National Indian Gaming Commission

In re: Gaming Ordinance of the Ponca Tribe of Nebraska	)	November 13, 2017

Amendment to Final Decision and Order

This is an amendment to the National Indian Gaming Commission's (Commission or NIGC) [1] Final Decision and Order in re: Gaming Ordinance of the Ponca Tribe of Nebraska. That decision, issued on December 31, 2007 (Commission decision), found that the Ponca Tribe of Nebraska's (Tribe's) trust parcel[2] in Carter Lake, Iowa (Carter Lake parcel or parcel) is eligible for gaming under the Indian Gaming Regulatory Act (IGRA) as land taken into trust as part of the restoration of lands for a restored tribe and resulted in the approval of the Tribe's site-specific gaming ordinance.[3]

The Carter Lake parcel was taken into trust by the U.S. Department of the Interior (Interior) in 2003.[4] Generally, IGRA prohibits gaming on parcels taken into trust after October 17, 1988;[5] however, it provides for several exceptions. One of these is the restored lands exception, which requires that land be "taken into trust as part of … the restoration of lands for

[1] The National Indian Gaming Commission (NIGC) is a federal regulatory agency established by Congress. 25 U.S.C. §§ 2704(a) & 2702(3). When the term "Commission" is used, it refers to the three individual members that make up the entity itself, including the Chair, Vice Chair, and Associate Commissioner. When the term "NIGC" is used, it refers to the agency.

[2] The parcel (Carter Lake parcel) is approximately 4.8 acres and was purchased in fee by the Ponca Tribe of Nebraska (Tribe) on September 24, 1999. The common address of the parcel is 1001 Avenue H, Carter Lake, Iowa. On January 10, 2000, the Tribe passed a resolution seeking to have the U.S. Department of Interior (Interior) take the land into trust. Ponca Tribe of Nebraska (Tribe) Resolution 00-01.

[3] Commission Final Decision and Order in re: The Gaming Ordinance of the Ponca Tribe of Nebraska (Dec. 31, 2007) (Commission decision); 25 U.S.C. § 2719(b)(1)(B)(iii).

[4] In February, 2003, Interior completed the trust acquisition. Letter from Interior, Bureau of Indian Affairs (BIA) Acting Great Plains Regional Director to BIA Superintendent, Yankton Agency (Feb. 10, 2003).

[5] 25 U.S.C. § 2719(a).

an Indian tribe that is restored to federal recognition."[6] Because Interior had not made a gaming eligibility determination when it took the Carter Lake parcel into trust,[7] the NIGC Chair (Chair) and, on administrative appeal, the Commission had to determine the eligibility of the parcel for gaming when the Tribe submitted a site-specific gaming ordinance to the NIGC that included the parcel in the ordinance's definition of "Indian lands."[8] The Commission decision, approving the Tribe's ordinance, was final agency action reviewable in federal district court.[9]

The States of Iowa and Nebraska (States) and the City of Council Bluffs, Iowa (City) challenged the Commission's decision, and the 8th Circuit Court of Appeals ordered the matter remanded to the Commission with instructions to reconsider the decision in accordance with its opinion. Specifically, the Commission decision was remanded to allow us, the Commission, to reconsider our determination that the Carter Lake parcel is eligible for gaming under IGRA's restored lands exception. In our original decision, we did not consider the agreement between the State of Iowa and the Tribe's outside counsel, Mr. Michael Mason (Mr. Mason or Tribe's attorney), concerning the process by which the Tribe would initiate gaming on the parcel and the public notice[10] (Corrected Notice).[11]

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[6] 25 U.S.C. § 2719(b)(1)(B)(iii).
[7] *Nebraska v. U.S. Dep't of Interior*, 625 F.3d 501, 511 (8th Cir. 2010).
[8] *See Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, 471 F. Supp. 2d 295, 324 (W.D.N.Y. 2007), amended on reconsideration in part, No. 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007) (finding that the NIGC Chair has a duty to determine whether a tribe's proposed gaming will occur on Indian lands before affirmatively approving a site-specific ordinance).
[9] 25 U.S.C. § 2714.
[10] On December 3, 2002, the BIA published a notice of intent to take the Carter Lake parcel into trust in a newspaper of general circulation in Carter Lake, Iowa but omitted certain language that the Tribe's attorney requested be included in the notice. On December 6, 2002, BIA published a corrected notice of intent to take the Carter Lake parcel into trust that included the Tribe's attorney's requested language. Council Bluffs Daily Nonpareil (Dec. 6, 2002). All references in this amendment to the published notice are to the Corrected Notice, unless otherwise indicated.
[11] *Nebraska*, 625 F.3d at 508.

In compliance with the remand order, after careful and complete review of the 8th Circuit's opinion, the agency record, the parties' submissions, and after consulting with Interior's Office of the Solicitor (Solicitor), the Commission finds and concludes that:

1) Upon review of the validity of the agreement between Iowa and the Tribe's attorney, we conclude that the agreement is invalid and does not estop the Tribe from gaming under IGRA's restored lands exception.

2) The Ponca Restoration Act does not limit the Tribe's "restored lands" to Knox and Boyd Counties, Nebraska.

3) The temporal, geographic, and factual circumstances factors of the restored lands analysis support the conclusion that the Carter Lake parcel is restored lands for a restored tribe.

Accordingly, we affirm our original conclusion that reversed the Chair's disapproval of the Tribe's site-specific gaming ordinance on the grounds that the Carter Lake parcel is restored lands for a restored tribe.

I. Procedural and Factual Background

In this amendment, we incorporate by reference the facts set forth in the original decision.[12] Given the significance of certain facts, they, along with the few new facts not previously discussed, are set out below.

The Tribe lost its federal recognition through a termination act[13] in 1962 and regained its federal recognition through the Ponca Restoration Act (PRA)[14] in 1990. On June 24, 1994, the Tribe adopted a Constitution.[15] Article IV of the Constitution created the Ponca Tribal Council, a

[12] Commission decision at 2-5.
[13] 25 U.S.C. §§ 971-980 (2012). Effective September 1, 2016, as part of a renumbering effort, the House of Representatives' Office of Law Revision Counsel removed more than 1,000 statutory provisions codified in Title 25, including the Ponca Restoration Act.
[14] 25 U.S.C. §§ 983-983h (2012) (PRA).
[15] Constitution of the Ponca Tribe of Nebraska, Certificate of Results of Election (June 28, 1994) and Certificate of Approval (July 22, 1994) ("Constitution of the Tribe"); Interior approved the Constitution of the Tribe on July 22, 1994.

nine member body, which constitutes the governing body of the Tribe.[16] Article V sets forth the Tribal Council's powers.[17]

On September 24, 1999, the Tribe purchased the Carter Lake parcel in fee, and, on January 10, 2000, it requested that Interior take the parcel into trust in light of the Tribe's desire to provide services to its members there.[18] Later that year, the Bureau of Indian Affairs (BIA) Regional Director notified relevant state and local officials in Iowa of her decision to accept the Carter Lake parcel into trust for the benefit of the Tribe.[19] Iowa and Pottawattamie County appealed that decision to the Interior Board of Indian Appeals (IBIA). The IBIA affirmed the BIA Regional Director's decision on August 7, 2002.[20]

A. Events after IBIA decision

After the IBIA's decision, the Tribe's attorney, Iowa, and Pottawattamie County reached an agreement to avoid further litigation, as Iowa could have sued Interior in federal court over the decision to accept the Carter Lake parcel into trust. Although there is no evidence to show that the agreement was reduced to writing, it was acknowledged by Iowa and the Tribe's attorney, Michael Mason, who had handled the administrative litigation before the IBIA on behalf of the Tribe.[21] On November 26, 2002, the Tribe's attorney sent the BIA an e-mail message requesting the notice of intent to take the Carter Lake parcel into trust include 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).

[16] *Id.* Art. IV § 1.
[17] *Id.* Art. V § 1.
[18] Tribe Resolution 00-01.
[19] Letter from BIA Great Plains Regional Director to Carter Lake Mayor, Iowa Governor, Pottawattamie County Supervisors (Sept. 15, 2000).
[20] *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002).
[21] *See* Affidavit of Jean M. Davis at ¶ 8 ("During the State's IBIA appeal, the Ponca Tribe of Nebraska was represented by Michael Mason of Oregon City, Oregon.") (Aug. 16, 2012).

> 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 land unless and until approved under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations under Section 20 of the Indian Gaming Regulatory Act has been obtained.[22]

In so doing, the Tribe's attorney stated: "Following is the language to append to the notice of decision for the trust acquisition for the Ponca Tribe of Nebraska in Carter Lake. This was negotiated with Assistant Attorney General Jean Davis of the State of Iowa and County Attorney Richard Crowl of Pottawattamie County, Iowa."[23] And he further added that "[o]n behalf of the Ponca Tribe of Nebraska, I request publication of the decision to take the Tribe's Carter Lake lands into trust as soon as possible."[24]

On December 6, 2002, the BIA published the Corrected Notice, which included the above language.[25]

On December 13, 2002, Iowa Assistant Attorney General Jean M. Davis wrote a letter to Mr. Mason at his office in Oregon stating, in part:

> Based upon our agreement that the lands will be used in a manner consistent with the original application and the corrected Public Notice, and not for gaming purposes, you have requested that the State of Iowa and Pottawatomie County forego judicial review and further appeals. Inasmuch as the corrected Public Notice now filed in this case contains the non-gaming purpose restriction to which we have agreed, the State of Iowa has agreed not to pursue judicial review or further appeals of the final decision of the United States Department of the Interior in this case.[26]

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[22] E-mail from Michael Mason to BIA Superintendent, Yankton Agency, re: Carter Lake settlement language (Nov. 26, 2002).
[23] *Id.*
[24] *Id.*
[25] *See supra* note 10 (Corrected Notice).
[26] Letter from Jean M. Davis, Assistant Attorney General, Iowa Department of Justice, to Michael Mason re: Ponca Tribe of Nebraska, Department of the Interior, Trust Acquisition of Carter Lake lands (Dec. 13, 2002).

Subsequently, the Tribe executed a deed conveying the Carter Lake parcel to the United States, and Interior completed the trust acquisition in February 2003.[27]

B. Gaming Ordinance Approval Process Before the NIGC

In October 2005, the Tribe, through its attorneys at the law firm Faegre and Benson, requested that the NIGC Office of General Counsel (OGC) issue an advisory legal opinion regarding the Carter Lake parcel, opining that the parcel constitutes restored lands for a restored tribe.[28] The attorneys' letter noted that "the Tribe orally agreed not to use the Carter Lake Parcel for gaming purposes provided the State and County agreed not to bring suit," citing to Ms. Davis' December 13, 2002 letter.[29] But, by invoking the restored lands exception, the letter also made clear that the Tribe did not consider itself bound by that oral agreement. This legal opinion request was subsumed by the Tribe's subsequent submission in February 2006 of a site-specific gaming ordinance for the Chair's review, which was withdrawn in May 2006.[30]

Iowa presented its views on the restored lands question to NIGC in an April 2006 letter, stating, *inter alia*, that "a serious argument may be made that the Tribe is now estopped from claiming that the restored lands exception … is applicable to the Carter Lake parcel."[31]

The Tribe's attorneys responded to this argument in a June 2006 letter, explaining that "any statements made by Michael Mason after the IBIA decision ... were not authorized by the

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[27] Warranty deed (Jan. 28, 2003); Letter from BIA Acting Great Plains Regional Director to BIA Superintendent, Yankton Agency (Feb. 10, 2003).

