception." *Nebraska ex rel.*

*Bruning*, 625 F.3d at 512. The Eighth Circuit viewed the agreement as relevant to a threshold issue of estoppel. Accordingly, that is how NIGC addressed the agreement, not as a balancing factor within the restored lands analysis.

Nothing in the Eighth Circuit's decision, or in any other judicial decision, suggests that NIGC had to consider the agreement in the context of estoppel and again as a factor in the restored lands analysis. The purpose of the *Grand Traverse* factors is to determine whether the circumstances of a trust acquisition indicate restoration for purposes of IGRA. *See Wyandotte Nation*, 437 F. Supp. 2d at 1214. The Corrected Notice, and the agreement reported therein, did not contain a restored lands analysis for the Carter Lake Parcel trust acquisition, nor was that its purpose. *Nebraska ex rel. Bruning*, 625 F.3d at 510-11. And neither Interior nor NIGC were a party to that agreement. Since Plaintiffs do not otherwise challenge NIGC's balancing analysis, this Court should conclude that NIGC's decision that the Carter Lake Parcel qualified as restored lands was not arbitrary or capricious.

### E. NIGC Properly Applied Interior's Regulations On the Restored Lands Exception

Plaintiffs next argues that NIGC should have applied the factors articulated in Interior's restored lands regulations, §§ 292.2, 292.7-292.12, notwithstanding that fact that the new regulations took effect in 2008, one year after the initial final agency action that was on remand to NIGC, and notwithstanding the regulations containing a grandfather clause advising in what circumstances the new regulations do not apply. 25 C.F.R. § 292.26. As NIGC recognized in its 2017 Decision, those circumstances articulated in the regulations' grandfather clause unequivocally exist here.

On August 25, 2008, approximately eight months after the Commission's 2007 Decision approving the Tribe's site-specific gaming ordinance, and almost a year after an October 2007 written legal opinion from the NIGC Office of General Counsel, the Interior Secretary codified regulations at 25 C.F.R. part 292. These regulations provide guidance specific to the restored lands exception. *See id*. §§ 292.2, 292.7-292.12. A tribe must demonstrate, among other things, "a significant historical connection to the land" for the exception to apply. *Id*. § 292.12(b).

The Part 292 regulations include a grandfather provision: the regulations do not apply to agency actions based on either written opinions pre-dating the regulations, *id*. § 292.26(b), or to "alter final agency decisions made pursuant to 25 U.S.C. § 2719 before the date of enactment of these regulations." *Id*. § 292.26(a). In the 2017 Decision, the Commission found that both of these "separate grounds", 2017AR0000032, trigger application of the grandfather clause. "Before the effective date of the[] regulations," there had been a "final agency decision[]" [December 31, 2007] and the "[NIGC] had issued a written opinion [on October 22, 2007] regarding the applicability of 25 U.S.C. § 2719 for [the Carter Lake] land to be used for a particular gaming establishment." 2017AR0000032-33. When either precondition of the grandfather clause is applicable, the clause is in effect, and the common law *Grand Traverse Band* analysis, as applied in both the original 2007 Decision and in the 2017 Amendment Decision, is utilized to determine whether a parcel qualifies for restored lands status. In challenging the triggering of the grandfather clause, Plaintiffs once again disregard plain language and offer strained interpretations, neither of which comport with the regulatory language and both of which rely on this Court adding limiting terms to the regulatory text.

With regard to Section 292.26(b), Plaintiffs contend that since the NIGC Office of General Counsel October 2007 opinion, which they admit was a "written opinion", "determined

that the Carter Lake Parcel did not qualify as restored land", ECF No. 22-1 at 31, the sub-clause cannot be applicable. But that reading depends on adding restrictive language to plain terms, namely that the opinion must have been not only a "written opinion" but one favorable to the Tribe. Moreover, the October 2007 opinion was not the end of the matter; it was reversed by the full Commission on December 31, 2007. The subsection refers solely to a written opinion that predates promulgation, and does not require a final agency action. And "[e]ven if the district court successfully vacated the Commission decision, the NIGC Office of General Counsel's opinion continues in effect, subject to 'full discretion to qualify, withdraw, or modify such opinion[].'" 2017AR0000033 (citing 25 C.F.R. § 292.26(b)).

Plaintiffs' criticism of the activation of Section 292.26(a), which uses the term "final agency decisions", ignores that they argued and the district court accepted for purposes of jurisdiction that the 2007 Decision was a final agency action when issued—otherwise it could not have been challenged by Plaintiffs under the APA. Plaintiffs do not contend that the decision was not final agency action when it was issued, nor can they. To obtain judicial review under the APA, the action challenged must be "final" agency action. 5 U.S.C. § 704. There is no special circumstance that exempts from the final agency action requirement a challenge to the agency's authority. *See, e.g., Aluminum Co. of Am. v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986) (a claim that the agency acted "beyond [its] statutory authority [does not] make any difference" for finality purposes). That should conclude the matter. A common-sense interpretation, consistent with the plain regulatory language—which itself places no temporal limitations based on subsequent judicial review—of the term "final agency decisions" means a decision that was final for the agency at the time of its issuance (here, December 2007).

