10-3060

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MIAMI TRIBE OF OKLAHOMA,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA; KENNETH SALAZAR, Secretary, United States Department of Interior; LARRY ECHOWAWK, Assistant Secretary of Interior, Bureau of Indian Affairs,
Defendants-Appellants,

On Appeal from the United States District Court
for the District of Kansas
The Honorable David J. Waxse, United States Magistrate

BRIEF OF APPELLEE MIAMI TRIBE OF OKLAHOMA

Respectfully submitted,

Kip A. Kubin
Bottaro, Morefield & Kubin, L.C.
1001 E. 101st Ter. Suite 120
Kansas City, MO 64131-3367
(816) 531-8588
kak@kc-lawyers.com

Christopher J. Reedy
19920 W. 161st Street
Olathe, KS 66062
(913) 269-6096
creedyfly@aol.com

STATEMENT REGARDING ORAL ARGUMENT

The Miami Tribe does not request oral argument.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

CASES **PAGE**

CASES **PAGE**

CASES **PAGE**

STATUTES/TREATIES/REGULATIONS

Page

OTHER SOURCES

JURISDICTIONAL STATEMENT

The Miami Tribe of Oklahoma ("Miami Tribe") challenges this Court's jurisdiction with respect to the requirement for a case in controversy because Appellants are challenging their own administrative agency action, a determination that has been affirmed by the District Court. G.Add.20.[1] The Miami Tribe suggests that there is no case in controversy and any dispute is now moot.

STATEMENT OF ISSUES

1. Whether a case in controversy exists and does this Court have jurisdiction over an administrative agency appeal of its own determination that has been affirmed by the District Court.

2. If this Court has jurisdiction, whether an Indian has a right to gift his interest in Indian land to his Tribe.

3. If this Court has jurisdiction, and the issue of tribal jurisdiction over Indian land is properly before this Court, whether the Miami Tribe has a right to have its day in Court to develop a record and present the merits of the Miami Tribe's jurisdiction over the Miami Reserve pursuant to 18 U.S.C. § 1151, as reserved by a United States District Court.

[1] This brief uses the abbreviation G.App.XX and G.Add.XX for reference to the Appellants' [Government] Appendix and Addendum, respectively. Reference to Appellants' Brief is Abbreviated by G.Br. XX. T.App.XX is the abbreviation for the Miami Tribe's Appendix. The XX refers to the applicable page of that document. The page number for G.Add. refers to the electronically noted page number from filing with the Court.

STATEMENT OF THE CASE

At first read of Appellants' brief, it would appear that this is a very complex case. It is simply not. This case is about a successful Indian's right to transfer his land to his Indian tribe.

James E. Smith ("Smith"), a member of the Miami Tribe and an experienced businessman, gifted one-third of his interest in the Maria Christiana Miami Reserve No. 35 restricted Indian allotment (“Miami Reserve”) to the Miami Tribe. The Miami Tribe accepted the gift. Department of Interior ("DOI") and Bureau of Indian Affairs ("BIA") (DOI and BIA, referred collectively as "Agency") refused to approve the gift based upon its self-interest of alleged fractionation. The Agency position violates federal policies enumerated by Congress and its fiduciary obligations. After District Court remand, the Agency approved the gift transfer and the District Court affirmed. The Agency now appeals.

STATEMENT OF FACTS

At quick glance, Appellants brief may tend to make one believe that this is a complex transaction in specialized Indian law. It is far from such. Furthermore, the Agency reference to gaming, as its initial fact, has no place in this case. Three pivotal factual points reinforce approval of the gift transfer:

1. All of the elements for a gift have been satisfied. Smith is a business man and the record is devoid of any indicia of undue influence or fraud;

2. A land gift to an Indian tribe does not perpetuate any further fractionation because the Tribe's existence is perpetual; and

3. Congress favors consolidation of Indian lands and transfers to tribes pursuant to the Indian Land Consolidation Act.

Smith is an Indian and member of the Miami Tribe. G.App.184. Smith inherited an interest in a restricted Indian allotment, the Miami Reserve. G.App.184. The Miami Reserve was granted to Smith's blood relative and tribal ancestor, Maria Christiana DeRome ("Maria Christiana"), by the United States pursuant to the Treaty of 1854, 10 Stats. 1093. G.App.34. Smith gifted an interest in the Miami Reserve to his Indian tribe, the Miami Tribe. G.App.35. The Miami Tribe accepted the gift. T.App.31, 86.

Smith's Indian heritage is traced to Maria Christiana DeRome [Grandmother of Maria Christiana 1854 allottee], a Miami Indian princess, who was granted Indian lands in the Treaty of October 23, 1826. 7 Stat. 300 (1826); T.App.30. Maria Christiana is a half-blood Miami Indian. 7 Stat. 300; T.App.97. At page 11 of their Brief, Appellants, in contradiction to the Treaty, wrongfully imply that the DeRome family, Smith and the heirs, are not blood Miami Indians because they did not migrate to Kansas. Besides the DeRome heirs currently living in Kansas, Maria Christiana's sister, Lillie, is buried at the Jingo cemetery located within a

couple of miles of the Miami Reserve. T.App.41; see also T.App.106-08. As heirs of Indian princess Maria Christiana DeRome, the DeRomes and Smith are blood Miami Indians. 7 Stat. 300 (1876).

The Maria Christiana restricted allotment patent contains a clause that states the tracts "shall never be sold or conveyed by the grantee or her heirs without the consent of the Secretary of the Interior…" G.App.34. In addition to the restriction against alienation, the United States has obligations of treaty protections to the DeRome heirs (including Smith and his ancestors) and the Miami Tribe: "[T]he United States shall protect the said [Miami] tribe and people thereof, in their rights and possessions, against the injuries, encroachments and oppression of any person or persons, tribe or tribes whatsoever." Treaty of November 6, 1838, Art. 10.

The Miami Tribe is attempting to consolidate interests in the Miami Reserve Indian lands pursuant to a BIA-approved plan and policy under the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2201 et seq. T.App.15-29. The Miami Tribe has recently acquired and owns an undivided interest in the Miami Reserve pursuant to the Agency Order of Judge Richard Reeh in the probate proceedings of Earlene Smith Downs. In re Earlene Downs, BIA Probate No. P-000-28048-IP; G.App.169. The BIA-approved Miami Tribe Land Consolidation Plan expressly includes the Miami Reserve as lands to be consolidated by the Tribe. T.App.28.

