National Indian Gaming Commission

In Re: Gaming Ordinance of The Ponca Tribe of Nebraska

December 31, 2007

FINAL DECISION AND ORDER

Appeal to the National Indian Gaming Commission ("NIGC" or "Commission") from a disapproval of a site specific gaming ordinance submitted by the Ponca Tribe of Nebraska ("Tribe"). This appeal is brought pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et. seq.*, and NIGC regulations at 25 C.F.R. Part 524.

Appearances

Michael Rossetti, James Meggesto, for the Ponca Tribe of Nebraska
Michael Gross for the Chairman, National Indian Gaming Commission
John Lundquist, Assistant Attorney General, for the State of Iowa, a limited participant pursuant to 25 C.F.R. § 524.2

DECISION AND ORDER

After careful and complete review of the agency record and pleadings filed by both the Tribe and the Chairman, as well as the State of Iowa, a limited participant pursuant to NIGC regulations at 25 C.F.R.§ 524.2, the Commission finds and orders that:

1. We affirm the Chairman's decision that the Carter Lake land meets the location and temporal factors of the restored lands analysis.

2. We reverse the Chairman's decision with respect to the factual circumstances factor for the following reasons:

(a) The Chairman's disapproval improperly relied on the Tribe's intended use of the land;

(b) The Chairman's disapproval improperly relied on events that occurred after the Department of the Interior's (DOI) final agency decision was made; and

(c) The factual circumstances of the acquisition weigh in favor of restoration.

3. We reverse the Chairman's disapproval of the ordinance because we find that the Carter Lake land meets the restored lands exception.

PROCEDURAL AND FACTUAL BACKGROUND

The factual background of the Tribe's history, including its termination and restoration to federal recognition, are well set forth in the Carter Lake Lands Opinion Memorandum (Disapproval Memo), which is incorporated by reference into the NIGC Chairman's (Chairman) disapproval of the ordinance. We see no need to revisit those facts here. The following events, however, are of particular significance to our decision.

The Tribe was restored to federal recognition in 1990 by virtue of the Ponca Restoration Act, 25 U.S.C. §§ 983 – 983h.

On September 24, 1999, the Tribe purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa. Shortly thereafter, on January 10, 2000, the Tribe passed a resolution seeking to have the DOI place the land into trust. The Tribe's stated intent was to place a healthcare facility on the land. (Ponca Tribe of Nebraska, Resolution 00-01.)

On September 15, 2000, the Great Plains Regional Director for the Bureau of Indian Affairs (BIA) within DOI 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.) Both the State of Iowa and Pottawattamie County appealed the September 15 decision to the Interior Board of Indian Appeals (IBIA). 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. *Id.* The IBIA thus affirmed the Regional Director's decision on August 7, 2002. *Id.*

Sometime following the IBIA decision in the Tribe's favor, the Tribe, the State of Iowa, and Pottawattamie County reached an agreement that avoided further litigation. Although there is no evidence to show that the agreement was reduced to writing, it was acknowledged through correspondence both by the Tribe and the State. On November 26, 2002, the Tribe's then attorney sent the BIA an e-mail message requesting that a notice of intent to take the land into trust be published and requested that the following language be included:

> 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 the additional language requested by the Tribe. On December 6, BIA published a "corrected notice of intent to take land into trust" this time including the language. (Council Bluffs Daily Nonpareil, December 6, 2002). 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 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.)

On January 28, 2003, following the publication of the corrected notice, the Tribe executed a deed conveying the Carter Lake land to the United States, and the BIA completed 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.)

On July 23, 2007, the Tribe submitted a site specific class II gaming ordinance amendment (ordinance) to the Chairman for review and approval. In this ordinance, the Tribe defined a parcel of trust land in Carter Lake, Iowa (Carter Lake land) as "Indian lands" meeting the restored lands exception to the general prohibition on gaming on lands acquired after October 17, 1988. 25 U.S.C.§ 2719(b)(1)(B)(iii). By letter dated October 22, 2007, the Chairman found that the Carter Lake land is not restored lands within the meaning of 25 U.S.C. § 2719 (b)(1)(B)(iii) and disapproved the ordinance. The Tribe filed a Notice to Appeal on November 9, 2007. Furthermore, on November 16, 2007, the Tribe and the Chairman filed a Joint Motion for Expedited Decision, requesting that the Commission issue a final decision on the appeal within 35 days or prior to the December 31, 2007 scheduled departure of Vice-Chairman Cloyce V. Choney.

