MEMORANDUM

To: Chairman Hogen

From: Michael Gross, Associate General Counsel, General Law

Date: October 22, 2007

Re: Ponca Tribe of Nebraska, site-specific gaming ordinance

On July 23, 2007, the Ponca Tribe of Nebraska submitted an amended gaming ordinance for approval. The single amendment makes the ordinance site specific by defining as "Indian lands" a piece of land in Carter Lake, Iowa, taken into trust in February 2003. With the submission of its amended ordinance, the Tribe supplied a detailed submission contending that the Carter Lake land is restored lands within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).[1] The Office of General Counsel has reviewed in detail the Tribe's submission, as well as supplemental material supplied both by the Tribe and the State of Iowa. We conclude that though the Ponca Tribe of Nebraska is itself a "restored" tribe, the factual circumstances surrounding the acquisition of the Carter Lake land show that it was not taken into trust as part of the Tribe's restoration. Accordingly, the Carter Lake land is not "restored land." We therefore recommend that you disapprove the ordinance.

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[1] This is actually the Tribe's second such submission. The Tribe submitted the same site-specific ordinance in February 2006 but withdrew it in August 2006 in the face of an impending disapproval. You were recused from that determination because the Tribe was then represented by Faegre & Benson. The Tribe has retained Akin Gump to represent its interests in this submission.

THE LAND IN CARTER LAKE, IOWA

Carter Lake, Iowa, incorporated 1930, sits on 1,236 acres of land (approx.) in Pottawattamie County and is the only city in Iowa west of the Missouri River. (www.cityofcarterlake.com/history.html.) The city is surrounded almost completely by Omaha, Nebraska, and the river makes up its small southern boundary and separates it from Council Bluffs, Iowa. Carter Lake's peculiar location is best grasped visually. Figure 1 provides a map:

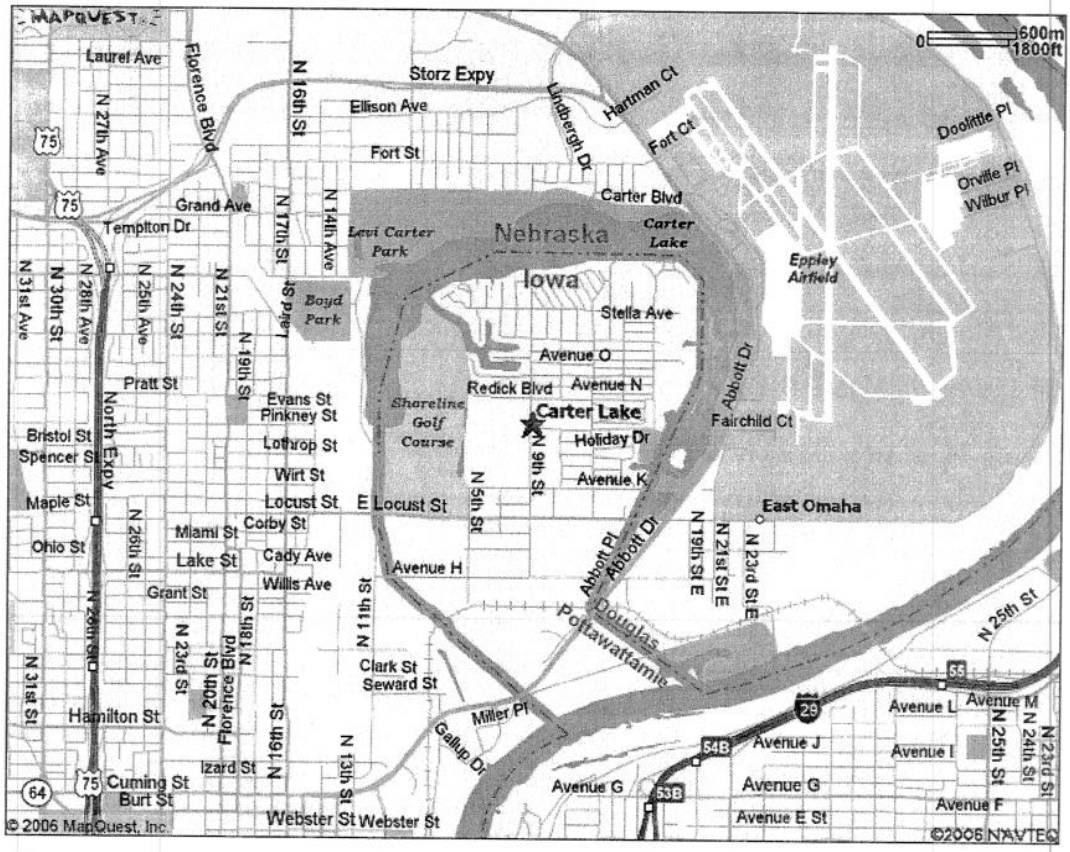

Figure 1: Carter Lake, Iowa. (Source: MapQuest Inc.)

Back before 1877, the Missouri River flowed around what is now the city and defined the border between Iowa and Nebraska. *Nebraska v. Iowa*, 143 U.S. 359, 370 (1892); *Nebraska v. Iowa*, 406 U.S. 117, 118 (1972). That year, however, the Missouri flooded and abandoned its ox-bow course for its present course, leaving the 323-acre

Carter Lake – then called Cut-Off Lake – to cradle the city's northern end. (*See, The History of Carter Lake, at* www.cityofcarterlake.com/history.html; Figure 1.)

With the change in the river's channel, the State of Nebraska claimed the land, arguing that the border between Nebraska and Iowa moved along with the river. The Supreme Court rejected the claim in 1892. Under well-settled riparian law, it held that when a river or stream marks the boundary of property, the boundary moves with the river when the river gradually changes its course through accretion. When, however, a river changes course by avulsion, when it "suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary;... the boundary remains as it was, in the center of the old channel, although no water may be flowing therein." *Nebraska v. Iowa*, 143 U.S. at 360; *Nebraska v. Iowa*, 406 U.S. at 118.

The 1877 flood, the Court found, changed the Missouri's course by avulsion, not accretion, and thus the boundary between the two states remained unchanged:

> [I]n 1877, the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel;... unless the waters of the river returned to their former bed, [such center line] became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

Nebraska v. Iowa, 143 U.S. at 370. The Court thus charged the two states to designate a boundary consistent with its opinion, which they did by compact, and Carter Lake remains in Iowa today. *Id.*; *Nebraska v. Iowa*, 406 U.S. at 118.

