No. 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 the Interior; LARRY ECHOHAWK, Assistant Secretary of Interior, Bureau of Indian Affairs,*
Defendants-Appellants.

ORAL ARGUMENT IS REQUESTED
ATTACHMENTS INCLUDED

On Appeal from the United States District Court for the District of Kansas
(Kansas City) (Hon. David J. Waxse, Magistrate Judge)

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STATEMENT OF RELATED CASES

Prior related cases before this Court include *State of Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), and *Miami Tribe v. United States*, 198 Fed.Appx. 686 (10th Cir. 2006). In addition, the government filed a prior interlocutory appeal in this case but voluntarily withdrew the appeal. *Miami Tribe of Oklahoma v. United States*, No. 06-3037.

STATEMENT OF JURISDICTION

Plaintiff's complaint, initially filed May 5, 2003, asserted jurisdiction under 28 U.S.C. 2201-02; 5 U.S.C. 701; 28 U.S.C. 1651(a); 28 U.S.C. 1331; and 28 U.S.C. 1361-62. District court clerk's record ("CR") Documents 1, 121, 126, Appellant's Appendix ("App.") 81.[1/] The district court entered final judgment on January 4, 2010. Addendum; App 183-211. *Miami Tribe of Oklahoma v. USA et al.*, 679 F. Supp. 2d 1269 (D. Kan. 2010). The United States filed a timely notice of appeal on March 5, 2010, pursuant to Fed.R.App.P. 4(b)(1)(B). CR 150; App. 212. The notice of appeal specified that the government sought review of all substantive orders issued prior to the entry of judgment in this case. *Id*. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Whether the district court erred in holding that a Department of the Interior ("Interior") decision disapproving a proposed gift conveyance from a tribal member to the Miami Tribe of Oklahoma of a fractional undivided interest in land

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[1/] This brief cites to documents from the district court clerk's record as CR XX. References to documents from the Administrative Record lodged with the district court at CR 128 further specify the Administrative Record page numbers thus: CR 128, AR XX. Citations also include page references to documents in the accompanying Appellants' Appendix as follows: App. XX. The primary district court and agency decisions are also included in the brief's attached Addendum.

held in restricted fee was arbitrary and capricious or contrary to law. This question encompasses the following subsidiary issues:

a. Whether the district court erred in holding that, under 25 C.F.R. 152.25(d) and 25 U.S.C. 2216(b), the Bureau of Indian Affairs ("BIA") violated its regulations and also lacked discretion to disapprove the gift conveyance when a special relationship existed between the grantor and the Tribe;

b. Whether the district court erred in holding that the decision is arbitrary and capricious because the BIA purportedly failed to consider whether tribal ownership of a portion of Smith's interest would in the long term reduce further fractionation of ownership interests in the parcel;

c. Whether the district court erred in holding that BIA's disapproval of the proposed gift conveyance is contrary to the policies set forth in the Indian Land Consolidation Act Amendments of 2000, 25 U.S.C.A. 2201 note & 2216 ("ILCA"), a holding based in part on the district court's erroneous finding that the Miami Tribe exercises jurisdiction over the parcel within the meaning of that Act.

STATEMENT OF THE CASE

The land at issue in this proceeding, the Maria Christiana Reserve No. 35 ("Reserve"), is a 35-acre, uninhabited parcel of land located in the State of Kansas approximately 50 miles south of Kansas City and approximately180 miles from the land base of the Miami Tribe of Oklahoma, a federally recognized tribe, in Oklahoma. The Reserve was patented in 1859 to Maria Christiana DeRome as a restricted Indian allotment. The Reserve is currently owned in undivided

restricted fee interests by more than 20 people, most of whom are descendants of Maria Christiana. The heirs of Maria Christiana DeRome and their descendants were not members of the Tribe between 1867 and 1996. To further the Tribe's efforts to establish gaming on the Reserve, the Miami Tribe adopted the current owners of the Reserve and enrolled them as tribal members in 1996.

This case arose when James E. Smith, one of the 1996-enrolled members, requested permission from Interior to give to the Tribe one-third of his 3/38 undivided restricted fee interest in the Reserve, *i.e.*, a 1/38 interest. The BIA of the Department of the Interior denied that request in 2002 and the Tribe brought this action to challenge that decision. In 2005, ruling only on the first of three counts of the Tribe's complaint, the district court remanded the determination to the agency, holding that the BIA lacked discretion to disapprove the gift, given the special relationship between Smith and his adoptive tribe and the district court's conclusion that the Tribe "exercises jurisdiction" over the Reserve. *Miami Tribe of Oklahoma v. United States et al.,* 374 F.Supp.2d 934, 945 (D. Kan. 2005).

The government requested that the district court enter a Rule 54(b) judgment to permit appeal of the 2005 order at that time.[2/] The district court

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[2/] The government also filed and withdrew a protective notice of interlocutory appeal from the June 22, 2005 order, *Miami Tribe of Oklahoma v. United States*,

declined to enter a Rule 54(b) judgment. On remand, and consistent with the district court's decision, the BIA approved Smith's application to give the 1/3 interest to the Tribe, but notified Smith that, because the land is in restricted fee status and Smith wished to convey his interest to the Tribe in "trust status," the Tribe would need to apply to BIA pursuant to 25 C.F.R. part 151 to have the BIA accept the land "in trust status" for the Tribe before the transfer could be completed. Both the Tribe and Smith sought clarification from the Interior Board of Indian Appeals ("IBIA") that Smith's land interests were already held in trust by the United States and therefore could simply pass to the Tribe as trust lands. The IBIA reviewed the history of the partitioning of the Reserve between Indian and non-Indian interests and affirmed that Smith holds a restricted fee title to his 3/38 interest in the allotment, so that the Tribe would need to submit a fee-to-trust application if it wished the land transferred into trust.

The Tribe then amended its complaint. The two-count amended complaint alleges a violation of ILCA for failing to transfer Smith's interest to the Tribe in trust and a breach of trust by refusing to transfer the land in trust and failing to maintain and hold the Miami Reserve in trust for the benefit of its Indian owners.

No. 06-3037, after concluding that there could be jurisdictional infirmities in such an appeal. See CR 60, 72.

The district court affirmed the IBIA's order and dismissed the Tribe's breach of trust claim. *Miami Tribe of Oklahoma v. USA et al.*, 679 F. Supp. 2d 1269 (D. Kan. 2010).

Final judgment having now been entered, the federal government seeks review of the district court's 2005 order of remand and subsequent orders perpetuating errors announced in that remand order. The Tribe did not appeal.

STATEMENT OF FACTS

A Statutory Background. --

1. Indian Gaming Regulatory Act. -- Since the early 1990's the Tribe has attempted to establish gaming on the Reserve under the Indian Gaming Regulatory Act ("IGRA") and has brought numerous law suits to that end. A tribe may conduct Class II & Class III gaming[3/] authorized under IGRA only on "Indian

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[3/] IGRA divides gaming into three categories, each subject to a different regulatory scheme. Class I gaming consists of social games solely for prizes of minimal value or traditional forms of Indian gaming, and it is regulated exclusively by the tribes. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming includes "the game of chance commonly known as bingo [as well as] pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo." 25 U.S.C. 2703(7)(A). An Indian tribe may engage in Class II gaming if the state permits such gaming for any purpose by any party, and if the National Indian Gaming Commission has approved a gaming ordinance adopted by the tribe. 25 U.S.C. 2710(a)(2) and (b).

lands" within that tribe's "jurisdiction." See 25 U.S.C. 2710(b)(1) (specifying requirements for tribe to engage in, license and regulate Class II gaming on "Indian lands within such tribe's jurisdiction"); 25 U.S.C. 2710(d)(3) (Class III gaming[4/] is permissible only if, among other requirements, it is authorized by ordinance adopted by "the Indian tribe having jurisdiction over such" Indian lands). IGRA does not define the term "jurisdiction." The Act defines "Indian lands" as

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

25 U.S.C. 2703(4).

2. Indian Land Consolidation Act. -- Congress enacted the Indian Land Consolidation Act ("ILCA"), 25 U.S.C.A. 2201 note & 2216, in 1983 to address problems associated with increasingly fractionated interests in Indian allotments.

[4/] Class III gaming consists of "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. 2703(8). Class III games include slot machines, house-banked card games such as baccarat and blackjack, casino games such as roulette and craps, electronic and electromechanical facsimiles of any game of chance, sports betting, parimutuel wagering and lotteries. 25 U.S.C. 2703(7)(B); 25 C.F.R. 502.4.

As originally enacted, ILCA (1) authorized Indian tribes to establish land consolidation plans (section 204)); (2) authorized Indian tribes to acquire partial or complete interests "in any tract of trust or restricted land within that tribe's reservation or otherwise subjected to that tribe's jurisdiction with the consent" of the majority of the parcel's owners (section 205(a)); and (3) authorized Indian tribes to decree that nonmembers or non-Indians shall not be entitled to receive by devise or descent any interest of a member of such tribe in trust or restricted lands "within that tribe's reservation or otherwise subjected to that tribe's jurisdiction" (Section 206).[5/]

Congress amended ILCA in 2000. Pub. L. 106-464, 114 Stat. 1991. Section 102 of the Amendments provides:

> It is the policy of the United States –
>
> (1) to prevent the further fractionation of trust allotments made to

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[5/] Amendments to ILCA in 1984 changed the verb "subjected" to the present tense (*i.e.*, "subject") in Sections 205-206. See Pub. L. 98-608, 98 Stat. 3171 (1984). The 1983 Act also provided for escheat to the tribe of any fractional interest in trust or restricted land "within a tribe's reservation or otherwise subjected to a tribe's jurisdiction" that comprised less than 2% of total acreage and did not produce income greater than $100 in the previous year (section 207). Pub. L. 97-459, 96 Stat. 2515 (1983). However, the escheat provision in the 1983 version was held to be an unconstitutional taking of property. *Hodel v. Irving*, 481 U.S. 704 (1987). In 1997, a 1984 amendment to the escheat provision was held unconstitutional as well. See *Babbit v. Youpee*, 519 U.S. 234 (1997).

> Indians;
>
> (2) to consolidate fractional interests and ownership of those interests into usable parcels;
>
> (3) to consolidate fractional interests in a manner that enhances tribal sovereignty;
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> (4) to promote tribal self-sufficiency and self-determination; and
>
> (5) to reverse the effects of the allotment policy on Indian tribes.

25 U.S.C.A. 2201 note.

The Amendments also added a subsection to the Act that provides in relevant part:

> (a) Policy. – It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions –
>
> (1) involving individual Indians;
>
> (2) between Indians and the tribal government that *exercises jurisdiction over the land;* or
>
> (3) between individuals who own an interest in trust and restricted land who wish to convey that interest to an Indian or the tribal government *that exercises jurisdiction over the parcel of land* involved;
>
> in a manner consistent with the policy of maintaining the trust status of allotted lands. * * *

25 U.S.C. 2216(a) (emphasis added).

Congress enacted further amendments to ILCA in 2004, primarily

pertaining to the probate of trust and restricted land. The 2004 Amendments exempted grantors that own five percent or less of a parcel from the requirement that an estimate of value be provided in writing to the owner of a restricted interest in land conveying by gift deed to "the tribe *with jurisdiction over the subject parcel of land.*" 25 U.S.C. 2216(b)(1)(B)(ii) (emphasis added).

3. <u>Conveyance of restricted land between Indians and a Tribe</u>. -- Pursuant to Interior's regulations, a conveyance of restricted land between an individual Indian and a Tribe is a two-part transaction consisting of approval of disposal by the grantor and approval of acquisition by the grantee. The disposal portion is governed by regulations set forth in 25 C.F.R. Part 152. The acquisition portion of a transaction is governed by 25 C.F.R. Part 151. In relevant part, the disposal regulations provide:

> Applications [for sale, exchange or gift of trust or restricted land] 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 or as under conditions set out in 152.25(d).

25 C.F.R. 152.23. In turn, Section 152.25(d) provides:

> *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 the owner's spouse, brother, sister, 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.

25 C.F.R. 152.25(d).

B. Factual and Procedural Background. --

1. History of the Reserve. -- The complicated history of the Reserve is set forth in *Miami Tribe of Oklahoma v. United States* ("*Miami I*"), 927 F. Supp. 1419 (D. Kan. 1996), and *State of Kansas v. United States ("Miami IV"),* 249 F. 3d 1213 (10th Cir. 2001). In brief, in an 1840 treaty between the United States and the Miami Tribe of Indians, the Tribe ceded its lands in Indiana in exchange for lands to be set aside in United States territories further west. 7 Stat. 582 (Nov. 28, 1840). Congress set aside lands in the Kansas territory, to which many members of the Miami Tribe emigrated in 1846; many other Miamis, however, remained in Indiana. See *Miami I*, 927 F. Supp. at 1424. Thereafter, the Miamis who remained in Indiana, rather than emigrating with the Tribe to Kansas Territory, were officially regarded as having severed their relationship with the Tribe. See *id.* (citing authorities).

By a treaty executed in 1854, the Miami Tribe (then based in Kansas Territory) agreed to cede all but 70,640 acres of its land in Kansas Territory. The United States, in turn, agreed to make $200,000 in payments to, and investments

for, the Tribe. 10 Stat. 1093. Those Miamis who had remained in Indiana and who were on a "corrected list" approved by the Indiana Miamis were to receive certain other payments, as well as allotments from the 70,640 acres of lands ceded in Kansas Territory. *Miami I*, 927 F. Supp. at 1423. A federal statute enacted June 12, 1858, 11 Stat. 329, added 68 individuals to the list of "Indiana" Miamis eligible for benefits under the 1854 Treaty. Among the individuals made eligible for these benefits under the 1858 statute was Maria Christiana DeRome, an Indiana or "Eastern" Miami Indian (according to the list of such Indians as amended by the 1858 statute).[6/]

Pursuant to the 1854 treaty and an 1859 statute, 11 Stat. 430, 430-31, the United States issued a restricted fee patent dated December 15, 1859, conveying 200 acres to Maria Christiana.[7/] Other "Indiana" Miami Indians named in the 1858 statute apparently also received allotments carved out of the 70,640 acres of land in Kansas reserved under the 1854 treaty for the benefit of the Miami Indians. See *Miami I*, 927 F. Supp. at 1425-26. However, the individuals added to the

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[6/] The DeRome family had been excluded from the original list of "Indiana" Miamis compiled pursuant to the 1854 legislation, apparently because they were not considered to be of Miami blood. See 927 F. Supp. at 1424 (citing H.R. Exec. Doc. No. 23, 49th Cong., 1st Sess. 1, 6 (1886)).

[7/] The 200-acre tract was reduced over time to the thirty-five acres that now constitute the Reserve. 927 F. Supp. at 1424.

"corrected" list of Miamis by the 1858 statute were later removed from the list of Tribal members in 1867 pursuant to an opinion of the Attorney General. See *id.*, 927 F. Supp. at 1423 n.4 (citing 12 Op. Att'y Gen. 236) (1867)).

The United States and the Miami Tribe entered into another treaty in 1867 intended to relocate the Tribe from Kansas to Oklahoma. In 1873, Congress enacted legislation in which it agreed to buy the Miamis' unallotted lands in Kansas if the Tribe agreed to sell, 17 Stat. 631, which the Tribe did agree to do. The 1873 statute also directed that the Secretary take a census of the Western Miami Indians, and that those who decided to remain in Kansas would become United States citizens and cease to be members of the Tribe, and those that relocated to Oklahoma would remain members.[8/] See *Miami I* at 1425.

In 1884, the "Western" Miamis (now based in Oklahoma) petitioned Congress for reimbursement for lands and moneys that had been given to the "Eastern" Miamis named in the 1858 statute; they alleged that the 1854 treaty had designated these benefits exclusively for the "Western" Miamis. See H.R. Rep. No. 51-3852 at 2 (1891). Congress referred the matter to the Court of Claims,

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[8/] The Miami Tribe of Oklahoma was originally placed on the Peoria Reservation. A Guide to the Indian Tribes of Oklahoma, Muriel H. Wright, pp 207-209 (1986 ed.). The Tribe now has 143 acres of trust land in Ottawa County, Oklahoma.

which determined that lands and monies to which the "Western" Miamis had been entitled under the 1854 treaty ceding tribal lands in Kansas had been erroneously conveyed and paid to the "Indiana Miami" individuals named in the 1858 statute. *Id.* at 1425. In 1891, the United States paid the Miami Tribe $61,971.03 as compensation for annuities improperly paid and land improperly allotted to these individuals, including Maria Christina. In 1960, the Miami Tribe brought a lawsuit seeking interest on the payments made in 1891 and won a judgment for $100,072. *Miami Tribe of Oklahoma v. United States,* 281 F.2d 202, 213 (Ct. Cl. 1960).

2. Prior Litigation About the Tribe's Jurisdiction Over the Reserve. --

I. Prior Unappealed Judgment Holding That the Tribe had Relinquished, and Congress had Abrogated, the Tribe's Jurisdiction over the Reserve. -- In 1994, the Tribe entered into a management contract with Butler National Corporation ("Butler") for the purpose of initiating gaming on the Reserve and submitted the contract for the National Indian Gaming Commission's ("NIGC") approval under 25 U.S.C. 2711. Interior and NIGC concluded in 1995 that the Reserve did not qualify as "Indian lands" for purposes of IGRA. In *Miami I*, 927 F.Supp. 1419 (D.Kan. 1976), the Tribe unsuccessfully challenged the NIGC's decision in district court. The district court concluded that Interior and

NIGC had reasonably construed IGRA's requirement that a tribe "exercise governmental power" over lands as requiring that the tribe have jurisdiction over the land. See *id.* at 1423 (commenting that "[a]bsent jurisdiction, the exercise of governmental power is, at best, ineffective, and at worst, invasion"). The court reasoned that the events surrounding the relocation of the Miami Tribe from Kansas to Oklahoma demonstrated that the Tribe had unmistakably relinquished its jurisdiction over the Reserve and that in the 1873 legislation Congress had abrogated the Tribe's jurisdiction over Kansas lands including the Reserve. *Id.* at 1426-27. Moreover, the heirs of Maria Christiana who had inherited interests in the Reserve were not members of the Tribe after 1867. *Id.* at 1427. On these and related grounds, the court concluded that the Tribe lacked sovereign jurisdiction over the Reserve. The Tribe did not appeal that decision.

ii. Following Further Litigation, This Court Concluded That the Tribe Could not Establish Jurisdiction Over the Reserve Through Unilateral Actions. -- In an effort to strengthen its case that the Reserve qualifies as Indian lands under IGRA, the Tribe amended its constitution in 1996 to allow it to admit the then current owners of the Reserve as members of the Tribe[9/] and thereafter

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[9/] In *Miami I*, the court declined to consider the Tribe's arguments that it had amended its constitution to admit the owners of the Reserve as members, noting

enlisted the current owners of the Reserve as tribal members. The Tribe also made other efforts to establish a presence on the Reserve. For example, it erected signs, offered services on the land, and leased the Reserve from the current owners for the purpose of conducting gaming. The owners consented to be governed by the Tribe. *Miami IV*, 249 F.3d at 1230-31.