The Commission issued a decision on the Joint Motion stating that it would do all in its power to issue a decision prior to the departure of Vice-Chairman Choney, but that circumstances may require additional time to review the matter and issue a decision, and that the Commission could not agree to be bound by an earlier deadline than that which is set forth in its regulations. [1] Under NIGC regulations, the Commission has ninety (90) days to decide an appeal of an ordinance disapproval.

[1] The Commission was able to accommodate the Joint Motion and this Decision and Order is issued prior to the departure of Vice-Chairman Choney.

In addition, the Commission invited the State of Iowa to file a Request to Participate pursuant to 25 C.F.R. § 524.2. The State filed its Request to Participate on November 29 and the Commission granted the request on November 30. Pursuant to a briefing deadline established by the Commission, both the Tribe and the Chairman replied to the State's filing on Dec. 7.

DISCUSSION

Legal Framework

Tribal ordinances or resolutions governing the conduct or regulation of Class II gaming on Indian lands are reviewed and approved by the Chairman under 25 U.S.C. § 2710(b)(2). Amendments to a tribe's gaming ordinance are submitted for approval by the Chairman in accordance with 25 C.F.R. § 522.3. A tribe may appeal a disapproval of a gaming ordinance, resolution, or amendment within 30 days after the Chairman serves notice of his determination of disapproval. 25 C.F.R. Part 524. The Tribe's appeal here was filed in a timely manner.

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.

There is no dispute that the Carter lake land meets this definition. However, there is a general prohibition on gaming on trust land acquired after October 17, 1988, unless the land meets one of several exceptions. 25 U.S.C. § 2719(a). Because the Carter Lake land was acquired after this date, the question then becomes whether the Carter Lake land meets any of the exceptions in § 2719. The Tribe contends that the land meets the restored lands exception, which requires land to be "taken into trust as part of . . . the

restoration of lands for an Indian tribe that is restored to federal recognition."[2] 25 U.S.C. § 2719(b)(1)(B)(iii).

Courts apply a three-factor test to determine whether lands are "restored" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii): (1) temporal proximity to restoration; (2) historical and modern nexus to the location; and (3) factual circumstances. *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Atty.,* 198 F. Supp. 2d 920, 935 (W.D. Mich., 2002). Applying these criteria to the restored lands exception places "belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion." *Id.* Courts apply the factors in a balancing test, and not all factors must weigh in a tribe's favor for the land to meet the restored lands exception. *Grand Traverse,* 198 F. Supp. 2d 920 at 936; *Wyandotte Nation v. National Indian Gaming Comm'n*, 437 F.Supp. 2d 1193, 1214 (D.Kan. 2006). In fact, the court in *Grand Traverse* found that "the land may be considered part of a restoration of lands on the basis of timing alone" 198 F. Supp. 2d 920 at 936, and the *Wyandotte* court found that the location factor is "arguably the most important component of the test for the restoration of land exception." *Wyandotte*, 437 F.Supp 2d 1193, 1214.

The Chairman's Decision and the Issues Presented by the Tribe's Appeal

Because the Tribe's ordinance was site-specific and defined the Carter Lake land as Indian land that meets the restored lands exception, the Chairman had to determine the validity of this assertion in the process of deciding whether to approve or disapprove the ordinance. *See*

[2] There is no dispute that the Tribe is a restored tribe.

e.g. Citizens Against Casino Gambling in Erie County, et. al. v. Kempthorne, et. al., 471 F. Supp. 2d 295, 323 (W.D. N.Y., 2007.