On September 24, 1999, the Ponca of Nebraska purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa, commonly known as 1001 Avenue H, Carter Lake, Iowa. Its legal description is:

Parcel A-1 (West; Iowa Property)

A parcel of land being part of lots 20, 21, and 22, together with part of the abandoned railroad right-of-way located north of the existing Illinois Central spur track in said lots 21 and 22, all in the Auditor's subdivision of section 21, township 75, range 44, West of the 5th P.M., Pottawattamie County, Iowa, said parcel described as follows:

Beginning at the northwest corner of said lot 20; thence along the northerly line of said lot 20, north 88° 28' 27" east, 69.05 feet; thence south 00°18' 05" east, 228.93 feet; thence north 89° 36' 57" east, 224.92 feet; thence north 00° 30' 42" west, 230.45 feet to a point on the northerly line of said lot 22; thence along said northerly line and along said northerly extended easterly, north 89° 11' 28" east, 221.33 feet to a point on the easterly line of said abandoned railroad right-of-way; thence along said easterly line and said easterly line extended southerly, south 00° 48' 32" east, 579.95 feet to a point on the northerly right-of-way line of the Illinois Central Railroad; thence along said northerly right-of-way line the following six (6) courses:

(1) South 89° 09' 18" west, 220.09 feet;
(2) North 64° 27' 01" east, 12.10 feet;
(3) North 61° 31' 11" west, 126.58 feet;
(4) North 46° 53' 25" west, 102.08 feet;
(5) North 38° 46' 37" west, 146.92 feet;
(6) North 50° 47' 51" west, 38.80 feet to a point on the westerly line of said Lot 20; thence along said westerly line, north 01° 03' 32" west, 301.52 feet to the point of beginning.

Said parcel of land contains an area of 4.81 acres, more or less.

(Trustees deed, recorded at Book 100 Page 15532, Pottawattamie County, Iowa.)

Shortly thereafter, on January 10, 2000, the Tribe passed a resolution seeking to have the Bureau of Indian Affairs place the land into trust. The Tribe's stated intent was to place a healthcare facility on the land:

> WHEREAS: The property will be utilized to provide services to our tribal members, primarily health services. Those services consist of Indian Health Service 638 contracted programs and Bureau of Indian Affairs P.L. 93-638 contract programs....

(Ponca Tribe of Nebraska, resolution 00-01.)

Three months later, in April 2000, the Tribe negotiated a "Cooperation and Jurisdictional Agreement" with the city of Carter Lake. The parties agreed that it would be to their mutual benefit for the Tribe to operate a medical clinic and a pharmacy on its land there. ("Cooperation and Jurisdictional Agreement," p. 1.) Among other things, the parties also agreed that they would exercise concurrent jurisdiction over civil actions involving tribal members, that they would exercise joint powers of arrest, and that the Tribe would provide law enforcement on the land. *Id.* at § II, ¶¶ A1, C; § III.

On September 15, 2000, the BIA Great Plains Regional Director wrote to relevant state and local officials in Iowa and stated her "intent to accept the land into trust for the benefit of the Ponca Tribe of Nebraska." (Letters from Cora L. Jones, Great Plains Regional Director, BIA, to Carter Lake Mayor, Iowa Governor, Pottawattamie County Supervisors, September 15, 2000.) Though neither Pottawattamie County nor the State of Iowa had responded to the Regional Director's previous, February 23, 2000 notice that she was considering the trust acquisition, both appealed her September 15 decision. They contended, in part, that the Tribe really intended to use the land for a casino and that the Regional Director erred in not considering this use. *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002).

The IBIA rejected the argument, finding that the land "was purchased ... and is currently used for health care facilities" and that any possible gaming use was speculative. The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

In December 2002, the Tribe, the State of Iowa, and Pottawattamie County apparently reached an agreement that avoided further litigation, though we have no evidence to show it was reduced to a writing. Iowa agreed to forego litigation in Federal

district court, and the Tribe agreed that the land would be used for the provision of governmental services and not for gaming. (November 26, 2002, e-mail from Michael Mason, Esq.; December 13, 2002, letter from Jean M. Davis, Assistant Attorney General, to Michael Mason, Esq.) On December 6, 2002, the BIA published in newspapers of general circulation in the Carter Lake area a "corrected notice of intent to take land into trust." The language of that notice was provided by the Tribe's attorney, (November 24, 2002, e-mail), and stated:

> The Regional Director of the Great Plains, Bureau of Indian Affairs, United States Department of the Interior has made a final determination that the United States will accept: [formal description of the Carter Lake land], which is located in the City of Carter Lake, Iowa, in the name of the United States for the benefit of the Ponca Tribe of Nebraska. The United States shall acquire title no sooner than thirty days from December 6, 2002. This notice was published in accordance with Title 25, Code of Federal Regulations, Seciton 151.12(b)....
>
> THE TRUST ACQUISITION OF THE CARTER LAKE LANDS HAS BEEN NAMED FOR NON-GAMING RELATED PURPOSES, AS REQUIRES (sic) BY THE PONCA TRIBE AND DISCUSSED IN THE SEPTEMBER 15, 2000, DECISION UNDER THE REGIONAL DIRECTORS ANALYSIS OF 25 CFR 151.10(c). AS AN ACQUISITION OCCURRING AFTER OCTOBER 17, 1988, ANY GAMING OR GAMING-RELATED ACTIVITIES ON THE CARTER LAKE LANDS ARE SUBJECT TO THE TWO PART DETERMINATION UNDER 25 U.S.C. SEC. 2719. IN MAKING IT'S (sic) 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 APPROVAL UNDER THE OCTOBER 2001 CHECKLIST FOR GAMING ACQUISITIONS, GAMING-RELATED ACQUISITIONS AND TWO-PART DETERMINATIONS UNDER SECTION 20 OF THE INDIAN GAMING REGULATORY ACT HAS BEEN OBTAINED.

(December 6, 2002, corrected public notice. Emphasis in original.)

On January 28, 2003, following the publication of this corrected notice, the Tribe executed a deed conveying the Carter Lake land to the United States, and the BIA finished the acquisition in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

The Carter Lake land is the land identified in the Ponca of Nebraska's amended gaming ordinance as "Indian lands," and it is the land where the Tribe now intends to offer gaming under the theory that the Carter Lake land is "restored land."

LEGAL ANALYSIS

I. Indian lands, generally.

IGRA permits gaming only on Indian lands, 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2), which it defines as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). The National Indian Gaming Commission's implementing regulations clarify:

> Indian lands means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either --
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
>
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. It is the opinion of the Office of General Counsel that the Ponca of Nebraska's land in Carter Lake is "Indian lands" under these definitions. It is trust land over which the Tribe exercises governmental power, and thus it satisfies § 502.12(b)(1).

A. Trust land

The Carter Lake land is, without question, now trust land. Again, the Tribe purchased the land in fee in 1999, and the BIA finished its fee-to-trust acquisition in February 2003. (February 10, 2003, letter from Great Plains Acting Regional Director to Superintendent, Yankton Agency.)