Challenges from non-Indians have plagued the Miami Reserve since

allotment. The Agency and government fulfilled their protection and trust obligations by defending outside encroachments to the Miami Reserve in The Kansas Indians, 72 U.S. 737, 5 Wall. 737 (1866), and in United States v. Board of Miami County Comm'rs, No. 80-N, (D. Kan. 1918). In those cases, the United States kept the Miami Reserve, among other Miami properties, from being taxed or dispossessed. Id. However, in a 1989 land dispute, Smith and his extended family members regretfully did not receive the needed protection of the Miami Reserve despite being represented by the Agency and United States. G.App.193. In Midwest Inv. Properties, Inc. v. DeRome, No. 86-2497-O, (D. Kan., Nov. 6, 1986), non-Indians were allowed by the United States to adversely possess 45 of the 80 acres of the Miami Reserve Indian lands despite the fact Indians owned undivided interests in the entire 80 acres. G.App.193-194. The remaining 35 acres are before the Court today. Id.

There is no dispute that the Miami Reserve is a "restricted Indian allotment". G.Br.11, G.App.194. The United States allotted 200 acres, which included the Miami Reserve, to Maria Christiana DeRome. G.App.193. The Miami Reserve has remained restricted Indian lands under the supervision of the United States since the time of allotment. The remaining 35 acres of the Miami Reserve is now owned by the heirs of Maria Christiana DeRome, including Smith. Id.

An Important clarification to page 14 of Appellants' Brief is the fact that the

1873 Treaty provisions requiring sale or dispossession did not apply to the Miami Reserve. The 1873 Treaty sale provisions involved the Miami Tribe's unallotted Indian land. The Miami Reserve had been allotted to Maria Christiana in 1859 G.App.34. The treaty provision applied to unallotted lands. It is also important to note the inaccuracy of land records and the fraud perpetrated against the Indians during the late 1800's.

At page 14 of their Brief, Appellants also contend that the heirs of Maria Christiana who had inherited interests in the Reserve were not members of the Miami Tribe after 1867. While the questionable government records and record keeping may support their position, the facts clearly show DeRome family members (heirs) migrated to Kansas and Maria Christiana's sister was buried within what was the Miami Reservation. See T.App.41; Jill Denning, Indian Treaty, Congress Figure in Land Dispute, The Miami Republican, June 9, 1982, 1-A, 13A. Being with the Tribe in Kansas Territory and being descendants of the Miami Tribe princess Maria Christiana, 7 Stat. 300 (1826), it is difficult to confirm they were not members of the Miami Tribe, or maybe their members was just not tracked by the Agency. The heirs are certainly recognized by Appellants as enrolled members today. G.App.184.

While the Miami Tribe does not believe jurisdiction is dispositive to any issue before the Court, the Tribe responds to Appellants' inaccurate jurisdiction

contentions. See Miami Tribe of Okla. v. United States, 927 F. Supp. 1428 (D. Kan. 1996) ("Miami I"). In Miami I, the Miami Tribe filed a Complaint against the National Indian Gaming Commission ("NIGC"), for APA review of the disapproval of its management agreement for gaming on the Miami Reserve. Id. The Miami Tribe's alleged lack of "historical jurisdiction" over the Miami Reserve was the reason for disapproval. During the Miami I litigation, the only facts considered by the NIGC in its disapproval, and the district court in its review, related to "historical jurisdiction" of the Miami Tribe. Current jurisdiction over the Miami Reserve was not analyzed in Miami I, but expressly reserved by the district court for the Miami Tribe to re-submit a management agreement to the NIGC for future consideration. 927 F. Supp. at 1428 (n.8).

In accordance with the district court's express reservation of rights, the Miami Tribe re-submitted a management agreement demonstrating current jurisdiction and governmental powers over the land. See Miami Tribe of Okla. v. United States, 5 F. Supp. 2d 1213 (D. Kan. 1998)("Miami II"). The NIGC and BIA refused to recognize the Miami Reserve as "Indian lands" and disapproved the management agreement. Id. at 1219.

In Miami II, the Miami Tribe sought judicial review of the disapproval of the management agreement. Id. at 1216. The Miami II court concluded that the agencies had acted arbitrarily and capriciously by relying on the history of the

Miami Reserve as a basis for finding that the Miami Tribe does not exercise "governmental power". The court recognized the Tribe's claim of current jurisdiction and governmental power over the Miami Reserve, thus making it Indian lands. Id. at 1218.

The Miami II court ruled that DOI and NIGC had not directly addressed the Tribe's position that "jurisdiction has arisen from the Reserve owners' membership in the Tribe," an argument that the court deemed "facially sound." Id. The court stated:

> If jurisdiction were established, based on these subsequent events, the court would find that the history of the parcel, at least that part dealing with the cession of the land and the Tribe's receipt of compensation, is irrelevant; the only inquiry under the statutory definition of "Indian lands" would be whether the tribe exercises--in the present--governmental power over the land. Thus, to the extent the NIGC and DOI conceded that jurisdiction has been satisfied here, the court believes that they considered improper factors when they cited the history of the Reserve as a basis for their decision.

Id.

While reversing and remanding Miami II, the district court retained jurisdiction over the matter. During the remand, DOI conducted an in-depth factual investigation that included a site visit to the Miami Reserve. T.App.59-61. In the Government's words, the Agency findings were, in part:

> That [Miami Reserve] site visit revealed a change in circumstances and several facts which were not available to the Department of the Interior when previous decisions by the

> NIGC were made or when the Office of the Solicitor prepared the first two opinions regarding the status of the allotment as Indian Lands for IGRA purposes. At the time of the site visit, the Miami Tribe had begun providing tribal services to the Native Americans in the area, developing the property, making annual appropriations for maintenance of the land, asserting regulatory jurisdiction over the parcel by developing land use plans and licensing a smoke shop operator pursuant to tribal tax codes. Moreover, the Miami Tribe had been providing law enforcement services to the area by providing a uniformed tribal police officer to patrol the area. This tribal officer had established a working relationship with the Miami County Police Department to share jurisdiction over this area, to the full extent allowed by federal law.

T.App.59-61, 104.

The Agency expressly found factual evidence of jurisdiction and governmental power that was not considered by the Agency when it issued the earlier opinions concerning the Reserve. T.App.56-58, 84-85.

At the direction of the Miami II district court, the Miami Tribe and attorneys representing the NIGC, DOI and BIA mediated the issue of Indian lands before the court. T.App.85. The mediation resulted in the Miami II Stipulation and Agreement that was adopted into the court's order of dismissal. T.App.85-93. In the Stipulation, the parties confirmed that the Miami Reserve is Indian land within the meaning of the Indian Gaming Regulatory Act, over which the Miami Tribe has jurisdiction and exercises governmental power. T.App.89.