[28] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel for NIGC, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion (Oct. 7, 2005); *See, generally,* http://www.nigc.gov/general-counsel/nigc-office-of-the-general-counsel; http://www.nigc.gov/general-counsel/indian-lands-opinions ; and http://www.nigc.gov/images/uploads/game-opinions/SubmittingRequestforLegalOpinionDec112013.pdf

[29] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion at 9 (Oct. 7, 2005).

[30] Letter from Vanya S. Hogen, Faegre and Benson, to NIGC Chairman Hogen re: Amended & Restated Gaming Ordinance for Ponca Tribe of Nebraska (Feb. 13, 2006); Letter from Vanya S. Hogen, Faegre and Benson, to NIGC Commissioner Choney re: Amended and Restated Gaming Ordinance for Ponca Tribe of Nebraska (May 9, 2006).

[31] Letter from John R. Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Office of General Counsel, at 3 (April 21, 2006).

Tribe" and that "it is not reasonable to rely on an agreement with a governmental entity without having received confirmation that the agreement was in fact presented to and authorized by the government."[32] In August 2006, by resolution of its Tribal Council, the Tribe addressed the language in the Corrected Notice, declaring: "the Tribal Council was not aware of and did not approve the language that was added to the amended notice (the 'Acknowledgment Language'), but acknowledges that the Tribe's attorney did know about the Acknowledgment Language."[33]

Approximately a year later, in July 2007, the Tribe resubmitted the site-specific gaming ordinance for the Chair's review. The Chair disapproved that ordinance on October 22, 2007, on the grounds that the specified land was after-acquired trust land not eligible for gaming pursuant to Section 20 of IGRA, 25 U.S.C. § 2719, because, although the Tribe qualified as a restored tribe, the Carter Lake parcel did not qualify as restored lands.[34] The Tribe appealed the Chair's decision to the Commission pursuant to NIGC regulations, 25 C.F.R. § 524.1.[35] The record before the full Commission on appeal included 15 substantive submissions from the Tribe and States. The full Commission reversed the Chair's decision on December 31, 2007.

C. Litigation of Gaming Ordinance Approval

The States and the City challenged the Commission decision, suing NIGC and Interior, and the U.S. District Court for the Southern District of Iowa (District Court) reversed the decision. Its reversal was based in part on the Commission's failure to consider the agreement between Iowa and the Tribe's attorney and the Corrected Notice. The Commission and Interior

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[32] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska-Request for an Indian Lands Opinion (Supplemental Material) at 3-6 (June 15, 2006).
[33] Tribe Resolution 06-27. By a subsequent resolution in April 2007, the Tribal Council reiterated almost the exact same point. *See* Tribal Resolution 07-25 ("the Tribal Council was not aware of and did not approve the language that was added to the amended notice (the "Acknowledgement Language"), but acknowledges that the Tribe's attorney apparently did know about the Acknowledgement Language).
[34] NIGC Chairman's Disapproval Memorandum (Chair Disapproval).
[35] NIGC regulations concerning appeals from disapprovals of gaming ordinances were updated in 2012 and now can be found in 25 C.F.R. part 582.

appealed, and the 8th Circuit held that "the absence of a determination on the record as to the validity of the agreement entered into between [] Iowa and the Tribe necessitates a remand."[36] Specifically, the 8th Circuit found that "[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."[37] Additionally, the 8th Circuit remanded the question of whether the PRA[38] limits the Tribe's "restored lands" under IGRA to Knox and Boyd counties in Nebraska, indicating that Interior should make this determination. The 8th Circuit remanded the case to the District Court with instructions to remand it further to the Commission for reconsideration of its restored lands analysis in accordance with the court's opinion.[39] On January 24, 2011, the District Court issued its remand order, directing the Commission to reconsider its restored lands analysis in accordance with the 8th Circuit's opinion and directing that "[r]econsideration should include all of the issues analyzed and explained in the Court of Appeals majority opinion."[40]

D. Remand Process Before the NIGC

For purposes of considering the issues required by the courts, NIGC and Interior set out two separate briefing schedules for the Tribe, the States, and the City. First, the Solicitor and NIGC invited the Tribe, States, and City to submit legal memoranda and supporting materials on the threshold question of whether the PRA limits the Tribe's restored lands to Knox and Boyd Counties in Nebraska.[41] On that issue, opening and response submissions were received from the

[36] *Nebraska*, 625 F.3d at 511.
[37] *Id.* at 512.
[38] 25 U.S.C. §§ 983-983h.
[39] *Nebraska* , 625 F.3d at 513.
[40] *Nebraska v. U.S. Dept. of the Interior*, No. 1-08-cv-6 (S.D. Iowa).
[41] Letter from Interior Solicitor and NIGC General Counsel to all parties (Feb. 15, 2011).

Tribe[42] and from the States and City.[43] Next, the Commission ordered briefing and requested evidence from the parties on three issues: (1) the authority of the Tribe's attorney, Mr. Michael Mason, to enter the agreement on behalf of the Tribe; (2) the legal effect and weight of the agreement as included in the Corrected Notice; and (3) the legal effect and weight of the Corrected Notice.[44] In response, we received opening and response submissions from all the parties.[45]

After carefully considering the parties' submissions along with the other aforementioned materials described above, NIGC followed the process outlined in the 8th Circuit opinion and the District Court order and consulted with the Department of the Interior Solicitor's Office on this decision.

II. The Agreement is Invalid and the Tribe is Not Estopped from Claiming the Carter Lake Parcel Meets IGRA's Restored Lands Exception.

As explained above, the 8th Circuit held that remand was necessary because there was no determination as to the validity of the agreement between Iowa and the Tribe's attorney.[46] Accordingly, we must determine whether the agreement is valid.[47] If it is, we must assess the

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[42] Memorandum from Tribe to Interior and NIGC re: the PRA (Mar. 17, 2011); Letter from James T. Meggesto, Akin Gump, to Jeffrey Nelson, Office of Solicitor, Interior and NIGC General Counsel Larry Roberts, re: *Nebraska v. U.S. Dept. of the Interior,* No, 1-08-CV-6 (S.D. Iowa) (April 25, 2011).

[43] Consolidated Response from the States of Iowa and Nebraska (States), and City of Council Bluffs, Iowa (City), submitted to Interior (Mar. 15, 2011); Letter from States to Solicitor (April 6, 2011).

[44] NIGC Commission Briefing Order (May 21, 2012).

[45] Tribe's Legal Memorandum Responding to the May 21, 2012 Request for Briefing (July 20, 2012); Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order (July 20, 2012); Tribe's Response to the Consolidated Brief of the States and City (Aug. 20, 2012); Consolidated Response Brief of the States and City (Aug. 20, 2012).

[46] *Nebraska*, 625 F.3d at 511.

[47] As an aside, it is important to note that IGRA does not provide NIGC or Interior with the authority or jurisdiction to hear breach of contract claims or issue decisions on them. NIGC's jurisdiction is rooted in its authority to implement the provisions of IGRA. 25 U.S.C. §§ 2712(b)(2); 2706(b)(10). In addition to Interior's authority as to Indian lands and the § 2719 exceptions, it has authority and duties as to tribal-state compacts, Class III procedures, and tribal revenue allocation plans. 25 U.S.C. §§ 2703(4); 2710(b)(3), (d)(3)(B), (d)(7)(vii); 2719. The agencies cannot expand their jurisdiction to include the authority to arbitrate agreements between tribes and third parties, because federal agencies do not have the power to arbitrate disputes or rule on matters outside the jurisdiction established by their enabling acts. *American Vanguard Corp v. Jackson*, 803 F. Supp. 2d 8, 12 (D.D.C. 2011) (citing *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132–33 (2000) ("A basic prerequisite to any act by a

impact of the agreement for purposes of the factual circumstances factor of the restored lands analysis. We conclude that the agreement included in the Corrected Notice was repudiated by the Tribe in 2005 and therefore the Tribe is not estopped from claiming the Carter Lake parcel meets the restored lands exception to IGRA's prohibition against gaming on land taken into trust after October 19, 1988.

A. The Tribe's Attorney Lacks Authority to Bind the Tribe

i. Parties' arguments

The Tribe argues that any agreement by Mr. Mason is invalid because he lacked authority to enter into it on the Tribe's behalf.[48] The Tribe posits that "[p]arties seeking to enforce an agreement against a governmental entity have the burden of demonstrating affirmatively that the agent who purported to bind the government had actual authority to do so."[49] According to the Tribe, "[l]ong-settled law establishes that governments – federal, state and tribal – are not and cannot be bound in perpetuity by the unauthorized acts of their agents."[50] And, as a matter of

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federal agency is that the agency possesses actual legal authority to undertake such action.")); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 158 (D.D.C. 2000) ("In all its actions, an agency is constrained by the statutory authority given by Congress."); *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139-40 (D.C. Cir. 2006) (*quoting, in part, MCI Telecomms. Corp. v. AT & T,* 512 U.S. 218, 231 n. 4 (1994) - "Agencies are therefore 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'"). Thus, we agree with the States' assertion that "[t]he central issue [in the remand]. . . is not whether to 'enforce' the agreement – that question appears to be beyond the power of the NIGC's jurisdictional mandate – but what import to give it in this proceeding." July 20, 2012 Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order.

[48] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Request for an Indian Lands Opinion (Supplemental Material) at 4-5 (June 15, 2006) ("Michael Mason lacked any authority to enter into a settlement on behalf of the Tribe"); Letter from Michael G. Rossetti and James T. Meggesto, Akin Gump, to NIGC Chairman Hogen, re: The Ponca Tribe of Nebraska - Request for an Indian Lands Opinion at 30 (July 23, 2007) (no agreement exists); Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 18 (no agreement with Tribe exists), at 31-33 (attorney acted beyond scope of his authority given the limitations set forth in tribal law and express reservations to the Tribal Council in same); Tribe's Aug. 20, 2012 Response to the Consolidated Brief of the States and City at 13 (no valid agreement exists).

[49] Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 9-11.

[50] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Amended Gaming Ordinance/Request for Indian Lands Opinion (Supplemental Material) at 12 (July 14, 2006) (citing Constitution of the Tribe, Art. V § 1(a)); Tribe's July 20, 2012 Legal Memorandum

tribal law, the Tribe's Constitution bestows the actual authority to enter into agreements with other governments on the governing body, the Tribal Council.[51] Thus, the Tribe claims that the agreement contravenes tribal law.[52]

Since the beginning of this matter, the Tribe has put forward an agreement with the City of Carter Lake as an illustration of how it made agreements with other governments during the time period at issue.[53] The Tribal Council passed Resolution 00-29 on April 17, 2000, authorizing a jurisdictional and services agreement with the City of Carter Lake for land that was potentially being taken into trust for the Tribe. The resolution explicitly stated that the "business affairs [of the Tribe] are conducted by the Tribal Council," and references the provision of the Tribal Constitution that authorizes the Tribal Council to negotiate and contract with other governments.[54] Further, the resolution announced that "[r]epresentatives of the Tribal Council and the City have negotiated an agreement on services and jurisdiction, including payments in lieu of taxes for the Property, and concurrent jurisdiction over disputes."[55] Next, the Tribal Council resolved that:

> [T]he Ponca Tribe approves and enters into the Cooperation and Jurisdictional Agreement with the City of Carter Lake ....[56] [T]he Tribal Council authorizes the

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Responding to the May 21, 2012 Request for Briefing at 10-14, 31-33; Tribe's Aug. 20, 2012 Response to the Consolidated Brief of the States and City at 3, 4-5, 12.