B. Governmental Power

The Carter Lake land is also land over which the Ponca of Nebraska exercise governmental power. In order to exercise governmental power over land, a tribe, like any other government, must first have jurisdiction to do so. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), *superseded by statute on other grounds as stated in Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (in addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D. Kan. 2000), *aff'd and remanded*, *Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (a tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (a tribe must first have jurisdiction in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4)).

Tribes are presumed to have jurisdiction over their members and lands. Indian tribes are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *see also*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978). There are no treaties or statutes applicable here that would limit the Tribe's jurisdiction.

Accordingly, when, as here, lands are held in trust for a tribe off-reservation, the analysis looks to whether the tribe is exercising governmental authority over the land. How exactly a tribe does this IGRA does not say, though there are many possible ways in many possible circumstances. For this reason, NIGC has not formulated a uniform definition of "exercise of governmental power," but rather decides that question in each case based upon all the circumstances. *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Reg. 12382, 12388 (1992).

The courts provide useful guidance. The First Circuit found that exercising governmental power involves "the presence of concrete manifestations of ... authority." *Narragansett Indian Tribe*, 19 F.3d at 703. Examples include the establishment of a housing authority, administration of health care programs, job training, public safety, conservation, and other governmental programs. *Id.* Here, the Ponca of Nebraska exercise governmental authority over the Carter Lake land in a variety of concrete ways: through its constitution and legislation, through an inter-governmental jurisdictional agreement, and through the provision of governmental services to its members.

The tribal constitution extends the Tribe's governmental jurisdiction to all of its trust lands:

> The territorial jurisdiction of the Ponca Tribe of Nebraska under this Constitution shall extend to all trust or tribal lands as described by metes and bounds in the Treaties heretofore ratified by the Congress of the United States of America and shall cover all future additions that are within or without said boundary lines that may be acquired by the Ponca Tribe of Nebraska, or by the United States of America and held in trust for the Ponca Tribe of Nebraska or its members....

Ponca Tribe of Nebraska Constitution, Art I.

Similarly, the Ponca Law and Order Code establishes a tribal court and gives jurisdiction over all tribal lands, including trust land:

> The general jurisdiction of the Tribal Court ... shall be all territory of the Ponca Tribe of Nebraska, including ... those lands held in trust by the United States for the benefit of the Tribe and members of the Tribe....

Ponca Law and Order Code §§ 1-2-1, 1-4-1.

In April 2000, the tribe exercised this jurisdiction, entering into a government-to-government "Cooperation and Jurisdictional Agreement" with the city of Carter Lake. Among other things, the agreement gave the parties concurrent jurisdiction over civil actions arising on the land and involving tribal members, and it gave them concurrent criminal jurisdiction over offenses committed by tribal members or members of other Federally recognized Indian tribes. (Cooperation and Jurisdiction Agreement, § II, ¶¶ A1, B.) Further, the parties have joint powers of arrest on the land, and the Tribe agreed to provide law enforcement there. *Id.* at § II, ¶C; § III.

Beyond this, the Tribe was only partially successful in making healthcare available on the land. In 2000, at a cost of $161,000, the Tribe placed a small modular building and paved parking lot on the land. The building was used to house a staff of four to provide health and social services. For budget reasons, the Tribe discontinued these services within a few years, but it still maintains offices there.

These things taken together, then, are concrete manifestations of the Tribe's exercise of governmental authority in Carter Lake.

Indian Lands, generally: conclusion

Given the foregoing, the Ponca Tribe of Nebraska exercises governmental authority over its Carter Lake land; it has jurisdiction to exercise that authority; and the land is held in trust for the tribe by the United States. The Carter Lake land, in short, is "Indian land" within the meaning of IGRA. 25 U.S.C. § 2703(4)(B).

II. GAMING ON AFTER-ACQUIRED TRUST LAND

Meeting the definition of "Indian lands" does not finish the analysis, however. The United States took the Carter Lake land into trust in February 2003, and thus the land falls within IGRA's general prohibition against gaming on trust land acquired after October 17, 1988. 25 U.S.C. § 2719(a). The question thus becomes whether the Carter Lake land meets any of the exceptions in § 2719. The Tribe contends that the land is restored land under 25 U.S.C. § 2719(b)(1)(B)(iii). It is the opinion of the Office of General Counsel that it is not. Though the Ponca Tribe of Nebraska was itself restored to Federal recognition, the land was not restored to the Tribe as part of that restoration, and thus the land is not restored lands.

To meet this "restored lands" exception, a tribe must be an "Indian tribe that is restored to Federal recognition," and the acquisition of the land into trust must be part of a "restoration of lands" for the tribe. These terms are not defined in IGRA or the NIGC's implementing regulations, but there is precedent.

A. The Ponca Tribe of Nebraska was restored to Federal recognition

To be an "Indian tribe that is restored to Federal recognition," a tribe must demonstrate a period of recognition by the United States, a period of non-recognition, and reinstatement of recognition by the United States. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 369 F.3d 960, 967 (6th Cir. 2004). The Ponca of Nebraska satisfy all three conditions.

1. Recognition by the United States

The Ponca are culturally and linguistically related to the Osage, Kaw, Quapaw, and the Omaha, and together these tribes comprise the Dhegiha language group within the Siouan language family. Beth R. Ritter, *Piecing Together the Ponca Past: Reconstructing the Degiha Migrations to the Great Plains*, 22 GREAT PLAINS QUARTERLY, 271, 272 (2002); Elizabeth S. Grobsmith and Beth R. Ritter, *The Ponca Tribe of Nebraska: The Process of Restoration of a Federally Terminated Tribe*, HUMAN ORGANIZATION, Spring 1992, at 3. Together these tribes migrated from the east into the Great Plains and eventually separated. The Ponca and the Omaha, being the last to split, settled together near what is now Niobrara, Knox County, Nebraska. Accounts differ as to when that split occurred, some dating it as early as 1390 and others as late as 1715. Grobsmith and Ritter, *The Ponca Tribe*, at 3-4.