The December 24, 1998 DOJ letter to counsel for the Miami Tribe reinforces the parties intent for the Stipulation to bind the United States, DOI, NIGC and BIA

with respect to the Miami Reserve Indian lands issue, in particular jurisdiction. T.App.85. The DOJ letter states, in part:

> After evaluating different options, the Department of Interior and the National Indian Gaming Commission authorized the following proposed settlement. The defendants are willing to enter into a Stipulation and Agreement stating the Maria Christiana [Miami] Reserve is Indian land within the meaning of 25 U.S.C. §2703(4) if the Miami Tribe will dismiss the case in its entirety…. It is my understanding the Court will essentially adopt the Stipulation into some type of order which will give the Tribe collateral estoppel protection if for some reason the Department of Interior would alter its position. Moreover, I believe the Stipulation would resolve any remaining issues involved in Count I [the management contract disapproval based on the "Indian land" determination].

T.App.85.

There has been no factual consideration on the record of the merits of the Miami Tribe's jurisdiction over the Miami Reserve since the investigations in Miami II confirmed the presence of current jurisdiction. See Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001) (reviewing a preliminary injunction); Miami Tribe of Okla. v. United States, 2006 U.S. App. LEXIS 21524 (10th Cir. Aug. 21, 2006)(appeal of a dismissal as premature).

SUMMARY OF THE ARGUMENT

The matter before the Court is about a successful Indian who desires to transfer part of his interest in Indian land to his Tribe as part of the Tribal consolidation efforts. The transfer of this interest, coupled with the interest the Tribe previously received via a probate, will be substantial enough to insure standing to protect the Indian land from further non-Indian encroachments, a task difficult for Appellants as they have admitted their "difficulty in effectively managing and protecting the property."

The Miami Tribe suggests that the Court lacks jurisdiction over this appeal because the Agency is attempting to appeal its own determination that was affirmed. If the Court finds jurisdiction, the District Court ruling should be affirmed because one of the most fundamental principles in our legal system is the right to transfer property, and an Indian should not be denied this right. Moreover, any future fractionation resulting from a transfer to the Tribe, as alleged by the Agency, is pure myth.

The Agency also raises the issue of Miami Tribe jurisdiction. Jurisdiction is not a dispositive element in this case. However, the Miami Tribe has responded to the Agency contentions and briefed the basis for its current jurisdiction over the Miami Reserve pursuant to 18 U.S.C.§1151.

ARGUMENT AND AUTHORITIES

I. THE COURT LACKS JURISDICTION BECAUSE APPELLANTS' APPEAL OF ITS OWN DETERMINATION IS NOT A CASE IN CONTROVERSY

Following a remand from the District Court, the Agency approved the gift transfer of Smith's interest to the Miami Tribe. The only matter further questioned by the Tribe was the status of the land, restricted Indian allotment or pure Indian trust. The District Court "affirm[ed] the IBIA's [Appellants] October 10, 2008 Order Affirming Decision in Part and Vacating in Part…" and confirmed as contended by the Agency that the Miami Reserve is restricted Indian land. The Miami Tribe did not appeal the determination and there is no case in controversy.

1. Standard of Review

This Court reviews a subject matter jurisdiction determination de novo. Albuquerque v. United States, 379 F.3d 901, 906 (10th Cir. 2004).

2. An Agency Cannot Appeal its own Determination

The Agency has confirmed the rule that an administrative agency cannot appeal its own determination in its pleadings filed in the District Court. T.App.11. The Agency cites Baca-Prieto v. Al Guigni, 95 F.3d 1006, 1008 (10th Cir. 1996) (discussing appeal of a remand), that states in part: "It is especially significant in this regard that, 'because the [agency] … has no avenue for obtaining judicial review of its *own* administrative decisions, it may well be foreclosed from again

appealing the district court's determination at any later state of this proceeding.'"

The Agency admits:

> Appellate review may be foreclosed if the agency rules in Plaintiff's favor based upon this Court's remand order, notwithstanding the fact that this Court's ruling is contrary to the agency's view…." See Bender v. Clark, 744 F.2d 1424, 1428 (10th Cir. 1984) (most important reason for finding appellate jurisdiction over an administrative remand was the government's inability to obtain judicial review of its own administrative decisions).

T.App.11.

In the case before the Court, the Agency is attempting to appeal its own determination. The Miami Tribe does not challenge the District Court's ruling. The Miami Tribe seeks approval of the transfer as a restricted Indian allotment. There is no case in controversy. Article 3 of the Constitution is not satisfied, and the Miami Tribe suggests that this Court does not have jurisdiction or the matters before the Court are moot.

II. THE DISTRICT COURT CORRECTLY REMANDED AGENCY'S WRONGFUL REFUSAL TO APPROVE AN INDIAN'S TRANSFER OF AN INTEREST IN INDIAN LAND TO HIS TRIBE PURSUANT TO THE AGENCY-APPROVED TRIBAL CONSOLIDATION PLAN AND THE DISTRICT COURT'S ORDERS SHOULD BE AFFIRMED

Following remand, the Agency approved Smith's requested transfer. The Tribe requests that the Smith transfer be approved, and the restricted Indian allotment status (having the same restriction against alienation) not change.

1. Standard of Review

"The Administrative Procedures Act requires federal courts to set aside federal agency action that is 'not in accordance with law', 5 U.S.C. § 706(2)(A) – which means, of course any law, and not merely those laws that the agency itself is charged with administering." Federal Comm. Comm'n v. Nextwave Personal Comm. Inc., 572 U.S. 293, 300 (2003).

Under the arbitrary and capricious standard, the Court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

2. Congress Enacted the Indian Land Consolidation Act to Facilitate Transfers such as the Smith Transfer to the Miami Tribe

This case is before the Court because the Miami Reserve is Indian land that requires agency approval of a transfer. Until remand, the Agency wrongfully refused such approval.

A. The Miami Reserve Patent Contains A Restriction Requiring Government Approval Prior To Any Transfer

The Miami Reserve restricted allotment that is the subject of this litigation is Indian lands. G.App.184. As Indian lands, the land patent contains a restriction against alienation. G.App.34. The patent states that the Miami Reserve tract "shall never be sold or conveyed without the consent of the Secretary of Interior, for the

time being." Id.

B. 25 U.S.C.§2216(b) Authorizes Approval of Smith's Transfer

25 U.S.C. § 2216(b)(1) of the Indian Land Consolidation Act ("ILCA") controls Smith's transfer to the Miami Tribe. The title of the statute reinforces this application: "Sales, exchanges and gift deeds between Indians and between Indians and Indian tribes."

25 U.S.C. § 2216(b) identifies the elements for application of the statute to trust and restricted land transactions: "[T]he sale or exchange or conveyance of an interest in trust or restricted land may be made for an amount that is less than the fair market value of that interest…." In the determination before the Court, the elements for an approval of a transaction under this statute have been unequivocally demonstrated and they are: a) "restricted land"; b) "gift"; c) "Indian"; and d) "Indian tribe."