[51] Tribe's Aug. 20, 2012 Response to the Consolidated Brief of the States and City at 3 4, 5, 6, 12-14, 31-33.

[52] *Id.* at 4 (agreement contravened Tribal law, Constitution of the Tribe, Art. V § 1(a)), 6 (the agreement violates the Constitutional provision "vesting Tribal Council with the *exclusive* authority to 'negotiate and contract with the Federal State and Local governments on behalf of the Tribe.'"), 12 (the agreement cannot bind the Tribe, as it was made without authority and "thus contrary to Tribal law"); *see also* Letter from Michael G. Rossetti and James T. Meggesto, Akin Gump, to NIGC Chairman Hogen, re: The Ponca Tribe of Nebraska- Request for an Indian Lands Opinion at 30 (July 23, 2007) (Corrected Notice not lawfully authorized).

[53] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Request for an Indian Lands Opinion (Supplemental Material) at 4 (June 15, 2006); Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 18-19.

[54] Tribe Resolution 00-29 at 1 (April 17, 2000); *see also* Cooperation and Jurisdictional Agreement between the Tribe and the City of Carter Lake (Apr. 27, 2000).

[55] *Id.*

[56] *Id.*

Tribal Council Chairman to negotiate minor changes to the Agreement to carry out this Resolution.[57]

The States responded to the Tribe's legal arguments regarding the limitations on government agents' ability to bind their principals and the Tribe's reliance on cases regarding tribal officials' limitations based upon unequivocal language in tribal constitutions, by insisting that such cases are irrelevant in this context.[58] The States also put forward substantive arguments and evidence regarding the actual authority and apparent authority of the Tribe's attorney.

Iowa argued that because the Tribe's attorney's actions were made in the context of litigation, a "pending dispute" between it and the Tribe, the Tribe may be bound by its attorney's agreement even if it was made without express actual authority since the Tribe failed to timely repudiate it.[59] In this regard, Iowa points out that the Corrected Notice, detailing the agreement, was published in a paper of general circulation, but "despite wide public dissemination of Mr. Mason's representations, only now [approximately 3 ½ years later] is the tribe attempting to repudiate" such actions and has failed to directly notify Iowa of Mr. Mason's "purportedly ultra vires actions."[60]

The States contend that the Tribe's attorney in fact had implied actual authority or apparent authority to enter into the agreement.[61] Specifically, the States posit that because "Mr. Mason represented the Tribe throughout the IBIA appeal and continued to represent the Tribe thereafter when the BIA and the Tribe knew that Iowa intended to challenge the trust acquisition

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[57] *Id.* at 2.
[58] Consolidated Response Brief of the States and City at 8 (Aug. 20, 2012); *see also id.* fn. 8.
[59] Letter from John Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Senior Attorney, re: Pending "Indian lands" decision for the Ponca Tribe in Nebraska in Carter Lake, Pottawattamie, Iowa, at 3-4 (July 19, 2006) (relying on and quoting *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089 (Ct. Cl. 1981)); *see also* Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 13 (July 20, 2012).
[60] *Id.* at 4.
[61] Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order (July 20, 2012) at 13-15; Consolidated Response Brief of the States and City at 3-10 (Aug. 20, 2012).

in federal court," he had implied or apparent authority to enter into an agreement or stipulation regarding the Carter Lake parcel.[62] In support of this argument, the States rely on and quote *Pueblo of Santo Domingo v. United States*,[63] for the proposition that "[a]n attorney employed for the purposes of litigation has the general implied or apparent authority to enter into such stipulations or agreements, in connection with the conduct of the litigation, as appears to be necessary or expedient for the advancement of his client's interest or to accomplishment of the purpose for which the attorney was employed."[64] Furthermore, the States assert that the litigation context also provides "a strong rebuttable presumption that the acts of [the Tribe's] attorney are within the scope of his employment" unless the Tribe can show that Iowa knew of relevant restrictions on his authority.[65] And, here, nothing in the record shows that Iowa was on notice in 2002 through 2003 of "any alleged limitation on the authority" of the Tribe's attorney, certainly not the Tribe's belated 2006 tribal resolution disclaiming the knowledge or approval of the language in the Corrected Notice.[66]

Finally, the States claim that Mr. Mason's communications with Ms. Davis, Iowa's attorney; Interior; and the public demonstrate that he possessed apparent authority.[67] Specifically, the communications with Iowa's counsel were detailed in affidavit by Ms. Davis, testifying:

> In the fall of 2002, I had multiple discussions with Mr. Mason concerning a possible negotiated resolution of the pending Carter Lake lands into trust issue. In a telephone conversation held September 13, 2002, Mr. Mason advised me that the Tribe had instructed the BIA to delay publication of the required public notice … so the parties would have time to reach a negotiated settlement. … On behalf of our respective clients,

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[62] Consolidated Response Brief of the States and City at 14 (Aug. 20, 2012).
[63] 647 F.2d 1087 (Ct. Cl. 1981).
[64] *Id.* at 1088–89.
[65] Consolidated Response Brief of the States and City at 15 (Aug. 20, 2012); *id.* (quoting *Pueblo of Santo Domingo v. United States*, 647 F.2d at 1088-89).
[66] Consolidated Response Brief of the States and City at 15 (Aug. 20, 2012).
[67] *Id.* at 8.

> Mr. Mason and I ultimately negotiated an [oral] agreement … [P]rior to the conclusion of the negotiations, I directly asked Mr. Mason whether he had the authority to bind the Tribe to the terms of the proposed settlement and he answered that he did.[68]

In addition, in the affidavit, Ms. Davis referenced a September 2002 article in the *Omaha World Herald* concerning the potential judicial review of the IBIA's decision which quoted Mr. Mason as saying: "We're hoping to resolve this and clarify that this is not an acquisition for gaming."[69]

ii. *Authority to Enter into an Agreement on Behalf of a Sovereign*

Our analysis begins with a discussion of Mr. Mason's authority to bind the Tribe to an agreement with the State. In doing so, the Commission is mindful of the admonition of the Court of Claims:

> [T]he court may not substitute itself unconditionally for the executive in granting authority to an unauthorized person. The most the court can do is interpret the limited authority of an authorized person in a broader manner than ordinarily would be the case. As a predicate to a finding of implied actual authority, there must be, at the least, some limited, related authority upon which the court can "administer" the law so as not to ignore the policies and decisions of those persons charged with managing [the government]. The court believes that *Landau* and the theory of implied actual authority is of limited application, and was not intended to repeal the long established rule that, when dealing with the government, only government agents with actual authority can make a contract, express or implied.[70]

As discussed above, Iowa appealed a decision by the Bureau of Indian Affairs to accept the Carter Lake parcel into trust. Although not a party[71] to the appeal, the Tribe retained Mr. Mason to represent the Tribe's interests in the matter.[72] Several months after the IBIA ruled in the BIA's favor, Mr. Mason entered into the agreement at issue here in an attempt to prevent further litigation by the State against Interior. Although the agreement did not settle litigation,

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[68] Affidavit of Jean M. Davis at ¶¶ 8, 9, 11-12, 14, *supra* note 21.
[69] *Id.* at ¶ 14 (*attaching, Omaha World Herald,* "Carter Lake land owned by tribe won't become casino" (Sept. 29, 2002)).
[70] *California Sand & Gravel, Inc. v. United States*, 22 Cl. Ct. 19, 27 (1990), *aff'd,* 937 F.2d 624 (Fed. Cir. 1991).
[71] The Tribe was an "interested party" in the IBIA proceeding. *See* Brief of Tribe, Board of Indian Appeals, Interior (April 30, 2001). Interior regulations provide that an "interested party" "means any person whose interests could be adversely affected by a decision in an appeal." 25 C.F.R. § 2.2.
[72] Tribe's July 20, 2012 Legal Memorandum Responding to the May 21, 2012 Request for Briefing at 3.

since no litigation had been filed and the Tribe was not a party to the IBIA proceedings, it did resolve the State's concern regarding the trust acquisition. The question that must be addressed here, though, is whether Mr. Mason had the authority to enter the agreement.

In their briefs, the States underscore that "Mr. Mason's communications with Iowa's counsel, with the BIA and with the public, as well as the record as a whole, indisputably show that he had apparent authority."[73] Specifically, the communications with Iowa's counsel were detailed in the affidavit submitted by the counsel, who testified that Mr. Mason "advised [] that the Tribe had instructed the BIA to delay publication of the required public notice … so the parties would have time to reach a negotiated settlement;" and that "he had the authority to bind the Tribe to the terms of the proposed settlement."[74] As for the BIA, Mr. Mason provided the agency with the proposed language for the Corrected Notice, representing that he negotiated the language with Iowa's counsel,[75] and requesting, explicitly on behalf of the Tribe, publication of the decision to take the Tribe's Carter Lake parcel into trust.[76]And, the communications with the public involve a September 2002 article in the *Omaha World Herald* concerning the potential judicial review of the IBIA's decision, in which Mr. Mason is quoted as saying: "We're hoping to resolve this and clarify that this is not an acquisition for gaming."[77] Additionally, Iowa suggests that Mr. Mason's actions and the Tribe's be assessed by actions of a subsequent attorney for the Tribe, who sought to obtain consent from Iowa to a two-part determination to

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[73] Consolidated Response Brief of the States and City at 8 (Aug. 20, 2012).
[74] Affidavit of Jean M. Davis at ¶¶ 9, 14, *supra* note 21.
[75] E-mail from Michael Mason to BIA Superintendent, Yankton Agency, re: Carter Lake settlement language (Nov. 26, 2002).
[76] *Id.*
[77] Affidavit of Jean M. Davis at ¶ 14, *supra* note 21 (*attaching, Omaha World Herald,* "Carter Lake land owned by tribe won't become casino" (Sept. 29, 2002)).

allow gaming on the Carter Lake parcel and, thus, "appears to have" implicitly acknowledged Mr. Mason's agreement.[78]

Although Mr. Mason may have had apparent authority to take certain actions when representing the Tribe in a court or administrative proceeding, such as filing of pleadings, propounding of discovery, waiver of trial objections, and appearances at merits hearings, none of those activities are at issue here. Notably, the agreement between Mr. Mason and Iowa was not entered as part of a court or administrative proceeding.[79] But, even more to the point here, the States' contentions overlook the fact that they were dealing with another sovereign – the Ponca Tribe of Nebraska. Due to the Tribe's status as a sovereign government,[80] the Commission will apply the same standards to the Tribe that apply to other sovereigns, such as state and federal governments.[81] Doing so leads to the clear conclusion that to bind a sovereign to a contract or agreement, the government agent needs to possess actual authority to enter the agreement.[82]

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[78] Letter from John Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Senior Attorney, re: Pending "Indian lands" decision for the Ponca Tribe in Nebraska in Carter Lake, Pottawattamie, Iowa, at 4 (July 19, 2006).