The Chairman found that the Carter Lake parcel meets both the temporal and location factors of the restored lands analysis, and there has been no challenge to these findings. We agree with the Chairman's findings in this regard and affirm those findings. What is in dispute, then, is the Chairman's application of the factual circumstances element and his resultant disapproval of the ordinance on the grounds that it purported to authorize and regulate gaming on lands upon which the Tribe could not lawfully game.

The Chairman found the following facts to be determinative in disapproving the ordinance: (1) the Tribe did not contemplate a gaming use for the land when it applied for trust status; (2) Iowa and Pottawattamie County challenged the Regional Director's decision to take the land into trust; (3) The Tribe represented before the IBIA that the land would not be used for gaming; (4) the IBIA affirmed the Regional Director's decision, finding it only speculative that the Tribe intended to game on the land; (5) the Tribe and the State reached agreement that the State would forgo litigation in Federal court and the Tribe acknowledged the land did not meet the restored lands test; (6) the Tribe's attorney requested that BIA's public notice contain language to the effect that the Tribe acknowledged that the lands are not restored lands; (7) the BIA published the requested language; and (8) the State wrote a confirming letter to the Tribe in which it agreed not to pursue judicial review of the IBIA's decision. These events, the Chairman found, show 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." Disapproval Memo at 27-30. Each of these factors fall into one of the following three categories: (1) the Tribe's expressions of

intent as to its use of the land; (2) the Tribe's expressions of intent regarding the restored lands status of the land; and (3) reliance by third parties upon those expressions of intent.

The Tribe argues that the Chairman erred in considering these facts for several reasons. First, prior agency opinions show that a tribe's intended use of the land at the time it is taken into trust is not relevant to the restored lands analysis. Tribe's Notice of Appeal at 5-6. Second, the Tribe's expressions of its intent that the Carter Lake parcel was not restored lands occurred outside the relevant period for consideration. *Id.* at 10-12. Third, case law does not support subjective intent as a factual circumstance, *Id.* at 7, and even if it did, the expressions of intent do not outweigh the overwhelmingly positive analysis of the location and temporal factors. *Id.* at 8. Finally, reliance by third parties was not within the Commission's authority to consider in a gaming ordinance review. Tribe's Response to Submission of the State of Iowa at 3-8.

The State argues, in part, that the Commission should affirm the Chairman's decision because the Tribe "previously repudiated any claim it may have had that the Carter lake trust holdings constitute restored land eligible for class III gaming under IGRA." Request to Participate in Appeal at 5 and that "[b]oth the State of Iowa and the BIA acted in reliance on [the Tribe's] representations." *Id.* at 7. [3]

Tribe's Intended Use of the Land is Not Relevant to a Restored Lands Analysis

The Chairman based his disapproval in part on the Tribe's representations that it intended to use the land for a health care facility and the IBIA ruling that gaming was only a speculative use. Disapproval Memo at 27-28. Reliance on these facts was error. Prior agency decisions

[3] Pottawattamie County was invited to submit information to the NIGC relative to the status of the Carter Lake land but did not do so. See Letter to Pottawattamie County Board of Supervisors from Michael Gross, NIGC Senior Attorney, dated March 10, 2006.

instruct that intended use at the time of the trust acquisition has no place in a restored lands analysis.

The question of whether lands are restored is, in fact, quite distinct from the question of whether a tribe intends to conduct gaming on those particular lands. In other words, the focus of the analysis is whether the land was acquired as part of the Tribe's restoration, not on what the Tribe planned to do with the land at the time. Most restored lands determinations are made through the DOI's trust acquisition process in cases where a tribe has expressed intent to game. However, there are also a number of cases, such as this one, where tribes acquire trust land for another purpose, and later, often within only a few years, receive a positive restored lands determination so that they may conduct gaming. Regardless of when the tribe expresses its intent to game, the analysis is the same.

On remand from the District Court in *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000), the DOI found that the land at issue was restored lands. It noted that the land "was taken into trust for historical, cultural and economic self-sufficiency" and that "[a]t the time of the land being taken into trust, the Tribes were not considering it for gaming purposes" but changed their intended purpose "to maximize their economic development opportunities." DOI Memorandum from Philip Hogen, Associate Solicitor, Division of Indian Affairs to Assistant Secretary – Indian Affairs Re: *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000) in regard to proposed gaming on the Hatch Tract in Lane County, Oregon (Dec. 5, 2001) (*Coos Opinion*). Only 22 months after the land was taken into trust for another purpose, the Tribes announced their intent to game and requested a restored lands opinion.