(i) History, Court Rulings, and BIA Documents Confirm Miami Reserve No. 35 is restricted Indian land

There can be no dispute that the Miami Reserve is a restricted Indian allotment and Indian land. 18 U.S.C. §1151; G.App.184. There is clearly a restriction against alienation that requires approval of the Agency. G.App.34.

(ii) Smith Has Freely Gifted an Interest in the Indian Land to the Miami Tribe, and the Miami Tribe accepted the gift.

The only factor analysis of the "gift" element should be the grantor's intent.

There has been absolutely no indicia anywhere in the record that questions Smith's intent to make the gift to his tribe. Smith and his family desire that the Miami Tribe own an interest in the Miami Reserve, that the tribe further protects the property, and helps maintain the Indian status consistent with the intent of Congress in passing the ILCA. G.App.35, T.App.41. President Clinton recognized this important factor in signing ILCA into law: "[ILCA] also contains provisions for the consolidation of fractional interests, as well as preventing Indian lands from being taken out of trust when inherited by non-Indians." 36 Weekly Comp. Of Pres. Doc. 2811 (Nov. 7, 2000).

(iii) Smith is an Indian

There can be no dispute that Smith falls squarely within the definition of "Indian" under ILCA. 25 U.S.C. § 2201(2) defines "Indian" as:

> "Indian" means any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe, or any person who has been found to meet the definition of "Indian" under a provision of Federal law if the Secretary determines that using such law's definition of Indian is consistent with the purposes of this Act[.]

The record and Appellants' Brief reinforce this point. Smith is a member of the Miami Tribe. G.App.34.

(iv) The Miami Tribe is an Indian Tribe

The remaining Indian Tribe element is also satisfied. No one has suggested anywhere in the record that the Miami Tribe is not an Indian tribe. The Miami

Tribe is federally-recognized. Moreover, BIA approved the Miami Tribe's ILCA Indian Land Consolidation Plan covering the Miami Reserve. T.App.15-29.

The Regulations governing the Agency authority also expressly authorize the approval of gift transfers:

> Applications for the sale, exchange or gift of trust or restricted land shall be filed in the form approved by the Secretary with the agency having immediate jurisdiction over the land. Applications may be approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners under the conditions set out in § 152.25(d).

25 C.F.R. § 152.23 (2002).

25 C.F.R. § 152.25(d) states:

> Gifts and conveyances for less than the appraised fair market value. With the approval of the Secretary, Indian owners may convey trust or restricted land, for less than the appraised fair market value or for no consideration when the prospective grantee is . . . lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

C. Elements Necessary For The Gift Have Been Satisfied

Smith and the Miami Tribe have done everything possible to complete the transfer of the property interest. Smith submitted the completed BIA application. G.App.35. Smith intended to transfer the interest in the Miami Reserve to the Miami Tribe, provided symbolic delivery, and the Tribe accepted the gift. The

elements of a gift have been met. See Owens v. Sun Oil Co., 482 F.2d 564, 566 (10th Cir. 1973). Defendants confirm that a special relationship exists between Smith and the Miami Tribe because Smith is a member of the Miami Tribe. G.App.41; G.Br.34-35; 25 C.F.R. § 152.25(d) (special relationship gives right to a gift transfer). The Agency determination to Smith admits: "… I can accept that a special relationship exists between you, as a member of the Miami Tribe of Oklahoma, and the Tribe." G.App.133.

The federal policy behind 25 U.S.C. § 2216 (2001) reinforces the propriety of the transfer. The gift transfer furthers the intent of Congress "to consolidate fractional interest in a manner that enhances tribal sovereignty." 25 U.S.C. § 2201. The ownership interest in its native lands reinforces the Tribe's rights to protect and maintain the Indian lands on behalf of its members. See R. 89-93.

D. Agency Contentions For Refusing To Approve The Gift Are Bare Conclusory Statements Unsupported By Facts On The Record

25 C.F.R. § 152.23 concisely sets forth the test for approval of a gift transfer. A gift transfer should be approved when: "the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners under the conditions set out in § 152.25(d)." § 152.25(d) expressly authorizes a no consideration (gift) transfer when a special relationship exists, and federal statute reinforces this position. 25 U.S.C. §2216(b); See G.Br.41 ("…25 U.S.C. 2216(b) certainly authorizes or confirms that a conveyance to a tribe for no consideration

may be approved…")

(i) The Smith-Tribe Special Relationship Satisfies Gift Requirements

There can be no dispute a special relationship exists. G.App.41; G.Br. 34-35. The regulatory justifications for government approval are in the disjunctive. Both of the applicable regulations use the word "or" in describing the requirements for approval of the transfer. 25 C.F.R. §§ 152.23, 152.25(d). Therefore, because the special relationship exists between Smith and the Miami Tribe, the Smith gift transfer to the Miami Tribe should be approved. G.App.61.

(ii) BIA Fails To Explain Smith's Interests Or Any Impact of a Transfer On Smith's Interests

Only two paragraphs of the Agency determination letter touch upon Smith or Smith's family. G.Add.69. The remaining paragraphs of the January 11, 2002 decision concern only the self-serving interests of the Agency – interests not part of the regulatory analysis, and certainly not valid considerations in light of the federal fiduciary responsibilities of the Agency to Smith and the Miami Tribe. See T.App.75-80, (¶¶20, 54, 57 "Federal Defendants admit they generally owe fiduciary and statutory duties to Native American Indians and Indian Tribes, including Mr. James Smith and the Miami Tribe").

Without focusing on the discussion of the "alleged work" that a gift transfer creates for the government, the Agency determination letter states:

> My concerns regarding tract management, competing interests between the Tribe and the individual Indian landowners, and the potential for land use conflicts are also true for this request. Additionally, the Bureau's position remains unchanged that Indian property, and that Indian tribes should pay fair market value for allotted land purchases unless special circumstances warrant otherwise. I am not informed of any special circumstances that would justify a gift of a portion of your undivided interest to the Tribe.
>
> Further, I believe the business development lease approved on December 8, 1999, gives the Tribe the necessary tool to undertake the development of a gaming facility and improve the potential for significant revenue of the Indian landowners. I can understand your stated desire to benefit the Tribe, but I feel the existing business lease with the Tribe will accomplish this. The recent history and the gaming-related aspects of this tract continue to cause me concern over the propriety of the transaction. While the proposed gift conveyance may fall within the requirements of §152.25(d), it does not outweigh my finding that the conveyance of a portion of your undivided interest to the Miami Tribe would not be in either your, or the other owners, long-range best interest. Accordingly, it is my determination that the proposed gift conveyance is not in the long-range best interest of either you or the other Indian owners of the allotment.