[79] Letter from Iowa Attorney General to NIGC Senior Attorney at 3 (Apr. 21, 2006) (acknowledging that agreement occurred after conclusion of IBIA proceeding.). The IBIA issued its decision on August 7, 2002, and Ms. Davis acknowledged her agreement with Mr. Mason in a letter, dated December 13, 2002. *See* Letter from Jean M. Davis, Assistant Attorney General, Iowa Department of Justice, to Michael Mason re: Ponca Tribe of Nebraska, Department of the Interior, Trust Acquisition of Carter Lake lands (Dec. 13, 2002).

[80] *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L.Ed. 25 (1831) ("Indian tribes . . . exercise 'inherent sovereign authority.'"); *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (finding that Tribes are "quasi-sovereign tribal entities"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) ("As we observed in *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 711, 42 L.Ed.2d 706 (1975)(Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' They 'are unique aggregations possessing attributes of sovereignty over both their members and their territory.'") (internal citations omitted).

[81] *See, e.g., CDST-Gaming I, LLC v. Comanche Nation*, No. CIV-08-A12, Court of Indian Appeals, Southern Plains Region, Anadarko, Okla., at 8-9 (May 15, 2017) ("Tribe is a sovereign government, and law applicable to governments on public contracts, not private commercial dealings, controls. .... In an action involving contract formation, the party asserting the validity of the contract bears the burden that the contract was made by a person having authority to bind the government.").

[82] *See Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997); *Negron Gaztambide v. Hernandez Torres*, 145 F.3d 410, 412, 416 (1st Cir. 1998); *Tracy v. United States*, 55 Fed. Cl. 679, 682 (2003); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); *Hachikian v. F.D.I.C.*, 96 F.3d 502, 505 (1st Cir. 1996), *abrogated by Hardemon v. City of Boston*, No. 97-2010, 1998 WL 148382 (1st Cir. Apr. 6, 1998); *Rock Island, Ark. & La. R.R. Co. v. United States,* 254 U.S. 141, 143(1920) (Holmes, J.); *CDST-Gaming I, LLC v. Comanche Nation*, No. CIV-08-A12, Court of Indian Appeals, Southern Plains Region, Anadarko, Okla. (May 15, 2017); *See, e.g., Moore v. Beaufort County,* 936 F.2d 159, 163 (4th Cir.1991).

Even in the context of the government being represented by attorneys, the attorneys still need actual authority to bind the sovereign.[83] In that regard, the States misplace reliance[84] on *Pueblo of Santo Domingo v. United States*.[85] The Court of Claims in that case acknowledged that "[u]nless he has been specifically authorized to do so (i. e., not merely impliedly or apparently), an attorney may not by stipulation or agreement, surrender any substantial rights of his client."[86]

Actual authority may be express or implied.[87] "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms."[88] Implied actual authority "is restricted to situations where 'such authority is considered to be an integral part of the duties assigned to a government employee.'"[89] Further, "[c]ontracting authority is integral to a government employee's duties when the government employee could not perform his or her assigned tasks without such authority and the relevant agency regulation does not grant such authority to other [] employees."[90]

As the party attempting to bind the sovereign Tribe to the terms of the agreement, the burden is on the States to demonstrate that the Tribe's attorney had express or implied actual authority to enter into the agreement.[91] The record before us does not contain any materials

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[83] *Margalli-Olvera v. I.N.S.*, 43 F.3d 345, 353 (8th Cir. 1994); *Negron Gaztambide*, 145 F.3d at 412; *Moore,* 936 F.2d at 163.
[84] Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 14-15 (July 20, 2012).
[85] 647 F.2d 1087, 1089 (Ct. Cl. 1981).
[86] *Id.* at 1088.
[87] *Anderson v. United States,* 344 F.3d 1343, 1353 n. 3 (Fed.Cir. 2003).
[88] *Tracy,* 55 Fed. Cl. at 682.
[89] *Aboo v. United States*, 86 Fed. Cl. 618, 627, *aff'd*, 347 F. App'x 581 (Fed. Cir. 2009) (citing *H. Landau & Co. v. United States,* 886 F.2d 322, 324 (Fed. Cir. 1989).
[90] *Liberty Ammunition, Inc. v. United States*, 119 Fed. Cl. 368, 404 (2014) (quoting *Flexfab, LLC v. United States,* 62 Fed. Cl. 139, 148 (2004)), *aff'd,* 424 F.3d 1254 (Fed. Cir.2005).
[91] *Negron Gaztambide*, 145 F.3d at 416; *Contractor Ser., Inc. v. N.L.R.B.*, No. 3-00-10034, 2000 WL 1780461, at *6 (S.D. Iowa Oct. 11, 2000); *City of El Centro*, 922 F.2d at 821; *Trauma Serv. Grp.*, 104 F.3d at 1327.

demonstrating that the Tribe's attorney had express or implied actual authority to bind the Tribe to the agreement.

As to express actual authority, Article V, § 1(a) of the Tribe's Constitution, clearly authorizes the Tribal Council "to negotiate and contract with the Federal, State, and local governments on behalf of the Tribe."[92] The record reflects that during the time period of 1999 through 2001, the Tribe entered into three agreements with other governments - the cities of Lincoln and Crofton, Nebraska, and Carter Lake, Iowa. The 1999 and 2001 agreements with the cities of Lincoln and Crofton explicitly acknowledge the Tribe's Constitution, Article V § 1(a), as its authority for entering the agreement.[93] The Tribal Chairman signed both agreements. As discussed above, the Tribe has continuously put forward a 2000 agreement with the City of Carter Lake as illustrative of its process for entering into inter-governmental agreements. That agreement noted that the Tribe authorized its Chairman to execute the agreement via a resolution of its Tribal Council.[94] And, the corresponding Tribal Council resolution declares: "[t]he Constitution provides the express power to the Tribal Council to negotiate and contract with local governments on behalf of the Tribe."[95] Unlike the agreement at issue here, these resolutions clearly demonstrate express actual authority.

Additionally, nothing in the Tribe's Constitution authorizes a private attorney retained for a specific matter to enter into agreements on behalf of the Tribe. The Tribe's Constitution grants the Tribal Council the authority to "employ counsel for the protection and advancement of the

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[92] Constitution of the Tribe, Article V, § 1(a).
[93] *See* Agreement between the Tribe and City of Lincoln, Nebraska (May 28, 1999); Cooperation and Jurisdictional Agreement of the Tribe and City of Crofton, Nebraska (Oct. 24, 2001).
[94] Cooperation and Jurisdictional Agreement between the Tribe and the City of Carter Lake (Apr. 27, 2000); *see also* Tribe Resolution 00-29 (April 17, 2000) ("the Tribal Council authorizes the Tribal Council Chairman to negotiate minor changes to carry out this Resolution.").
[95] Tribe Resolution 00-29.

rights of the Tribe."[96] While the Tribal Council could have tasked Mr. Mason with negotiating with Iowa following the IBIA's decision, it is implausible that the Tribal Council would surrender to outside counsel the ultimate decision whether to enter into an agreement. Further, the record does not contain any evidence of such an extraordinary delegation of authority from the Tribal Council to Mr. Mason.[97]

Likewise, Mr. Mason did not possess implied actual authority to enter into the agreement. As set forth above, implied actual authority is limited to situations where the authority is "an integral part of the duties assigned to a government employee,"[98] meaning the government employee could not perform his assigned tasks without such authority. Mr. Mason was not a "government employee," but a private attorney retained to represent the Tribe for a specific matter.[99]

The doctrine of implied actual authority does not ordinarily extend to government contractors.[100] In addition, negotiating an agreement with Iowa after the conclusion of the IBIA proceeding cannot fairly be characterized as an integral part of his duties to represent the Tribe in

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[96] Constitution of the Tribe, Article V, § 1(b).

[97] *See, e.g., Humlen v. United States*, 49 Fed. Cl. 497, 504 (2001) ("Without a formal delegation of contracting authority, such designation is not enough to give a contracting officer's 'authorized representative' the requisite authority to bind the Government in contract."); *see also United States v. Lua*, 990 F. Supp. 704, 714 (N.D. Iowa 1998) ("The court [] concludes that Kozak has failed to establish that the FBI agents assigned to the [] investigation possessed actual authority to make an agreement with Kozak for her cooperation. Accordingly, Kozak is not entitled to specific performance of the alleged cooperation agreement because Kozak has failed to establish that the FBI agents were authorized to make promises to obtain defendant's cooperation. Absent such authority, there is no delegation of federal authority in the record.").

[98] *Aboo*, 86 Fed. Cl. at 627 (citing *H. Landau & Co.*, 886 F.2d at 324 ; *see also Cruz-Pagan v. United States*, 35 Fed. Cl. 59, 63 (1996) (finding that "integral" means "necessary or essential" to the employee's efficient performance of those duties); *United States v. Lilly*, 810 F.3d 1205, 1211 (10th Cir. 2016) ("integral" for purposes of implied actual authority requires that "the authority [] be incidental to some other express grant of authority." "Because implied actual authority emanates from an agent's core competency, the agent must first possess express actual authority in the subject area at question before implied authority may be invoked." (internal citations omitted)).

[99] Mr. Mason was a contractor, who owned his own legal office in Oregon and worked from it. *See* Affidavit of Jean M. Davis at ¶ 8, *supra* note 21 ("During the State's IBIA appeal, the Ponca Tribe of Nebraska was represented by Michael Mason of Oregon City, Oregon."); Letter from Jean M. Davis, Assistant Attorney General, Iowa Department of Justice, to Michael Mason re: Ponca Tribe of Nebraska, Department of the Interior, Trust Acquisition of Carter Lake lands (Dec. 13, 2002).

[100] *Liberty Ammunition, Inc.*, 119 Fed. Cl. at 404, 405(quoting *Flexfab, LLC,* 62 Fed. Cl. at 148); *see also Peninsula Grp. Capital Corp. v. United States,* 93 Fed. Cl. 720, 731 (2010).

the IBIA proceeding. Moreover, even if Mr. Mason had some post-proceeding authority to negotiate, entering into an agreement with another government cannot be an integral part of his duties. As a general matter, and as the Tribe's Constitution itself makes clear, the decision to enter into an agreement lies with the client, the Tribal Council.

That Mr. Mason might have believed he had the authority to bind the Tribe is of no consequence here. Express or implied actual authority to bind the sovereign must exist "even when the government agents themselves may have been unaware of the limitations on their authority."[101] Thus, the record contains no evidence that Mr. Mason had express or implied actual authority to enter the agreement.

iii. Any party entering a contract with a federally recognized Indian Tribe accepts the risk of correctly ascertaining the authority of the agents who purport to act for the Indian Tribe.