Interior and NIGC again concluded, however, that the Tribe's new contacts with the Reserve were insufficient and, on the basis of Interior's determination, NIGC again refused to approve the management contract. In a new lawsuit brought by the Tribe, the district court set aside NIGC's decision, finding that Interior had failed to provide a reasoned explanation for its decision, specifically failing to explain why the Tribe's recent activities (such as enrolling the owners of the allotment as tribal members) were insufficient to make the Reserve "Indian lands" within the meaning of IGRA. *Miami Tribe of Indians v. United States* ("*Miami II*"), 5 F. Supp. 2d 1213 (D. Kan. 1998). The court remanded the case to NIGC for further proceedings and stayed court proceedings on a breach of trust claim pending the outcome.

On remand, Interior concluded in an Associate Solicitor's Opinion that the

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that the amendment post-dated the NIGC's decision and that the Tribe had not definitively shown that it had the owners' consent. 927 F.Supp. at 1428.

Tribe had shown that it exercises governmental power over the Reserve and that the Reserve therefore was Indian land under IGRA.[10/] *Miami IV*, 249 F.3d at 1220. Based on this Opinion that the Reserve constituted "Indian lands," NIGC approved the Tribe's management contract. To resolve the *Miami II* litigation, the parties entered into a Stipulation and Agreement stating that the NIGC accepted, for the purpose of reviewing a gaming-related contract between the Tribe and Butler, that the Reserve is "Indian land" within the meaning of 25 U.S.C. 2703(4) over which the Miami Tribe of Oklahoma has jurisdiction and exercises governmental power. The United States and the Tribe then filed in the district court a Stipulation of Dismissal stating that they had entered into a stipulation and agreement resolving the lawsuit in its entirety. The district court thus dismissed the suit.

Next, the State of Kansas filed suit, asserting that the Reserve is not a restricted Indian allotment over which the Tribe exercises governmental control, but instead is subject to the State's full civil regulatory jurisdiction, and that the Reserve therefore is not "Indian land" under IGRA. The district court entered a

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[10/] The Associate Solicitor's 1998 opinion did not address, however, the threshold question of whether the Tribe may validly "exercise jurisdiction" over the Reserve. 249 F.3d at 1220.

preliminary injunction restraining the federal defendants from taking any action to facilitate gaming on the land. *State of Kansas v. United States* ("*Miami III*"), 86 F. Supp. 2d 1094 (D. Kan. 2000).

On appeals brought by the United States, the Tribe, and Butler, this Court affirmed the grant of a preliminary injunction. *State of Kansas v. United States* ("*Miami IV*"), 249 F. 3d 1213 (10th Cir. 2001). In pertinent part, this Court held that the State was very likely to prevail on the merits. 249 F.3d at 1227-31. The Court found that the federal agencies had failed to explain the basis for the conclusion that the Tribe has jurisdiction over the Reserve and concluded, based on its own analysis, that the Tribe did not have jurisdiction over the Reserve. In so concluding, the Court discounted the Tribe's reliance on its own "unilateral actions" or the "consent of the fee owners" as a basis for finding that it could legitimately exercise jurisdiction over the parcel, explaining that an "Indian tribe's jurisdiction derives from the will of Congress." *Id.* at 1229, 1230, 1231. "In concluding that the Tribe exercised governmental power over the tract without first establishing the Tribe's jurisdiction over the tract, the NIGC, in effect, put the cart before the horse." 249 F.3d at 1229. "A proper analysis of whether the tract is 'Indian lands' under IGRA begins with the threshold question of the Tribe's jurisdiction, rather than the recent unilateral actions of the Miami Tribe." *Id.*

Significantly, this Court found to be *res judicata* the district court's conclusion in *Miami I,* 927 F.Supp. at 1424-27, that no lawful basis exists to suggest the Tribe currently has jurisdiction. "Congress years ago 'unambiguously intended to abrogate the Tribe's authority of its lands in Kansas and move the Tribe to new lands in Oklahoma.'" 249 F.2d at 1230, quoting *Miami I*, 927 F.Supp. at 1426. The Court concluded that the facts and conclusions in the Tribe's first two lawsuits challenging the adverse "Indian lands" determination demonstrated that "Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the land." *Id.* at 1230, 1231.

iii. Challenge to the Solicitor's Opinion. -- After the this Court's decision in *Miami IV*, the district court remanded the case to the federal agencies, instructing the agencies to conduct further proceedings consistent with the district court and appellate opinions. Following the remand, the Tribe resubmitted a proposed gaming management contract for approval by the NIGC. The NIGC in turn requested an advisory opinion from the Solicitor of the Interior regarding the Tribe's jurisdiction over the Reserve. In 2002, the Solicitor concluded that, following this Court's decision in *Miami IV*, the Tribe lacks jurisdiction over the Reserve. Letter, Solicitor William G. Meyers III, to Acting General Counsel

Penny J. Coleman, dated 10/31/02, included in brief Addendum and published at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx. Without waiting for an NIGC determination on the gaming management contract, on November 27, 2002, the Tribe filed a complaint in the United States District Court for the District of Kansas challenging the Solicitor's opinion and seeking to enforce the Stipulation and Agreement that ended the *Miami II* decision, in which the NIGC acknowledged that the Reserve is "Indian land" under IGRA over which the Tribe has jurisdiction and exercises governmental power.

The district court held that the 2002 Interior opinion was not a final agency action under the APA and not ripe for review. It further held that the United States had not waived its sovereign immunity from enforcement of the stipulation and that any available remedy for the Tribe's claims lay in the Court of Federal Claims. The Tribe appealed. This Court affirmed. *Miami Tribe v. United States*, 198 Fed.Appx. 686, 2006 WL 2392194 (10th Cir. 2006). The Tribe eventually withdrew its request for approval of the proposed gaming management contract before the NIGC could rule on it.

3. **The Present Suit. --** James E. Smith holds a 3/38, or 7.89%, undivided restricted fee interest in the Reserve, which he inherited from heirs of Maria Christiana DeRome. As noted above, none of the landowner heirs of Maria

Christiana DeRome were members of the Tribe between 1867 and 1996 when Smith and other owners of the Reserve were adopted as members of the Tribe. In 2001, Smith sought authorization from the Secretary of the Interior to convey one-third of his 3/38 interest in the Reserve to the Tribe as a gift without consideration. The proposed conveyance would give the Tribe a 1/38, or 2.63%, ownership interest in the property. *James E. Smith and Miami Tribe of Oklahoma v. Eastern Oklahoma Regional Director, BIA,* 47 IBIA 259, CR 128, AR 689-701.

I. Interior's Initial Decision in This Case. -- In a January 11, 2002, letter decision signed by the BIA Acting Regional Director of the Eastern Oklahoma Region, the BIA denied Smith's application to approve the proposed gift conveyance. Letter dated 1/11/02, CR 128, AR 182-184; App. 132. The BIA acknowledged that, due to Smith's recent enrollment as a member of the Tribe, a special relationship exists between Smith and the Miami Tribe within the meaning of 25 C.F.R. 152.25(d), but nonetheless denied the proposed gift conveyance.[11/]

[11/] The decision refers to the agency's analysis in disapproving a 1993 application for a gift conveyance to the Tribe proposed by Smith's aunt, Ms. Earline Smith Downs. See *Downs v. Acting Muskogee Area Director*, 29 IBIA 94, 1996 WL 164987 (I.B.I.A. 1996). Ms. Downs was not then a member of the Tribe and thus could not claim a special relationship. In 2006, however, upon Ms. Downs' death, the Tribe acquired her 3/19 interest pursuant to probate proceedings, and now holds that restricted fee interest subject to a beneficial life estate for James E. Smith. Declaration of Karen Stills, Exhibit A to Defendants'

The decision stated that highly fractionated ownership interests greatly complicate the Bureau's land management efforts and the successful discharge of the federal government's trust responsibility. The agency noted issues regarding tract management, competing interests between the Tribe and the individual Indian landowners, the potential for land use conflicts, and the propriety of the transaction given the recent history related to the Tribe's attempt to establish gaming. The decision further states: "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." Letter dated 1/11/02, CR 128, AR 183; App. 133.

The decision also found that the proposed conveyance conflicts with the federal government's policy on fractionated interests as set out in Section 102 of the Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, 114 Stat. 1991; 25 U.S.C.A. 2201 note (set forth above). Letter dated 1/11/2002, CR 128, AR 184; App. 134. BIA reasoned that conveying only 1/3 of Smith's undivided 3/38 interest in the allotment "would add to, rather than eliminate, the further fractionation of individually-owned Indian lands" and "would not serve to consolidate fractional ownership interests into useable parcels." *Id*. The decision

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Response to Miami Tribe's Second Supplement to the Administrative Record (CR 147; App. 166).

further states that the conveyance would not enhance tribal sovereignty or promote tribal self-sufficiency and self-determination over what can be accomplished through the Tribe's current lease of the property and would not reverse the effects of the allotment policy on the Miami Tribe given the distance of the tract from the Tribe's land base. *Id*. Because it would not approve the disposal part of the transaction, BIA found it unnecessary to consider the acquisition portion of the transaction.

Smith appealed to the IBIA and the Tribe intervened in the Board proceedings. On October 31, 2002, the IBIA affirmed BIA's decision. *Smith v. Acting Eastern Oklahoma Regional Director,* 38 IBIA 182, 2002 WL 32345894; CR 128 at 8-14; App. 125; Addendum. The IBIA noted that it had previously affirmed the BIA's disapproval of a similar proposed gift conveyance of an ownership interest in the Reserve because it would increase fractionation and thus conflict with ILCA policies. The IBIA refused to consider unsupported claims, asserted only on appeal, that the Tribe has a plan to consolidate the fractional interests of some 25% of the heirs to the allotment through conveyances to the Tribe, because this information was not made available to the Regional Director and the Board has a well-established practice of declining to consider information

presented for the first time on administrative appeal.[12/]

ii. District Court Proceedings. -- The Tribe then filed the present action in the District Court for the District of Kansas. Complaint, CR 1. Count one of the Tribe's three-count complaint sought judicial review of the BIA's denial of approval under the Administrative Procedure Act. For relief on count one, the complaint requested that the court declare that the federal defendants' evaluation was unreasonable, arbitrary and capricious and enter an order compelling federal defendants to approve the transfer of one-third of Smith's interest in the Reserve to the United States in trust for the Tribe.

Count two alleged a breach of trust based upon the government's refusal to timely consider and approve the requested transfer. The complaint requested, *inter alia,* an order and writ of mandamus compelling federal defendants to

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[12/] The Board also rejected the Tribe's argument that the BIA had a non-discretionary duty to approve the transfer under 25 U.S.C. 2216(c), explaining that the provision is not relevant because it addresses acquisitions, rather than dispositions of trust/restricted property. Furthermore, the provision is probably inapplicable because it applies only to restricted land "located within a reservation" and the Reserve is not within a current reservation. The Board also rejected Smith's and the Tribe's contention that the Regional Director's decision is unconstitutional because it is an abrogation of the right to pass property. The Board explained that to the extent there is such abrogation, it is effected by federal statute and the Board has no authority to declare a federal statute or regulation unconstitutional. 2002 WL 32345894 at *3; App. 124.

approve Smith's transfer, to timely process all future transfers consistent with the court's order, and an order compelling defendants "to recognize and protect the Miami Tribe's jurisdiction" over the Reserve "for all activity related to the Reserve."

Count three alleged that the government's refusal to approve the proposed transfer violated substantive and procedural due process because Smith has a right to dispose of his interest as he desires and the Tribe has a right to receive interests in real property. Again, the relief requested was an order compelling federal defendants to approve the transfer and take the interest into trust for the Tribe.

In its June 22, 2005, order, *Miami Tribe of Oklahoma v. United States et al.,* 374 F.Supp.2d 934 (D. Kan. 2005) (Addendum; App. 33), the district court ruled on count one, holding that the BIA's decision disapproving the proposed conveyance was arbitrary and capricious and contrary to law. The court first concluded that the BIA's preference that Indian landowners receive at least fair market value for their interest unless special circumstances warrant otherwise, is inconsistent with 25 C.F.R. 152.25(d) and 25 U.S.C. 2216(b). Second, the court held that, in concluding that the conveyance would further fractionate ownership of the parcel, the BIA failed to consider long-range impacts. The court suggested that the conveyance to the Tribe would reduce fractional interests in the long run,

because the Tribe intended to hold onto this fractional interest and to try to acquire other fractional interests. Third, the district court found that the BIA's decision as a whole was contrary to the stated policies of ILCA. As part of its conclusions, the district court held, without citing any supporting authority, that even though this Court had previously concluded that the Tribe did not have jurisdiction over the Reserve for purposes of IGRA, the Tribe nonetheless qualified as a "tribal government that exercises jurisdiction over the land" for purposes of ILCA Section 2216(a). The district court concluded by ordering the BIA decision reversed and instructing BIA to "forthwith approve Smith's application."

The United States timely sought reconsideration of the court's order (CR 30), which the district court partially granted in a memorandum and order dated November 23, 2005, CR 37; App. 54, Addendum. Instead of ordering BIA to approve Smith's application, the district court remanded the matter to BIA for further proceedings consistent with the court's June 22, 2005, order. Following various motions to stay the case or otherwise establish procedures for resolving the case, *inter alia*, the district court extended its stay of Counts II and II pending agency disposition of the remand proceedings previously ordered on Count I. CR 73; App. 66.

Desiring immediate appellate review of the district court's decision as to

Count I, the government moved for entry of a F.R.C.P. 54(b) judgment on Count I; the district denied this motion on December 29, 2006. CR 80; App. 73. Thus Interior was obligated on remand to reconsider the application consistent with the district court's order.

iii. Interior Decisions on Remand. -- On October 23, 2007, the BIA Regional Director, consistent with the district court's order, approved Smith's application for a gift deed for the 1/38 interest to the Tribe. Letter, Regional Director Jeannette Hanna to James E. Smith, dated 10/23/07, CR 128, AR 237-238; App. 135, Addendum. Smith's application indicated, however, that he wished to transfer his undivided interest to the Tribe with the interest to remain in "trust status," even though Smith holds his interest in restricted fee. BIA informed Smith and the Tribe that, for the Tribe to acquire the interest in trust, tribal acquisition would have to be processed "in accordance with 25 C.F.R. 151 upon the receipt of an application for a trust acquisition from the Tribe." *Id*. (see also *supra* at 9).

Both Smith and the Tribe sought review by the IBIA, seeking to establish that Smith held his title in trust, rather than restricted fee. In the administrative proceedings before the IBIA, Interior explicitly preserved the right to appeal from the district court's earlier orders "particularly, but not limited to, the extent to

which such orders applied [ILCA] to the subject property and the Department of the Interior's review of James E. Smith's requested gift conveyance." September 15, 2008, Supplemental Brief of Appellee at 5, CR 128, AR 732; App. 162; see also May 9, 2008, Brief of Appellee at 4 (same), CR 128, AR 266; App. 140.

On October 10, 2008, the IBIA affirmed in part and vacated in part the Regional Director's decision on remand.[13/] *James E. Smith and Miami Tribe of Oklahoma v. Eastern Oklahoma Regional Director, BIA,* 47 IBIA 259, CR 128, AR 689-701; App. 147. The IBIA concluded that the Smith property was held in restricted fee title, not trust, consistent with district court statements in the June 22, 2005, decision, 374 F. Supp. 2d at 936. 47 IBIA 268-269. The Tribe did not dispute the Regional Director's determination that, if Smith held fee title, then the Tribe must submit a fee-to-trust application pursuant to Part 151. Finally, the IBIA concluded that, because the Tribe had not yet indicated whether it would accept a restricted fee interest (as opposed to the requested trust status), the Tribe was required to inform the Regional Director whether it wished to accept a restricted fee interest from Smith before the BIA could proceed with the transfer.

[13/] At the BIA's request, the IBIA vacated in part the Regional Director's determination to the extent that it might suggest that title would or should convey in unrestricted fee simple to the Tribe, and concluded that the restricted fee interest could pass to the Tribe as a restricted fee interest. 47 IBIA 270; App. 158.

App. 158.

iv. Final District Court Opinion and Judgment. -- Following the IBIA's decision, the Tribe filed an amended complaint in the district court on October 17, 2008. CR 121, 126; App. 81. Count I alleged a violation of ILCA for failing to transfer Smith's interest to the Tribe in trust, and Count II alleged a breach of trust by refusing to transfer the land in trust and failing to maintain and hold the Miami Reserve in trust for the benefit of its Indian owners. The Tribe dropped its previous third count (a Constitutional Due Process claim). The Tribe requested injunctive relief to compel the government to recognize the Tribe's jurisdiction over the Reserve, recognize that the Reserve is held in trust and promptly process future applications to transfer land in trust to the Tribe.

In the district court, the government again explicitly reserved the right to appeal from the June 2005 orders. Defendants' Response in Opposition to Miami Tribe's APA Brief (CR 134) at 53, n.11 ("Defendants acknowledge that the Court has found that the Tribe has jurisdiction for purposes of Section 2216(a). Nevertheless, the Defendants do not concede this point and they respectfully reserve all rights to appeal the Court's finding.")

In its January 4, 2010, decision, the district court upheld the IBIA's October 10, 2008 decision. The district court concluded that the IBIA was correct in

finding that Smith's interests were held in restricted fee and could be taken into trust for the Tribe only through a fee-to-trust application. Accordingly, the court upheld the IBIA's decision affirming the BIA's refusal to approve Smith's transfer to the Tribe in trust. 679 F.Supp.2d at 1280.

As to its previous jurisdictional conclusion, the court did not revisit its prior decision but merely noted that the parties recognized that the district court had already ruled "that for purposes of the policy section of the ILCA, codified at 25 U.S.C. 2216(a), Miami Tribe qualifies as a tribal government that exercises jurisdiction over Miami Reserve." *Id*. at 1282. The district court then declined the Tribe's request to require the government to "recognize and protect Miami Tribe's jurisdiction over the Reserve" for purposes of future transfer applications. *Id*.

This appeal followed.