In any event, the first definitively Ponca villages in the Niobrara area date from about 1750. Ritter, *Piecing Together*, at 279. While most historic Ponca villages cluster in the Niobrara area, villages have been found as far south as the confluence of the Platte and Missouri Rivers south of Omaha in Nebraska; as far west in Nebraska as Cherry County, near the confluence of the Niobrara and Snake Rivers; as far north and west as Hughes County, South Dakota, east of Pierre; and as for north and east as Pipestone,

Minnesota. Ritter, *Piecing Together*, at 274; James H. Howard, *Known Village Sites of the Ponca*, PLAINS ANTHROPOLOGIST 15, NO. 48, 109-134 (1970). The range of the Ponca villages is best shown visually. Figure 2 provides a map:

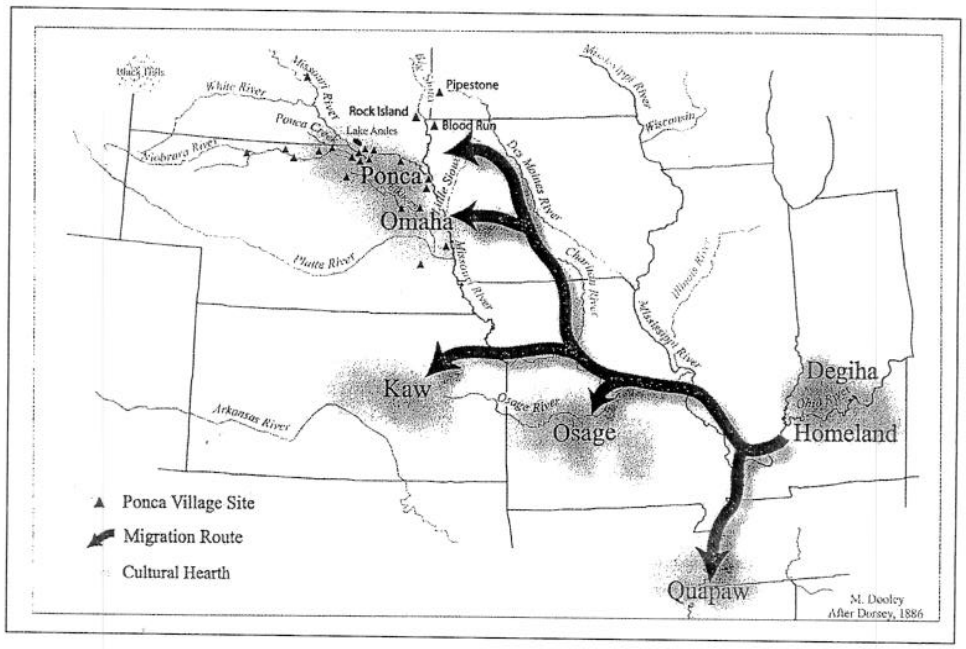

Figure 2: Ponca migration and village sites. (Reproduced from Ritter, *Piecing Together the Ponca Past:*, 22 GREAT PLAINS QUARTERLY, 271, 274 (2002)

On June 25, 1817, following the War of 1812, the Ponca struck the first of four treaties with the United States. This first treaty forgave any prior injuries or acts of hostility that might have existed, renewed in perpetuity the friendly relations between the two nations that existed before the war, and placed the Ponca under the protection of the United States. 7 Stat. 155 (1817).

In June 1825, the nations struck a second treaty. This one again acknowledged the protection and supremacy of the United States, and it permitted the United States to regulate commerce with the Ponca, which was to be conducted exclusively with American citizens. 7 Stat. 247, Articles 1 - 4 (1825). This last was important, apparently, because the Ponca were active traders and had traded with both the French and the

Spanish back into the 18th Century. Each of those nations, at one time or another, tried to monopolize the Ponca trade. Ritter, *Piecing Together*, at 279.

The Ponca ceded no land in either the 1817 or the 1825 treaty. This changed, however, with the treaty of March 12, 1858. In that treaty, the Ponca ceded "all the lands now owned or claimed by them, wherever situate," except for a reservation that was, more or less, a 25-mile square between the Niobrara and Ponca Rivers. The Ponca agreed to relocate there within one year. In consideration for the land and for the Ponca relocation, the United States agreed to pay various annuities and to provide money, over various periods of years, for the Poncas' subsistence – to purchase stock and agricultural implements, break up and fence land, build houses, establish schools, build mills, etc. 12 Stat. 997, Articles I and II (1858).

On March 10, 1865, the third treaty was "supplemented" with a fourth, by which the Ponca ceded an additional 30,000 acres, and the United States returned burial grounds and corn fields, various portions of townships around old village sites, and islands in the Niobrara River. This resulted in a Ponca reservation of some 96,000 acres. 14 Stat. 675, Articles I and II (1865); Grobsmith and Ritter, *The Ponca Tribe*, at 5. These four treaties *per se* demonstrate recognition of the Ponca by the United States.

Before the modern era of Federal Indian law, one way the United States recognized the governmental status of Indian tribes was by negotiating and entering into treaties with them. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and

sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."); *United States v. Washington*, 898 F. Supp. 1453, 1458 n.7 (W.D. Wash. 1995), *aff'd in part, rev'd in part on other grounds*, 157 F.3d 630 (9th Cir. 1998) (treaty rights are "the result of the negotiation between two sovereigns, the United States and the Tribes."); *NIGC Karuk Lands Opinion* at 3 (Oct. 12, 2004) ("Based on the fact that the Tribe negotiated treaties with the United States it can clearly be stated that there existed a government-to-government relationship at one time").

As of 1865, then, the Ponca Tribe was recognized by the United States. Thereafter, however, the tribe split into the Ponca of Nebraska (or Northern Ponca) and the Ponca of Oklahoma (or Southern Ponca). The question thus arises whether the United States recognized the Ponca of Nebraska after the split, and the answer to that question is "yes."

The split was the culmination of a sequence of events that began in 1868, when the United States struck the Fort Laramie treaty with the Great Sioux Nation. 15 Stat. 635 (1868). Incredibly, the land that treaty set aside for the Sioux included all of the Ponca reservation. 15 Stat 635, Article II. This made the Ponca intruders in their own homes, and for eight years the more numerous and more powerful Sioux raided and attacked them. *Ponca Restoration Act etc. Hearing on S. 1747 et al. Before the Senate Select Committee on Indian Affairs*, 101st Congress, 2nd Sess. 221 (1990) (testimony of Dr. Elizabeth S. Grobsmith, professor, University of Nebraska, and sources cited therein). (Hereafter, "*Ponca Restoration Hearings*.") The United States' solution to the problem it created was to relocate the Ponca.

Congress appropriated money to do so in 1876, and in 1877, the government informed the Ponca chiefs that the tribe must relocate to the Indian Territory. Eight chiefs were selected to visit and select a new reservation, but when they went, they found the land inhospitable and asked to return home. The request was denied, but they returned anyway, journeying some 500 miles in 40 days. *Ponca Restoration Hearings* at 222.