By entering into an agreement with an agent of a sovereign tribe, the State accepted the risk of inaccurately assessing the agent's authority to bind the Tribe.[102] In that regard, courts have held:

> In order to create a binding contract with the federal government, the government's representative must have actual authority to enter into the contract. Actual authority may be express or implied. A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms. Implied actual authority is restricted to situations where such authority is considered to be an integral part of the duties assigned to a government employee. *Anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.*[103]

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[101] *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (citing, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *United States v. Stewart*, 311 U.S. 60, 70 (1940) and *In re Floyd Acceptances*, 19 L.Ed. 169 (1868); *See also, Contractor Ser., Inc. v. N.L.R.B.*, No. 3-00-10034, 2000 WL 1780461, at *6 (S.D. Iowa Oct. 11, 2000).

[102] *Fed. Crop Ins. Corp.*, 332 U.S. at 384; *Marco Development Corp. v. City of Cedar Falls*, 473 N.W. 2d 41, 43 (Iowa 1991).

[103] *Jumah v. United States*, 90 Fed. Cl. 603, 612 (2009) *aff'd,* 385 F. App'x. 987 (Fed. Cir. 2010) (internal citations omitted) (emphasis added) (also citing *City of El Centro,* 922 F.2d at 820; *accord Harrison v. United States*, 120

The 8th Circuit has explicitly adopted this principle.[104] Even if the government agent is unaware of the limitations of his authority, the onus is still on the party contracting with the Federal Government to determine the true bounds of the agent's authority.[105] An example of this is *Contractor Services, Inc. v. National Labor Relations Board*, where the U.S. District Court in the Southern District of Iowa granted summary judgment in favor of the Board (NLRB) when a company claimed that an NLRB employee had entered into a settlement agreement with the company but the company failed to present evidence of its efforts to confirm the employee's authority. The court explained:

> Perhaps most importantly, however, CSI has failed to show that Mr. Palmer was authorized to make an offer of settlement on behalf of the NLRB. As held by the Federal Circuit in *Trauma Service Group*, the burden is on the party proposing to enter into an agreement with the United States to ensure the requisite authority exists, "even when the Government agents themselves may have been unaware of the limitations on their authority."*Trauma Service Group*, 104 F.3d 1321. CSI does not allege it took steps to ensure Mr. Palmer had obtained any authority to offer a settlement to CSI .... In short, even if Mr. Palmer had represented to CSI that he had authority to make the purported offer, it remained CSI's burden to confirm such authority existed. *Id.* Absent evidence suggesting CSI made any attempt to confirm Mr. Palmer's authority, the Court finds summary judgment appropriate.[106]

> These principles also are well founded under Iowa law. In Iowa:

> One who contracts with a city is bound at his peril to know the authority of the officers with whom he deals, and a contract unlawful for lack of authority, although entered in good faith, creates no liability on the part of the city to pay for it, even in *quantum meruit.*[107]

Fed. Cl. 533, 546 (2015) and *Council for Tribal Employment Rights v. United States*, 112 Fed. Cl. 231, 243 (2013) *aff'd,* 556 F. App'x 965 (Fed. Cir. 2014). *Liberty Ammunition, Inc.*, 119 Fed. Cl. at 404, 405; *See Peninsula Grp. Capital Corp.*, 93 Fed. Cl. at 731.

[104] *United States v. Hoffart*, 256 F.2d 186, 192 (8th Cir. 1958); *see also Trauma Serv. Grp.*, 104 F.3d at 1325; *City of El Centro,* 922 F.2d at 820; *Jumah*, 90 Fed. Cl. at 612.

[105] *Federal Crop Ins. Corp.*, 332 U.S. at 384.

[106] *Contractor Ser., Inc. v. N.L.R.B.*, No. 3-00-10034, 2000 WL 1780461, at *6 (S.D. Iowa Oct. 11, 2000).

[107] *Marco Dev. Corp.*, 473 N.W.2d at 43(citing Am.Jur.2d *Municipal Corporations* § 504, at 557 (1971)).

Illustrative of this rule is *Madrid Lumber Co. v. Boone County*.[108] In this case, the Supreme Court of Iowa addressed a situation somewhat similar to the events at issue in this remand. A county Board of Supervisors accepted a proposal for work on a county home. Plaintiffs claimed that the Defendant County was estopped to deny liability under the oral agreement.[109] The Iowa Supreme Court disagreed and found:

> It is now well established that counties and municipal corporations, being creatures of the legislature, have such powers to contract and only such powers as the legislature grants them. When the legislature permits the exercise of power in a given case only in accordance with imposed restrictions, a contract entered into in violation thereof is not merely voidable but void. … When acting without authority or beyond its powers, the city council cannot estop the city, for, no matter what its representations, a party dealing with it is bound to take notice of all statutory limitations upon its authority.[110]

As to the present circumstances, when Iowa negotiated with Mr. Mason, it was certainly well aware of the unique nature of contracting with federally recognized Indian tribes. As discussed above, Iowa has entered into a number of agreements with other tribes in the state, including, as the Tribe points out, gaming compacts, as well as agreements related to the Indian Child Welfare Act.[111] And, even the Iowa legislature recognizes in its statutory law that agreements are entered into with the governing bodies of Indian tribes.[112] Therefore, the burden was on Iowa to confirm that Mr. Mason had the requisite actual authority to negotiate and enter into the purported agreement.

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[108] 55 Iowa 380, 381 (1963).
[109] *Id.* at 381.
[110] *Id.* at 383-384 (internal citations omitted).
[111] Tribe's July 20, 2012 Legal Memorandum Responding to the May 12, 2012 Request for Briefing at 16-17 (referencing compacts between Iowa and various tribes); *See* NIGC website – Compacts between Iowa and tribes - http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#Iowa , including approved compacts with the Omaha Tribe in 1992 & 1995, the Sac & Fox of the Mississippi in Iowa in 1995, and the Winnebago Tribe in 1995 & 1998; Tribal/State Agreement for Funding Tribal Foster Care Placements and Other Child Welfare Services Matters, between the Sac and Fox Tribe of the Mississippi in Iowa and Iowa (July 19, 2006).
[112] Iowa Code Ann. § 421.47 ("The department and the governing body of an Indian tribe may enter into an agreement to provide for the collection and distribution or refund by the department within Indian country of any tax or fee imposed by the state and administered by the department.").

The plain language of the Tribe's Constitution bestows express actual authority to enter into agreements with other governments on the Tribal Council, and the State has failed to meet its burden to demonstrate that Mr. Mason had express or implied actual authority to enter into the agreement on the Tribe's behalf. Thus, in accordance with the above analysis, we find – for the sole and narrow purpose of this remand – that the alleged agreement between Iowa and Mr. Mason is invalid.

B. Institutional Ratification: The Record Indicates that the Tribe Ratified the Unauthorized Agreement but also Timely Repudiated its Ratification in 2005.

The question then becomes whether the Tribe subsequently ratified the invalid agreement and is therefore bound by it. The States do not specifically argue the theory of institutional ratification but do contend the publication of the Corrected Notice constitutes the Tribe's acknowledgement of the agreement and communication "to the world" concerning it.[113] The Tribe did not, nor was it asked to, brief this argument.

"[I]nstitutional ratification may serve to validate an otherwise unauthorized contract."[114] Such ratification "may occur when the Government seeks and receives benefits from an unauthorized contract. It requires the involvement of government officials who have contracting authority and whose actions demonstrate 'clear acceptance of an unauthorized agreement.'"[115] "For an unauthorized promise to be binding under the doctrine of institutional ratification, an official with the power to ratify must know the material facts relating to the acceptance of the

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[113] State of Iowa's Request to Participate in Appeal and Written Submission at 6 (Nov. 29, 2007); Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 7 (July 20, 2012).
[114] *Home Fed. Bank of Tennessee, F.S.B. v. United States*, 57 Fed. Cl. 676, 689 (2003); *See also Digicon Corp. v. United States,* 56 Fed.Cl. 425, 426 (2003).
[115] *BioFunction, LLC v. United States*, 92 Fed. Cl. 167, 174 (2010) (*quoting, in part, Strickland v. United States,* 382 F.Supp.2d 1334, 1348 (M.D.Fl.2005)); *See also Doe v. United States*, 58 Fed. Cl. 479, 487-88 (2003), *aff'd*, 112 F. App'x 54 (Fed. Cir. 2004) ("Ratification requires knowing acquiescence to an unauthorized agreement"; "Plaintiff cannot show that there was *active* acceptance of his alleged contract").

benefits and must acquiesce in their acceptance."[116] These officials must "have actual or constructive knowledge of the unauthorized acts"[117] and fully know the material facts,[118] meaning the content of the unauthorized contract.[119]

As the U.S. Supreme Court has explained:

> Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event.... If there be want of it, though such want arises from the neglect of the principal, no ratification can be based on any act of his. *Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them.*[120]

To help us further understand the standard, Black's Law Dictionary defines *inference* as "[a] conclusion reached by considering other facts and deducing a logical consequence from them"[121] and defines *necessary inference* as "[a] conclusion that is unavoidable if the premise on which it is based is taken to be true."[122]

Lastly, the burden to demonstrate institutional ratification lies with the *plaintiff* or person or entity claiming it or the existence of a valid agreement.[123]

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[116] *Gary v. United States*, 67 Fed. Cl. 202, 217 (2005). *See also Villars v. United States, 126 Fed. Cl. 626, 633 (2016); P & K Contracting, Inc. v. United States, 108 Fed. Cl. 380, 390 (2012), aff'd, 534 F. App'x 1000 (Fed. Cir. 2013); SGS-92-X003 v. United States*, 74 Fed. Cl. 637, 654 (2007) (Institutional ratification "occurs when the Government seeks and receives the benefits from an otherwise unauthorized contract" and officials with ratifying authority know of the unlawful promise).

[117] *Doe v. United States*, 58 Fed. Cl. 479, 486 (2003), *aff'd*, 112 F. App'x 54 (Fed. Cir. 2004). *See also SGS-92-X003*, 74 Fed. Cl. at 654.

[118] *Villars*, 126 Fed. Cl. at 633; *Doe*, 58 Fed. Cl. at 486; *See also Gary*, 67 Fed. Cl. at 217 ("For an unauthorized promise to be binding under the doctrine of institutional ratification, an official with the power to ratify must know the material facts relating to the acceptance of the benefits …").

[119] *See, e.g., Doe*, 58 Fed. Cl. at 486 ("the question is whether DEA agents with procurement authority had actual or constructive knowledge of contractual promises to compensate Plaintiff … nowhere in Plaintiff's pleadings does he claim that these 'high-ranking officials' knew of the content of the alleged promises made to him"), *aff'd*, 112 F. App'x 54 (Fed. Cir. 2004); *Villars*, 126 Fed. Cl. at 633.

[120] *United States v. Beebe*, 180 U.S. 343, 354 (1901) (emphasis added).

[121] INFERENCE, Black's Law Dictionary (10th ed. 2014).

[122] NECESSARY INFERENCE, Black's Law Dictionary (10th ed. 2014).