SUMMARY OF ARGUMENT

In the initial decision of January 11, 2002, the BIA properly exercised its discretion in denying Smith's application to give a fraction of his restricted fee interest in the Reserve to the Tribe. The Regional Director considered many aspects of the proposed gift transfer, including the question of consideration, the fact of increased fractionation, concerns about tract management and competing interests between the Tribe and the individual owners, and the potential for land use conflicts. The Regional Director's conclusion that the proposed gift conveyance is not in the "long-range best interest of [Smith] or other Indian owners of the allotment" is reasonable and amply supported by his analysis and the record. It comports fully with the statutory authority delegating this decision to the agency's discretion for approval.

The district court thus erred in its June 22, 2005, order, in determining that the Department of the Interior abused its discretion in disapproving the gift conveyance. Even though the agency found the existence of a special relationship between Smith and the Tribe, the wording of the regulatory and statutory delegation of broad discretionary authority to the agency permits the agency to take into consideration other factors and to deny a gift transfer when, in the opinion of the agency, the transaction is not clearly justified as in the long-term

interest of the parties.

The district court also erred in finding that the Tribe "exercises jurisdiction" over the Reserve. As this Court has found, it is *res judicata* that the Tribe lacks sovereign jurisdiction over the Reserve. The district court erred in its analysis and assumption that unilateral actions of the Tribe to "police" and "control" the Reserve constituted the exercise of jurisdiction within the meaning of ILCA; the court's order provided no authority and no rationale for reaching this conclusion under ILCA when this Court reached the opposite conclusion under IGRA. This analysis and ruling, conflicting as it does with the *Miami I* decision, leaves jurisdiction in a state of confusion, and could lead to continued litigation if not addressed by this Court.

Because the district court's order of June 22, 2005, was erroneous, the district court's final judgment should be reversed and Interior's 2002 decision disapproving the gift conveyance should be upheld.

ARGUMENT

I. **Standard of Review. --** This Court reviews the case *de novo* applying the standards governing review of agency action under the Administrative Procedure Act. *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996). Review of the administrative record is narrow, and agency action in furtherance of the

agency's statutory mandate is entitled to "substantial deference." *Chipman v. Shalala,* 90 F.3d 421, 422 (10th Cir. 1996); *McAlpine v. United States*, 112 F.3d 1429, 1432 (10th Cir. 1997); *Hoyl v. Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 1997). Agency action will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

As the status of the Reserve under federal law turns on the interpretation of federal statutes and other questions of law, the district court's legal conclusions are subject to *de novo* review. See, *e.g.*, *Burlington Northern R.R. Co. v. Huddleston*, 94 F.3d 1413, 1416 (10th Cir. 1996). However, Interior's interpretation of the meaning of the words "exercise jurisdiction" in ILCA's policy provisions, 25 U.S.C. 2216(a), is subject to the familiar *Chevron* standard. *Miami IV*, 249 F.3d at 1229.

> When we review an agency's application of a statute where Congress has clearly spoken to the issue before us, we must give effect to the unambiguous intent of Congress. *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 * * * (1984). However, where Congress is silent regarding the issue before us, and has delegated authority over the subject matter to the agency construing the statute, we will defer to the agency's construction. *Id*. at 843-44 * * *. We will set aside the agency's interpretation only if, in the context of the statute, the agency's construction is unreasonable or impermissible. *Id*. at 843, 845 * * *. We apply this level of deference only when the agency's interpretation is reached through formal rulemaking procedures or an adjudication. *Headrick v. Rockwell Int'l Corp*., 24 F.3d 1272, 1282 (10th Cir. 1994).

Hoyl, 129 F.3d at 1385.

An agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation. *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 684 (10th Cir. 2010); *Barnhart v. Walton*, 535 U.S. 212, 217 (2002); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

II. The District Court Erred in Holding That BIA's 2002 Denial of the Proposed Conveyance was Arbitrary, Capricious, and Contrary to Law. -- The district court erred in three respects in reversing the BIA's 2002 decision. First, the court erred in concluding that the agency lacked discretion to disapprove the gift conveyance when a special relationship existed between Smith and the Tribe. Second, the court erred in reversing the agency's reasonable exercise of discretion when the court concluded that increased fractionation of the ownership of the reserve was not a valid basis for denying the gift conveyance. Finally, because it is *res judicata* that this Tribe does not have sovereign jurisdiction over the Reserve, the district court erred in concluding that the Tribe "exercises jurisdiction" over the Reserve under ILCA. In sum, the BIA's 2002 decision was not arbitrary and capricious and the district court erred in setting it aside.

A. The BIA Reasonably Denied the Gift Conveyance Application. --

1. The BIA Acted Well Within its Discretion in Disapproving The Proposed Gift Conveyance. -- The January 11, 2002, BIA decision faithfully implemented the governing statutes and regulations and reasonably denied the proposed gift conveyance of a fraction of Smith's undivided 3/38 interest in the Reserve. CR 128, AR 182-184; App. 132. The Acting Regional Director acted in consideration of the regulatory factors set forth in 25 C.F.R. 152.25(d), which states:

> 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 the owner's spouse, brother, sister, 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.

Id. (emphasis added). In addition, the Regional Director applied the overarching charge to the agency in approving conveyances:

> Applications [for sale, exchange or gift of restricted land] 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 or as under conditions set out in 152.25(d).

25 C.F.R. 152.23.

Pursuant to these regulations, the Regional Director acknowledged that a

special relationship existed between Smith and his adoptive Tribe but expressed concerns about "tract management, competing interests between the Tribe and the individual landowners, and the potential for land use conflicts." CR 128, AR 183; App. 133, incorporating by reference the same Regional Director's earlier decision reviewed in *Earline Smith Downs v. Acting Muskogee Area Director, BIA*, 29 I.B.I.A. 94, 1996 WL 164987 (I.B.I.A.) (February 23, 1996). In the *Downs* matter, the Regional Director had denied a gift conveyance of a partial interest in the Maria Christiana Reserve, not only because, in that instance, there was no special relationship between the donor and the Tribe, but also because management of the tract would become more difficult with further fractionation of ownership. "[W]here tribes own small interest in allotted lands, the tribes and the individual owners often have competing interests in the use of the land." *Id*. at *4-5.[14/]

The Regional Director also expressed concern that Smith should receive fair market value absent "any special circumstances that would justify a gift of a portion of [Smith's] undivided interest to the Tribe." CR 128, AR 183; App. 133.

[14/] The IBIA concluded in the Downs case that "the Area Director's conclusions concerning the likely increase in management problems were clearly based on BIA expertise in this area, as was his conclusion that such problems would probably work to the detriment of appellant and the other landowners." *Id*. at *5.

Noting that a recently approved business development lease would benefit the Tribe, the Regional Director stated that "I can understand your stated desire to benefit the Tribe, but I feel the existing business lease with the Tribe will accomplish this." *Id*.

Finally, the Regional Director stated:

> The recent history and gaming-related aspects of this tract continue to cause me concern over the propriety of such a 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*.

Id., emphasis added.

Regarding fractionation, the Regional Director concluded that the conveyance of 1/3 of Smith's undivided 3/38 interest would

> add to, rather than eliminate, the further fractionation of individually-owned Indian lands. It would not serve to consolidate interests and the ownership of those interest[s] 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 your undivided interest to the Miami Tribe conflicts with stated U.S. policy [on fractionated interests as set out in the ILCA Amendments of 2000].

CR 128, AR 184; App. 133.

The IBIA reviewed and affirmed this decision in its order of October 31, 2002. *James E. Smith v. Acting Eastern Oklahoma Regional Director, BIA,* Order Affirming Decision, 38 IBIA 182, 2002 WL 32345894, CR 128, AR 8-14; App. 125; Addendum. Noting that "[w]hile a careful pre-approval examination is required * * * the determination of whether to approve a conveyance is a matter within the discretion of BIA." *Id*. at *2, citing *Downs v. Acting Muskogee Area Director*, 29 I.B.I.A. 94, 97, 1996 WL 164987, at *3 (Feb. 23, 1996).

> Thus, as in the case of other BIA *discretionary* decisions, the Board's role here is to determine whether the BIA has given proper consideration to all legal prerequisites to the exercise of discretion. If it has, and if there is support for its decision in the record, the Board will not substitute its judgment for BIA's.

Id. at *2, quoting *Downs*, 28 I.B.I.A. at 97; App. 127 (emphasis added). The Board also noted that Smith bore the burden of demonstrating that the Board did not properly exercise its discretion. *Id*. at *4; App. 129. The Board concluded that "the Regional Director made a careful examination of the circumstances surrounding [Smith's] gift deed application. The Board finds that the record provides support for the Regional Director's decision." *Id*.

In its June 2005 order, the district court incorrectly concluded that the BIA had no discretion to disallow the gift transfer application once it had found that a

special relationship existed between the Tribe and Smith. 374 F.Supp.2d at 940. The district court mistakenly focused narrowly on the regulations' use of the disjunctive "or" to conclude that "under the plain language of the statute, Smith need only meet one of the three listed conditions." *Id*. In the district court's view, if there is a special relationship between grantor and grantee, then that is the end of the matter: "[t]hat finding, by itself, is sufficient under [Section] 152.25(d) to allow Smith to give his interest to Miami Tribe." *Id*.

The district court's analysis failed to appreciate the degree of discretion conveyed to the BIA by the governing regulations, or the actual breadth of the Regional Director's analysis and conclusions. The regulations plainly do not allow Smith to unilaterally give the Tribe an interest, nor do they require that BIA *must* approve a gift conveyance whenever a special relationship is found to exist. Rather, Section 152.25(d) provides that "[w]ith the *approval of the Secretary*, Indian owners *may* convey" restricted land for no consideration when a special relationship exists between grantor and grantee (emphasis added). Far from being mandatory, the regulations expressly and affirmatively state that 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 or as under conditions set out in § 152.25(d)*." 25

C.F.R. 152.23 (emphasis added). Thus, while Section 152.23 *allows* BIA to approve a gift conveyance whenever conditions set out in 152.25(d) are met (regardless of the long-range best interests of the owner or owners), its plain language most certainly does not *require* BIA approval in that circumstance.

The statutory authority for the regulations also confers considerable discretion on the agency. See 25 U.S.C. 483 (Secretary of the Interior "is authorized *in his discretion* . . . to approve conveyances, with respect lands or interest in lands held by individual Indians"); 25 C.F.R. Part 152; 38 Fed. Reg. 10080 (April 24, 1973); 64 Fed. Reg. 13,894, 13,895 (Mar. 23, 1999) (correction of codification errors) (emphasis added).

As the IBIA noted, the regulations expressly retain BIA's discretion to evaluate and disapprove conveyances even where a special relationship exists. The agency's interpretation and application of its own regulation is not contrary to the regulations' plain language and thus it should be accorded considerable deference. *E.g.*, *Barnhart v. Walton*, 535 U.S. 212, 217 (2002); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The district court should have refrained from substituting its own judgment for the agency's. *Morris*, 598 F.3d at 684.

In its November 23, 2005, order on the United States' motion for reconsideration, Memorandum and Order, CR 37, Addendum; App. 54, the district

court stated that it had not previously held in its June 22, 2005, order that BIA is required to approve a request if one of the three listed conditions in 25 C.F.R. 152.25(d) is met. Instead, the court stated, it held that the existence of a special relationship was sufficient by itself for the agency to "*allow* Smith to give his interest to the Miami Tribe." *Id.* at 8; App. 61 (emphasis added). The district court characterizes the BIA decision as requiring Smith to show both "special circumstances" *and* a "special relationship" in order to convey his land interest to the Tribe without consideration. That is incorrect. The BIA did not determine that it could not approve the conveyance without a showing of "special circumstances." Rather, the record here shows that the BIA exercised its discretionary authority to disapprove the conveyance in light of the totality of the circumstances, *including* the lack of special circumstances, even though there exists a special relationship between Smith and the Tribe. CR 128, AR 182-184; App. 132. Here, the Regional Director considered the totality of the circumstances and reasonably found the conveyance not to be in the best long-term interest of Smith and the other owners.

The district court also incorrectly suggested (Memorandum and Order dated 11/23/05, CR 37 at 11; App. 64) that the BIA's policy of requiring a tribe to pay fair market value absent special circumstances conflicts with 25 U.S.C. 2216(b).

The suggested conflict does not exist. The Regional Director's decision did not rest exclusively on the fact that there were no special circumstances justifying the lack of any consideration for the interest conveyed, but was based on a careful examination of the totality of the circumstances in this case.

Second, Section 2216(b) does not preclude BIA from considering, along with other reasons for disapproving a proposed conveyance, the fact that a grantor is not receiving fair market value and that there are no special circumstances. Section 2216(b) provides in relevant part:

> Notwithstanding any other provision of law and only after the Indian selling, exchanging, or conveying by gift deed for no or nominal consideration an interest in land, has been provided with an estimate of the value of the interest of the Indian pursuant to this section –
>
> > (I) the 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; and
> >
> > (ii) the approval of a transaction that is in compliance with this section shall not constitute a breach of trust by the Secretary.

While 25 U.S.C. 2216(b) certainly authorizes or confirms that a conveyance to a tribe for no consideration may be approved, it, too, is stated in permissive terms and does not negate BIA's discretion and authority to consider the interests of the grantor or other owners of restricted property. In short, there is no conflict between the BIA decision and Section 2216(b).

Furthermore, the thrust of Section 2216(b) is to provide procedural protection for the grantor by requiring that the grantor be provided an estimate of the value of his interest before conveying it by gift. Section 2216(b) thus suggests congressional concern for the owner's interests by requiring that individuals not be deprived of fair consideration for a conveyance without first being given full disclosure of the value of their interest before a gift conveyance may be approved.[15/] The provision hardly suggests a mandate to approve gift conveyances to tribes whenever a "special relationship" with the donor exists without regard to fair consideration. Indeed, if the district court's reading of Section 2216(b) were correct, then Interior would be required to approve every conveyance for less than fair market value between Indians and Tribes as long as the owner received an estimate of value. Such a radical reading is not supported by any authority or the statute itself.

[15/] Notably, when the decision at issue was rendered, Section 2216(b) waived the requirement for an estimate of value only where the grantee was the owner's spouse, brother, sister, lineal ancestor of Indian blood, lineal descendant, or collateral heir. Amendments enacted in 2004, Pub. L. 108-373, 118 Stat. 1773, provide that the requirement for an estimate of value also may be waived by an owner of a restricted interest conveying a gift deed to "the tribe with jurisdiction over the subject parcel of land, where the grantor owns a fractional interest that represents 5 percent or less of the parcel." 25 U.S.C. 2216(b)(1)(B). This exemption does not apply here both because the Tribe does not have jurisdiction over the Reserve (see *infra* at 45) and because Smith owns a fractional interest greater than 5 percent.

2. The BIA Reasonably Disapproved the Gift Conveyance Because it Would Further Fractionate Ownership of the Reserve. -- The district court also mistakenly concluded that the BIA improperly failed to consider how tribal ownership would enhance the long-term potential for consolidation of the highly fractionated ownership in the property. 374 F.Supp. 2d at 941-43; App. 43. Contrary to the district court's suggestion, there is no evidence that the BIA's analysis was short-sighted. It is beyond cavil that, at the time of the original agency decision in question, conveyance of a 1/38 interest to the Tribe would increase the number of fractionated interests. And, as a matter of common sense, it is not certain that conveyance to the Tribe of only a partial interest of one of over 20 owners will reduce fractionation of ownership interests in this parcel over the long-term. Even if the Tribe were to amass fractional interests from other owners, obtaining a partial interest from Smith does not cause a net reduction in fractionation.

The district court reasoned that the Tribe's interest will not be further fractionated because the Tribe "has clearly indicated its intention to consolidate the land interest in Miami Reserve in its Land Consolidation Plan filed with and approved by the BIA." 374 F.Supp. 2d at 942; App. 44. By contrast, according the district court, individual owners' interests likely will be increasingly

fractionated due to inheritance. *Id*. at 941; App. 44. However, because Smith retains 2/3 of his interest, it seems a long stretch to assume that the proposed conveyance could lessen the potential for further fractionation of interests.

The district court alluded to the Tribe's plan for land consolidation. *Id*. at 942; App. 44. At most, the plan shows current tribal desire to acquire the Reserve; it may falter or be abandoned in the future. As noted in the Board decision, the assertion that some 25% of the owners might also want to convey some or all of their interests to the Tribe was presented in the first instance to the Board, and was not substantiated by record evidence. *Smith v. Acting Eastern Oklahoma Regional Director,* 38 IBIA 182, 2002 WL 32345894 at *2, n.4; CR 128, AR 10; App 127; Addendum.[16/] Moreover, it is speculation to assume that acquisition of a fractional interest or the mere existence of a consolidation plan makes the Tribe materially more likely to acquire more fractional interests in the Reserve and in a manner that reduces fractionation and augments the Tribe's degree of ownership interest.

In this case, BIA has already rendered a decision that took into account competing concerns. The district court's holding that the decision should be reconsidered due to BIA's alleged failure to consider long-term potential for

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[16/] The IBIA ordinarily does not consider information submitted for the first time on appeal. *Mosay v. Minneapolis Area Director*, 27 I.B.I.A. 126, 132 (1995); *Estate of Evan Gillette, Sr.,* 22 I.B.I.A. 133 (1992).

consolidation is really an instance of a district court impermissibly substituting its judgment as to appropriate policy for that of the agency.

In short, even though consolidation of land ownership in the tribes is a legitimate policy goal as reflected in ILCA, it is not apparent that the proposed conveyance furthers that goal. In any event, BIA has discretionary authority to temper a policy of encouraging consolidation of ownership in tribes with other policies, such as protection of the interests of the owners, and precluding potential conflicts between current owners and the Tribe and land management difficulties. That discretion was not abused here.

B. The District Court Erred in Finding that the Tribe "Exercises Jurisdiction" Over the Reserve. -- In addition to concluding that BIA's decision conflicts specifically with 25 U.S.C. 2216(b), the district court incorrectly concluded that the BIA's decision was contrary to the policies set forth in Section 102 of the ILCA amendments of 2000 and 25 U.S.C. 2216(a). The latter provides: "It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions" "between Indians and the tribal government *that exercises jurisdiction over the land*" or between individuals who own an interest in trust and restricted land who wish to convey the interest to "the tribal government that *exercises jurisdiction over the parcel of land involved.*" 25

U.S.C. 2216(a) (emphasis added). Even accepting that it is proper to simply analyze agency action "as a whole" and ask whether it is consistent with the highly general "policy" statement of a federal statute, the district court's analysis of the import of these policy provisions was misguided. Although the district court recognized that, in *Miami IV*, this Court found it *res judicata* that the Tribe's jurisdiction over the land had been terminated by Congress and that the Tribe could not reestablish jurisdiction by unilateral exercise of power over the lands (374 F.Supp.2d at 944-45), the district court nonetheless concluded to the contrary that the Tribe can, through unilateral actions taken on uninhabited lands, "exercise[] jurisdiction over the land" within the meaning of 25 U.S.C. 2516(a). *Id*. The court did not cite any authority for this proposition and did not provide any cogent reason for distinguishing the Tribe's jurisdiction under IGRA from its jurisdiction under ILCA.