G.App.133.

(iii) The Decision And Record Wholly Lack Discussion of Tract Management, Competing Interests, or Conflicts

The Agency disapproval determination letter lacks any factual discussion of Smith's or the Smith family's interests in the Miami Reserve as required by 25 C.F.R. §§ 152.23 and 152.25(d). G.Add.68-70. There is no mention how the Miami Tribe's attempt to consolidate Indian lands in any way negatively impacts

Smith or the other landowners' interests. Id. The letter is simply self-serving and lacks sound reasoning of the stated purpose for the transfer. The absence of facts to support the decision is reversible error and justifies the District Court rulings. Miami II, 5 F. Supp. 2d at 1217 ("The agency must make plain its course of inquiry, its analysis and its reasoning…[T]he 'arbitrary and capricious' standard requires an agency's action to be supported by facts in the record.")

The Agency determination briefly mentions a lease and purported "land use conflicts." The reference to purported "land use conflicts" is skeptical pessimistic conjecture, at best. There is not a single factual reference to any real conflict. The lease with the Miami Tribe pertains to Indian Gaming under IGRA. Nothing in the proposed gift transfer relates to gaming. Furthermore, the lease signed by all of the co-owners is clear evidence of their cooperation with the Miami Tribe. Unlike the gift, the lease is not a permanent commitment to the Miami Tribe.

The Miami Tribe seeks acquisition of the Indian lands for the purpose of advancing its BIA-approved Indian Land Consolidation Plan, T.App.15-29; and for long-term protection of the undivided Indian interest and rights in the Indian land. Smith seeks to promote these purposes with the gift to his Indian tribe. T.App.41. There is a clear long-term benefit to Smith, protection of the Indian land status.

The most important interest to Smith and Smith's family members related to the Miami Reserve is that the Indian lands remain Indian lands. Absent the Indian

land status, the undivided interest in the isolated 35 acres of the Miami Reserve (located on the Lynn/Miami County border) is of very little value to Smith or any of the other co-owners. The Indian land status could give the tract potential value long term and thus additional benefit to the owners. T.App.41.

It is particularly ironic that Congress has clearly set forth a policy to protect the Indian nature of Indian lands in the ILCA, yet the Agency aggressively opposes transfer to the Tribe. See 25 U.S.C. § 2201 (2001).

Moreover, despite its trust obligations, the Agency has admitted that:

> The past history of the tract shows that the Bureau [of Indian Affairs] has had difficulty in effectively managing and protecting the property. It's remoteness from other trust or restricted property, together with the distance from the Bureau's nearest field agencies (Horton approx. 90 miles; Miami approx. 100 miles) and lack of adequate resources has contributed greatly to the allotment's current reduced acreage and unproductive state.

T.App.65.

The Agency opposition to the transfer is also consistent with its treatment of the Smith family and Miami Tribe. BIA, in conjunction with the Department of Justice, previously convinced Smith's extended family members to allow transfer of undivided interests in the Miami Reserve to a non-Indian, a corporation that allegedly was adversely possessing the Indian lands. G.App.85, 193. This is despite the fact that Indian lands are not supposed to be subject to state adverse possession laws. 25 C.F.R. § 1.4(a), see also McGannon v. Straightlege, 32 Kan.

524, 525 (1884) ("The title being Indian title – or, in other words, the title being vested in the United States and an Indian – no statute of limitations could operate against such title."); and the fact that the United States has fiduciary obligations to protect Smith's interest and the Smith/DeRome families' interests in the Miami Reserve. T.App.79-80 (¶¶54,57); Midwest Inv. Prop., Inc. v. DeRome, No. 86-2487-0 (D. Kan. 1986).

The unthinkable failure to protect these restricted Indian lands caused a dramatic reduction in size of the restricted allotment from 80 to 35 acres. This is despite Agency protection obligations. See also HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224, 1245 (10th Cir. 2000) (stating "federal government bears special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction").

Smith and the Tribe now believe that the only way to proactively protect the Indian nature of the Miami lands is to have Miami Tribe ownership of the Miami Reserve. The Tribe has resources to permanently protect the lands and to prevent future injustices against the Tribe and the landowners. The Miami Tribe continues to use and patrol the Miami Reserve. G.App.50. Since it appears the United States government cannot fulfill its obligations to the Indian tribal members, the Tribe should certainly be afforded a protection role, and be allowed to receive the Smith interest to unequivocally assure standing in any future challenges.

E. Appellants' Meritless Fractionation Contention is No Justification for Disapproval of the Transfer

At page 43 of their brief and the very first point BIA asserts in its disapproval letter is the burden of fractionated interests on the government. G.App.133-134. "As set out in my earlier analysis of a similar conveyance request by Ms. Earlene Smith Downs, highly fractionated ownership interests greatly complicate the Bureau's land management efforts and the successful discharge of the Federal government's trust responsibility." Id. at 133. The agency's assertion of further fractionalization is misplaced. A transfer to the Miami Tribe would not impact fractionalization. Unlike its members, the Miami Tribe will continue into perpetuity.

The Smith interest, as well as any other interest transferred to the Miami Tribe, will have no further fractionation – there are no descendants or heirs promoting fractionation. As confirmed in its Indian Land Consolidation Plan, the Miami Tribe seeks to consolidate and make use of its consolidated Indian lands. The Miami Tribe chief and tribal representatives are working hard to attempt to consolidate interests in the Miami Reserve, despite Agency opposition. The Miami Tribe has no incentive or plan to ever divest or transfer the interest.

Moreover, even if the Miami Tribe wanted to transfer the interest, it would first have to obtain approval of the BIA. Smith's interest transferred to the Tribe must remain as a restricted allotment. 25 U.S.C § 2216(d) expressly states: "Status of

lands. The sale, exchange, or conveyance by gift deed for no or nominal consideration of an interest in trust or restricted land under this section shall not affect the status of the land as trust or restricted lands." Therefore, as a restricted Indian allotment, there can be no further fractionation unless BIA allows it. The suggestion of future fractionation of the transferred interest is simply not realistic.

F. Agency Disapproval of the Smith Transfer Contradicts ILCA Purposes

There can be little question that enactment of the ILCA was an attempt by Congress to keep trust and restricted "Indian lands" in the possession and ownership of Indians. See Pub. L. No. 106-462, § 102 (2000); 25 U.S.C. § 2201 (2000) (notes). "It is the policy of the United States… to consolidate fractional interests and ownership of these interests into usable parcels;… to consolidate fractional interests in a manner that enhances tribal sovereignty;… and… to reverse the effects of the allotment policy on Indian tribes." Pub. L. No. 106-462, § 102 (2000).