After denying repeated requests by the Ponca to reverse its removal decision, and because the Ponca refused to go to the Indian Territory voluntarily, the government issued an order for removal on April 12, 1877. Removal began for some of the Ponca on April 30, 1877, and for others in May. The journey, known as the "Ponca Trail of Tears," was made without adequate provision or preparation and encountered horrible weather. Many died, and the Ponca arrived "discouraged, homesick and hopeless ... on the lands of strangers, in the middle of a hot summer, with no crops or prospects for any." *Ponca Restoration Hearings* 222-223.

In early 1879, Chief Standing Bear, whose son had died and had asked to be buried in the Ponca homeland, set out for Nebraska with 66 others. Having reached the Omaha Tribe's reservation that spring, Standing Bear and his company were arrested by General George Crook for the purpose of returning them to the Indian Territory. *United States ex. Rel. Standing Bear v. Crook*, 25 F. Cas. 695, 686 (D. Neb. 1879). With the support of many outraged citizens, including prominent attorneys and newspapermen, Standing Bear applied for a writ of habeas corpus. *Ponca Restoration Hearings*, 223-224. Finding for the first time that Indians were "persons" under American law, and finding no lawful grounds to relocate Standing Bear and his companions, District Court Judge Elmer S. Dundy ordered their freedom. *Standing Bear*, 25 F. Cas. at 700-701.

The treatment of the Ponca and Judge Dundy's decision received national attention. In 1880, a committee was appointed by the Senate to investigate, and it made a report to President Hayes in 1881 condemning the government's mismanagement of Ponca affairs. *Ponca Restoration Hearings*, 225-226.

In an Act of March 2, 1889, Congress made some reparation for giving the Ponca reservation to the Sioux Nation. It provided that Ponca members "now occupying a part of the old Ponca Reservation, within the limits of the said Great Sioux Reservation..." were to be allotted land there. 25 Stat. 892. Under this authority, 27,236 acres were allotted to 168 people. H. REP. No. 2076, *Providing for the Division of the Tribal Assets of the Ponca Tribe of Native Americans of Nebraska Among the Members of the Tribe*, 87th Cong., 2d Sess. at p. 15 (1962) ("H. Rep. 2076"); S. Rep. No. 1623, *Providing for the Division of the Tribal Assets of the Ponca Tribe of Native Americans of Nebraska Among the Members of the Tribe, and for Other Purposes*, 87th Cong., 2d Sess. at p. 14 (1962) ("S. Rep. 1623.") From this point forward, the Northern Ponca were established in Nebraska.

That the United States recognized the Ponca of Nebraska, as distinct from the Ponca of Oklahoma and the Ponca before 1868, is evident from the tribe's reorganization under the Indian Reorganization Act. In the modern era of Indian law, Federal recognition of an Indian tribe requires both a legal basis for recognition, *i.e.* Congressional or executive action, and some empirical indicia of recognition, namely, a "continuing political relationship with the group...." *Grand Traverse*, 369 F. 3d at 968, *quoting* Cohen, *Handbook of Federal Indian Law*, at 6 (1982); *Mashpee Tribe v. Sec'y of the Interior*, 820 F.2d 480, 484 (1st Cir. 1987). Both criteria are met here.

Among its various provisions, the Indian Reorganization Act of 1934 grants any Indian tribe the right to adopt a constitution, which must be done by majority vote at a

special election called for the purpose and which must then be approved by the Secretary of the Interior:

> Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when –
>
> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
>
> (2) approved by the Secretary pursuant to subsection (d) of this section.

25 U.S.C. § 476(a). The Act likewise permits the Secretary to issue, upon petition, a charter of incorporation to a tribe. 25 U.S.C. § 477.

The IRA itself, in short, provides both a legal basis for the United States' recognition of an Indian tribe and a basis for a continuing political relationship with the tribe. Under the IRA, a tribe may adopt a constitution or corporate charter, or both, recognized by the United States, and the approval by the Secretary of the Interior is the beginning of Federal supervision of the tribe's legal affairs. Subsequent tribal elections under a tribal constitution, for example, are subject to Federal regulation. 25 C.F.R. §§ 81.1-81.24.

The Ponca of Nebraska approved a constitution and by-laws on February 29, 1936, and these were approved by the Secretary of the Interior five weeks later on April 3. H. Rep. 2076 at 11; S. Rep. 1623 at 11. A corporate charter for the Ponca Tribe of Native Americans of Nebraska was ratified on August 15, 1936. H. Rep. 2076 at 11; S. Rep. 1623 at 11. From 1936 forward, then, until termination in 1966, the United States recognized the Ponca of Nebraska.

2. Termination or non-recognition by the United States

The second condition for demonstrating that a tribe is restored to Federal recognition is the loss of prior recognition by the United States. Such a loss may occur through legislative action – *e.g.* by statute or treaty – or by administrative action. *Grand Traverse,* 369 F.3d at 968-72; *TOMAC v. Norton,* 193 F. Supp. 2d 182, 193-94 (D.D.C. 2002); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 705-07 (W.D. Mich. 1999), *vacated on other grounds*, 288 F.3d 910 (6th Cir. 2002). The Ponca of Nebraska lost Federal recognition forty years ago, after the passage of a termination act, 25 U.S.C. §§ 971 – 980.

During the mid-20th Century, the "Termination Era," Congress promoted an end to the trust relationship between the United States and the Indian tribes and aimed instead at assimilation:

> it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship.

H.C.R. 108, *Termination of Federal Supervision: The Removal of Restrictions Over Indian Property and Person*, 83rd Cong., 2nd Sess. (1953).

On September 23, 1958, the Ponca of Nebraska adopted a resolution and petition noting that only eight adult members participated in the last regular tribal election – held in November 1949, with none held between then and 1958 – and that only 23 adult Indians, not all of them Ponca, resided on the reservation. H. Rep. 2076 at 9; S. Rep. 1623 at 9. The resolution and petition then sought

> the Bureau of Indian Affairs, the county commissioner [sic] of Knox County [Nebraska], and the State of Nebraska to cooperate with us in the

> development of a program leading to disposal of property owned by the Ponca Tribe and the distribution of proceeds and any other assets of the of the Ponca Tribe to those members who may be determined to be entitled to participate in such distribution. We further petition that the Congress of the United States enact legislation to accomplish the purposes of this program, developed pursuant to the petition, and to dissolve the corporation known as the Ponca Tribe of Native Americans of Nebraska.

H. Rep. 2076 at 10; S. Rep. 1623 at 9.

On September 17, 1959, the Knox County Board of Supervisors adopted a resolution "favoring the introduction and passage in the U.S. Congress of a proposal [sic] legislative bill providing for emancipation of the Ponca Tribe of Native Americans of Nebraska...." H. Rep. 2076 at 10; S. Rep. 1623 at 10.