1. It is *Res Judicata* That the Tribe Does Not Have Jurisdiction Over the Reserve.-- This Court has previously found that it is *res judicata* that Congress abrogated the Tribe's jurisdiction over the Reserve many years ago and the Tribe does not currently have jurisdiction over the Reserve. In *Miami IV*, the Court reviewed in detail the history of the Tribe's exercise of jurisdiction over the Reserve, starting with the question of whether the Tribe, as a matter of

sovereignty, had jurisdiction over the Reserve: "We agree with the *Miami Tribe I* court that before a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land." 249 F.3d at 1219, citing *Miami I*, 927 F.Supp. at 1423. The question of the Tribe's jurisdiction "in turn, focuses principally on congressional intent and purpose, rather than recent unilateral actions of the Miami Tribe." *Id*. The Court then reviewed the *Miami I* decision and found that the district court there had

> thoroughly analyzed the question of the Tribe's jurisdiction over the tract based upon the United States' treatment of the tract. The court concluded that no lawful basis existed to suggest the Tribe presently had jurisdiction over the tract. * * * Rather, Congress years ago "*unambiguously* intended to abrogate the Tribe's authority of its lands in Kansas and move the Tribe to new lands in Oklahoma."

Id. at 1230, citing *Miami I* at 1426 (emphasis added by the court of appeals). This Court then noted that the Tribe did not appeal *Miami I* when it could have and that consequently, "the district court's findings and conclusions regarding the status of the tract, including its construction of the relevant legislation and treaties, are now *res judicata* and we need not revisit them here." *Id*. Here too, the district court's decision in *Miami I* that the Tribe lacks jurisdiction over the Reserve is *res judicata* and should not be revisited.

There is no basis for treating the question of jurisdiction over land differently for purposes of ILCA. To the contrary, ILCA's legislative history

affirmatively supports an interpretation of jurisdiction as a question of the existence of sovereignty over the land. The legislative history for the original ILCA in 1983 states the following with respect to language referring to land "subjected to" tribal jurisdiction:

> Section 206 states that any Indian tribe may provide by appropriate action of its governing body (tribal resolution, ordinance or similar action) that only members of the tribe or Indians may inherit (by devise or descent) any interest in trust or restricted lands located within a reservation or subject to that tribe's jurisdiction. For purposes of this Act, tribal jurisdiction means that the tribe exercises civil governmental powers over the lands involved or that the Secretary recognizes that the tribe has the authority to exercise civil governmental powers over such lands. The term "subjected to that tribe's jurisdiction" is used so that tribes which have had their reservations diminished or disestablished will still be covered under this Act as long as there are still individual or tribal trust lands located within these former or diminished reservations.

H.R. Rep. No. 97-908 at 8, reprinted in 1983 U.S.C.C.A.N. 4415, 4418. The last sentence suggests that Congress contemplated that individual allotments which were on a former reservation that was disestablished may be covered, but only "as long as there are still individual or tribal trust lands located within these former or diminished reserves." *Id*. The parcel at issue here is concededly held not in trust, but in restricted fee, and the provision is thus inapplicable.[17/] Moreover, the

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[17/] Although the Tribe presented extensive argument to the district court that the Reserve is held in trust, the Tribe did not appeal the issue after the district court ruled in its January 4, 2010, decision that the current owners of the Reserve

sentence defining tribal jurisdiction indicates that either a tribe with sovereignty is actually exercising its authority or a tribe not exercising any authority is actually recognized by Congress or the executive branch as having sovereign authority. In any event, a tribe may not unilaterally assume jurisdiction over land. Here, the Miami Tribe has acted as it is had civil authority over the Reserve but the courts have recognized that it has been decided that it lacks precisely that authority.

The facts that the district court here relied upon -- unilateral actions by the Tribe evincing dominion over the Reserve -- do not alter this analysis. The district considered the same or similar Tribal actions[18/] as were before this Court in *Miami IV*: erecting a welcome sign and flying the tribal flag over the Reserve; establishing a smoke shop and outreach center on the tract, and extending periodic law enforcement to the tract. 249 F.3d at 1219. This Court expressly held that predicating a finding of jurisdiction upon these behaviors "without first establishing the Tribe's jurisdiction" was putting the cart before the horse. 249 F.2d at 1229. This reasoning is equally true for any jurisdictional analysis under

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own their interests in restricted fee, and not in trust. 679 F.Supp. 2d at 1280.

[18/] The Tribe "patrols and protects the lands, takes care of any burning needed, passes laws governing use of the lands, leases the lands, issues permits for individuals to use the lands, and uses the land for religious ceremonies." 374 F.Supp. 2d at 945; App. 45.

ILCA.

That the Reserve's owners have been adopted into the Tribe also does not alter the jurisdictional analysis. First, that factor was also before this Court in *Miami IV* and was not found to compel a different result. *Miami IV*, 249 F.3d at 1230-31. In addition, the Interior Solicitor's October 31, 2002, opinion expressly analyzes the history of Congressional action and the significance of the adoption and concludes that tribal jurisdiction cannot be inferred from the fact that the Tribe adopted the Reserve's owners and the Reserve owners agreed to submit to tribal jurisdiction. "The Tribe cannot by its unilateral actions override the intent of Congress as expressed in numerous Acts." Letter, Solicitor William G. Meyers III, to Acting General Counsel Penny J. Coleman, dated 10/31/02, at 15 (Addendum; http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx). Even if congressional intent is ambiguous on this precise question, Interior's interpretation, as the agency to whom implementation of the statute is delegated, is entitled to *Chevron* deference. See *Chevron,* 467 U.S. at 843, n.11; 844; *Salt Lake City v. WAPA*, 926 F.2d 974, 978 (10th Cir. 1991). In this instance, the agency has appropriately relied on cases interpreting the same question under an analogous statute.

2. <u>The Jurisdiction Inquiry is The Same Under Both ILCA and IGRA</u>.

-- There is no basis for the district court's conclusion that the question of jurisdiction is a different inquiry with a different result under ILCA than under IGRA. See, *e.g.*, 374 F.Supp.2d at 945; App. 50 ("The Court does not interpret 25 U.S.C. 2216(a)'s use of the phrase 'tribal government that exercises jurisdiction over the land' to require an actual Congressional grant of jurisdiction over Miami Reserve to Miami Tribe."). The wording of the two statutes provides no basis for drawing such a distinction. Compare IGRA, 25 U.S.C. 2710(b)(1) (specifying requirements for tribe to engage in, license and regulate Class II gaming on "*Indian lands within such tribe's jurisdiction*"); 25 U.S.C. 2710(d)(3) (Class III gaming is permissible only if, among other requirements, it is authorized by ordinance adopted by "*the Indian tribe having jurisdiction* over such" Indian lands); 25 U.S.C. 2703(4) (Indian lands includes restricted land "over which an *Indian tribe exercises governmental power*"); with ILCA, 25 U.S.C. 2216(a) (encouraging consolidation of land ownership through transactions between individuals with an interest in restricted land and tribe "that exercises jurisdiction over the parcel of land involved") (emphasis added to all immediately preceding quotations).

The district court suggests (374 F.Supp.2d at 945; App. 51) that BIA's

position in this litigation that the Tribe does not exercise jurisdiction over the parcel within the meaning of ILCA is inconsistent because (1) the agency implicitly recognized that the Miami Tribe exercises jurisdiction over the Reserve by approving the Miami Tribe's Indian Land Consolidation Plan; and (2) the agency relied on the policy on fractionated interests set out in Section 102 of the ILCA Amendments of 2000 in support of its denial of the application. However, BIA's approval of the Land Consolidation Plan occurred before the Interior Solicitor's opinion following *Miami IV* that the Tribe does not have jurisdiction over the parcel. Following and in accordance with the Solicitor's opinion, the government has consistently taken the position that the Tribe lacks jurisdiction over the Reserve. As to application of the policies of ILCA, the concern here is not whether they apply but whether the district court accurately determined that the Tribe is legitimately exercising jurisdiction over the Reserve. Similarly, neither the Interior Solicitor's Opinion nor this Court's analysis of tribal jurisdiction is defined by or limited to IGRA or its policies; rather, the issue of jurisdiction is an independent, albeit predicate, question for determining whether land is "Indian land" for purpose of IGRA. There is no reason why the inquiry should be different under the two enactments.

CONCLUSION

For the foregoing reasons, the district court's final judgment should be reversed and Interior's 2002 decision disapproving the gift conveyance should be upheld.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the United States believes that oral argument would assist the Court in resolving the important questions presented in this appeal.

Respectfully submitted,

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Addendum

Miami Tribe of Oklahoma v. United States, 679 F.Supp.2d 1269 (D.Kan. 2010);

IBIA Order, dated December 5, 2008: 47 IBIA 259
(CR No. 128-12; AR 689-701);

Letter from BIA Regional Director to James E. Smith, dated October 23, 2007,
(CR No. 128-4; AR 237-238);

Miami Tribe of Oklahoma v. United States, Memorandum and Order Regarding Reconsideration, dated November 23, 2005, (CR No. 37);

Miami Tribe of Oklahoma v. United States, 374 F.Supp.2d. 934 (D.Kan. 2005);

IBIA Order, dated October 31, 2002: 38 IBIA 182,
(CR No. 128-2; AR 8-14);

Letter from BIA Regional Director to James E. Smith, dated January 11, 2002
(CR No. 128-3; AR 182-184);

Solicitor's Opinion, dated October 31, 2002, at
http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

sioner of Social Sec. Admin., 223 F.3d 968, 976 (9th Cir.2000) (finding that when lay evidence rejected by ALJ is given effect required by federal regulations, it became clear claimant's limitations were sufficient to meet or equal listed impairment).

As noted by the Ninth Circuit, however, district courts do have "some flexibility" in how they apply the "credit as true" rule. *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir.2003). Further, the situation in this case is much different from that in *Schneider*, wherein the Commissioner failed to cite any evidence to contradict the statements of five lay witnesses regarding her disabling impairments. 223 F.3d at 976. For these reasons, it is not appropriate to credit as true the statement from plaintiff's daughter, particularly since it hardly indicates plaintiff is not capable of performing any work.

CONCLUSION

Based on the foregoing discussion, the Court should find the ALJ improperly concluded plaintiff was not disabled, and should reverse the ALJ's decision and remand this matter to the Commissioner for further administrative proceedings in accordance with the findings contained herein.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b), the parties shall have ten (10) days from service of this Report and Recommendation to file written objections thereto. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Accommodating the time limit imposed by Fed.R.Civ.P. 72(b), the clerk is directed set this matter for consideration on **December 18, 2009**, as noted in the caption.

MIAMI TRIBE OF OKLAHOMA, Plaintiff,

v.

UNITED STATES of America; Dirk Kempthorne, Secretary, United States Department of the Interior; and George Skibine, Assistant Secretary of Interior Bureau of Indian Affairs, Defendants.

Civil Action Case No. 03–2220–DJW.

United States District Court,
D. Kansas.

Jan. 4, 2010.

Background: Indian tribe brought action under Administrative Procedures Act (APA) seeking judicial review of decision of Department of Interior, Bureau of Indian Affairs (BIA), denying tribe member's application to gift portion of his interest in restricted land to tribe. Tribe filed claim alleging breach of trust. Parties consented to exercise of jurisdiction by magistrate judge. Tribe moved for equitable relief to remedy wrongful administrative actions. BIA moved to dismiss breach of trust claim.

Holdings: The District Court, David J. Waxse, United States Magistrate Judge, held that:

(1) prior partition order transferring restricted undivided interest in particular allotment to United States in trust for benefit of Indian owners did not permanently change individual Indian

owners' interest in that allotment from restricted fee allotment to trust allotment;

(2) Court could not order BIA to recognize Indian tribe as having jurisdiction over particular restricted fee allotment on any future applications to transfer interest in that allotment;

(3) BIA could not be required by court to process applications for transfers of interests in restricted Indian land within 180 days or any other time period without statute or regulation requiring it to do so;

(4) tribe invoked federal jurisdiction over its breach of trust claim;

(5) Administrative Procedure Act (APA) provided general waiver of sovereign immunity that applied to breach of trust claim;

(6) BIA did not have any fiduciary duties with respect to management of allotment that may arisen from trust relationship, including any fiduciary duty to maintain status of allotment for Indian tribe as trust allotment; and

(7) actions or inactions of administrative agency in carrying out its agency duties, including duty to consider and decide applications for approval to transfer interests in restricted Indian land, did not constitute valid basis for Indian tribe's breach of trust claim.

Ordered accordingly.

1. Indians ⚿175

Prior partition order transferring restricted undivided interest in particular allotment to United States in trust for benefit of Indian owners did not permanently change individual Indian owners' interest in that allotment from restricted fee allotment to trust allotment, where trust had been created only until Bureau of Indian Affairs (BIA) determined individual Indian owners' respective ownership percentages in newly-partitioned allotment. Indian Land Consolidation Act, § 217(d), 25 U.S.C.A. § 2216(d).

2. Administrative Law and Procedure ⚿763

The duty of a court reviewing agency action under the arbitrary or capricious standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made; the arbitrary and capricious standard focuses on the rationality of an agency's decision-making process rather than on the rationality of the actual decision.

3. Indians ⚿168, 170, 175

A trust allotment, which prevents Indians from improvidently disposing of allotted lands, is conveyed by means of a written instrument or certificate, called a trust patent, under which the government holds the land for a designated period of years in trust for the sole use and benefit of the allottee with an agreement to convey at the end of the trust period.

4. Indians ⚿168, 175

A restricted allotment, which prevents Indians from improvidently disposing of allotted lands, is conveyed by means of a patent conveying to the allottee the land in fee, but prohibiting its alienation for a stated period.

5. Indians ⚿175

Through trust allotments and restricted allotments, which prevent Indians from improvidently disposing of allotted lands, the United States may possess supervisory control over land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.

6. Administrative Law and Procedure ⇐706

Agency action is unlawfully withheld when the agency has failed to take a discrete agency action that it is required to take. 5 U.S.C.A. § 706(1).

7. Administrative Law and Procedure ⇐706

An agency's general deficiencies in compliance lack the specificity required to compel agency action. 5 U.S.C.A. § 706(1).

8. Indians ⇐175

District court on judicial review of application for gift conveyance could not order Bureau of Indian Affairs (BIA) to recognize Indian tribe as having jurisdiction over particular restricted fee allotment on any future applications to transfer interest in that allotment, although tribe qualified as tribal government that exercised jurisdiction over that allotment under Indian Land Consolidation Act (ILCA); prospective future applications that had not been administratively exhausted were not properly before court because agency action unlawfully withheld or unreasonably delayed was required for relief sought. 5 U.S.C.A. § 706; Indian Land Consolidation Act, § 217(a), 25 U.S.C.A. § 2216(a).

9. Indians ⇐174

Bureau of Indian Affairs (BIA) could not be required by court to process applications for transfers of interests in restricted Indian land within 180 days or any other time period without statute or regulation requiring it to do so. 5 U.S.C.A. § 706(1).

10. United States ⇐105, 125(22)

In order to bring a lawsuit against the federal government for breach of trust, an Indian tribe must bring its claim in a competent court, one statutorily vested with subject matter jurisdiction, it must establish the government's consent to be sued under the doctrine of sovereign immunity, and it must assert a federally recognized right entitling it to the relief requested.

11. Federal Courts ⇐192, 195

Indian tribe invoked federal jurisdiction over its breach of trust claim by invoking statutes governing federal question jurisdiction, jurisdiction over civil actions brought by Indian tribes, and mandamus jurisdiction. 28 U.S.C.A. §§ 1331, 1361, 1362.

12. United States ⇐125(22)

Administrative Procedure Act (APA) provided general waiver of sovereign immunity that applied to Indian tribe's breach of trust claim against United States, since claim sought relief "other than money damages" and stated claim that Bureau of Indian Affairs (BIA) acted or failed to act. 5 U.S.C.A. § 702.

13. United States ⇐125(3, 5)

Jurisdiction over any suit against the United States requires a clear waiver of sovereign immunity by the United States and it requires a claim falling within the terms of the waiver.

14. United States ⇐125(5)

The terms of the government's consent to be sued must be unequivocally expressed.

15. United States ⇐125(22)

The terms of the government's consent to be sued by Indian tribes must be unequivocally expressed even when they are suing the government for breach of its trust responsibilities.

16. Indians ⇐175

Bureau of Indian Affairs (BIA), which had denied allottee's application to gift transfer part of his undivided interest to tribe, did not have any fiduciary duties with respect to management of allotment that may have arisen from trust relation-

ship, including any fiduciary duty to maintain status of allotment for tribe as trust allotment, where allotment originally had been conveyed as restricted allotment and its status as restricted allotment had never changed.

17. United States ⇐105

When determining whether an Indian tribe has a federally recognized right, one of three threshold requirements for an Indian tribe to bring a lawsuit against the federal government for breach of trust, a court first must decide whether a general fiduciary relationship exists in a particular area between the government and the tribe, and then it must determine whether, in the context of that relationship, the government has breached any specific fiduciary responsibilities; it makes that determination by considering the government conduct at issue in light of the requirements of the statutes and regulations that create the general fiduciary relationship in the first place.

18. Indians ⇐105
United States ⇐105

When determining whether the government has breached any specific fiduciary responsibilities to an Indian tribe, a court examines whether a statute, treaty, or other fundamental document, creates a trust relationship, the nature of the relationship, and whether the general law of trusts has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations; however, even if a fiduciary obligation does exist, the tribe asserting the claims for breach of trust must link any breach to a specific statutory or regulatory provision.

19. Indians ⇐117

Unless a specific duty has been placed on the government with respect to the Indian tribe, the government's responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.

20. Indians ⇐105

A fiduciary relationship exists between the government and an Indian tribe when the government wields a high degree of control or supervision over property or assets belonging to Indians or an Indian tribe.

21. Indians ⇐105, 141(2), 152

Where the federal government takes on or has control or supervision over tribal monies or properties, the government has a fiduciary relationship to the Indian owners of the property.

22. Indians ⇐174
United States ⇐105

Actions or inactions of administrative agency in carrying out its agency duties, including duty to consider and decide applications for approval to transfer interests in restricted Indian land, did not constitute valid basis for Indian tribe's breach of trust claim, even if administrative agency's duties may have been statutorily required.