[123] *See, e.g., Doe*, 58 Fed. Cl. at 487-88; *Gary*, 67 Fed. Cl. at 217-18; *Home Fed. Bank of Tennessee, F.S.B.*, 57 Fed. Cl. at 689; *Strickland*, 382 F. Supp. 2d at 1348.

The Tribal Council is the governing body with the relevant contracting authority. The initial inquiry is whether the Tribal Council had actual or constructive knowledge of Mr. Mason's agreement. When we review all of the circumstances, we must conclude that the Tribe had actual or constructive knowledge at some point during the period between 2002 and 2005 and for a limited period of time acquiesced in the agreement.

The record indicates that the Tribe had retained Mr. Mason to represent its interests in connection with Iowa's challenge to the land-into-trust decision before the IBIA. As explained above, in September 2002, the *Omaha World Herald* reported on Mr. Mason's efforts, following the IBIA's decision, to forestall a possible judicial challenge by Iowa with his assurances that the Tribe had no intent to game on the parcel.[124] Further, the Corrected Notice, which contained the content of Mr. Mason's agreement with the State, was then published once, on December 6, 2002, in the *Council Bluffs Daily Nonpareil*, a daily newspaper for Council Bluffs, Iowa.[125] Additionally, at some point, the Tribal Council reportedly decided to pursue gaming on the Carter Lake parcel by retaining Steven Sandven as its attorney to seek the support of the Governor of Iowa, the procedure contemplated in the agreement.[126] This effort proved unsuccessful. Eventually, the Tribal Council retained the law firm Faegre and Benson to assist in pursuing gaming on the Carter Lake parcel under IGRA's restored lands exception.[127] Faegre and Benson began that effort with an October 7, 2005 letter to the NIGC that included an acknowledgment of some sort of agreement: "the Tribe orally agreed not to use the Carter Lake

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[124] *Omaha World Herald,* "Carter Lake land owned by tribe won't become casino" (Sept. 29, 2002).
[125] *See* Proof of Publication by Jeannette Johnson (Dec. 18, 2002).
[126] Letter from John Lundquist, Iowa Assistant Attorney General, to Michael Gross, NIGC Senior Attorney, re: Pending "Indian lands" decision for the Ponca Tribe in Nebraska in Carter Lake, Pottawattamie, Iowa, at 4 (July 19, 2006) .
[127] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion (Oct. 7, 2005).

Parcel for gaming purposes provided the State and County agreed not to bring suit."[128] Presumably, Faegre and Benson, consistent with its professional obligations,[129] conferred with the Tribe in drafting that letter and obtained the Tribe's authorization before sending it.

While none of the factors listed above, when viewed in isolation, would necessarily lead to a conclusion that the Tribe had actual or constructive knowledge of Mr. Mason's agreement, the sum of these circumstances indicates the Tribal Council's actual or constructive knowledge of the agreement at some time during this period.

Further, Mr. Sandven's subsequent efforts on behalf of the Tribe to obtain the State's concurrence to game on the land, and the assertions of Faegre and Benson detailed above support the conclusion the Tribal Council acquiesced to Mr. Mason's agreement. However, it should be pointed out that the motivation for seeking a two-part determination is not known by this Commission. That being said, as with our discussion of constructive notice, when we look at the totality of all of the facts in the record, it is not unreasonable to conclude that the Tribe acquiesced in the agreement.

But, even if the Tribe became aware of and acquiesced in 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.[130] That repudiation was restated in Faegre and Benson's June 15, 2006[131] and July 14, 2006 [132] letters to NIGC. Furthermore, the Tribal Council's August 6, 2006 and April 2, 2007 resolutions made clear the Tribal Council did not

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[128] *Id.* at 9.
[129] *See, e.g.*, Model Rule of Professional Conduct 1.4(a)(3) ("A lawyer shall … keep the client reasonably informed about the status of the matter.").
[130] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Penny Coleman, NIGC Acting General Counsel, re: the Ponca Tribe of Nebraska – Request for an Indian Lands Opinion (Oct. 7, 2005).
[131] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska- Request for an Indian Lands Opinion (Supplemental Material) at 4-5 (June 15, 2006).
[132] Letter from Vanya S. Hogen and Colette Routel, Faegre and Benson, to Michael Gross, NIGC Staff Attorney, re: Ponca Tribe of Nebraska: Amended Gaming Ordinance/Request for Indian Lands Opinion (Supplemental Material) (July 14, 2006).

believe any sort of agreement binding. The State asserts the Tribal Council's representations in the resolutions that it "was not aware of and did not approve the language that was added to the amended notice,"[133] is not the same as the Tribal Council being unaware of the agreement or its terms.[134] Whether the State's reading is a fair criticism of the Tribal Council resolutions, they clearly informed the State that the Tribe did not consider the agreement binding and it intended to game under the restored lands exception.

Significantly, neither Mr. Mason's 2002 agreement nor the Tribe's short-lived acquiescence was an admission that the Carter Lake parcel did not satisfy IGRA's definition of restored lands. At best, the agreement attempted to memorialize the Tribe's pledge that it would not invoke that exception to IGRA's prohibition of gaming on lands acquired after IGRA's enactment in exchange for the State's agreement not to seek judicial review of the IBIA's decision. When the Tribe decided in 2005 to invoke the restored lands exception, Iowa was free to challenge Interior's land-into-trust decision. There was no time-bar to suit as the relevant statute of limitations, 28 U.S.C. 2401(a), was six years.

Finally, the State's argument primarily relies on *Pueblo of Santo Domingo v. United States*,[135] which supports the conclusion that the Tribe timely repudiated the unauthorized agreement. That case involved the allegedly unauthorized stipulation by the tribe's attorney in a proceeding before the Indian Claims Commission ("ICC") in 1969. The stipulation that certain tribal lands had been taken by the United States formed the basis for further proceedings in the ICC leading to a published decision by the ICC on the extent and dates of taking and a published

[133] Tribe Resolution 06-27; Tribe Resolution 07-25.
[134] Consolidated Brief of the States and City in response to NIGC's May 21, 2012 Briefing Order at 7 (July 20, 2012).
[135] 647 F.2d 1087 (1981).

decision by the Court of Claims on interlocutory appeal.[136] The ICC's statutory authorization then expired in 1978, and the case was transferred to the Court of Claims for a determination of compensation. Twelve years later, when the tribe moved to withdraw from the 1969 stipulation on the ground that it had been unauthorized, the Court of Claims acknowledged that a client may "seasonably" apply for relief from an unauthorized stipulation but denied the motion because "it was far too late in the day."[137] The reasonable period for a client to repudiate an unauthorized agreement depends on the circumstances. In *Pueblo of Santo Domingo*, the United States, the ICC, and the Court of Claims had expended considerable resources in reliance on the stipulation. In this situation, in contrast, Iowa expended no resources in reliance on the 2002 agreement. The Tribe repudiated the agreement at a time when Iowa still had well over two years to challenge the IBIA's decision. Additionally, unlike *Pueblo of Santo Domingo*, here, no tribunal was burdened by the out-of-court agreement, the 2002 agreement had no judicial approval, and it was not subject to the supervision of any tribunal. The Tribe's repudiation was seasonable and not too late in the day.

We thus conclude that the appropriate response by Iowa to the Tribe's repudiation of the unauthorized agreement was to file suit against Interior challenging the IBIA's decision rather than using the NIGC proceeding as a collateral attempt to enforce the agreement. This case presents unusual factual circumstances in which a sovereign, despite an apparent short period of acquiescence, timely repudiated an unauthorized out-of-court agreement without any material injury to the other party. Here, the agreement by each party was to not do something – file suit or seek to game under the restored lands exception. Iowa has suffered no detrimental reliance or injury by the Tribe's repudiation of the unauthorized agreement.

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[136] *Id.* at 1088.
[137] *Id.* at 1088-89.

Further, Iowa could have protected its interests and avoided all dispute by obtaining the Tribal Council's express authorization of the agreement in 2002. Iowa had an additional chance to protect its interests, by challenging the land-into-trust decision in 2005 when the Tribal Council repudiated the agreement. We conclude that the Tribe is not estopped from asserting that the land is eligible for gaming pursuant to IGRA's exception for restored lands of a restored tribe.[138]

II. Ponca Restoration Act

The PRA, among other things, delineated a two-county (Knox and Boyd) area for mandatory trust acquisitions for the benefit of the Tribe and explicitly made the Indian Reorganization Act, and other federal laws of general applicability, applicable to the Tribe.[139] The Tribe asserts the PRA's purpose was to place the Ponca Tribe on an equal footing with all other federally recognized tribes. As such, the Tribe argues, with the unqualified application of the IRA and all other laws of general applicability, including IGRA, to the Tribe, the PRA permits the discretionary acquisition of additional lands either within or outside of Knox and Boyd Counties to restore the Tribe's land base.[140] And Congress expressly did not limit the restored land status to lands in those two counties.[141] The State argues that the PRA unambiguously limits trust lands that may be considered restored to land in Knox and Boyd Counties, particularly because the PRA did not expressly identify the Carter Lake parcel as restored land.

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[138] *United States v. Stewart*, 311 U.S. 60, 70(1940) *Madrid Lumber Co.*, 255 Iowa at 383-384.
[139] 25 U.S.C. §§ 938a & 983b(c).
[140] Tribe's Legal Memorandum Regarding the Ponca Restoration Act at 7-11(Mar. 17, 2011).
[141] *Id.* at 11-13; Letter from James T. Meggesto, Akin Gump, to Jeffrey Nelson, Office of Solicitor, Interior and NIGC General Counsel Larry Roberts, re: *Nebraska v. U.S. Dept. of the Interior,* No, 1-08-CV-6 (S.D. Iowa) at 1-2 (April 25, 2011).

The Solicitor provided the Commission an opinion concluding that, although the PRA provides for mandatory and discretionary trust acquisitions in Boyd and Knox Counties, the plain language of the statute allows Interior to take additional land into trust outside those counties under the Indian Reorganization Act and that land may qualify as restored land.[142] The Solicitor contrasted the PRA with other restoration acts that put geographic limits to the Secretary's authority to take land into trust for restored tribes, noting Congress knows how to restrict trust acquisitions if so intends and chose not to here.[143] Thus, although the Solicitor's opinion concludes that the Carter Lake parcel, which is outside Boyd and Knox Counties, may qualify for restored lands status, it does not address whether the parcel does qualify. That question is once again before us here as a result of this remand.[144]

III. Restored Lands Analysis

Although the legal framework and the purpose underlying the restored lands exception is set forth in our original Commission decision, it bears repeating.[145] Section 20 of IGRA, 25 U.S.C. § 2719, prohibits gaming on trust lands acquired by Interior for a tribe after October 17, 1988, unless an exception is satisfied. Relevant to this discussion, IGRA provides an exception for "lands taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition."[146]

Courts have provided insight as to the restored lands exception of § 2719. The 6th Circuit Court of Appeals found that IGRA does not define either the words "restored" or "restoration" in the restored lands exception; thus, the court determined that it must give the words "'their

[142] Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 9, 13 (Mar. 13, 2012).
[143] *Id.* at 10-11.
[144] In reaching this decision, the NIGC followed the process outlined in the 2009 Memorandum of Agreement with the Solicitor to obtain the Solicitor's concurrence. *See* Letter from Eric Shepard, Associate Solicitor Indian Affairs, Department of Interior, Office of the Solicitor, to Michael Hoenig, NIGC General Counsel (November 1, 2017).
[145] Commission decision at 6.
[146] 25 U.S.C. § 2719(b)(1)(B)(iii).

ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.'"[147] To that end, the 6th Circuit concluded that a district court "appropriately looked to the dictionary definitions of 'restore' and 'restoration,' which include the following meanings: to give back, return, make restitution, reinstatement, renewal, and reestablishment."[148] Further, courts have determined that, given the plain meaning of the term "restoration," the purpose of the restored lands exception, is to "place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion."[149] This is because:

> Under IGRA, tribes that had not been disbanded have the right to conduct gaming activities on lands which they held prior to October 17, 1988. Thus, only property acquired subsequent to this 1988 date is subject to IGRA's limitations on gaming activities. As such, Indian tribes that were disbanded, and then restored after 1998, were at a disadvantage *vis a vis* those tribes that had not been disbanded and held land prior to 1998. 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.[150]

As we articulated in our original Commission decision, "[t]he core question of any restored lands analysis is whether the land at issue was taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition."[151] "That language implies a

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[147] *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 369 F.3d 960, 967 (6th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 420, 431–32 (2000)); *see also Oregon v. Norton*, 271 F. Supp. 2d 1270, 1279 (D. Or. 2003); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 706 (W.D. Mich. 1999).

[148] *Grand Traverse*, 369 F.3d at 967 (citing *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney For W. Dist. of Michigan (Grand Traverse II)*, 198 F. Supp. 2d 920, 928 (W.D. Mich. 2002)); *see also Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1213 (D. Kan. 2006); *City of Roseville v. Norton,* 219 F.Supp. 2d 130, 159-60 (D.D.C. 2002), *aff'd,* 348 F.3d 1020 (D.C. Cir. 2003).

[149] *Grand Traverse II*, 198 F. Supp. 2d at 935; *Wyandotte Nation,* 437 F. Supp. 2d at 1213; *City of Roseville,* 219 F. Supp. at 160; *City of Roseville,* 348 F.3d. at 1031 ("restoration of lands is to a restored tribe what the 'initial reservation' is to an acknowledged tribe: the lands the Secretary takes into trust to reestablish the tribe's economic viability.").

[150] *City of Roseville*, 219 F. Supp. at 160-61; *see also Grand Traverse & Chippewa Indians v. U.S. Attorney For W. Dist. of Michigan (Grand Traverse I)*, 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999).

[151] Commission decision at 12 (citing *Grand Traverse II*, 198 F. Supp. 2d at 934); *see also Nebraska*, 625 F.3d at 510 ("Under the exception, the general gaming prohibition does not apply when 'lands are taken into trust as part of ... the restoration of lands for an Indian tribe that is restored to Federal recognition.'"); *Wyandotte Nation*, 437 F.

process rather than a specific transaction, and most assuredly does not limit restoration to a single event."[152] Courts apply a three-factor test in a restored lands analysis: the acquisition's temporal proximity to restoration (temporal factor), the tribe's historical and modern nexus to the location (geographic factor), and the factual circumstances surrounding the acquisition (factual circumstances factor).[153]

The States argue in their brief that Interior's after-acquired lands regulations at 25 C.F.R. Part 292, which differ slightly from the common law test for restored lands, apply to this decision. However, the regulations contain a grandfather clause at § 292.26 that provides two separate grounds for escaping Part 292's applicability—both of which apply here.

Under the first ground, the regulations specify at § 292.26(a) that they "do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of the regulations." The Commission's final agency decision to approve the Tribe's site-specific gaming ordinance was issued on December 31, 2007, before the Section 20 regulations went into effect on August 25, 2008. Although 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.[154]

Under the second ground, the Part 292 regulations "shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the [NIGC] issued a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a

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Supp. 2d at 1213. Here, the Tribe's status as a restored tribe is not at issue. *Nebraska*, 625 F.3d at 510 ("The States concede that the Tribe's status is one "restored to Federal recognition.").

[152] *Grand Traverse II*, 198 F. Supp. 2d at 936.

[153] *Grand Traverse II*, 198 F. Supp. 2d at 935; *see also Butte Cnty., Cal. v. Hogen*, 609 F. Supp. 2d 20, 27-28 (D.D.C. 2009) (*citing Grand Traverse II* as the leading case for restored land exceptions) and *Wyandotte Nation*, 437 F. Supp. 2d at 1214.

[154] *Nebraska*, 625 F.3d at 503 (finding that, once the district court concluded that the Commission improperly disregarded the purported agreement between Iowa and the Tribe, it should have remanded the case to the agency to consider all relevant factual circumstances).

particular gaming establishment ...."[155] A legal opinion from the NIGC Office of General Counsel was originally issued regarding this matter in conjunction with the Chair's decision on October 22, 2007. Even 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[]."[156] Therefore, the regulations do not apply to the Commission decision and this amendment to it.

A. Temporal Factor

The *Grand Traverse* court found that "land may be considered part of a restoration of lands on the basis of timing alone."[157] This factor is not at issue here. As stated in the original Commission decision, the Chair set forth a strong positive analysis of the temporal factor in support of a restored lands finding, which we affirmed.[158] In brief, though, the Chair concluded that:

> there were a total of 13 years between Congress's restoration of the Tribe and the acquisition of the Carter Lake land into trust but the Tribe did not acquire within that time a significant land base separate and apart from Carter Lake. In fact, what it did acquire represents only a fraction of what it could acquire under its restoration act and of what its Congressionally mandated economic plan calls for. ... The Tribe owned in trust only an office building in Lincoln, Nebraska [] and approximately 150 acres in Niobrara, Nebraska for a community building and bison grazing land. Though Congress restored the [Tribe] in 1990, the Tribe only had a constitution approved in 1994. The Tribe purchased the Carter Lake land in September 1999, only five years later, and filed its application to take the Carter Lake land into trust in January 2000. The trust acquisition would have been complete in September 2000 but for [] litigation ...[159]

B. Geographic Factor

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[155] 25 C.F.R. § 292.26(b).
[156] *Id.*
[157] *Grand Traverse II*, 198 F. Supp. 2d at 936 ("As a matter of timing, the acquisition of the [] site was part of the first systematic effort to restore tribal lands.").
[158] Commission decision at 1, 8.
[159] Chair Disapproval at 25-27 (internal citations omitted).

In *Wyandotte Nation v. National Indian Gaming Commission*, the court underscored that the geographic factor is "arguably most important [] component of the test," as it "relates to the location of the land in relation to the tribe's historical location."[160] Similarly, in *Grand Traverse II*, the court concluded that the reasoning contained in prior Solicitor's opinions was appropriate – "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."[161]

In the original Commission decision, the Commission affirmed the Chair's conclusions regarding the geographic factor.[162] It is worth underscoring that the Chair found that "[t]he Tribe has historical and modern ties to its Carter Lake land and to the surrounding area that weigh in favor of finding that the land is restored."[163] In particular, as to the historical ties, the Chair determined that "[s]cholars have identified the aboriginal territory of the Ponca, and it includes Carter Lake"[164] and, as to the modern ties, that the Tribe possessed such ties because it had a "direct relationship with the Carter Lake land itself before it was taken into trust."[165] Therefore, the geographic factor continues to weigh in favor of restored land status for the Carter Lake parcel.

C. Factual Circumstances of the Trust Acquisition

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[160] 437 F. Supp. 2d at 1214.
[161] *Grand Traverse II*, 198 F. Supp. 2d at 935-36 ("The Solicitor concluded that the lands at issue were part of a restoration simply on the basis that the lands at issue were within the twenty-county area ceded by the tribe to the United States." The court found that "in light of the virtually identical history of these tribes with the Grand Traverse Band, reliance on the Solicitor's analysis is particularly appropriate. Treating similarly situated tribes in a similar manner is consistent with federal legislation that counsels against interpretations that distinguish among tribes in ambiguous circumstances. *See* 25 U.S.C. § 476(f)").
[162] Commission decision at 1, 8.
[163] Chair Disapproval at 23.
[164] *Id.* at 24-25.
[165] *Id.* at 25 (specifically detailing the nature of the Tribe's modern ties with the Carter Lake parcel).

Under the final factor, we examine the factual circumstances of the trust acquisition to assess whether there are indicia of restoration.[166]

1. There are no significant intervening trust acquisitions prior to the Carter Lake parcel.

Initially, we reiterate the finding articulated in the original Commission decision, which focused upon whether the Tribe had significant intervening trust parcels between its restoration as a federally recognized tribe and the Carter Lake parcel trust acquisition. The Commission determined that the "Carter Lake land is among the first acquisitions of the Tribe" without other significant intervening trust acquisitions on its behalf.[167] Notable for purposes of the factual circumstances factor, is not the timing of the acquisition of the Carter Lake parcel but the lack of other meaningful trust acquisitions after the Tribe's restoration.[168] Of consequence here is the fact – which was also noted by the Commission in its 2007 decision – that at the time of the acquisition, the Tribe owned in trust only an office building in Lincoln, Nebraska and approximately 150 acres in Niobrara, Nebraska for a community building and bison grazing land.[169]

Courts have examined tribes' acquisition of other trust parcels to assess whether a particular parcel's acquisition shows indicia of restoration.[170] For example, in the *Grand Traverse* cases, the courts found that "an absence of any substantial restoration of lands

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[166] *Wyandotte Nation*, 437 F. Supp. 2d at 1214.
[167] Commission decision (citing Chair Disapproval at 26 ("In fact, what it did acquire represents only a fraction of what it could acquire under its restoration act and of what its Congressionally mandated economic plan calls for. … The Tribe owned in trust only an office building in Lincoln, Nebraska . . . and approximately 150 acres in Niobrara Nebraska, for a community building and bison grazing land.")).
[168] *Id.*
[169] *Id.*
[170] *Grand Traverse I*, 46 F. Supp. 2d at 702 (Tribe introduced evidence of the absence of any substantial restoration of lands preceding the property at issue.); *Grand Traverse II*, 198 F. Supp. 2d at 936-37 (same); *Wyandotte Nation*, 437 F. Supp. 2d at 1217-19 (Court upheld Commission's determination that parcel was not restored, as the Tribe had substantial restoration of land preceding the parcel at issue and, consequently, the parcel was not a meaningful acquisition.).

preceding the property at issue" was a fact in support of a finding of restored lands.[171] Conversely, in *Wyandotte Nation v. National Indian Gaming Commission*, the court upheld the agency's conclusion that the parcel at issue was not restored, because, as part of its analysis, the agency found that the Tribe had substantial restoration of land preceding the parcel at issue.[172]

In the matter at hand, we agree with the Chair that the Tribe did not acquire "a significant land base separate and apart from Carter Lake" and that "there were no significant intervening trust acquisitions."[173] As a consequence, this noteworthy fact weighs in support of a restored lands finding.