Similarly, the Commission's Office of General Counsel (OGC) has issued two opinions in favor of restored lands for tribes that originally expressed their intent to use the property for another purpose. The Bear River Band of Rohnerville Rancheria sought a restored lands decision in much the same way the Tribe does here – by way of a site-specific ordinance. The land the Bear River Band sought to game on was land it had purchased through a Community Development Block Grant from the U.S. Department of Housing and Urban Development and with the assistance of the BIA. The Secretary accepted the land into trust, and only one year later, the Bear River Band began to seek a restored lands determination. Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Bear River Band of Rohnerville Rancheria at 2 (August 5, 2002). The OGC found that the land was restored lands under the IGRA. *Id.* at 14.

More recently, our OGC found that the land upon which the Mooretown Rancheria wished to conduct gaming was restored land despite that the land had been originally acquired for housing purposes and, like the Bear River Band land, was also purchased with HUD money. Memorandum from John R. Hay, NIGC Staff Attorney, through Penny J. Coleman, NIGC Acting General Counsel to Philip N. Hogen, NIGC Chairman Re: Mooretown Rancheria Restored Lands at 9-10 (October 18, 2007). Again, only two years had passed before the Tribe announced its intent to game and sought a restored lands opinion. *Id.*

As is shown by these earlier restored lands opinions, the Tribe's intended use of the land is not relevant to a restored lands finding and tribes are free to change their intended use of the land to take advantage of gaming opportunities if the land otherwise meets the relevant factors. Here, the Tribe took more than twice as long as other tribes to change course and pursue gaming. Like Coos, Bear River, and Mooretown, the Tribe is free to do so. It was error for the Chairman

to consider that the Tribe did not contemplate a gaming use for the land when it applied for trust status; that it represented before the IBIA that the land would not be used for gaming; and that the IBIA relied on that representation.

The Trust Decision was Made When the IBIA Issued its Final Agency Decision and Events Which Post-Date this Decision Were Improperly Considered

Although we have found the intended use of the land is not relevant, we still must determine whether the Tribe's expressed intention with regard to the restored status of the land, and reliance thereon, are factual circumstances appropriately considered in the restored lands analysis. Before we can do so, however, we must address whether the Tribe's expressions of that intent were timely considered; i.e. were they present at the time the land was taken into trust?

The 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." *Grand Traverse* at 934. Whether the lands are taken into trust as part of a restoration of lands necessarily depends on the facts present at the time of the acquisition, or, more precisely, the facts present when the decision to acquire the land was made. Any facts which were not present at the time of the decision are not part of the trust acquisition, and, therefore, are not properly considered.

At issue is exactly when the acquisition occurred. There are three views expressed here:

1. The Tribe argues that the decision was made on September 15, 2000, when the Regional Director issued the decision to take the land into trust. Tribe's Notice of Appeal at 11.
2. The Chairman stated that the earliest the decision could have been final was in August 2002 when the IBIA decision was issued. Disapproval Memo at 27-30.

3. The Chairman then expanded the time frame to the date the Secretary signed the deed in February 2003, and relied on this later date and events which occurred up and until this date, in his disapproval of the ordinance. *Id.* The State agrees with the Chairman's reliance on this later date. State of Iowa's Request to Participate at 6.

We believe the correct view, first expressed by the Chairman, is that the land to trust decision was made when it became a final agency decision, i.e. upon the IBIA's decision. Consequently, events that occurred after that were not considered as part of the trust decision. Support for this view rests in DOI's regulations that govern both IBIA appeals and land acquisitions. Interior's regulations provide that the IBIA decides "finally for the Department appeals to the head of the Department pertaining to administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR chapter I."[4] 43 C.F.R. § 4.1(b)(2). Additionally, 25 C.F.R. § 4.312 states, "rulings by the [IBIA] are final for the Department and must be given immediate effect." Finally, 43 C.F.R. § 4.21(d) provides, in pertinent part:

> No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor.