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David D. Zimmerman, Office of United States Attorney, Kansas City, KS, for Defendants.

MEMORANDUM AND ORDER

DAVID J. WAXSE, United States Magistrate Judge.

This matter comes before the Court on Plaintiff Miami Tribe's APA Brief Seeking Equitable Relief to Remedy Wrongful Administrative Actions (doc. 130). Miami

Tribe requests that the Court set aside the October 10, 2008 decision of the Interior Board of Indian Appeals ("IBIA") as arbitrary and capricious under the Administrative Procedures Act. Miami Tribe further requests that the Court grant judgment on its breach of trust claim in its favor and enter a permanent injunction against Defendants. The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). As set forth below, the Court affirms the IBIA's October 10, 2008 Order Affirming Decision in Part and Vacating in Part, denies Miami Tribe's requests for equitable relief, and dismisses the breach of trust claim set forth in Count II of Miami Tribe's Second Amended Complaint.

I. Procedural Posture of Matter Before the Court

James E. Smith ("Smith"), a member of the Miami Tribe of Oklahoma ("Miami Tribe"), holds a 3/38 restricted undivided interest in the Maria Christiana allotment, Miami No. 35 ("Miami Reserve"), located in Miami County, Kansas. In 2001, Smith submitted his application to the Bureau of Indian Affairs ("BIA") for approval to gift transfer one-third of his 3/3 8 undivided interest in Miami Reserve to Miami Tribe (hereinafter "application for gift conveyance"). The BIA denied Smith's application for gift conveyance on January 10, 2002.

On May 5, 2003, Miami Tribe commenced the present action in this Court seeking judicial review of the BIA's denial of Smith's application under the Administrative Procedures Act ("APA").[1] Miami Tribe also asserted claims that Defendants breached their fiduciary and trust duties to Miami Tribe, and that Defendants had violated substantive and procedural due process and property rights of Miami Tribe. Early in the case, the parties agreed to bifurcate Miami Tribe's request for judicial review under the APA from its claims based upon breach of trust and constitutional violations.

On June 22, 2005, 374 F.Supp.2d 934, the Court issued its Memorandum and Order reversing the BIA's January 11, 2002 decision that denied Smith's application for gift conveyance, and instructing the BIA to forthwith approve Smith's application.[2]

On July 7, 2005, Defendants filed their Motion for Reconsideration of the Court's June 22, 2005 Memorandum and Order, requesting that the Court reconsider its decision and affirm the BIA's denial of Smith's application. Defendants alternatively requested the Court remand the matter to the BIA rather than reversing the BIA's decision. On November 23, 2005, the Court granted Defendants' Motion for Reconsideration as to the portion of the Court's Memorandum and Order that directed the BIA to forthwith approve Smith's application for gift conveyance.[3] The Court ordered that the case be remanded to the BIA for further proceedings consistent with the Court's June 22, 2005 Memorandum and Order. Specifically, the Court remanded the matter for the BIA to consider the proposed transfer's long-term impact on further fractionation of Miami Reserve.

On remand, the BIA approved Smith's application to give one-third of his 3/38 interest in Miami Reserve to Miami Tribe. The BIA issued its decision dated October 23, 2007, which notified Smith and Miami Tribe that Smith's application for gift con-

1. U.S.C. § 701 *et seq.*

2. *Miami Tribe of Okla. v. United States*, 374 F.Supp.2d 934 (D.Kan.2005).

3. *See* Nov. 23, 2005 Mem. & Order (doc. 37).

veyance was approved by the BIA. The letter, however, further advised that with respect to Smith's request to transfer his interest to Miami Tribe "in trust," Miami Tribe would need to submit an application for a trust acquisition under 25 C.F.R. 151. The BIA's October 23, 2007 letter stated, in pertinent part:

> Your letter dated April 23, 2007, provided clarification that you wish to transfer 1/3 of your undivided interest to the Tribe with the interest to the Tribe to remain in "trust status." Therefore, the proposed gift conveyance will be processed as a two-part transaction consisting of a disposal by you and an acquisition by the Tribe in trust status. The disposal portion is considered in accordance with 25 CFR 152.17 and the acquisition portion will be processed in accordance with 25 CFR 151 upon the receipt of an application for a trust acquisition from the Tribe. In this regard, by copy of this letter, the Tribe is advised of the Bureau's findings that consideration will be given to the acquisition upon receipt of the application from the Tribe.
>
> The Deed to Restricted Indian Land you executed on June 20, 2007, if approved, would have conveyed the interest in fee status to the Tribe. Therefore a deed transferring a 1/38 interest in [Miami Reserve] to the United States of America in Trust for the Miami Tribe of Oklahoma is enclosed for your review and execution.
>
> The executed deed is to be returned to this office and will be included in the Tribe's fee-to-trust application.[4]

Miami Tribe appealed the BIA's October 23, 2007 decision on remand with the Interior Board of Indian Appeals ("IBIA"). On October 10, 2008, the IBIA issued its Order Affirming Decision in Part and Vacating in Part. The IBIA affirmed the BIA Regional Director's determination that Smith holds his interest in Miami Reserve in restricted fee title and that interest is not being held in trust by the United States.[5] It vacated the decision "to the extent that it suggests that the interest to be conveyed to the Tribe would be an unrestricted fee simple interest."[6] The IBIA's decision further indicated that "[b]ecause the Tribe seeks title in the name of the United States in trust for the Tribe, and in the absence of any indication by the Tribe that it will accept Smith's gift if Smith holds restricted fee title, the Regional Director need not proceed further with the transaction at this time."[7]

On October 30, 2008, Miami Tribe filed its Second Amended Complaint (doc. 126) asserting two counts. In Count I, Miami Tribe seeks APA review of the BIA's refusal to approve Smith's request to transfer one-third of his interest in Miami Reserve "in trust" to Miami Tribe. In Count II, Miami Tribe asserts a common law breach of trust claim against Defendants based upon their alleged breaches of their fiduciary and trust duties. These breaches include the BIA's refusal to approve Smith's application, refusal to approve the transfer of Smith's interest in trust for the benefit of Miami Tribe, refusal to timely consider and act on Smith's appeal of the denial of his request for transfer, failure to protect and recognize Miami Tribe's jurisdiction over Miami Reserve, and failure to

4. BIA's Oct. 23, 2007 decision, Ex. A to Miami Tribe's APA Br. (doc. 130–11).

5. IBIA's Oct. 10, 2008 Order Affirming Decision in Part and Vacating in Part, Ex. K to Second Amended Complaint (doc. 126–11).

6. *Id.* at 3.

7. *Id.*

maintain and hold Miami Reserve in trust for the benefit of its Indian owners. Miami Tribe seeks equitable relief under the APA for these alleged breaches, including an order compelling Defendants to: (1) approve Smith's transfer in trust to Miami Tribe, (2) recognize and protect Miami Tribe's jurisdiction over Miami Reserve, (3) hold Miami Reserve in trust for the benefit of Miami Tribe and the other beneficial owners, and (4) process all future transfers of interests in Indian lands from a member to his or her Indian tribe within 180 days of the submission of the application for approval.

Miami Tribe filed the instant APA Brief Seeking Equitable Relief to Remedy Wrongful Administrative Actions (doc. 130) on December 15, 2008. Miami Tribe later filed supplements to the administrative record on February 23, 2009 (doc. 140) and May 21, 2009 (doc. 146). Defendants filed their Response to Miami Tribe's Second Supplement to the Administrative Record (doc. 147) on June 11, 2009.

In its APA brief, Miami Tribe requests that the Court set aside the IBIA's October 10, 2008 decision as arbitrary and capricious under the APA. It further requests that the Court grant equitable relief on its breach of trust claim and enter an order mandating that Defendants recognize the trust status of Miami Reserve, recognize Miami Tribe's jurisdiction over Miami Reserve, and process all future application for transfers of interest in Miami Reserve within 180 days.

The Court will first review the IBIA's October 10, 2008 decision, and will then address Miami Tribe's requests for specific equitable relief under the APA. The Court will then address Defendants' request for dismissal of the breach of trust claim set forth in Count II of Miami Tribe's Second Amended Complaint.

II. Review of IBIA's October 10, 2008 Decision

[1] Miami Tribe seeks judicial review of the IBIA's October 10, 2008 decision affirming the BIA's post-remand determination that Smith holds his interest in Miami Reserve in restricted fee title and the interest is not being held in trust by the United States. It further seeks review of the agency's refusal to approve Smith's proposed gift transfer "in trust" to Miami Tribe. It contends that pursuant to the 1989 order partitioning Miami Reserve, entered in *Midwest Investment Properties, Inc. v. DeRome*,[8] the last remaining 35 acres of Miami Reserve was conveyed "to the United States Government by and through the Bureau of Indian Affairs ... in trust for the benefit of the Indian owners."[9] Miami Tribe argues that absent any indication that Miami Reserve has been transferred out of trust by the United States, Smith's present interest in Miami Reserve continues to be held in trust.

According to Miami Tribe, if Smith's present interest is held in trust by the terms of the 1989 partition order, then the IBIA acted arbitrarily and capriciously when it refused to approve the gift transfer of Smith's interest "in trust" under 25 U.S.C. § 2216(d). That statute provides that "the sale, exchange, or conveyance by gift deed for no or nominal consideration of an interest in trust or restricted land ... shall not affect the status of the land as trust or restricted land." Miami Tribe asks the Court to remand the matter to the BIA for timely approval of Smith's

8. Civ. A. No. 86–2497–O (D.Kan. May 3, 1989).

9. *Midwest Inv. Properties, Inc. v. DeRome*, No. 86–2497–0, Order Confirming Report of Commissioners in Partition (D.Kan. May 3, 1989), Ex. B to Miami Tribe's APA Br. (doc. 130–3).

transfer in trust, consistent with the express language of the 1989 partition order, the representations of Defendants with respect to the partition order, and 25 U.S.C. § 2216(d).

Defendants argue that Smith's property interest in Miami Reserve is held only in restricted fee status and is not trust property. They claim the record is replete with evidence demonstrating that Miami Reserve was originally issued in restricted fee and remained in restricted fee thereafter. Defendants contend that Congress understood Miami Reserve to be in restricted fee when it contemplated Public Law 97–344, by specifically mandating that any conveyance to Indian grantees pursuant to partition would have to be made in restricted fee. And subsequent court decisions involving Miami Reserve have also expressed the understanding that the property continues to be held in restricted fee status. Defendants argue that the 1989 partition order language purportedly conveying Miami Reserve to the United States Government in trust was only intended to allow the Indian-owned portion of the property to be transferred out of joint ownership with the non-Indian owners. They point out that the 1989 partition order states that the Indian owners are "to be vested with restricted fee title in percentages determined by the Bureau of Indian Affairs." [10] Defendants explain that the transfer of Miami Reserve to the United States Government in trust was for the purpose of allowing a brief period of time for the BIA to calculate the percentage ownership for each Indian owner. After the BIA completed its calculations of the ownership percentages, then ownership would vest in the proper percentage to each Indian owner in restricted fee status, as provided by the partition order language. Defendants argue this is supported by Public Law 97–344(3), which authorized the partitioning of Miami Reserve and provides that "[a]ny conveyance ordered by the court in such [partition] proceedings will be made in unrestricted fee simple to non-Indian grantees and in a restricted fee to Indian grantees." Defendants ask the Court to affirm the IBIA's decision that Smith presently holds his interest in Miami Reserve in restricted fee title and that interest is not being held in trust by the United States.

A. Administrative Procedures Act

Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." [11] The APA authorizes the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," and to "hold unlawful and set aside agency action, findings, and conclusions" that the court finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [12]

[2] The court's scope of review under the arbitrary and capricious standard is narrow and deferential.[13] A reviewing court must consider whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.... The court is

10. *Midwest Inv. Properties, Inc. v. DeRome*, No. 86–2497–0, Order Confirming Report of Commissioners in Partition (D.Kan. May 3, 1989), Ex. B to Miami Tribe's APA Br. (doc. 130–3).

11. 5 U.S.C. § 702.

12. 5 U.S.C. §§ 706(1)-(2)(A).

13. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

not empowered to substitute its judgment for that of the agency." [14] The duty of a court reviewing agency action under the arbitrary or capricious standard is to ascertain whether the agency "examined the relevant data and articulated a rational connection between the facts found and the decision made." [15] Because the arbitrary and capricious standard focuses on the rationality of an agency's decision-making process rather than on the rationality of the actual decision, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." [16] The inquiry into the agency's decision should be a substantial inquiry that is searching and careful; however, the reviewing court has no power to substitute its own judgment for that of the administrative agency.[17]

In order to determine whether the IBIA's decision, affirming the BIA's approval of Smith's application for gift conveyance but refusing to transfer the interest "in trust," is arbitrary and capricious, the Court must first ascertain whether Smith's present interest in Miami Reserve is held in trust, or is held in restricted fee status. This requires the Court to determine whether the initial conveyance of Miami Reserve was a trust allotment or restricted allotment.

14. *Id.*

15. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir.1994).

16. *Id.* at 1575 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

17. *Id.*

18. 256 U.S. 484, 486–87, 41 S.Ct. 561, 65 L.Ed. 1054 (1921).

19. *Id.* at 486, 41 S.Ct. 561.

B. Trust versus restricted allotments

[3–5] In *United States v. Bowling*,[18] the Supreme Court discussed the two modes "by which Indians are prevented from improvidently disposing of allotted lands:" trust allotments and restricted allotments.[19] A trust allotment is conveyed by means of a written instrument or certificate, called a trust patent, under which the government holds the land for a designated period of years in trust for the sole use and benefit of the allottee with an agreement to convey at the end of the trust period.[20] In contrast, a restricted allotment is conveyed by means of a patent conveying to the allottee the land in fee, but prohibiting its alienation for a stated period.[21] Both have the same effect so far as the power of alienation is concerned.[22] With respect to both classes of allotments, the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.[23] In *Bowling*, the Supreme Court stated that Congress determines which mode is to be followed with respect to the lands of a particular tribe, and this usually is done in the act directing that the lands be allotted.[24]

C. Relevant historical background of Miami Reserve [25]

20. *U.S. v. Ramsey*, 271 U.S. 467, 470, 46 S.Ct. 559, 70 L.Ed. 1039 (1926) (citing *Bowling*, 256 U.S. at 486, 41 S.Ct. 561).

21. *Id.*

22. *Id.*

23. *Bowling*, 256 U.S. at 487, 41 S.Ct. 561.

24. *Id.*

25. A more detailed history of the Maria Christiana Allotment, Miami Reserve No. 35, is set forth in *Miami Tribe of Okla. v. United States*,

Smith's property interest in Miami Reserve derives from his status as a relative of Maria Christiana DeRome. The infant Maria Christiana DeRome, half-blood Miami Indian, was issued a restricted fee patent dated December 15, 1859, pursuant to the Treaty of June 5, 1854 with the Miami Indians [26] and Section 11 of the Act of March 3, 1859.[27] The patent for restricted allotment provided that the lands "shall never be sold or conveyed by the grantee or her heirs without the consent of the Secretary of the Interior, for the time being." [28]

Over time, the original 200–acre allotment has been reduced to its present size of approximately 35 acres. After Maria Christiana DeRome died in 1860, her parents sold 120 of the original 200 acres with the approval of the Secretary of the Interior, leaving 80 acres of the original allotment.

In 1986, Midwest Investment Properties, Inc. ("Midwest Investment") filed a partition action in federal district court on a claim of adverse possession to ownership of the unrestricted interest in the remaining 80 acres of the allotment. The United States represented the Indian land owners of Miami Reserve in the partition action, and ultimately reached a compromise with Midwest Investment on the adverse possession claim. As a result of the compromise, the parties presented an agreed Order Confirming Report of Commissioners in Partition to the court with the following provision:

> IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that partition of the real estate described in the Journal Entry of September 22, 1988, is hereby made as follows:
>
> To the Midwest Investment Properties, Inc., ownership of the following described real estate:
>
> West 45 acres of the East Half of the Southwest Quarter of Section 13, Township 19 S, Range 24 E, Miami County, Kansas, subject to a 66–foot easement in favor of the East 35 acres.
>
> *To the United States Government by and through the Bureau of Indian Affairs to hold the following described real estate in trust for the benefit of the Indian owners to be vested with restricted fee title in percentages determined by the Bureau of Indian Affairs,* to-wit:
>
> East 35 acres of the East Half of the Southwest Quarter of Section 13, Township 19 S, Range 24 E, Miami County, Kansas, together with a 66–foot easement over and across the North 66 feet of the West 45 acres of the East Half of the Southwest Quarter of Section 13, Township 19 S, Range 24 E, for the sole purpose of ingress and egress.[29]

The order, entered by the court on May 3, 1989, thus partitioned the 80 acres of Miami Reserve into two tracts: 45 acres to Midwest Investment Properties, Inc., and 35 acres to "the United States Government ... in trust for the benefit of the Indian

927 F.Supp. 1419, 1424–26 (D.Kan.1996). *See also Miami Tribe of Okla. v. United States,* 5 F.Supp.2d 1213 (D.Kan.1998); *State ex rel. Graves v. United States,* 86 F.Supp.2d 1094 (D.Kan.2000), *Kansas v. United States,* 249 F.3d 1213 (10th Cir.2001); and *Miami Tribe of Okla. v. United States,* 316 F.Supp.2d 1035 (D.Kan.2004).

26. 10 Stat. 1093.

27. 11 Stat. 430.

28. Admin. Record (doc. 128–3), p. 44.

29. *Midwest Inv. Properties, Inc. v. DeRome,* No. 86–2497–0, Order Confirming Report of Commissioners in Partition (D.Kan. May 3, 1989), Ex. B to Miami Tribe's APA Br. (doc. 130–3) (emphasis added).

owners to be vested with restricted fee title." [30]

D. Whether Smith's interest in Miami Reserve is held in trust by the United States

Miami Tribe does not appear to dispute that the original land patent issued to Smith's relative, Maria Christiana DeRome, was issued in restricted fee. The Court finds no indication of any language in the record that the original land patent issued to Maria Christiana DeRome contained any provision that the land was to be held by the United States in trust. In the absence of any trust language in the original land patent, the Court finds that the original grant by the United States to Maria Christiana DeRome was conveyed by patent as a restricted allotment rather than a trust allotment.