In April 1962, Idaho's Senator Church introduced S. 3174, a bill "to provide for the division of the tribal assets of the Ponca Tribe of Native Americans of Nebraska among the members and to terminate Federal supervision and control over the tribe." S. Rep. 1623 at 1. Enacted on September 5, 1962, this act provided, in brief, for the Secretary of the Interior first to establish a roll of tribal members and then to distribute all tribal assets, both personal property and real property (including trust land), to those members. Members were also eligible to select and purchase as much as five acres of land for a homesite. Any lands not so selected would be sold at auction. 25 U.S.C. §§ 971- 975.

At the time, 691.11 acres of land were held in trust for the Tribe by the United States, and 2,180.39 acres of allotted trust land – all that remained in Ponca hands after the allotment of 27,236 acres in 1889 – were held in fractionated ownership. An additional 152.5 acres was owned by the United States. S. Rep. 1623 at 14-15; H. Rep. 2076 at 15.

In any event, the termination act provided three years for the distribution of assets, 25 U.S.C. § 973(a). Following that, "the Secretary of the Interior shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated," 25 U.S.C. § 980, which the Secretary did on October 18, 1966. 31 Fed. Reg. 13810. From that point, until the restoration of the Ponca of Nebraska by statute in 1994:

> the tribe and its members [were] not ... entitled to any of the special services performed by the United States for Indians or Indian tribes because of their Indian status, [and] all statutes of the United States that affect Indians or Indian tribes because of their Indian status [were] inapplicable to them, and the laws of the several States [applied] to them in the same manner they apply to other persons or citizens....

25 U.S.C. § 980.

In short, by the passage of the termination act, Congress removed the legal basis for the United States' recognition of the Ponca of Nebraska, and the Secretary then removed all indicia of any continuing political relationship with the Tribe. The United States no longer dealt with the Ponca of Nebraska as a political entity, and the Tribe thus lost its prior recognition.

3. Reinstatement of recognition

Like the loss of recognition, a reinstatement of recognition, the third and final condition for being "a tribe that is restored to recognition," may occur through legislative or administrative action, *i.e.* the Federal acknowledgement process. *Grand Traverse,* 369 F.3d at 967, 969-72. Congress reinstated recognition of the Ponca of Nebraska by statute in 1994.

In 1988, Congress formally repudiated H.C.R. 108 and its policy of termination: "Congress repudiates and rejects House Concurrent Resolution 108 of the 83d Congress

and any policy of unilateral termination of Federal relations with any Indian nation." 25 U.S.C. § 2501(f).

On October 11, 1989, Senators Exon and Kerry, both of Nebraska, introduced S. 1747, the "Ponca Restoration Act." S. REP. 101-330, *Providing for the Restoration of Federal Recognition to the Ponca Tribe of Nebraska, and for Other Purposes*, 101st Cong., 2nd Sess. (1990). ("S. Rep. 101-330.") The legislative history clearly and unambiguously states the purpose of the bill: "to restore Federal recognition to the Northern Ponca Tribe of Indians in the State of Nebraska." S. Rep. 101-330 at 1.

Signed into law on October 31, 1990, the Ponca Restoration Act, 25 U.S.C. §§ 983 – 983h, did exactly that: "Federal recognition is hereby extended to the Ponca Tribe of Nebraska." 25 U.S.C. § 983a. The Act also states:

> All rights and privileges of the Tribe which may have been abrogated or diminished before the date of enactment of this Act by reason of any provision of Public Law 87-629 [25 U.S.C. §§ 971 – 980] are hereby restored and such law shall no longer apply with respect to the Tribe or the members.

25 U.S.C § 983b(a).

In sum, over its history, the Ponca Tribe of Nebraska was recognized by the United States, lost this recognition, and was reinstated to Federal recognition. Therefore the Tribe is an "Indian tribe that is restored to Federal recognition" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

B. Land taken into trust as part of the restoration

Given that the Ponca Tribe of Nebraska is a restored tribe, its land in Carter Lake, Iowa, only satisfies the requirements of § 2719(b)(1)(B)(iii) if it was taken into trust as part of the Tribe's restoration. Nothing in IGRA requires that this be done by Congressional action or in the very same transaction that restored the Tribe. Lands may

be restored to a tribe through the administrative fee-to-trust process. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp. 2d 689, 699-700 (W.D. Mich. 1999).

Still, not every trust acquisition for a restored tribe meets this exception. There must be some limiting condition – something that ties the trust acquisition to, or shows it to be a part of, the tribe's restoration. *Grand Traverse*, 198 F. Supp. 2d 920 at 935. Accordingly, both the NIGC and the courts that have considered the question find the necessary limiting condition in the factual circumstances of the trust acquisition, the location of the trust acquisition, and the temporal relationship of the trust acquisition to the tribal restoration. *See, e.g., Coos,*116 F. Supp. 2d at 164; *Grand Traverse*, 198 F. Supp. 2d at 935; *In Re Sault Ste. Marie Tribe of Chippewa Indians, Resolution No. 2006-101, amendment to Tribal Code § 42.801, Gaming Ordinance* (restored lands opinion, September 1, 2006); *In Re Karuk Tribe of California*, (restored lands opinion, October 12, 2004). Here, while the Tribe has historical and modern ties to the Carter Lake land, and while the trust acquisition process at least began not long after the Tribe's restoration, the facts surrounding the acquisition show conclusively that the Carter Lake land was not restored land.

1. The Tribe's ties to Carter Lake, Iowa.

The Tribe has historical and modern ties to its Carter Lake land and to the surrounding area that weigh in favor a finding that the land is restored.

a. Historic ties.

Scholars have identified the aboriginal territory of the Ponca, and it includes Carter Lake. The eastern boundary of the Ponca territory was, approximately, the Missouri River, and the southern boundary was the Platte River. Figure 2, above, for example, shows that while most Ponca villages were concentrated around what is now Niobrara, Nebraska, Ponca villages have been found as far north and east as Pipestone, Minnesota, and almost as far south as the Platte, further south in Nebraska than present-day Omaha, which surrounds Carter Lake. Ritter, *Piecing Together*, at 274.

Scholars have also written:

> The eastern boundary of the Ponca territory ran *roughly* from the from the west bank of the Missouri, opposite the present-day Sioux City, Iowa, down to the mouth of the of the Platte River.... The North Platte River formed the southernmost boundary of the Poncas. Directly south of that boundary lived the Pawnee, who traditionally hunted to the south....

Joseph H. Cash and Gerald W. Wolff, *The Ponca People* (1975). And see, James H. Howard, *The Ponca Tribe*, 130-131 (1965) (noting that the eastern boundary of the Ponca territory "was a line extending south to the Platte River from a place on the Missouri called *Ni-agatsatsa*," and the "southern boundary of the Ponca domain was the Platte (North Platte west of the fork)").