2. *Carter Lake parcel was acquired into trust in accordance with the Ponca Economic Development Plan, mandated by the PRA, to reestablish the Tribe's economic viability.*

The D.C. Circuit Court of Appeals has advised that "the 'restoration of lands' is to a restored tribe what the 'initial reservation' is to an acknowledged tribe: the lands the Secretary takes into trust to re-establish the tribe's economic viability."[174] As to the Carter Lake parcel, the BIA Superintendent recommended approval of the trust acquisition, because "the acquisition is in accordance with the Ponca Economic Development Plan"[175] mandated by the PRA.[176] In submitting the plan to Congress, the Assistant Secretary of Indian Affairs stated that "the Plan

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[171] *Grand Traverse I*, 46 F. Supp. 2d at 702; *Grand Traverse II*, 198 F. Supp. 2d at 936-37.
[172] *Wyandotte Nation*, 437 F. Supp. 2d at 1217-18.
[173] Chair Disapproval at 25-26.
[174] *City of Roseville*, 348 F.3d at 1031; *See also Grand Traverse II*, 198 F. Supp. 2d at 936 ("the Band's evidence clearly established that the parcel was of … economic …significance to the Band.").
[175] Memorandum to BIA Area Director, Aberdeen, from Superintendent, Yankton Agency re: Ponca – fee to trust – Carter Lake, IA (Aug. 11, 2000) ("This acquisition is also in accordance with the Ponca Economic Development Plan that proposes having land in trust in Pottawattamie County."); *see also* Letter to Cora L. Jones, BIA Regional Director, from Mr. Fred LeRoy, Tribal Chairman (Aug. 23, 2000) ("The primary justification for taking this land [Carter Lake parcel] into trust is the intent of Congress in passing the Ponca Restoration Act and the Assistant Secretary's support for and understanding of the Ponca Economic Development Plan.").
[176] 25 U.S.C.A. § 983h. Recently, Interior underscored that "[t]he primary purpose of the PRA … is to acquire lands for the Tribe on which to support tribal economic development and self-sufficiency." *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) (Mar. 13, 2012).

calls for a diverse portfolio of development in each of the five main [tribal] service areas,"[177] including Pottawatomie County where the parcel is located.[178] To this end, the plan authorized the acquisition and development of land in these areas.[179] As to the Carter Lake area, Interior has concluded that "[b]y including trust acquisitions and commercial development [there], the plan recognizes both the Tribe's connections to that area and its intent to use that land for commercial purposes."[180] Further, upon submitting the plan to Congress, the Assistant Secretary represented that Interior had "complied with Section 10 of the Act which requires negotiation with the Tribe to establish a plan, consultation with State and local officials regarding the plan, *and having the property acquired for the Tribe taken into trust.*"[181] This representation was made subsequent to the Tribe's application to take the Carter Lake parcel into trust.[182] Finally, in the submission to Congress, the Assistant Secretary indicated that Interior was in "complete support" of the plan

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[177] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate (Feb. 17, 2000).

[178] On October 1, 1990, the House of Representatives Committee on Interior and Insular Affairs issued a report, detailing its amendments to S.1747 including an amendment whose intent was to "restrict[] the land that the Secretary can acquire for the economic development plan to Knox and Boyd Counties." H.R. Report No. 101-776 (1990). However, the plain language of the PRA does not support such a reading. *See* 25 U.S.C. § 983h. Furthermore, Interior has found that the plan is not so restricted, explaining that it authorized the acquisition and development of land in key service areas of the Tribe to include Pottawattamie County. *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 15 (Mar. 13, 2012). The plan in fact explicitly details the lands that the Tribe needed for purposes of its economic self-sufficiency. *See* Ponca Economic Development Plan. Specifically, the plan states: "the Tribe will need 160 acres in Douglas, Sarpy, and Pottawattamie Counties to locate manufacturing and service and niche retail businesses. These are to generate $14 million annually."; *see also* Ponca Economic Development Plan ("Proposed Tribal Lands – The Plan proposes a tribal land base of 2,235 acres, all within both the aboriginal territory of the Ponca Nation and the service areas established by the [PRA]," including "160 acres suitable for industrial and commercial uses in and around Omaha."). Finally, as noted by Interior, the PRA required that Interior submit the plan to Congress, which it did, and Congress "did not object or modify the plan." *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) (Mar. 13, 2012); 25 U.S.C. § 983h.

[179] Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 16 (Mar. 13, 2012); Ponca Economic Development Plan.

[180] *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 15 (Mar. 13, 2012).

[181] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate at 2 (Feb. 17, 2000) (emphasis added).

[182] *See* Letter to Mr. Timothy Lake, BIA Superintendent, from Mr. Fred LeRoy, Tribal Chairman (Jan. 10, 2000).

because "achievement of the major goals of the plan will mean self-sufficiency for the Tribe and an end to the poverty the Tribe has lived with since termination."[183] Given the above, it is apparent that the Carter Lake parcel was taken into trust to re-establish the Tribe's economic vitality. Therefore, this is a fact that weighs in favor of a restored lands finding.

3. Carter Lake parcel was acquired into trust from the PRA's service area.

Another fact of potential significance is that the Carter Lake parcel was taken into trust from lands within the Tribe's service area delineated in the PRA.[184] In *City of Roseville v. Norton*, the D.C. Circuit Court of Appeals indicated that "the term 'restoration' can [] readily be construed to include lands acquired pursuant to the restoration statute [] from within the restored tribe's service area designated in the [statute.]"[185] Admittedly, here, the Carter Lake parcel was taken into trust pursuant to the Indian Reorganization Act, not explicitly pursuant to the PRA.[186] Nevertheless, Interior concluded that the PRA did not foreclose discretionary trust acquisitions pursuant to the Indian Reorganization Act but explicitly allowed them.[187] In addition, the PRA mandated the creation of an economic plan, which when devised set forth a goal of acquiring land in Pottawattamie County. We therefore give some weight in favor of a restored lands finding to the fact that the Carter Lake parcel was accepted into trust from the Pottawattamie County service area designated by the Tribe's restoration act.

4. Carter Lake parcel was acquired in trust to re-establish the Tribe's land base and to compensate it for historical wrongs.

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[183] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate (Feb. 17, 2000).
[184] 25 U.S.C. § 983c.
[185] 348 F.3d at 1026. But, the court explicitly rejected providing guidance as to other circumstances. *Id.* ("Because the Auburn Tribe's land is located in Placer County, which was a designated area in the AIRA, and thus became, by operation of law, the Tribe's reservation, *see* 25 U.S.C. § 1300*l*–2(c), the court has no occasion to decide whether land obtained by a tribe other than through the tribe's restoration act is the "restoration of lands" for IGRA purposes....").
[186] Warranty Deed (Jan. 28, 2003).
[187] *See* Letter from Interior Solicitor Tompkins to NIGC General Counsel Roberts re: Remand in *Nebraska ex rel. Bruning v. U.S. Dep't of the Interior,* No. 1-08-cv-6-CRW-CFB (S.D. Iowa Jan. 24, 2011) at 9 (Mar. 13, 2012).

Finally, "a 'restoration of lands' could easily encompass new lands given to a restored tribe to re-establish its land base and compensate it for historical wrongs."[188] As the Chair found, after the Tribe's restoration it did not have "a significant land base separate and apart from Carter Lake."[189] The only other trust holdings were an office building in Lincoln, Nebraska and approximately 150 acres in Niobrara, Nebraska for a community building and bison grazing land.[190] Hence, putting the Carter Lake parcel into trust signifies an effort to restore the Tribe's land base. As for historical wrongs, the Tribe suffered termination,[191] including resultant poverty,[192] and, prior to that, loss of its reservation and forced removal from it without adequate provision or preparation that resulted in the death of many of the Tribe's members.[193] Thus, this too weighs in favor of a restored lands finding.

In light of the facts outlined above, we find that the factual circumstances factor weighs in favor of the Carter Lake parcel constituting restored lands.

D. Consideration of All 3 Factors – Factual Circumstances, Temporal and Geographic

Next, all the factors articulated in *Grand Traverse* – namely the temporal, geographic, and factual circumstances factors – must be considered in total. That being said, it is worth reiterating that in *Grand Traverse*, the district court stated that "the land may be considered part

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[188] *City of Roseville*, 348 F.3d. at 1027.
[189] Chair Disapproval at 25-26.
[190] *Id.* at 26. However, the Chair Disapproval contains a typographical error. It erroneously cites the dates of the trust deeds for these parcels in 2003, when they occurred in 1993. *See* Warranty Deed (June 22, 1993); Letter from Michael G. Rossetti and James T. Meggesto, Akin Gump, to NIGC Chairman Hogen, re: The Ponca Tribe of Nebraska- Request for an Indian Lands Opinion, at 30 (July 23, 2007).
[191] Chair Disapproval at 19-21; *City of Roseville,* 348 F.3d. at 1029 ("Had the Auburn Tribe never been terminated, it would have had opportunities for development in the intervening years, including the possible acquisition of new land prior to the effective date of IGRA. A 'restoration of lands' compensates the Tribe not only for what it lost by the act of termination, but also for opportunities lost in the interim.").
[192] Letter from Kevin Gover, Assistant Secretary – Indian Affairs to Honorable Albert E. Gore, President of the Senate (Feb. 17, 2000).
[193] Chair Disapproval at 15-17.

of a restoration of lands on the basis of timing alone."[194] In the matter at hand, there were 13 years between Congress's restoration of the Tribe and the trust acquisition of the Carter Lake parcel. Congress restored the Tribe in 1990, the Tribe's Constitution was approved in 1994, the Tribe purchased the land in September 1999, the Tribe filed its application to take the land into trust in January 2000, and the trust acquisition would have been complete in September 2000 but for litigation. Based on this timing alone, then, we could determine that the Carter Lake parcel is restored.

Also, the geographic factor supports the finding that the Carter Lake parcel is restored lands. As we mentioned above, in *Wyandotte Nation*, the court underscored that the location factor is "arguably [the] most important [] component of the test," as it "relates to the location of the land in relation to the tribe's historical location." In this amendment, we reiterate our affirmation of the Chair's findings that "[t]he Tribe has historical and modern ties to its Carter Lake land and to the surrounding area that weigh in favor of finding that the land is restored."[195] Importantly, as to this factor, "[s]cholars have identified the aboriginal territory of the Ponca, and it includes Carter Lake."[196]

And, our reassessment of the factual circumstances factor shows that it too supports the conclusion that the Carter Lake parcel was taken into trust as part of the restoration of lands for a restored tribe. Given the above, we find that the test set forth in *Grand Traverse* establishes that the Carter Lake parcel is restored lands. The Department of the Interior, Office of the Solicitor, concurs.[197]

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[194] *Grand Traverse II*, 198 F. Supp. 2d at 936.
[195] Chair Disapproval at 23.
[196] *Id.* at 24.
[197] *See* Letter from Eric Shepard, Associate Solicitor Indian Affairs, Department of Interior, Office of the Solicitor, to Michael Hoenig, NIGC General Counsel (November 1, 2017).

IV. Conclusion

We affirm the Commission's December 31, 2007, decision as set forth herein, affirming in part and reversing in part the Chair's decision.

It is so ordered by the National Indian Gaming Commission.

Jonodev Osceola Chaudhuri
Chairman

Kathryn Isom-Clause
Vice Chair