With respect to the specific application of 25 U.S.C. § 2216, Congress has stated: "It is the policy of the United States to encourage and assist the consolidation of Indian land ownership through transactions… between Indians and the tribal government that exercises jurisdiction over the land…" 25 U.S.C. § 2216(a)(3). These statements certainly apply to 25 U.S.C. § 2216(b). Congress has expressly stated that it is the policy of the United States to encourage and assist

the consolidation of Indian land ownership through transactions involving Indians and the tribal government that exercises jurisdiction over the land. As a member of the Miami Tribe, the Miami Tribe has jurisdiction over Smith, a tribal member, and his land, the Miami Reserve. See United States v. Mazurie, 419 U.S. 544, 556-57 (1975) ("it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.")

The express statements of Congressional policy in ILCA surely trump any conflicting regulatory policy. See Sundance Assoc. v. Reno, 139 F. 3d 804, 808 (10th Cir. 1998) (striking a regulation because an agency's power is only the "power to adopt regulations to carry into effect the will of Congress as expressed by the statute."); Aerolineas Argentinas v. United States, 77 F.3d 1564, 1575 (Fed. Cir 1996) ("… a regulation can not override a clearly stated statutory enactment.").

It is important to note, the purpose of the approval is to prevent overreaching. The purpose behind 25 C.F.R. §§ 152.23 and 152.25(d) is the same purpose behind the restriction against alienation placed on the patent to the Miami Tribe's Princess Maria Christiana DeRome. That is, to prevent illegal, fraudulent, or improvident transactions to misappropriate interests in Indian lands from Indians. See Tooahnippah v. Hickel, 397 U.S. 598, 609 (1970). Legislative history shows that the necessity of DOI approval of intervivos transfers comes

from the concerns of "the Government to protect Indians from improvident acts or exploitation by others." Id. There is no evidence of such anywhere on the record.

An example of applicability of § 152.23 could have been to prevent Smith's 1986 loss of part of the interest in Miami Reserve. Midwest Inv. Prop., Inc. v. DeRome, No. 86-2487-0 (D. Kan. 1986). In Midwest Inv. Prop., Inc., the United States represented Smith, Smith's family (heirs of Princess Maria Christiana DeRome) and the BIA. At the advice of the U.S. Attorney, Smith's family settled the adverse possession claims by the non-Indian company without regard to 25 C.F.R. §§ 152.23. See G.App.85, 193. The litigation resulted with Smith's family losing more than fifty percent of the Miami Reserve. G.App.193-194. The Miami Tribe was not a party to the adverse possession litigation, but is now committed to Smith and his family to help protect the Indian lands in the future.

The Agency's refusal to approve the Smith transfer contradicts the compelling policy of consolidation of Indian lands in favor of the Miami Tribe. In the determination, BIA stated:

> [The proposed transfer] would not serve to consolidate fractional interest in the ownership of those interests into usable parcels. It would not enhance tribal sovereignty or promote tribal self-sufficiency and self-determination over what can be accomplished through the lease. It does not reverse the effects of the allotment policy on the Miami Tribe due to the off reservation, out of state location of the tract; therefore I find the proposed conveyance of a portion of [Smith's] undivided interest to the Miami Tribe conflicts with stated U.S. policy.

The Agency's decision is short-sided, arbitrary and capricious because the Agency did not reasonably consider the Smith transfer request in light of the Miami Tribe's BIA-approved Indian Land Consolidation Plan and the express purposes of ILCA, 25 U.S.C. § 2216 (2001).

It is a well-settled principle of statutory construction that statutes passed for the benefit of Indian Tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indian tribe. Three Affiliated Tribes v. World Engineering, 467 U.S. 138, 149 (1983) (doubtful expressions are be resolved in favor of weak and defenseless people who are wards of the nation, dependent upon its protection and good faith). This same rule should apply to regulations.

The Smith transfer to the Miami Tribe promotes the express purposes of the law. Simply stated, the Miami Tribe is consolidating ownership of the restricted Indian land allotments to the Miami Tribe. The Smith transfer is part of the Miami Tribe's Indian Land Consolidation Plan ("Miami Plan"). The Miami Plan was approved by the BIA by letter dated January 17, 2001. T.App.15. The Indian land is part of the former Miami Reservation. The Smith transfer is one step in the Indian land re-acquisition effort under the Miami Plan. The Miami Tribe has recently acquired another interest in the Miami reserve through its consolidation efforts. G.App.169 (Downs Probate). As noted by the Agency, the Tribe also has a lease for the Miami Reserve that is approved by the Agency.

The Miami Tribe has the resources to make productive and cultural uses of the Miami Reserve. The Miami Tribe's productive uses would reinforce the express ILCA policies to: "consolidate fractional interests and ownership of those interests into usable parcels; . . . consolidate fractional interests in a manner that enhances tribal sovereignty; and …to reverse the effects of the allotment policy on Indian Tribes." 25 U.S.C. § 2201 (2001).

Furthermore, Agency scrutiny of a transfer from a member to his tribe should be minimal. No approval is necessary when a tribe pays for a transfer. 25 U.S.C. §2204(b)(3). Section 2204(b)(3) states:

> The approval of the Secretary shall be required for a land sale initiated under this section, except that such approval shall not be required with respect to a land sale transaction initiated by an Indian Tribe that has in effect a land consolidation plan that has been approved by the Secretary under section 204[25 U.S.C.§ 2203].

Upon approval of the Smith transfer, the Miami Reserve shall remain restricted Indian land. 25 U.S.C. § 2216(d) controls this transaction and states: "Status of lands. The sale, exchange, or conveyance by gift deed for no or nominal consideration of an interest in trust or restricted land under this section shall not affect the status of the land as trust or restricted lands."

Application of Section 2216(d) is reinforced by the congressional policy "to reverse the effects of the allotment policy on Indian tribes." Pub. L. No. 106-462, § 102 (2000). Reversing the effects of the allotment policy is part of Congress

effort to keep restricted “Indian lands” in the possession and ownership of Indians. See Pub. L. No. 106-462, § 102 (2000); 25 U.S.C. § 2201 (2000) (notes). There is simply no justification for any disapproval of the Smith transfer.

III. TRIBAL JURISDICTION DOES NOT IMPACT THE APPROVAL DETERMINATION

We have found nothing in the statutes requiring tribal jurisdiction for the approval of Indian land transfers. Moreover, Defendants did not even consider jurisdiction in their determinations. G.App.146 ("This question [of jurisdiction], however, is not being considered for this case at this time…."). See also G.Add.36. However, the Miami Tribe responds to the Agency contentions which are directly opposite the Agency's position in ILCA application of the James Dallas McHenry probate, T.App.71.