As a rough marker, however, the Missouri River was not an impassable boundary. Living memory – in the form of deposition testimony from Ponca elders in 1912 in support of a claim before Indian Claims Commission, *Omaha Tribe v. United States*, No. 21,002 (1911-1912) – is consistent with the writings of the scholars. It establishes the Ponca territory, their travels and their hunts east of the Missouri and south to the Platte.

For example, Louis Le Roy, age 70 in 1912, Howard, *Known Village Sites*, at 114, testified as to boundaries:

> They commence east of Omaha city on the other side of the River Wasabte (Black Bear's Den). From there they went to Pipestone, and from Pipestone to Choteau Creek. From there they went up where Crow Creek Agency is, somewhere near there. From there they went to what they call "Dry wood" or "Dry timber." From there they went to what they call "Fork of the Missouri." Then the crossed and went south. From there they went over to the South of the Platte River. They followed the Platte River east and went down as far as the mouth of the Platte. From there they went to Ponca City – where Ponca City now is.

(Le Roy OLC 1912:35.)

Similarly, Chief Yellow Horse, brother of Chief Standing Bear and himself 67 in 1912, testified:

> Even in my time I knew that they went as far [south] as the Platte and as far east as the old Ponca village and even across the Missouri River to kill deer, buffalo, and elk.

(Yellow Horse, OLC 1912:146).

b. Modern ties

The tribe has modern ties to the Carter Lake land. The Tribe had a direct relationship with the Carter Lake land itself before it was taken into trust. The tribe purchased the land in fee in November 1998. In 2000, it finished negotiating and then executed the jurisdiction and cooperation agreement with the City of Carter Lake. The Tribe also erected a small modular building on the land and paved the attendant parking lot. The tribe housed a staff in the building to provide health services and social services. Though the tribe ceased those services because there was not enough money to fund them, it nonetheless still maintains an office there.

2. The timing of the Carter Lake trust acquisition.

This factor too could weigh in favor of a finding that the Carter Lake land is restored land. 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 call for.

In *In Re Sault Ste. Marie Tribe of Chippewa Indians*, above, for example, the NIGC found that a parcel of land that that tribe acquired in 2000 was not restored lands because of the great length time that passed between the tribe's recognition and the 2000 acquisition and because of the large amount of other property the tribe had otherwise acquired in that time. Specifically, there were 28 years between the Sault Ste. Marie tribe's restoration and the trust acquisition. Further,

> the Tribe had its first reservation parcel by 1975, and three reservation parcels by 1984 as well as an additional 184.21 acres in trust. These parcels were taken into trust three and nine years after Tribal restoration. By the time the St. Ignace parcel was placed into trust in 2000, the Tribe had acquired 50 parcels totaling nearly another 1000 acres into trust. These trust parcels have given [the Tribe] significant acreage devoted to member housing, community services, and economic development that might better be determined part of the Tribes first systematic effort to restore its land base.

In Re Sault Ste. Marie Tribe of Chippewa Indians, restored lands opinion at p. 16. Accordingly, the NIGC found that the 2000 parcel was not restored lands.

Here, there was no such long passage of time and there were no significant intervening land acquisitions. The Tribe owned in trust only an office building in Lincoln, Nebraska (Ponca Tribe of Nebraska resolution 96-101) and approximately 150 acres in Niobrara, Nebraska, for a community building and bison grazing land. (Submission, p. 24; May 27 and June 22, 2003 trust deeds). Though Congress restored the Ponca of Nebraska in 1990, the Tribe only had a constitution approved in 1994. (Ponca Tribe of Nebraska resolution 00-01). The Tribe purchased the Carter Lake land in September 1999, only five years later, and it 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 the litigation with Pottawatamie County and the State of Iowa, which postponed the acquisition to the beginning of 2003.

Accordingly, the timing of the Carter Lake acquisition weighs in favor of a finding of restored lands.

3. **Factual circumstances surrounding the trust acquisition.**

Notwithstanding the foregoing two factors, however, the facts immediately surrounding the trust acquisition show that the Carter Lake land is not restored land.

To begin with, the Tribe did not contemplate a gaming use for the land when it applied to have the land taken into trust. Instead, the Tribe sought to have the land taken into trust so that it might place a healthcare facility on the land:

> WHEREAS: The property will be utilized to provide services to our tribal members, primarily health services. Those services consist of Indian Health Service 638 contracted programs and Bureau of Indian Affairs P.L. 93-638 contract programs....

(Ponca Tribe of Nebraska, resolution 00-01.) This is not to suggest that a tribe's representations of use in a fee-to-trust application will be determinative. Rather, this is one fact among many others that speaks to the circumstances surrounding the trust acquisition.

Next, the State of Iowa and Pottawatomie County challenged the September 15, 2000 decision of the BIA Great Plains Regional Director to take the Carter Lake land into trust. They appealed to the IBIA and contended, in part, that the Tribe really intended to use the land for a casino and that the Regional Director erred in not considering this use. *Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002). In its brief before the IBIA, the Tribe again represented that the land would not be used for

gaming but "is to be used for administrative services, including health care, and for health care facilities." (*Iowa v. Great Plains Region Director*, Brief of Ponca Tribe of Nebraska, April 30, 2001, p. 4.)

On August 7, 2002, the IBIA decided in favor of the Tribe, finding that the land "was purchased ... and is currently used for health care facilities" and that any possible gaming use was speculative. The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

Rather than continuing to litigate, attorneys for the Tribe and the State reached an agreement – acknowledged in writing, but never formally memorialized – under which Iowa agreed to forego litigation in Federal court, and the Tribe agreed that the Carter Lake land would not be used for gaming. (November 26, 2002, e-mail, from Michael Mason, Esq.; December 12, 2002, letter from Jean M. Davis, Assistant Attorney General, to Michael Mason, Esq.)

Accordingly, on November 26, 2002, the Tribe's then-attorney sent an e-mail to the BIA requesting that a notice of intent to take the Carter Lake land into trust be published as soon as possible. (November 26, 2002, e-mail from Michael Mason.) He requested further that the notice contain the following language, which was substantially identical to what was eventually published:

> 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 CFR 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. sec. 2719(B)(1)(B). There may be no gaming or gaming-related activities on the land unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-

> Related Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained.

(November 26, 2002, e-mail, from Michael Mason, Esq.)