These regulations unequivocally demonstrate that the IBIA decision is a final agency decision.

BIA regulations requiring public notice that a final decision has been made are also instructive here. Section 151.12(b) of 25 of C.F.R. requires public notice "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 C.F.R.

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[4] The land into trust process is governed by 25 C.F.R. Part 151, which falls within chapter I of 25 C.F.R, and is therefore appropriately within the jurisdiction of IBIA.

§ 151.12(b). When the BIA amended its regulation regarding land acquisitions, it added this notice requirement to facilitate judicial review of decisions by the Secretary to take land into trust. *See* 61 Fed. Reg. 18082 (Apr. 24, 1996); S*ee also*, *McAlpine v. United States*, 112 F.3d 1429, 1433 (10th Cir. 1997). The preamble to the BIA regulation explains that the rule:

> establishes a 30-day waiting period after final administrative decisions to acquire land in trust under the [IRA]. The Department is establishing this waiting period so that parties seeking review of final decision by the [IBIA]…will have notice of administrative decisions to take land into trust before title is actually transferred. This notice allows interested parties to seek judicial or other review under the [APA]…

61 Fed.Reg. 18082 (Apr. 24, 1996). The preamble further explains:

> following consideration of the factors in the current regulations and completion of the title examination, the Department, through Federal Register notice, or other notice to affected members of the public, will announce any final administrative determination to take land in trust. The Secretary will not acquire title to the land in trust until at least 30 days after publication of the announcement. This procedure permits judicial review before transfer of title to the United States. The Quiet Title Act (QTA), 28 U.S.C. § 2409(a), precludes judicial review after the United States acquires title. (citations omitted).

The timing and purpose of the public notice shows that it was not considered as part of the trust decision. The purpose of the notice is to advise the public that a land to trust decision has been made so that affected parties may sue in federal court to prevent the trust acquisition before the land is formally acquired because the Quiet Title Act precludes judicial review after the United States acquires title. See 28 U.S.C. § 2409(a). See also, *Governor of Kansas, et. al. v. Kempthorne*, 505 F.3d 1089 (10th Cir. 2007). The agreement entered into between the Tribe and the State, and the written documentation of that agreement, all occurred after, and as a result of, the land to trust decision. It was *because* the IBIA issued a final decision that the State sought the agreement with the Tribe that it would not pursue its remedies in federal district court so long as the Tribe "acknowledged that the lands are not eligible for the exceptions under 25 U.S.C.

§ 2719(b)(1)(B)."[5]

Finally, and importantly, the IBIA acts under authority delegated to it by the Secretary. See 43 C.F.R. 4.1, which provides that "[t]he Office of Hearings and Appeals, [of which the IBIA is a board] is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings and appeals and other review functions of the Secretary." *Id.* Because the IBIA acts for the Secretary and decides matters finally as the Secretary would, the IBIA decision here was, in effect, the Secretary's decision. The actions that followed that decision, i.e. the publication of the notice and the signing of the deed were not part of the decision whether to take the land into trust, but were actions the Secretary was required to take following a decision to take land in trust. This conclusion is supported by the use of the word "shall" in 25 C.F.R. § 151.12(b). Once the waiting period has expired and there is no challenge to the decision or request for reconsideration, the Secretary must acquire the land into trust.

We are not persuaded by the Tribe's argument that the decision-making process ended with the Regional Director and any events that occur after that point are not properly considered. Had the State not appealed, the Tribe would be correct in its timing analysis; however, where an appeal is timely filed and further documents may be submitted for consideration,[6] the Regional Director's decision cannot be said to have been final. While the Regional Director expressed intent to take the land into trust, that decision was timely appealed to IBIA and it is the IBIA decision that constitutes final agency action. DOI was not, as the Tribe suggests, "simply defending its decision by following the process set forth by law." Tribe's Notice of Appeal at 11.

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[5] As discussed at pages 16-17, *infra*, the question of restoration is a legal one not affected by a tribe's acknowledgement that the land is or is not restored.