1. Standard of Review

The standard of review for this point III is the same as for point II. This Court reviews agency actions de novo.

2. Congress gives the Miami Tribe Current Jurisdiction over the Miami Reserve in 18 U.S.C.§1151

There are at least three clearly established origins of Indian jurisdiction over lands: (1) original/indigenous derived from native possession; (2) Congressionally derived jurisdiction through statute; and (3) Treaty granted jurisdiction. See

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 650 (2001) ("Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty" and see fn. 5). The Miami Tribe possesses (2) statutory jurisdiction over the Miami Reserve granted by Congress pursuant to 18 U.S.C. § 1151.

A. Congress Provides Indian Tribes With Current Jurisdiction Over Restricted Allotments in 18 U.S.C.§1151

Federal courts have repeatedly confirmed that Congress gives Indian tribes civil jurisdiction over restricted Indian allotments such as the Miami Reserve in 18 U.S.C. § 1151.

In Mustang Production Co. v. Harrison, this Court confirmed the rule for determining tribal jurisdiction:

> In order to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country. Indian Country U.S.A. Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1987) ("[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal and state authority with respect to Indians and Indian lands.") . . . . In Oklahoma Tax Commission v. Sac and Fox Nation, 113 S.Ct. 1985, 1991 (1993), the Supreme Court specifically stated that "Indian allotments, whether restricted or held in trust by the United States," are Indian country. . .. Indian tribes have jurisdiction over lands that are Indian country, and allotted lands constitute Indian country.

Mustang Production Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996) (confirming tribal jurisdiction for taxing).

"Indian country" is a term of art. 18 U.S.C. § 1151 defines "Indian country" as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).

B. The Miami Reserve is an Indian Allotment

As discussed above, there can be no dispute that the Miami Reserve is a restricted Indian allotment. G.App.34, 184, G.Br.16, 26-27. As a restricted Indian allotment with the beneficial owners of the allotment as members of the Miami Tribe, Congress has given the Miami Tribe current jurisdiction over the Miami Reserve. 18 U.S.C. 1151. This is confirmed by the Supreme Court in recognizing that Indian tribes have jurisdiction over their members and properties. See Atkinson Trading Co., v. Shirley, 532 U.S. 645, 653, 658 (2001).

The fact that some of the Miami Reserve beneficial owners only recently joined the tribe does not impact present jurisdiction. The Agency's November 12, 2002 letter to the Seneca Chief (written shortly after the Smith determination)

reinforces the Agency proposition that Indian tribes can expand their sovereign authority over their people as they join the tribe or properties as they are acquired. T.App.50; See also Smith v. Bonifer, 154 F. 883, 886 (D. Or. 1907) aff'd 166 Fed. 846 (9th Cir. 1909) (ruling Indians "may after their relationship with the tribe has been severed, rejoin the tribe and be again recognized and treated as members thereof, and tribal rights and privileges attached according to the habits and customs of the tribe with which affiliation is presently cast.")

As a member of the Miami Tribe, the Miami Tribe has jurisdiction over Smith, a tribal member, and his land, the Miami Reserve. See United States v. Mazurie, 419 U.S. 544, 556-57 (1975) ("it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."). Jurisdiction is reinforced by the existing Miami Tribal ownership of the undivided interest in the Miami Reserve, G.App.169. (Transfer from Downs Probate), and the Agency's previous position with respect to ILCA in the Dallas McHenry Probate. In re James Dallas McHenry, IDOK274P93 (Sept. 1, 1994)(T.App.41, excerpt inserted at T.App.71).

As recognized by the Agency in the November 2002 letter, T.App.50, Congress grant of jurisdiction to tribes under 18 U.S.C. § 1151 is one way the Miami Tribe possesses jurisdiction over the Miami Reserve. If tribes do not acquire jurisdiction under this statute, then many tribes are violating the Indian

Gaming Regulatory Act in their gaming activities on acquired lands.

This Court recognized the critical importance of tribal jurisdiction in HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224, 1245-46 (10th Cir. 2000). In HRI, Inc., the Court stated:

> The fundamental constitutional principles supporting independent federal inquiry into the title status of Indian land apply with even greater force to disputes over Indian country jurisdictional status. Jurisdictional status of land implicates not only ownership, but also the core sovereignty interests of Indian tribes and the federal government in exercising civil and criminal authority over tribal territory.

Id. (emphasis added and noting Congress intended that agencies protect tribal lands and governance). The Agency continues to ignore the Miami Tribe's jurisdiction over the Miami Reserve in the current, as opposed to the historical sense. This was the factual basis for the remand in the Miami II determination. 5 F. Supp. 2d at 1218.

The Agency refusal to apply or even mention 18 U.S.C.§1151 is a violation of the "Blackfeet canon" under which "federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit." Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997).

The Agency has previously contended that this Court left no room for a finding of jurisdiction. Since the settlement of Miami II, there has been no record

before a court allowing the Miami Tribe to demonstrate jurisdiction. The Agency ignores the footnote in Miami I, 927 F. Supp. 1419, 1428 (D. Kan. 1996) (n.8), allowing for the analysis of current jurisdiction over the Miami Reserve, consistent with the Miami II findings and 18 U.S.C. § 1151. App. 153, 155, 163-65.

Had the Agency contention been true, this Court would not have left open the question to allow a finding of jurisdiction as determined in Miami II. At page 1223 of the Opinion, this Court ruled:

> If the tract qualifies as "Indian lands", the Tribe exercises a degree of sovereignty over the tract which may allow it the right to establish gaming facilities thereon consistent with IGRA. The State in turn may not extend application of its laws to the tract absent Congressional consent.

Kansas v. United States, 249 F.3d 1213, 1223 (10th Cir. 2001) (review of a preliminary injunction). Again, no court has ever addressed the merits of present jurisdiction over the Miami Reserve, 18 U.S.C. § 1151.

No DOI or NIGC administrative record has ever been before the Tenth Circuit Court of Appeals with respect to tribal jurisdiction over the Miami Reserve. There has been no judicial determination on the merits that the Miami Tribe lacks present jurisdiction under 18 U.S.C. § 1151. This is the point that the Miami Tribe has repeatedly attempted to make since the district court expressly reserved this right of re-submittal for management agreement approval following Miami I. 927 F. Supp. at 1428 (n.8).

2. Res Judicata Has No Place in the Matters before the Court because the Miami Tribe has not had a Final Determination on the Merits regarding its Indian Land

Res judicata, commonly known as claim preclusion, prevents the same parties from litigating the same cause of action when the previous action reached a final judgment on the merits. See United States v. Mendoza, 464 U.S. 154, 159 (fn. 3), 104 S. Ct. 568 (1984) (emphasis added).