But Plaintiffs and Amici argue that subsequent litigation events mean that it is *now* not a "final agency decision[]" and therefore cannot be the basis for the applicability of Section 292.26(a). If Plaintiffs' interpretation of the litigation history is correct, there would be no waiver of sovereign immunity allowing judicial review of this case, because there is no longer final agency action. NIGC, however, found no reason to view the history or status of litigation as a prohibition on application of the subsection, noting that "[a]lthough the District Court by vacating the Commission decision called into question whether the Commission's decision still constitutes a final agency decision, on appeal the 8th Circuit determined that doing so was in error." 2017AR00000032. That interpretation was reasonable and not inconsistent with the plain language of the regulation. The mere existence of the remand, to permit agencies to review their previous analyses, can hardly mean that the decision to approve a site-specific ordinance was not final for the agency when it was issued, in December 2007, particularly given the Eighth Circuit's treatment of the district court's ruling. The 2017 Amendment obviously is not inconsistent with application of the grandfather clause.[7]

Just as Plaintiffs complain, as discussed above, that Interior should have considered the Part 292 regulations (stripped of the grandfather clause contained within) in ascertaining the

[7] *Amici* argue that "nothing in the grandfather provision binds the NIGC to its previous opinion," Amicus Brief at 6, a statement that misstates the terms of the clause. Their citation to *BellSouth Telecommunications, Inc. v. Se. Tel., Inc*., 462 F.3d 650 (6th Cir. 2006), does nothing to assist their interpretation, as the decision did not deal with a grandfather clause, much less this clause. Similarly, they contend that, applying the Part 292 regulations absent the clause, this Court should make a finding that the Tribe fails to satisfy 25 C.F.R. §292.12(a). This assertion raises a question that is not before this Court and which the agency should have the opportunity to decide, if necessary, in the first instance. *See, e.g., PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799, 809 (D.C. Cir. 2004) (Roberts, J., concurring) (courts should not go beyond "narrow and effectively conceded basis for disposition" to address additional issues "wholly unnecessary to the disposition of the case" that "at the end of the day lead[] to the same result"); *cf. Noble Energy, Inc. v. Salazar*, 671 F.3d 1241, 1246 (D.C. Cir. 2012) ("an agency is entitled to construe its own regulations in the first instance").

plain meaning of the Ponca Restoration Act, they simultaneously argue that even if the clause is applicable on its terms, NIGC should have somehow disregarded it because of the Act. Again, that view relies on their interpretation of the Act, and rejects the language of the regulation, which provides that grandfathering occurs if ether condition is satisfied. The remainder of Plaintiffs' argument is apparently that the Part 292 regulations, aside from the clause, are at odds with the *Grand Traverse* test applied by the Commission. ECF No. 22-1 at 39. The Commission described the Part 292 regulations as "differ[ing] slightly" from the common law test, 2017AR0000032, and Plaintiffs do not bother to explain why application of the regulations absent grandfathering would necessarily have led to a different result.[8] The existence of the grandfather provision within the regulations does not, and cannot, contradict the agency's own interpretation of IGRA, and the agency did not ignore its own regulations. In the very limited

[8] The Interior Secretary explicitly acknowledged the *Grand Traverse* cases and drew from them in the drafting of the Part 292 regulations. The very idea of explicitly establishing a "temporal relationship of the acquisition [of later-acquired lands] to the tribal restoration" is taken from *Grand Traverse* and became 25 C.F.R. § 292.12(c). *See Nebraska ex rel. Bruning v. United States Dept. of the Interior*, 625 F.3d 501, 510 (8th Cir. 2010) ("[C]ourts have articulated a three-factor test to determine whether a parcel was taken into trust as part of the restoration of land to a tribe; under this test, 'land that could be considered part of such restoration might appropriately be limited by . . . the temporal relationship of the acquisition to the tribal restoration.' ") (citing *Grand Traverse*, 198 F. Supp. 2d at 935). The Preamble to the Final Rule expressly responded to comments requesting that the Secretary hew closely to the District of Michigan's decisions in the *Grand Traverse* cases. One response explains that the *Grand Traverse* cases validated the inclusion of an "historical connection" test even though such a test was not made explicit in the plain language of the statute. *Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354, 29,365 (May 20, 2008). Another commenter "requested that the rules put all restored tribes on an even playing field by incorporating the, so called, Grand Traverse standard into the rule." *Id*. at 29,366. The Secretary explained that "[t]his recommendation was adopted in so far as we followed the *Grand Traverse* standard that if the tribe is acknowledged under 25 C.F.R. 83.8, and already has an initial reservation proclaimed after October 17, 1988, the tribe may game on newly acquired lands under the restored lands exception provided it is not gaming on any other land." *Id*.

instances in which the clause has been applied—instances even less likely to occur in the future—it is effectuated and given purpose because its criteria are satisfied while allowing the agency, as Section 292.29(b) specifically provides, to take a different view prospectively.

## CONCLUSION

For the above-stated reasons, Defendants respectfully request that this Court grant their motion for summary judgement, deny Plaintiff's and Intervenor-Plaintiffs' motion for summary judgment, and enter a judgment upholding the NIGC's 2017 Amendment to Final Decision and Order, affirming the NIGC's December 31, 2007 conclusion that the Carter Lake parcel is restored lands for a restored tribe.

Dated: September 20, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2018, a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Southern District of Iowa, along with Plaintiff's and Intervenor-Plaintiffs' counsel, using the ECF system of the Court.

*/s/ JoAnn Kintz*

JoAnn Kintz

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