Since the issuance of the original land patent to Maria Christiana DeRome in 1859, nothing in the record shows that Congress changed the status of Miami Reserve from a restricted allotment to a trust allotment. Instead, Congress reaffirmed in 1982 that the Indian grantees' interests in Miami Reserve are held in restricted fee. In 1982, Congress enacted Public Law No. 97–344 "for the portioning of certain *restricted* Indian land in the State of Kansas." [31] It provides that "any owner of an interest in the ... 80 acres ... known as the Maria Christiana Miami Allotment, lands derived from a patent under the Act of March 3, 1859 (11 Stat. 430)[,] may commence an action in the United States District Court for Kansas to partition the same in kind or for the sale of such land in accordance with the laws of the State of Kansas." [32] It further provides that for the purpose of such partition action, "the Indian owners shall be regarded as vested with an unrestricted fee simple title to their interests in the land and the United States shall be a necessary party to the proceedings. Any conveyance ordered by the court in such proceedings will be made in unrestricted fee simple to non-Indian grantees and in a *restricted fee* to Indian grantees." [33]

Because the actions of Congress determine whether a land interest granted by allotment is a trust allotment or a restricted allotment,[34] the Court concludes that Smith's present interest in Miami Reserve, derived from the land patent issued to Maria Christiana DeRome, is held as a restricted allotment, and not as a trust allotment.

Miami Tribe argues that Miami Reserve was transferred to the United States Government in trust in 1989 by the Order Confirming Report of Commissioners entered in the *Midwest Investment Properties v. DeRome* partition action. The 1989 Order partitioning and conveying the east 35 acres of the 80 remaining acres of Miami Reserve was conveyed "[t]o the United States Government by and through the Bureau of Indian Affairs to hold the following described real estate in trust for the benefit of the Indian owners to be vested with restricted fee title in percentages determined by the Bureau of Indian

30. *Id.*

31. 96 Stat. 1645 (1982) (emphasis added). Pub.L. 97–344 was enacted Oct. 15, 1982, and amended by Pub.L. 97–428 on Jan. 8, 1983.

32. Pub.L. No. 97–344(3), 96 Stat. 1645 (1982).

33. *Id.* (emphasis added).

34. *See Bowling,* 256 U.S. at 487, 41 S.Ct. 561 ("It rests with Congress to say which of the two modes [trust or restricted allotment] shall be followed in respect of the lands of a particular tribe, and this usually is done in the act directing that the lands be allotted."); *Miami I,* 927 F.Supp. at 1425 n. 5 (Miami Reserve's restricted status arises from the terms of the United States' conveyance of the property to Maria Christiana DeRome).

Affairs." [35] According to Miami Tribe, the plain language of the order requires Miami Reserve to be held by the United States in trust for the benefit of the Indian owners, which would include Smith.

At first glance, the language of 1989 *Midwest Investment* partition order appears to support Miami Tribe's position that Miami Reserve was placed in trust. The order clearly uses the "in trust" language. However, upon a closer reading, the partition order appears internally inconsistent by conveying the newly-partitioned Miami Reserve to the United States in trust for the benefit of the Indian owners and then providing that the Indian owners are "to be vested with restricted fee title." Although the order transfers Miami Reserve to the United States in trust for the benefit of the Indian owners, the Court does not find that the order permanently changed the individual Indian owners' interest in Miami Reserve from a restricted allotment to a trust allotment. Instead, the Court finds that the trust was created only for a limited purpose and for a limited time. That purpose and time were until the BIA was able to determine the Indian owners' respective ownership percentages in the newly-partitioned Miami Reserve. Thus, any trust created by the 1989 order would have only lasted until such time as the BIA determined the ownership percentages of the Indian owners. This interpretation of the partition order comports with the order's recitation that the Indian owners are "to be vested with restricted fee title" in percentages determined by the BIA at the time those percentages are determined. The Court thus finds that Smith's interest in Miami Reserve was not permanently changed from a restricted allotment to a trust allotment by the 1989 partition order. Any trust created by that order terminated upon the BIA's determination of the individual Indian owners' respective ownership percentages in the newly-partitioned Miami Reserve. Smith's present interest in Miami Reserve is a restricted fee interest and is not held in trust by the United States.

Having determined that Smith's present interest in Miami Reserve is not held in trust by the United States, the IBIA's decision affirming the BIA's refusal to approve Smith's transfer in trust was not arbitrary and capricious and is affirmed. If Miami Tribe still intends to accept Smith's proposed gift transfer notwithstanding the Court's determination that Smith's interest in Miami Reserve is not held in trust, then it should notify the BIA of its intention to proceed with the transfer and the BIA should act promptly on such request. If Miami Tribe wishes to have the interest Smith transfers to it taken into trust, then it must comply with the procedures set forth in 25 C.F.R. Part 151 for submitting an application for trust acquisition.

III. Specific Injunctive Relief Sought to be Compelled

[6, 7] Miami Tribe also requests specific equitable relief under 5 U.S.C. § 706(1) arising from the BIA's alleged breaches of trust and fiduciary duties with respect to Smith's application for gift conveyance. Under section 706(1) of the APA, a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." [36] Agency action is unlawfully

35. *Midwest Inv. Properties, Inc. v. DeRome*, No. 86–2497–0, Order Confirming Report of Commissioners in Partition (D.Kan. May 3, 1989), Ex. B to Miami Tribe's APA Br. (doc. 130–3).

36. 5 U.S.C. § 706(1); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (hereinafter *"SUWA"*). *See also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir.1999) ("Through § 706 Congress has stated un-

withheld when the agency has "failed to take a *discrete* agency action that it is *required to take*."[37] The limitation of required agency action rules out judicial direction of even discrete agency action that is not demanded by law.[38] An agency's general deficiencies in compliance lack the specificity required to compel agency action.[39] The principal purpose of these APA limitations is:

> to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.[40]

Miami Tribe asks for specific injunction relief in the form of an order compelling Defendants to do the following: (1) approve the transfer of Smith's interest in trust and continue to hold Miami Reserve in trust for the benefit of Miami Tribe; (2) recognize and protect Miami Tribe's jurisdiction over Miami Reserve for all activity related to Miami Reserve; and (3) process all future transfers of interests in Indian lands from a member to his or her Indian tribe within 180 days of the submission of the request. The Court will address each request for relief.

equivocally that courts must compel agency action unlawfully withheld or unreasonably delayed").

37. *SUWA*, 542 U.S. at 64, 124 S.Ct. 2373 (emphasis in original).

A. Request that Defendants approve the transfer of Smith's interest in trust and continue to hold Miami Reserve in trust for the benefit of the Miami Tribe and other beneficial Indian owners

In addition to asking the Court to set aside the BIA's decision as arbitrary and capricious, Miami Tribe also asks for specific equitable relief in the form of an order compelling Defendants to approve Smith's requested transfer in trust and continue to hold Miami Reserve in trust for the benefit of the Miami Tribe and the other beneficial Indian owners. As discussed above in Section II.D., the Court finds that Miami Reserve is not held in trust by the United States. Because the only agency action that can be compelled under the APA is that which is *legally* required,[41] and because the Court has found that Smith's interest is not being held in trust, the Court cannot compel Defendants to approve the transfer of Smith's interest in trust and to continue to hold Miami Reserve in trust for the benefit of the Miami Tribe and other beneficial Indian owners.

B. Request that Defendants recognize and protect Miami Tribe's jurisdiction over Miami Reserve

Miami Tribe also requests that the Court compel Defendants to recognize and protect Miami Tribe's jurisdiction over Miami Reserve. Defendants acknowledge that the Court has already found that Miami Tribe has jurisdiction for the limited purposes of the Indian Land Consolidation Act ("ILCA"), but oppose any request by

38. *Id.*

39. *Id.* at 66, 124 S.Ct. 2373.

40. *Id.*

41. *SUWA*, 542 U.S. at 63, 124 S.Ct. 2373.

Miami Tribe to order them to recognize Miami Tribe as having jurisdiction over Miami Reserve for all purposes. In its reply, Miami Tribe states that it is merely requesting that the Court's ruling that Miami Tribe exercises jurisdiction over Miami Reserve for purpose of the land consolidation policies of the ILCA be incorporated to apply to future Miami Reserve land transactions, not just the Smith transfer.

[8] As the parties recognize, the Court has ruled that for purposes of the policy section of the ILCA, codified at 25 U.S.C. § 2216(a), Miami Tribe qualifies as a tribal government that exercises jurisdiction over Miami Reserve.[42] To the extent that Miami Tribe asks the Court to order the BIA to recognize and follow this ruling on any future applications to transfer an interest in Miami Reserve, the APA does not provide a mechanism for awarding such relief. Under 5 U.S.C. § 706, a court is permitted to "compel agency action unlawfully withheld or unreasonably delayed." Miami Tribe has not shown that the relief sought, i.e., that the BIA be compelled to abide by the Court's determination that Miami Tribe exercises jurisdiction over Miami Reserve when considering any future application for transfer interests in Miami Reserve, constitutes agency action unlawfully withheld or unreasonably delayed.

The Court already issued its decision on Smith's application for gift conveyance that Miami Tribe is a tribal government that exercises jurisdiction over Miami Reserve for purposes of 25 U.S.C. § 2216(a). As such, the Court has already granted a remedy to the extent a remedy is available. Prospective future applications that have not been administratively exhausted are not properly before the Court. It would therefore be inappropriate for the Court to order the BIA to recognize Miami Tribe as has having jurisdiction over Miami Reserve on any future applications.

C. Request that Defendants process all future applications for transfers of interests in Miami Reserve within 180 days

[9] Miami Tribe also requests that the Court order Defendants to process all future applications for transfers of interests in Miami Reserve within 180 days of the submission of the application for approval. It argues that the extended delays it has suffered, in both exhausting the administrative process and the remand, justify mandating reasonable time deadlines for the future processing of transfers. It contends that the Court has equitable powers to grant prospective relief from wrongful agency conduct.

To establish agency inaction under section 706(1) of the APA, Miami Tribe must show that the BIA failed to carry out a mandatory, nondiscretionary duty that it is required to take.[43] Miami Tribe has not cited and the Court is not aware of any statute or regulation requiring the BIA to process application for transfers of interests in restricted land within 180 days or any other time period. Thus, any request for an order compelling BIA to approve future applications by Indian owners to transfer their interest in Miami Reserve to Miami Tribe with 180 days is not a mandatory, nondiscretionary duty that the BIA is required to take. The Court thus cannot compel Defendants to process all future applications for transfers of interests in Miami Reserve within 180 days as requested by Miami Tribe.

42. *See Miami Tribe of Okla. v. United States*, 374 F.Supp.2d 934, 944–45 (D.Kan.2005).

43. *SUWA*, 542 U.S. at 64, 124 S.Ct. 2373.

To the extent that Miami Tribe is attacking the BIA's expected refusal to approve future applications to transfer interests in Miami Reserve in a timely manner as a programmatic challenge, that type of challenge is prohibited by the Supreme Court's decision in *Lujan v. National Wildlife Federation.*[44] "[R]espondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." [45] The *Lujan* decision makes clear that the prohibition on programmatic challenges is motivated by institutional limits on courts which constrain their review to narrow and concrete actual controversies.[46] This avoids courts encroaching on the other branches of government and respects the expert judgment of agencies specifically created to deal with complex and technical issues.

IV. Miami Tribe's Breach of Trust Claim (Count II)

In their Response in Opposition to Miami Tribe's APA Brief, Defendants ask the Court to dismiss Count II of Miami Tribe's Second Amended Complaint. They argue that because Miami Reserve is currently restricted fee land and Miami Tribe has not submitted an application to convert the land from restricted fee to trust, Miami Tribe is not entitled to a remedy for alleged breach of trust based upon Defendants' refusal to convert Miami Reserve to trust status. They further contend that Miami Tribe is not entitled to a remedy for breach of trust because it has not had any jurisdiction over Miami Reserve for decades.

A. Breach of Trust Claims Against the Federal Government by an Indian Tribe

[10] In order to bring a lawsuit against the federal government for breach of trust, an Indian tribe must satisfy three threshold requirements.[47] First, it must bring its claim in a competent court, one statutorily vested with subject matter jurisdiction.[48] Second, it must establish the government's consent to be sued under the doctrine of sovereign immunity.[49] Finally, it must assert a federally recognized right entitling it to the relief requested.[50]

1. Subject matter jurisdiction

[11] In this case, Miami Tribe invokes federal question jurisdiction under 28 U.S.C. § 1331, jurisdiction over civil actions brought by Indian tribes under 28 U.S.C. § 1362, and mandamus jurisdiction under 28 U.S.C. § 1361. The Court finds that Miami Tribe has invoked statutes that would confer jurisdiction over its breach of trust claim set forth in the Second Amended Complaint.

2. Waiver of sovereign immunity

[12–15] Next, the Court determines whether the APA provides a general waiver of immunity which would apply to Miami Tribe's breach of trust claim. Jurisdiction over any suit against the government requires a clear waiver of sovereign immu-

44. 497 U.S. 871, 891, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

45. *Id.*

46. *See id.* at 891–94, 110 S.Ct. 3177.

47. Nell Jessup Newton, *Enforcing the Federal–Indian Trust Relationship After Mitchell I,* 31 Cath. U.L.Rev. 635, 639 (1982).

48. *Id.*

49. *Id.*

50. *Id.*

nity by the United States.[51] Additionally, it requires a claim falling within the terms of the waiver.[52] The terms of the government's consent to be sued must be "unequivocally expressed." [53] This is true even when Indian tribes are suing the government for breach of its trust responsibilities.[54] Thus, jurisdiction over any suit against the government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver.[55]

When a plaintiff sues the government for damages, the waiver may be found in a statute such as the Tucker Act,[56] the Indian Tucker Act,[57] or the Federal Tort Claims Act.[58] When a plaintiff sues the government for "relief other than money damages," waiver may be found in the Administrative Procedures Act.[59] Under the APA, 5 U.S.C. § 702, "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

Because Miami Tribe's Second Amended Complaint seeks relief "other than money damages" and states a claim that an agency acted or failed to act, it falls within the APA's waiver of sovereign immunity contained in 5 U.S.C. § 702. Therefore, Miami Tribe's action "shall not be dismissed or relief therein be denied on the ground that it is against the United States." [60] The United States has waived immunity from suit under 5 U.S.C. § 702 of the APA.[61] The breach of trust claim brought by Miami Tribe falls within the terms of that waiver. The Court thus concludes that the APA provides a general waiver of sovereign immunity which would apply to Miami Tribe's breach of trust claim.

3. Federally recognized right to relief

[16–18] Finally, Miami Tribe must assert a federally recognized right entitling it to relief. In determining whether Miami has a federally recognized right, the Court first must decide whether a general fiduciary relationship exists in a particular area between the government and Miami Tribe.[62] Then, it must determine whether,

51. *United States v. Mitchell*, 445 U.S. 535, 538–539, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) *("Mitchell I"); Gros Ventre Tribe v. United States*, 344 F.Supp.2d 1221, 1225 (D.Mont.2004).

52. *United States v. Mitchell*, 463 U.S. 206, 216–217, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) *("Mitchell II")*.

53. *Mitchell I*, 445 U.S. at 538, 100 S.Ct. 1349.

54. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003).

55. *Id.*

56. 28 U.S.C. § 1491.

57. 28 U.S.C. § 1505.

58. 28 U.S.C. § 2671.

59. *See State of New Mexico v. Regan*, 745 F.2d 1318, 1321 (10th Cir.1984) (Section 702 of the APA "has been construed as granting the United States' consent to suit in cases involving agency action, subject however, to the proviso that the action is not one for 'money damages.' ").

60. 5 U.S.C. § 702.

61. *See Cobell v. Norton*, 240 F.3d 1081, 1094 (D.C.Cir.2001) (APA waives federal officials' sovereign immunity for actions "seeking relief other than money damages" involving a federal official's action or failure to act).

62. *Navajo Nation v. United States*, 263 F.3d 1325, 1339 (Fed.Cir.2001) (Shall, J. concurring in part and dissenting in part), *reversed on other grounds*, 537 U.S. 488, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003).

in the context of that relationship, the government has breached any specific fiduciary responsibilities.[63] It makes this determination by considering the government conduct at issue in light of the requirements of the statutes and regulations that create the general fiduciary relationship in the first place.[64] The court must examine whether a statute, treaty, or other fundamental document, creates a trust relationship, the nature of the relationship, and whether the general law of trusts has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations.[65] Even if a fiduciary obligation does exist, the tribe asserting the claims for breach of trust must link any breach to a specific statutory or regulatory provision.

In *United States v. Mitchell*, ("*Mitchell I*"),[66] the seminal case dealing with the fiduciary trust obligations owed by the government to federally recognized Indian tribes, the Supreme Court recognized that certain statutes, in that case the General Allotment Act,[67] can create a limited trust relationship between the United States and Indian allottees. The Supreme Court later revisited the Indian allottees' claim in *Mitchell II*,[68] where it found statutes and regulations established the comprehensive responsibility of the government in managing the harvesting of Indian timber, with virtually every stage of the process under federal control.[69] From these statutes and regulations, the Court determined that "a fiduciary relationship necessarily arises when the [g]overnment assumes such elaborate control over forests and property belonging to Indians." [70] The Court stated that the very statutes and regulations that create the fiduciary relationship also "define the contours of the United States' fiduciary responsibilities." [71]

[19] While *Mitchell I* and *Mitchell II* involved a tribe's claim for money damages under Tucker Act and the Indian Tucker Act, other courts have permitted breach of trust causes of action against the federal government in cases where an Indian tribe sought non-monetary relief under the APA.[72] In *Morongo Band of Mission Indi-*

63. *Id.*

64. *See Mitchell II*, 463 U.S. at 224, 103 S.Ct. 2961 (noting that "the statutes and regulation now before us ... establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities."); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377–80 (Fed.Cir.2001) (determining, after finding a fiduciary relationship, what the government's specific obligations are and whether the statute that created the relationship altered the general law of trusts in any way); *Pawnee v. United States*, 830 F.2d 187, 191 (Fed.Cir.1987) (stating that the existence of a "general fiduciary relationship does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust").

65. *White Mountain Apache Tribe*, 249 F.3d at 1380.

66. 445 U.S. 535, 542, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980).

67. Section 5 of the General Allotment Act obliged the United States to "hold the land ... in trust for the sole use and benefit of the [allottee]." 25 U.S.C. § 348.

68. 463 U.S. 206, 224, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983).

69. *Id.* at 222, 103 S.Ct. 2961 (citations omitted).

70. *Id.* at 225, 103 S.Ct. 2961.

71. *Id.* at 224, 103 S.Ct. 2961.

72. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574–75 (9th Cir.1998) (an APA case wherein the court recognized that the United States bears a trust responsibility to Indian tribes); *Cobell v. Norton*, 240 F.3d 1081, 1094–95 (D.C.Cir.2001) ("That plaintiffs rely upon common law trust principles in pursuit of their claim is immaterial, as here they seek specific relief other than money damages, and federal courts have jurisdiction to hear such claims under the APA.").

ans v. FAA,[73] the Ninth Circuit, however, limited the government's duty so that unless a specific duty has been placed on the government with respect to the Indian tribe, the government's responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.[74]

B. Whether Miami Tribe has asserted a federally recognized right entitling it to relief

[20, 21] Courts recognize a fiduciary relationship between the government and an Indian tribe when the government wields a high degree of control or supervision over property or assets belonging to Indians or an Indian tribe.[75] In those cases, all the necessary elements of a common-law trust are present: a trustee (the government), a beneficiary (the Indian tribe), and a trust corpus (the property or asset).[76] Where the federal government takes on or has control or supervision over tribal monies or properties, the government has a fiduciary relationship to the Indian owners of the property.[77]

In this case, Miami Tribe alleges that Defendants stand in a fiduciary relationship with respect to the requested transfer of Smith's interest in Miami Reserve and with respect to protecting the trust status of Miami Reserve and the jurisdiction of the Miami Tribe over Miami Reserve. According to Miami Tribe, Defendants have breached their trust obligations and fiduciary duties by the BIA's refusal to approve Smith's application, refusal to approve the transfer of Smith's interest in trust for the benefit of Miami Tribe, refusal to timely consider and act on Smith's appeal of the denial of his request for transfer, failure to protect and recognize Miami Tribe's jurisdiction over Miami Reserve, and failure to maintain and hold Miami Reserve in trust for the benefit of its Indian owners.

[22] The Court has determined that Miami Reserve is not being held in trust by the United States and, except for a brief period of time after the 1989 partition order, has never been held in trust by the United States. Because Miami Reserve was originally conveyed to Smith's relative as a restricted allotment, and its status as a restricted allotment has never changed, Defendants do not have any fiduciary duties with respect to its management that may arise from a trust relationship. This would include any fiduciary duty to maintain the status of Miami Tribe as a trust allotment. Without a trust relationship, the Court looks to whether Miami Tribe can base its breach of trust claim on a statute, regulation, or treaty conferring fiduciary duties upon the government.

The Court notes that all Miami Tribe's remaining allegations of breaches of fiduciary duties are based upon the BIA's actions or inactions as they relate the performance of its duties as an administrative agency, including the duty to consider and decide applications for approval to transfer interests in restricted Indian land. The

73. 161 F.3d 569, 574–75 (9th Cir.1998).

74. *Id.* at 574.

75. *Mitchell II*, 463 U.S. at 225, 103 S.Ct. 2961 ("a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).") (citing *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct.Cl.1980)).

76. *Mitchell II*, 463 U.S. at 225, 103 S.Ct. 2961.

77. *Navajo Tribe*, 624 F.2d at 987.

Court finds that the actions or inactions of an administrative agency in carrying out its agency duties do not constitute a valid basis for Miami Tribe's breach of trust claim. While the administrative agency's duties may be statutorily required, they are not duties the breach of which would necessarily give rise to a breach of trust claim. The remedy for breach of an administrative agency's duties is provided by the APA by way of judicial review of the agency's decision or by compelling agency unlawfully withheld. These alleged breaches committed by an administrative agency while carrying out its agency duties cannot by themselves constitute the basis for a breach of a trust duty by the government to an Indian tribe.

In the absence of any fiduciary or trustee-beneficiary relationship between the government and Miami Tribe, the Court determines that Miami Tribe has not asserted any federally recognized right that would entitle it to relief. Miami Reserve is not being held in trust, nor has ever been held in trust except for a brief period of time after the 1989 partition order. Miami Tribe's allegations of breaches that arise from the agency's actions or inactions as they relate the performance of its duties, including the duty to consider and decide applications for approval to transfers interests in restricted Indian land, also do not constitute an actionable basis for a breach of trust claim. As Miami Tribe has not asserted any duty on the part of Defendants, that, if breached, would constitute a valid basis for its breach of trust claim against Defendants, it cannot recover on that claim. The Court must therefore dismiss Miami Tribe's breach of trust claim set forth in Court II of its Second Amended Complaint.

IT IS THEREFORE ORDERED THAT the October 10, 2008 Order of the IBIA affirming in part and vacating in part the BIA's October 23, 2007 decision is affirmed.

IT IS FURTHER ORDERED THAT Miami Tribe's claim for breach of trust (Count II) is dismissed.

IT IS SO ORDERED.

WALLACE B. RODERICK REVOCABLE LIVING TRUST, Trustee Wallace B. Roderick, on Behalf of Itself and all others Similarly Situated, Plaintiffs,

v.

XTO ENERGY, INC., Defendant.

Case No. 08–1330–JTM.

United States District Court,
D. Kansas.

Jan. 12, 2010.

Background: Royalty owners of natural gas wells brought putative class action against lessee, alleging that they received inadequate royalties. Lessee filed motions to dismiss and for summary judgment, and owners moved for additional time to respond to the motion for summary judgment.

Holdings: The District Court, J. Thomas Marten, J., held that:

(1) Kansas and Oklahoma law recognized a cause of action for breach of the implied covenant to market;

(2) first-to-file rule warranted dismissal of claims brought by owners that also fell within those claims advanced in a class action pending before another district court; and

United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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JAMES E. SMITH and MIAMI TRIBE OF OKLAHOMA, Appellants,	)	Order Affirming Decision in Part and Vacating in Part
v.	)	Docket Nos. IBIA 08-44-A 08-50-A
EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	October 10, 2008

Since 2001, James E. Smith, a member of the Miami Tribe of Oklahoma (Tribe), has sought to convey to the Tribe a 1/38 interest in an allotment located in Kansas.[1] The Bureau of Indian Affairs (BIA) declined to approve Smith's requested conveyance, which was affirmed on appeal to the Board of Indian Appeals (Board). *See Smith v. Acting Eastern Oklahoma Regional Director*, 38 IBIA 182 (2002) (*Smith I*). However, on appeal to the United States District Court for the District of Kansas, *Smith I* was reversed and remanded. *Miami Tribe of Oklahoma v. United States*, 374 F. Supp. 2d 934 (D. Kan. 2005) (*Miami Tribe II*), *as amended by* 2005 U.S. Dist. LEXIS 29468 (D. Kan. Nov. 23, 2005). Following the remand of *Smith I*, BIA reconsidered Smith's requested conveyance. The Eastern Oklahoma Regional Director (Regional Director), BIA, (1) approved Smith's application to give 1/3 of his 3/38 interest in the Maria Christiana allotment to the Tribe, and (2) notified Smith and the Tribe (collectively, Appellants) that, because the land is in restricted fee title and because Smith had stated that he wanted the interest conveyed "in trust" to the Tribe, the Tribe would need to submit an application to BIA to accept the land

[1] This allotment is variously known as the Maria Christiana allotment, Miami Reserve No. 35, Miami 35, Allotment No. 35, and Maria Christiana Reserve No. 35. We will refer to the allotment as the Maria Christiana allotment; to distinguish the allotment as it exists today from the larger parcel that once included undivided fee simple interests (prior to the 1989 partition action), we will refer to the larger, pre-1989 parcel as the Maria Christiana property.

"in trust status." Decisions dated October 23, 2007, and February 6, 2008. Appellants separately appealed the Decisions to the Board.[2]

The Board received opening briefs from Appellants in which they argue that BIA currently holds title to Smith's interest in trust for him, and that the 1/38 gift interest can retain its trust status after conveyance to the Tribe. In her answer brief, the Regional Director urges the Board to affirm her determination that Smith owns his interest in restricted fee, but requests that the Board vacate that portion of the Decision that suggested the land would pass to the Tribe in *unrestricted* fee or fee simple, unless the Tribe submitted an application to have the interest taken into trust. The Regional Director indicates that she is willing to complete the processing of the gift deed and record a restricted fee title for a 1/38 interest in the Tribe. Appellants oppose the remand, reiterating their argument that the United States already holds title to Smith's interest in trust for him and, therefore, is required by law to accept the interest in trust for the Tribe pursuant to 25 U.S.C. § 2216(d)[3] without regard for the regulations governing discretionary trust acquisitions at 25 C.F.R. Part 151. We construe the Tribe's opposition to the remand as refusing to accept Smith's gift of his 1/38 interest unless title will be held in trust by the United States, at least pending this Board's determination of the status of Smith's title.[4]

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[2] The October 23 decision did not include appeal instructions. Therefore, the Regional Director reissued her October 23 decision in an abbreviated form on February 6, 2008, and added appeal instructions. We construe this appeal as an appeal from both decisions but, because the second decision is not substantively different from the October 23 decision, we will refer hereafter to the two decisions as a single "Decision".

[3] In its entirety, section 2216(d) provides:

> **(d) 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 that land as trust or restricted land.

[4] We note that the Tribe previously expressly declined to accept a gift of an interest in the Maria Christiana allotment if it were not processed as a "trust-to-trust transfer." *See Downs v. Acting Muskogee Regional Director*, 29 IBIA 94, 95 (1996). The record before the Board in the present appeal does not contain a tribal resolution or other statement from the Tribe reflecting an acceptance of Smith's gift. The record does include a document confirming that, as of 2002, the Tribe had yet to submit a tribal resolution to BIA "accepting the conveyance or requesting that it be taken into trust for them." Memorandum from Regional Realty Officer to Regional Director, Jan. 4, 2002, at 2; *but see* Letter from Smith to BIA, Apr. 23, 2007 ("I have gifted and the Tribe has accepted, 1/3 of my undivided interest").

On July 24, 2008, while this appeal was pending, the District Court ordered the Department of the Interior (Department) to issue a final decision on Smith's appeal from the Decision within 90 days. *Miami Tribe of Oklahoma v. United States*, No. 03-2220 DJW (D. Kan. July 24, 2008).

Given the directive of the District Court and Appellants' opposition to the Regional Director's request for remand, the Board denies the Regional Director's request for remand and, instead, expedites its consideration of this appeal. On the merits, we affirm the Regional Director's determination that Smith holds his interest in restricted fee title and that it is not being held in trust by the United States. We also vacate the Regional Director's Decision to the extent that it suggests that the interest to be conveyed to the Tribe would be an unrestricted fee simple interest. Because the Tribe seeks title in the name of the United States in trust for the Tribe, and in the absence of any indication by the Tribe that it will accept Smith's gift if Smith holds restricted fee title, the Regional Director need not proceed further with the transaction at this time.

Background

1. The Maria Christiana Allotment

The history of the ownership of and title to the Maria Christiana allotment is chronicled in a series of Federal court decisions as well as Board decisions. *See, e.g., Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001); *Miami Tribe II*; *Miami Tribe of Okla. v. United States*, 316 F. Supp. 2d 1035 (D. Kan. 2004); *Kansas v. United States*, 86 F. Supp. 2d 1094 (D. Kan. 2000); *Miami Tribe of Okla. v. United States*, 5 F. Supp. 2d 1213 (D. Kan. 1998); *Miami Tribe of Okla. v. United States*, 927 F. Supp. 1419 (D. Kan. 1996) (*Miami Tribe I*); *Downs*, 29 IBIA 94; *Smith I*. Here, we will recount only that history necessary to our determination of the status of title.

The Maria Christiana allotment originally constituted 200 acres allotted to an infant named Maria Christiana De Rome in 1859 in restricted fee. *Miami Tribe II*, 374 F. Supp. 2d at 936. With the approval of the United States, 120 acres was sold in 1860 by Maria Christiana's parents following her untimely death. *Id.* It is not entirely clear how the remaining 80 acres descended over the ensuing 120 years, but by October 15, 1982, when Congress enacted Public Law 97-344 (Pub. L. 97-344) concerning 3 allotments in Kansas, including the Maria Christiana property, some interests in the property remained in Indian ownership and some interests had passed into non-Indian ownership. *See* Letter from Undersecretary of the Interior Paul Hodel to Senator William Cohen, Chairman, Senate Select Committee on Indian Affairs, May 8, 1981, at 2 (reprinted in Partitioning of Certain

Restricted Land in the State of Kansas: Hearing on S.478 before Senate Select Committee on Indian Affairs, 97th Cong. 9-10 (1981) (Senate Hearings)) (Hodel Letter). With respect to Indian heirs, the allotment was "currently in probate and ha[d] been for some time due to the difficulty of tracing the many heirs." *Id.*[5]

Public Law 97-344 authorized "any owner of an interest" in the Maria Christiana property to commence litigation to partition the allotment, and specified that for purposes of any such action, "the Indian owners shall be regarded as vested with an unrestricted fee simple title to their interests in the land" and "[a]ny conveyance ordered by the court in such proceedings will be made in unrestricted fee simple to non-Indian grantees and *in a restricted fee to Indian grantees*." Pub. L. 97-344 (emphasis added).[6] The legislation was prompted by an interest in resolving fractionation in the ownership of the land[7] and making the land productive through partitioning the ownership interests between Indian and non-Indian owners. Canan Testimony at 5. In particular, the Department opined that the bill was necessary because the Department possesses authority only to partition trust lands but did not have similar authority where title is held in restricted fee. *See* Hodel Letter at 2. In addition, because of the non-Indian ownership in a portion of the allotment, the Department opined that it lacked authority under 25 U.S.C. § 480 to lease the property. Canan Testimony at 5-6, 8. As a result of the fractionated and mixed ownership, i.e., unrestricted and restricted fee title, of the allotment, title was clouded and the property was nonproductive. Hodel Letter at 2.

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[5] According to the legislative history for Pub. L. 97-344, many of the heirs to the three Kansas allotments, including the Maria Christiana property, had left Kansas and did not report the deaths of heirs to BIA or the presence or absence of a will. S. Rep. No. 97-107 at 2 (1981). At the time of a 1940 probate involving the Maria Christiana property, Congress reported that there were 16 heirs to the allotment with interests at that time as small as 23/1440. H. R. Rep. No. 97-341 at 2 (1981).

[6] The legislative history for Pub. L. 97-344 confirms that the intent of the bill was to have interests pass in restricted fee to Indian owners following any partition action and, for non-Indian owners, unrestricted fee simple. *See* Senate Hearings, Testimony of James F. Canan at 6 (Canan Testimony); Hodel Letter at 1; Letter from Department to Congressman Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs, July 7, 1981, at 1 (attached to H. R. Rep. No. 97-341 (1981)).

[7] One of the other allotments included in the bill had "over 50 owners with interest[s] as small as a fraction of 7,392/1,330,560." Canan Testimony, at 5.

Following the enactment of Pub. L. 97-344, Midwest Investment Properties, Inc., brought a partition action, *Midwest Investment Properties v. DeRome*, No. 86-2497 (D. Kan.), asserting ownership of the 80-acre Maria Christiana property by adverse possession. Letter from Department, Office of the Solicitor, to National Indian Gaming Commission, May 23, 1995, at 3 n.3.[8] In 1989, Earl E. O'Connor, then chief judge, issued his final order in *Midwest Investment Properties*, entitled "Order Confirming Report of Commissioners in Partition" (partition order). The partition order effected the partition of the Maria Christiana property and ordered that 45 acres be partitioned for the plaintiff and the remaining 35 acres should go

> [t]o the United States Government . . . to hold . . . in trust for the benefit of the Indian owners *to be vested with restricted fee title in percentages determined by the Bureau of Indian Affairs*.

Id. at 2 (emphasis added). The Court's order was "approved by" the parties' attorneys, including counsel for the United States. According to a letter dated October 14, 1988, and written by the Assistant Regional Solicitor for the Department to the Indian heirs of the Maria Christiana property, the interests of the heirs were represented in *Midwest Investment Properties* by the United States.[9] The administrative record does not contain the commissioners' report or any pleadings from the litigation other than the partition order; the parties have not independently provided the Board with any other records from the litigation in *Midwest Investment Properties*.

Following the resolution of the litigation in *Midwest Investment Properties*, the United States determined the percentage of the interests of the Indian heirs. *See* Title Status Reports (identifying the current Indian owners of the Maria Christiana allotment and their

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[8] According to the District Court in *Miami Tribe II*, Midwest Investment Properties, Inc., claimed to adversely possess the *unrestricted*, or non-Indian interest(s), in the Maria Christiana property. *Miami Tribe II*, 374 F. Supp. 2d at 937. Such interests could result, e.g., where a restricted interest owned by an Indian passed either by intestacy or by will to a non-Indian spouse or other non-Indian heir, which would result in the removal of any restrictions on the interest. *See Bailess v. Paukune*, 344 U.S. 171 (1952); *see also* 17 Stat. 417 (Jan. 23, 1873) (authorizing the removal of restrictions upon the alienation of Miami Indian lands in Kansas in which "the title has legally passed to citizens of the United States other than Indians").

[9] The version of the Assistant Regional Solicitor's 2-page letter submitted to the Board by Appellants was entirely redacted except for the first three sentences.

respective, undivided interests). BIA considers the Indian interests in the Maria Christiana allotment to be restricted fee interests and not interests held in trust by the United States. *See, e.g.*, BIA Appraisal, June 7, 2007, at 8; memorandum from Regional Realty Officer to Regional Director, Jan. 4, 2002, at 1.[10] Also after the resolution of *Midwest Investment Properties*, the Tribe began to develop plans for gaming on the Maria Christiana allotment, which led to several cases in the District Court beginning in 1995 when the Tribe's plans hit Federal roadblocks. *See, e.g., Miami Tribe I.*

2. Smith's Gift Deed Application

In 2001, Smith submitted a gift deed application to BIA to convey 1/3 of his 3/38 undivided interest in the Maria Christiana allotment to the Tribe. BIA denied the application and, on appeal to the Board, we affirmed. *Smith I*, 38 IBIA 182. The Board determined that, with respect to the arguments under the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2201 *et seq.*, Smith and the Tribe[11] had not distinguished Smith's appeal from *Downs*, in which the Board affirmed the Regional Director's denial of a proposed conveyance of a portion of Downs's interest in the Maria Christiana allotment to the Tribe. 38 IBIA at 185.[12] Appellant and the Tribe appealed the Board's decision in *Smith I* to the District Court for the District of Kansas. *Miami Tribe II, as amended.*

The District Court disagreed with the Board and concluded that BIA's denial of Smith's application was arbitrary and capricious. *Id.* On remand, in her decisions of October 23, 2007, and February 6, 2008, the Regional Director reconsidered Smith's gift deed application and approved the conveyance of 1/3 of his 3/38 interest in the Maria

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[10] It appears that Appellant and the Tribe also understood — and accepted, at one point in time — BIA's determination that Appellant's interest was a restricted fee interest. In 2007, Smith signed a "Deed to Restricted Indian Land" to transfer a 1/38 interest in the Maria Christiana allotment to the Tribe; the Tribe's counsel transmitted the signed deed to BIA in June 2007 with a cover letter that referenced the "Deed to Restricted Indian Land - James E. Smith Transfer."