[6] *See* 43 C.F.R. § 4.22 for regulations regarding submissions to IBIA.

It was still actively engaged in the decision-making process up and until the final agency decision.

The Chairman considered events that occurred up until the Secretary signed the deed. Even if this were the appropriate time-frame for considering evidence, we agree with the Tribe that "there is no evidence that Interior 'reviewed, analyzed, or considered whether to approve or endorse whatever 'agreement' that may have given rise to the notice before publishing it in the local newspaper. Rather, the Department simply accepted certain language to be appended to the . . . notice without independently determining whether it concurred with the substance..." Tribe's Request for Indian Lands Opinion at 33 (July 23, 2007). See also, internal BIA e-mail referencing the language in the notice as a "compromise reached by the Ponca Tribe and the State of Iowa ... [and that] 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." December 3, 2002, e-mail from Tim Lake, Superintendent, BIA, Yankton Agency, to various BIA recipients.

Consequently, we find that the IBIA decision is the point at which the decision was made by the agency, and any relevant events that occur up and until this point are properly considered as part of that decision. Events occurring after the decision are not properly considered. As such, the Chairman erred in relying on events that occurred after DOI's decision was final.[7]

[7] Because we find that the Tribe's expressed intentions and reliance thereon are not relevant because they occurred after the DOI final decision, we need not reach the question whether the subjective intent of a tribe and reliance thereon are proper factual circumstances to be considered in a restored lands analysis nor do we reach the question of the enforceability of the agreement between the Tribe and the State.

The Carter Lake Land Meets the Location, Temporal Proximity, and Factual Circumstances Factors and is Therefore Restored Land under the IGRA

The Chairman set forth a strong positive analysis of the location and temporal factors, which we affirm. Because the test for restored lands is a balancing test, we weigh as well the factual circumstances prong of the analysis. As discussed at pages 12-16, *supra,* the factual circumstances on which the Chairman relied occurred after IBIA's final decision and were therefore improperly considered. When we evaluate, however, the factual circumstances that occurred within the relevant time period, we find one fact in particular that weighs in favor of restoration, and no facts which weigh against it. Whether a tribe has significant intervening trust parcels is a fact that we have previously considered as part of the factual circumstances analysis. See Memorandum to Philip N. Hogen, Chairman, from Penny J. Coleman, Acting General Counsel, Re: Cowlitz Tribe Restored Lands Opinion, November 22, 2005 at 9; Memorandum to Philip N. Hogen, Chairman, through Penny J. Coleman, Acting General Counsel, from John R. Hay, Staff Attorney, Re: Mooretown Rancheria Restored Lands, October 18, 2007. Here, we note that the Carter Lake land is among the first trust acquisitions of the Tribe ("[t]he 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." Disapproval Memo at 26.). We find that the factual circumstances prong, as well as the location and temporal prongs, weighs in favor of a finding that the Carter Lake land is restored.

Despite the clear direction of the law, we are troubled by the inequities worked in this case. We do not "diminish the importance of [the Tribe's] concession to the State of Iowa." State's Request to Participate at 9. It seems the Tribe led the State down the primrose path with promises it never intended to keep. Yet, the law here prevents us from granting either a remedy

to the State or imposing a consequence on the Tribe. Without a consequence for those who so boldly promise whatever suits them, we are concerned by the tarnish the Ponca's actions may leave on the credibility and good faith of other tribes that attempt to have land taken into trust.

CONCLUSION

We affirm in part and reverse in part the Chairman's decision. We affirm the Chairman's determination that the land meets the location and temporal factors of the restored lands analysis. We reverse the Chairman's decision with respect to the factual circumstances factor because it improperly relied on the Tribe's intended use of the land and events that occurred after the Department of Interior's final agency decision was made. Because the Chairman relied on the factual circumstances findings to disapprove the ordinance, we reverse the Chairman's disapproval of the ordinance. The Carter Lake land meets the restored lands exception. The ordinance is therefore hereby approved.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

Philip N. Hogen Chairman	Cloyce V. Choney Vice-Commissioner	Norman H. DesRosiers Commissioner