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## Court undermines NIGC authority in controversial casino case

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DES MOINES, Iowa – In a case that pits the authority of the Interior Department against that of the National Indian Gaming Commission to issue determinations for casino sites, a federal judge has ruled on Interior’s side.

Judge Charles Wolle in the U.S. District Court for Southern Iowa, issued a double edged decision Nov. 28, saying NIGC lacked authority to approve a casino ordinance for the Ponca Tribe of Nebraska on a controversial 4.8-acre parcel of restored trust land in Carter Lake, Iowa, but even if it had the authority its decision was “unreasonable and arbitrary,” because Ponca had agreed with the State of Iowa not to have gaming on the site.

On Dec. 13, however, the federal government asked Wolle to reconsider the ruling, saying he made factual and legal errors.

“We are confident that the law remains on the side of the tribe and continue to pursue our world-class resort in Carter Lake that will create great economic benefits for the community,” Tribal Chairman Larry Wright said in a statement.

The lawsuit was filed by the states of Iowa and Nebraska and the City Council of Bluffs, Iowa, against Interior and the NIGC, and their top officials.

In his 11-page ruling, Wolle reversed the NIGC approval and said the decision should have been made by Interior and the BIA.

The ruling furthers an ongoing power struggle between Interior and the commission, an independent entity created by the Indian Gaming Regulatory Act that exists within the Interior Department, over jurisdiction to determine gaming issues.

NIGC Chairman Phil Hogen defended the commission’s independence in November at the Global Gaming Expo, the world’s largest gaming conference.

“I’m deeply concerned that it not be infringed upon,” Hogen said.

More importantly, some tribes say, if the ruling stands, it could set a precedent that could be used against other tribes to restrict their rights to carry out governmental functions, including economic development, on trust lands.

NIGC spokesman Shawn Pensoneau told Indian Country Today that the decision to appeal hasn’t yet been made.

The case has a number of unique twists and turns.

Congress terminated the Ponca Tribe in 1962 and began selling off its lands, but in 1990, Congress restored the tribe’s federal acknowledged and authorized Interior to place up to 1,500 acres of land in Nebraska in trust for the tribe.

Ponca bought the 4.8 acres in Carter Lake, Iowa, in 1999 and asked Interior to take it into trust to use for health services and central governmental functions. The BIA issued a preliminary notice of its decision to take the land into trust, with no environmental review because there would be no land use change. The state and Pottawatomie County appealed to the Interior Board of Indian Appeals.

The IBIA affirmed the BIA’s decision to take the land into trust, but not as restored land, only as normal trust land “that would not open the door to gaming,” Wolle wrote.

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To ward off a lawsuit with the state, Ponca agreed that the land was not to be taken into trust as restored land that might permit casino gaming. Interior issued a notice that there "would be no gaming or gaming-related activities on the land unless and until approved under the 2001 checklist of gaming acquisition has been obtained." The land was conveyed to the BIA in trust for the tribe in February 2003.

In February, 2006, the tribe filed a request with NIGC to transform the Carter Lake parcel into restored Indian lands eligible for gaming under IGRA. The state of Iowa objected, and the tribe withdrew the request in August 2006.

A year later, the tribe resubmitted the request for approval of an amended ordinance to allow gaming based on a restored Indian lands determination.

On the advice of the commission's general counsel, Hogen denied the request.

The tribe appealed to the full three-member commission, which approved the request on Dec. 31, 2007.

"The court here decides not whether gaming should ever be allowed on the Carter Lake, Iowa site, but whether the NIGC had authority to make the decision to allow gaming there and whether its reasoning may be upheld," Wolle wrote.

The Department of Justice supported NIGC's authority to approve the gaming ordinance, citing a February, 2007, Memorandum of Agreement (MOA) between Interior and NIGC regarding casino determinations.

Wolle rejected that argument, saying, "The MOA, carefully read, does not provide NIGC that broad authority to override DOI decisions, nor explicit authority to make initial restored land decisions."

But some parts of the MOA seem to clearly provide NIGC with that authority:

"If a tribe requests that the NIGC approve a management contract or ordinance for gaming on existing trust lands, the OGC (Office of General Counsel) will draft the legal opinion to the Chairman on whether the tribe has Indian lands; and the OGA will draft the legal opinion to the Chairman whether existing or proposed tribal gaming operations will be on Indian land when the land is already held in trust by the United States."

Wolle also rejected the government's defense citing several other federal court decisions that support NIGC authority to issue restored land opinions involving trust land and gaming requests. None of those cases involved a promise by the tribe not to conduct gaming, Wolle said.

John Brown, a spokesman for the Narragansett Indian Tribe, said the judge focused on the wrong issue.

"I believe the NIGC acted correctly, because the Department of Interior could not take those lands into trust with those limitations – regardless of what agreements the tribe signed. The primary authority for taking those lands into trust are the Indian Gaming Regulatory Act and the Ponca Restoration Act itself and I believe the judge erred in his decision by not reviewing that particular portion of the statute," Brown said.

The Ponca Tribe was terminated and later restored, Brown pointed out.

"The land they got was restored land. There's nothing in the statute that says the tribe cannot purchase additional lands. And lands taken into trust in another state are part of a tribe's ancestral territory – otherwise they can't be put into trust – so they are by definition restored lands," Brown said.

"Basically, this has got to be appealed and overturned."

The ruling could set a precedent for other tribes, he said, including the Narragansetts who await a U.S. Supreme Court decision in a case brought by the state of Rhode Island against Interior's decision to take 31 acres of purchased land into trust for the tribe.

Brown also objected to the states' increasing role in recent litigation.

"As of late, the states have been more and more involved, while the tribes, who are the ones who are primarily affected, have to argue as amicus. There's a double standard being applied here. The tribes are excommunicated by the courts and the states have been allowed in. It's part of the judicial termination that's been going on."

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