The issues before the Court in Miami I were not the same as any of the other Miami Tribe cases cited by The Agency, including the appeal of the preliminary injunction to the Tenth Circuit Court of Appeals. Moreover, in Miami I, the District Court recognized that the record with respect to current jurisdiction would be considerably different with the tribal amendment. Consequently, the Miami I court incorporated footnote 8 into the. Opinion. 927 F. Supp. at 1428.

In footnote 8 of Miami I, the District Court made the unequivocal express reservation that permitted the Miami Tribe to resubmit a management agreement to the NIGC for approval based upon current jurisdiction. The Miami I Court ruled:

> Nothing in this [Miami I] ruling precludes plaintiff [Miami Tribe] from Resubmitting its management contract to the NIGC along with evidence of Current owners' consent and the newly adopted tribal amendment.

Miami Tribe of Okla. v. United States, 927 F. Supp. 1419, 1428 (D. Kan. 1996)(fn. 8).

Res judicata does not apply when a court has reserved issues for later

determination. Yapp v. Excel Corp., 186 F. 3d 1222, 1229 (10th Cir. 1999); see also Apparel Art Intern. v. Amertex Enters., 48 F.3d 576, 586 (1st Cir. 1995); D & K Properties Crystal Lake v. Mutual Life Ins. Co. of N.Y., 112 F.3d 257 (7th Cir. 1997); Restatement (Second) of Judgments, § 26(1)(b) (1982) (stating that no merger occurs to extinguish a claim when "the court in the first action has expressly reserved the plaintiff's right to maintain the second action"); 18 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction and Related Matters, § 4413 (Supp. 1998) ("A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim should be effective to forestall preclusion.")

The doctrine of res judicata is also inapplicable to the cases cited by the Agency because they are not judgments or rulings on the merits. The Tenth Circuit Court of Appeals review of Miami Reserve matters relied upon by the Agency were based upon a preliminary injunction and a motion to dismiss – not the merits of the case. Miami Tribe of Okla. v. United States, 2006 U.S. App. LEXIS 21524 (10th Cir. Aug. 21, 2006)(affirming dismissal because claim was premature); Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001)(reviewing a preliminary injunction). For this reason, any reliance upon the doctrine of law of the case is equally inapplicable. The merits of the Miami Tribe's present jurisdiction over Miami Reserve have only been addressed in Miami II (settled in favor of the

Miami Tribe finding jurisdiction over the Miami Reserve).

In their brief, the Agency has implied that in 1873 Congress eliminated restrictions against alienation on Miami lands, including the restrictions on Miami Reserve. See 17 Stat. 417. A careful reading of the statute demonstrates that Congress only removed restrictions from land "in all cases in which title has legally passed to citizens of the United States other than Indians." 17 Stat. 417 (Jan. 23, 1873) (emphasis added).

As a restricted Indian allotment with the beneficial owners of the allotment as members of the Miami Tribe and the Miami Tribe itself, Congress has given the Miami Tribe jurisdiction over the Miami Reserve. 18 U.S.C. §1151. Jurisdiction was confirmed in 1998 when the parties to this litigation, stipulated and warranted:

> On November 10, 1998 the Associate Solicitor, Division of Indian Affairs, Department of Interior issued an opinion stating that the Reserve is Indian land as defined by the Indian Gaming Regulatory Act, over which the Tribe has jurisdiction and exercises governmental power[.]…The status of the Reserve as Indian land is no longer disputed between the parties [.]

T.App.84-85, 89.

As noted above, the Miami Tribe exercises jurisdiction over the Miami Reserve. Although this could be a factor considered in the transfer, there does not appear to be anything in the statute requiring such consideration. The District Court's rulings should be affirmed.

CONCLUSION

The Miami Tribe does not believe there is a case in controversy before the Court. Therefore, the appeal should be dismissed for lack of jurisdiction. However, should this Court perform a review, the Court should affirm the District Court's ruling because Appellants' fractionation contention is no justification for the Agency intervention into an Indian's fundamental right to transfer property to his Tribe in the long term best interest of the Indian. Despite the fact that jurisdiction is not dispositive for any matter before the Court, if jurisdiction is reviewed, the Miami Tribe seeks its right to establish a record for a determination on the merits that 18 U.S.C.§1151 is the proper test for jurisdiction and that the Miami Tribe be given its day in Court to demonstrate jurisdiction in the current sense as reserved by the district court in Miami I. The Miami Tribe respectfully requests that the Court AFFIRM the District Court's Orders entered January 4, 2010, November 23, 2005 and June 22, 2005, dismiss this appeal and grant such other relief as is just and proper.

Respectfully submitted,

BOTTARO, MOREFIELD & KUBIN, L.C.

s/Kip Kubin
Kip A. Kubin (#11599)
1001 E. 101st Ter. Suite 120
Kansas City, MO 64131-3367
(816) 531-8588
kak@kc-lawyers.com

CHRISTOPHER J. REEDY

s/ Christopher J. Reedy
Christopher J. Reedy (#17615)
19920 W. 161st Street
Olathe, KS 66062
(913) 780-9595
creedyfly@aol.com

ATTORNEYS FOR THE MIAMI TRIBE

CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 9,247 words.

XX I relied on my word processor to obtain the count, and it is Microsoft Word 9,247 Words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Christopher J. Reedy
Christopher J. Reedy (#17615)
19920 W. 161st Street
Olathe, KS 66062
(913) 269-6096
creedyfly@aol.com

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the Appellate ECF system and that all participants in this case, listed below, were served through that system:

LANNY D. WELCH
United States Attorney

DAVID D. ZIMMERMAN
Assistant United States Attorney
500 State Avenue, Suite 360
Kansas City, Kansas 66101
(913) 551-6730 (telephone)
(913) 551-6541 (facsimile)
E-mail: david.zimmerman@usdoj.gov

I IGNACIA S. MORENO
Assistant Attorney General

ELLEN J. DURKEE
M. ALICE THURSTON
U.S. Department of Justice
Environment & Natural
Resources Division,
Appellate Section
P.O. Box 23795 L 'Enfant Plaza
Washington, D.C. 20026
(202) 514-2772
alice.thurston@usdoj.gov

I further certify that:
(a) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(b) the digital submissions have been scanned for viruses with the most recent version of a McAfee antivirus, version updated as of August 2,.2010, continuously updated and, according to the program, are free of viruses.

s/Christopher J. Reedy
Christopher J. Reedy (#17615)
19920 W. 161st Street
Olathe, KS 66062
(913) 269-6096
creedyfly@gmail.com

ATTORNEY FOR MIAMI TRIBE