On December 3, 2002, the Regional Director published in a newspaper of general circulation in Carter Lake a notice of intent to take the Carter Lake land into trust but omitted this additional language. On December 6, BIA published a "corrected notice of intent to take land into trust" this time including the language. (December 6, 2002, corrected public notice.) An internal BIA e-mail noting the incorrect publication described the additional language as follows:

> The attached Notice of Intent was published in the Council Bluffs, Iowa, newspaper yesterday, December 2 [sic, December 3], 2002. you will recall that the last paragraph in the Notice was a compromise reached by the Ponca Tribe and the State of Iowa as well as Pottawatomie County, Iowa. The Solicitor's office had no problem including the appended paragraph. If we did not include the last paragraph, Iowa would have litigated the matter in Federal Court. Also, the last paragraph was agreed upon by the Ponca's attorney....

(December 3, 2002, e-mail from Tim Lake to various BIA recipients.)

On December 13, 2002, Jean M. Davis, an Iowa Assistant Attorney General, wrote a confirming letter to the Tribe's attorney, stating:

> As you are aware, the Corrected Notice of Intent to take Land in Trust was published in the Council Bluffs *Daily Nonpareil*. The corrected Public Notice makes clear that that lands to be taking into trust in this case will be taken for non-gaming related purposes. The corrected Public Notice also contains the acknowledgement by the Ponca Tribe of Nebraska that the lands are not eligible for any of the exceptions found under 25 U.S.C. sec. 2719(b)(1)(B).
>
> This corrected Public Notice is consistent [with] your repeated representations to me and to Pottawattamie County, made on behalf of the Ponca Tribe of Nebraska, that the Tribe intends to use the lands for the purpose stated in the original application, not for gaming activities. 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 Pottawatamie 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.

(December 13, 2002, letter from Jean M. Davis.) The trust acquisition of the Carter Lake land followed in February 2003. (January 28, 2003, warranty deed; February 10, 2003, letter from Acting Regional Director, Great Plains Region, BIA, to Superintendent, Yankton Agency.)

In and of themselves, these facts are determinative. They culminate in the language of the corrected notice, and they unambiguously indicate that at the time of the acquisition, no one involved intended the Carter Lake land to be used for gaming or, more importantly, to be restored land. Only the opposite appears. Every government involved in the acquisition regarded the Carter Lake land as land that was not restored within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii), a characterization that the Tribe has not, until now, disputed.

The Tribe contends that the above facts are not properly considered here because they do not surround the trust acquisition. Rather, the Tribe contends, these facts all post date the acquisition of the Carter Lake lands, which occurred upon the September 15, 2000 decision of the Regional Director. This is not persuasive. The trust acquisition was not, in fact, complete on that date.

There are a number of ways to see this. First and foremost, the record shows that the Regional Director's decision to take the Carter Lake land into trust was not final on September 15, 2000. By its own terms, the decision states that it may be appealed to the IBIA within 30 days, and "if no appeal is timely filed, *this decision will become final for the Department of the Interior at the expiration of the appeal period.*" (September 15, 2000,

Letters from Cora L. Jones, Great Plains Regional Director, BIA, to Carter Lake Mayor, Iowa Governor, Pottawattamie County Supervisors.) (Emphasis added.)

The State of Iowa and Pottawattamie County in fact did appeal to the IBIA, which did not render its decision until August 2002. That is the earliest date in which the trust acquisition might be final because then and only then could an action on the decision be heard in Federal district court. Prior to that, the suit would have been stayed or dismissed under the doctrine of primary jurisdiction. *Reiter v. Cooper,* 507 U.S. 258, 268 (1993); *Grand Traverse Band*, 46 F. Supp. 2d at 706 (primary jurisdiction doctrine permits Federal courts to stay or dismiss actions over which they have jurisdiction pending resolution of issues within the special competence of an administrative agency.) The earliest, then, that the decision was final was in August 2002.

Another indication that the final decision did not occur in September 2000 is found in Department of the Interior land-into-trust regulations. Before land may be taken into trust, these regulations require the publication of a notice, either in the *Federal Register* or in a newspaper of general circulation, stating that "a final agency determination to take land into trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." 25 U.S.C. § 151.12(b). That notice was published here for the first time on December 3, 2002, and the deed transferring the Carter Lake land to the United States in trust for the tribe was not executed until early 2003.

With the exception of the Tribe's statements of intent as to the use of the Carter Lake land, both to the BIA and before the IBIA, all of the above events surround the taking of the Carter Lake land into trust in the latter half of 2002 and early 2003. They are, therefore, properly considered here.

That said, the Tribe also contends in various ways that the limiting language of the corrected notice can of itself have no legal effect. It contends that neither the corrected notice nor the apparent settlement agreement with the State of Iowa was authorized by the tribal government. It contends that in any event, an agreement limiting the use of the Carter Lake lands would require approval by the Secretary under 25 U.S.C. § 81. In sum, it contends that none of the usual mechanisms for limiting uses of land – a deed restriction or covenant or a binding settlement agreement – are present here. Whether or not that is so, it is, ultimately, irrelevant to the determination here.

As to the settlement agreement, the NIGC Chairman need take no position on whether the notice was properly authorized by the tribal government or whether there was a binding settlement agreement between the Tribe and the State of Iowa. It certainly appears from the facts in the record that both the State of Iowa and the BIA regional office believed that the tribal attorney had the apparent authority to act on behalf of the Tribe. It appears as well that Iowa did not pursue litigation further because it struck an agreement with the Tribe that the Carter Lake land would only be used for gaming under a 2-part determination. If that agreement was never valid or binding, Iowa, presumably, is still free to seek judicial review of the IBIA's decision. That action, presumably, could also address the applicability of 25 U.S.C. § 81 and the determination by the Secretary that that law requires. In passing, it should be noted that there does not appear to be any evidence in the record of such a determination after the Tribe entered into a separate 1999 settlement agreement with the City of Lincoln, Nebraska, that prohibited gambling on the Tribe's trust lands there. (*See* May 19, 1999 letter from Chairman Fred LeRoy to Mayor of Lincoln; May 28, 1999 intergovernmental agreement regarding tribal land.)

Be all of that as it may, the question is whether the Carter Lake land is or is not restored land, given the facts that surround the trust acquisition. The question is not whether the notice, or any alleged agreement based upon it, is legally enforceable or whether there is a legally binding document restricting the use of the Carter Lake land in such a way as that the land must perforce cease to be restored lands under IGRA. The facts surrounding the trust acquisition, as set out above and detailed in the corrected notice of intent to take land into trust, demonstrate that the Carter Lake land was not part of a restoration of the Tribe's lands at the time it was taken into trust.

Given all of the foregoing, it is the opinion of the Office of the General Counsel that the land in Carter Lake, Iowa, though "Indian lands" within the meaning of IGRA, is not restored land under 25 U.S.C. § 2719(b)(1)(B)(iii). Gaming is therefore not permissible on the Carter Lake land under IGRA. The Department of the Interior, Office of the Solicitor, concurs in this analysis.

RECOMMENDATION

Disapprove the ordinance.