[11] The Tribe was permitted to intervene in Smith's appeal to the Board. *Smith I*, 38 IBIA at 184.

[12] In *Downs*, the Board affirmed the Area Director's determination that approval of the conveyance of such a small portion of Downs's interest (1%) would conflict with ILCA's policy of promoting consolidation of fractional interests. Because the Tribe did not already own an interest in the allotment, approval of Downs's gift deed application would create a new fractional interest in the property. 29 IBIA at 98.

Christiana allotment to the Tribe. Smith then executed a "Deed to Restricted Indian Land" to convey a 1/38 interest in the allotment to the Tribe. However, because he had "clarified" that he wanted the transferred interest to "remain in trust status," BIA informed him (and the Tribe) that the gift conveyance would "be processed as a two-part transaction consisting of a disposal by [Smith] and an acquisition by the Tribe in trust status." October 23, 2007, Decision at 2. BIA further explained that "the acquisition portion [of the gift conveyance] will be processed . . . in accordance with 25 C.F.R. [Part] 151 upon the receipt of an application for a trust acquisition from the Tribe." *Id.* BIA enclosed, for Smith's review, a deed for a conveyance from him to the United States in trust for the Tribe, which when executed would be placed by BIA in the Tribe's trust application file.

Appellants appeal to the Board from the Regional Director's determinations that Smith holds restricted fee title to his interest and that the Tribe must therefore comply with Part 151 (if the parties intend to make a restricted-fee-to-trust conveyance) by submitting an application for the United States to accept title to the interest in trust for the Tribe.

The parties submitted briefs. The Tribe does not dispute the applicability of Part 151 if the land is not presently held in trust, arguing only that it is already held in trust. The Regional Director requests that the Board affirm her determination that Smith holds his interest in the allotment in restricted fee, but vacate the decision to the extent that it suggested that the conveyance would pass to the Tribe in unrestricted fee. The Regional Director seeks a remand in order to permit her to approve the conveyance as an individual-restricted-fee-to-tribal-restricted-fee transaction. Appellants oppose the Regional Director's proposal, arguing that the District Court's decision in *Midwest Investment Properties* requires the Indian interests in the Maria Christiana allotment to be held in trust for their benefit, rather than in restricted fee.

The Board requested supplemental briefing from the parties on two issues. First, in light of the Regional Director's willingness to process the conveyance as a restricted-fee-to-restricted-fee transfer, is the Tribe adversely affected by the Regional Director's decision as clarified, i.e., is this appeal moot? Second, is the District Court's apparent determination that Smith holds restricted title to his interest in the Maria Christiana allotment dispositive and binding on the parties, citing *Miami Tribe II*, 374 F. Supp. 2d at 936; *see also Miami Tribe I*, 927 F. Supp. at 1421, 1426 n.5 (the Maria Christiana allotment is a restricted Indian allotment). Appellants and the Regional Director each submitted timely briefs in response to the Board's order.

Discussion

1. Mootness

We first consider whether this appeal is moot, and conclude that it is not. Although the differences between restricted fee title and trust title may be few in number, the Tribe contends that the differences are significant. The Tribe asserts that, according to final regulations published at 73 Fed. Reg. 29354 (May 20, 2008), the Department has taken the position that Congress deliberately omitted mention of tribal restricted fee lands in determining whether 25 U.S.C. § 2719, concerning gaming on lands acquired after October 17, 1988, applied to lands held in fee by tribes but subject to a restriction against alienation. In its rulemaking, the Department observed that Congress expressly refers to restricted fee lands in both the definition of "Indian lands" at 25 U.S.C. § 2703(4)(B) and in describing lands acquired after October 17 that are "contiguous to other land held in . . . restricted status," 25 U.S.C. § 2719(a)(2)(A)(ii). However, in section 2719, where Congress addresses whether tribes may conduct gaming on *trust* lands acquired after October 17, Congress omits any mention of lands acquired in restricted fee. Appellants maintain, therefore, that Congress clearly appreciated a difference between the two forms of holding title, which the Department memorialized in its responses to comments to the proposed rules for section 2719. *See* 73 Fed. Reg. at 29355. Accepting as true the Tribe's allegations, solely for purposes of the mootness issue, we conclude that this appeal is not moot because the status of the title, if transferred to the Tribe, may be legally and practically relevant.

2. Restricted Fee Title vis-a-vis Trust Status

Turning to the merits, the Board is squarely presented with a straightforward legal question: What is the nature of the interest owned by Smith in the Maria Christiana allotment? We readily conclude that Smith holds restricted fee title to his interest in the allotment and that it is not being held by the United States in trust. Therefore, we affirm the Regional Director's determination that title is in restricted fee. If the Tribe intends for BIA to accept the interest in trust for the Tribe, the Tribe must comply with the requirements of 25 C.F.R. Part 151.

In making their argument, Appellants focus on the "trust" language in the District Court's partition order in *Midwest Investment Properties*, wholly ignoring that portion of the order directing that title vest in restricted fee. Appellants suggest that if any ambiguity exists, it should be resolved in their favor. We find no ambiguity in the Court's language with respect to the nature of title to the resulting Indian land: Its meaning becomes readily clear and consistent in examining the statute authorizing the litigation and the surrounding

circumstances. Consequently, we conclude that BIA correctly determined that Smith holds title to his undivided interest in the Maria Christiana allotment in restricted fee, and that the United States does not hold it in trust.

Although we could chronicle the history of title to the Maria Christiana allotment since its original issuance in restricted fee to Maria Christiana in 1859, we begin our analysis instead in 1982 when Congress enacted Pub. L. 97-344. That statute permits suits to be brought in the United States District Court for the District of Kansas to partition three parcels of Indian land in Kansas, one of which is the Maria Christiana property. In plain language, the statute requires any conveyance resulting from a partition action to "be made in . . . a restricted fee to Indian grantees." Pub. L. 97-344.

Four years after the passage of Pub. L. 97-344, Midwest Investment Properties, Inc., instituted suit in the District Court, claiming ownership by adverse possession to a portion of the Maria Christiana property. *Midwest Investment Properties v. DeRome*, No. 86-2497 (D. Kan.). In 1989, the District Court issued its final order, the partition order, in *Midwest Investment Properties*. The partition order states that the issue of partitioning the Maria Christiana property had been referred to certain designated commissioners who prepared a report for the Court to which no parties filed objections.[13] The Court described the report as "in strict compliance with the law and the order of [the] Court [and proposed a] partition of [said] real estate [that] is fair, just and reasonable." Partition order at 1-2. The Court then ordered that 45 acres be partitioned for the plaintiff and the remaining 35 acres should go "[t]o the United States Government . . . to hold . . . in trust for the benefit of the Indian owners *to be vested with restricted fee title in percentages determined by the Bureau of Indian Affairs*." *Id.* at 2 (emphasis added). The Court's order was "approved by" each of the attorneys participating in the litigation, including counsel for the United States. *Id.* at 3.

The Indian heirs to the Maria Christiana property were represented in *Midwest Investment Properties* by the United States. The District Court, in its partition order, did not purport to determine the ownership interests of each of the Indian owners but expressly left this determination to be made by the United States. Hence, in ordering 35 acres of the Maria Christiana property to go "to the United States Government . . . to hold . . . in trust for the benefit of the Indian owners," the Court was impressing a temporary trust on the

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[13] Appellants argue that there was "no partition" because the Court's order was the result of a compromise. Leaving aside the *non sequitur*, it is abundantly clear that the Court's order *was* a partition order. And whether or not the absence of objections was the product of compromise is irrelevant to our interpretation of the Court's order.

United States, as a named defendant and as representative of the Indian owners in the partition action, until such time as the United States determined the percentage of each Indian heir's undivided ownership interest in the 35 acres. Once that determination was made, the District Court's order provided that the Indian heir was "to be vested with restricted fee title" — exactly as the statute required. The United States apparently quickly recorded the partition order to protect title to the Indian-owned portion of the property. As shown by BIA records, BIA then determined the ownership interests among the Indian owners and recorded their title as restricted fee. Once title was vested in restricted fee in the Indian owners, any title held in trust by the United States necessarily dissolved because fee title cannot be held in trust by the United States and in restricted fee by the Indian owner at the same time. Additionally, it would be an oxymoron for the United States to hold *restricted* fee in trust.[14] Therefore, we conclude that BIA properly determined that Smith holds restricted fee title to his interest in the Maria Christiana allotment, and thus his title is not being held in trust by the United States.

Our conclusion not only is consistent with Pub. L. 97-344 and the partition order, it is consistent with the District Court's conclusion in *Miami Tribe II* that Smith holds "a 3/38 restricted undivided fee interest in the Maria Christiana allotment." 374 F. Supp. 2d at 936, *as amended*, 2005 U.S. Dist. LEXIS 29468 at *1-*2 (same); *Miami Tribe I*, 927 F. Supp. at 1426 n.5 (the Maria Christiana allotment is a restricted Indian allotment). In *Miami Tribe II*, the District Court stated that, in *Midwest Investment Properties*, it "ordered the partitioning of the [Maria Christiana property] into two tracts consisting of 45 acres to Midwest Investment Properties, Inc. and 35 acres to the Indian owners in restricted fee title." 374 F. Supp. 2d at 936. Nowhere does the Court describe the interest as being held in trust by the United States.[15]

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[14] As explained by Cohen, "[a]llotment is a term of art in Indian law, describing *either* a parcel of land owned by the United States in trust for an Indian ('trust' allotment), or owned by an Indian subject to a restriction on alienation in the United States or its officials ('restricted' allotment)." Cohen's Handbook of Federal Indian Law (2005) at 1039 (emphasis added); *see* Cohen's Handbook of Federal Indian Law (1982) at 615-16 (same). Thus, the United States does not hold, and it would make no sense for it to hold, "restricted fee" title "in trust."

[15] Our decision also is consistent with the Board's previous characterizations of Indian title in the Maria Christiana allotment. *See Smith I*, 38 IBIA at 182 ("[Smith] holds a 3/38 restricted interest in the [Maria Christiana] allotment"); *Downs*, 28 IBIA at 94 ("The Maria Christiana allotment presently consists of 35 acres and is owned by the Indian heirs of the original allottee in restricted fee status.").

The Tribe urges us to disregard the District Court's characterization as mere "dicta." Tribe's Supp. Brief at 11-13. But in the District Court litigation, the Tribe specifically sought an order from the Court instructing the United States to take the gift interest from Smith in trust for the benefit of the Tribe when the Tribe asked the Court to "clearly resolve the future trust status [of the Tribe's interest in the Maria Christiana allotment] to prevent future litigation." Tribe's Supp. Brief, Mar. 11, 2005, filed in *Miami Tribe*, No. 03-2220 (D.Kan.), at 16. The United States responded that "none of the legal title to the [Maria Christiana allotment] is held in trust by the United States for the benefit of the Indian heirs of the original allottee. . . . The Maria Christiana [allotment] is in restricted fee status." United States's First Supp. Brief, Mar. 24, 2005, filed in *Miami Tribe*, No. 03-2220 (D.Kan.), at 13-14. Pursuant to the Tribe's request, the District Court arguably *did* "clearly resolve the future trust status" of the interest to be conveyed to the Tribe, stating that the Court in *Midwest Investment Properties* ordered the transfer of "restricted fee title" to the Indian owners of the Maria Christiana allotment. *Miami Tribe II*, 374 F. Supp. 2d at 936.

Although the parties sought reconsideration of *Miami Tribe II*, reconsideration was not sought of the Court's characterization of the status of Smith's title.[16] We leave it to the Court to determine what weight to give its earlier pronouncement, but our reading of the Court's decision is entirely consistent with our interpretation of Chief Judge O'Conner's partition order and Pub. L. 97-344.

Conclusion

Congress enacted Pub. L. 97-344 to enable the partitioning of the Maria Christiana property between Indian and non-Indian interests. Congress further decreed in the statute that, for purposes of any partition action, the Indian owners would be deemed possessed of their interest in fee simple but, upon the conclusion of the partition action and a determination of each Indian owner's respective percentage interest in the remaining property, the Indian owners would be vested with restricted fee title. Therefore, Smith holds a restricted fee title to his 3/38 interest in the Maria Christiana allotment, and we affirm that portion of the Regional Director's Decision.

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[16] The fact that Appellant subsequently executed a deed conveying restricted fee title in 2007 coupled with the transmittal of the deed to BIA by the Tribe's attorney with a cover letter referencing "Deed to Restricted Indian Land - James E. Smith Transfer," suggests that the Tribe accepted the District Court's determination.

The Tribe does not dispute the Regional Director's determination that if Smith holds restricted fee title, then the Tribe must submit a fee-to-trust application in accordance with 25 C.F.R. Part 151 if it prefers to have the land held in trust. Thus, before the Regional Director may proceed, the Tribe must inform her whether it wishes to accept Smith's gift of a 1/38 *restricted* fee interest in the Maria Christiana allotment. Of course, the Tribe may still apply to the United States to accept the interest in trust on the Tribe's behalf.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's October 23, 2007, and February 6, 2008, decisions that Smith's interest in the Maria Christiana allotment is held in restricted fee title and, pursuant to the Regional Director's request, vacates that portion of her decisions that may suggest that title would or should be conveyed in unrestricted fee simple to the Tribe.

I concur:

Debora G. Luther
Administrative Judge

Steven K. Linscheid
Chief Administrative Judge

James E. Smith and Miami Tribe of
Oklahoma v. Eastern Oklahoma Regional
Director, BIA
Docket Nos. IBIA 08-44-A and 08-50-A
Order Affirming Decision in Part and
Vacating in Part
Issued October 10, 2008
47 IBIA 259

Distribution:

James E. Smith
Appellant (08-44-A)
66700 San Rafael Road
Desert Hot Springs, CA 92240-2627
BY CERTIFIED MAIL

Christopher J. Reedy, Esq.
for Miami Tribe of Oklahoma
Appellant (08-50-A)
19920 W. 161st Street
Olathe, KS 66062
BY CERTIFIED MAIL

Superintendent
Miami Agency, BIA
P.O. Box 391
Miami, OK 74355

Regional Director
ATTN: Division of Real Estate Services
Eastern Oklahoma Regional Office
Bureau of Indian Affairs
3100 W. Peak Blvd.
P.O. Box 8002
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United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Eastern Oklahoma Regional Office
P.O. Box 8002
Muskogee, OK 74402-8002

IN REPLY REFER TO:
Real Estate Services

OCT 23 2007

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. James E. Smith
66700 San Rafael Road
Desert Hot Springs, California 92240-2627

Dear Mr. Smith:

The Bureau of Indian Affairs (Bureau), Eastern Oklahoma Regional Office (EORO), has reviewed your Application for Gift Deed of Indian Land dated April 5, 2007, for the transfer of a 1/38 interest in and to the following described land: E½E½E½SW¼; E½W½E½E½SW¼ and E½W½W½E½E½SW¼ of Section 13, Township 19 South, Range 24 East, 6th Principal Meridian, Miami County, Kansas, Maria Christiana allotment, Miami 35. The reason stated in your application is your desire "to promote consolidation of Indian lands, sovereignty, and for Miami Tribe members to advance the purposes of the Miami Tribe."

Under Title 25, Code of Federal Regulations, Part 152.17 (25 CFR 152.17), "trust or restricted lands acquired by allotment, devise, inheritance, purchase, exchange, or gift may be sold, exchanged, and conveyed by the Indian owner with the approval of the Secretary or by the Secretary with the consent of the Indian owner." Section 152.25 (d) provides that:

> "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 the owner's spouse, brother, sister, 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."

In the case of a gift conveyance, it is the Bureau's duty to ensure that the prospective donor understands the effect of his/her action. It is also the Bureau's duty to make a careful examination of the circumstances to determine whether the transaction is in the donor's best interest. The Bureau must refrain from approving a gift deed where there is question as to the donor's intent or where the facts show the conveyance is not in the donor's best interest. See e.g., Estate of Evan Gillette, 22 IBIA 133 (1992), aff'd, *Gillette v. Babbitt*, No. A4-92-134 (D.N.D. Oct. 15, 1993), aff'd, No. 93-3769 (8th Cir. May 19, 1994.) Pursuant to Title 25, U.S.C. § 2216 (b) (1) (A), the Bureau provided you an estimate of value of the property for the proposed gift conveyance on June 15, 2007, and you subsequently provided a waiver for the consideration as authorized by 25 U.S.C. § 2216 (b) (1) (B) on June 28, 2007.

EXHIBIT
G

Your application is not for a gift conveyance to a spouse, brother, sister, or lineal ancestors of Indian blood or lineal descendants, but rather to the Miami Tribe (Tribe) based on a special relationship existing between you, as an enrolled member of the Tribe, and the Tribe. The administrative record contains evidence of a Directional Disclaimer (subject to the reservation of a life estate) executed by you in favor of the Tribe, pursuant to 25 U.S.C. § 2206 (a)(3) and § 2206 (j)(8)(A) of the *Indian Land Consolidation Act* of 2000 as amended by the *American Indian Probate Reform Act* of 2004, Public Law 108-374, of property which you inherited from the estate of Earlene (Smith) Downs, Miami NE, which is also a part of the Maria Christiana allotment, Miami 35. The Bureau has therefore determined that a special relationship exists between you and the Tribe which meets the requirements of 25 CFR 152.25(d.) Based upon the finding of a special relationship and after careful examination of the circumstances, your application for a gift deed is approved by the Bureau.

Your letter dated April 23, 2007, provided clarification that you wish to transfer 1/3 of your undivided interest to the Tribe with the interest to the Tribe to remain in "trust status." Therefore, the proposed gift conveyance will be processed as a two-part transaction consisting of a disposal by you and an acquisition by the Tribe in trust status. The disposal portion is considered in accordance with 25 CFR 152.17 and the acquisition portion will be processed in accordance with 25 CFR 151 upon the receipt of an application for a trust acquisition from the Tribe. In this regard, by copy of this letter, the Tribe is advised of the Bureau's findings that consideration will be given to the acquisition upon receipt of the application from the Tribe.

The Deed to Restricted Indian Land you executed on June 20, 2007, if approved, would have conveyed the interest in fee status to the Tribe. Therefore a deed transferring a 1/38 interest in the above described property to the United States of America in Trust for the Miami Tribe of Oklahoma is enclosed for your review and execution. The executed deed is to be returned to this office and will be included in the Tribe's fee-to-trust application.

If you have any questions, please contact Mrs. Annette Jenkins, Realty Officer, Eastern Oklahoma Regional Office, Division of Real Estate Services, at (918) 781-4658.

Respectfully,
(Sgd) Jeanette Hanna

Regional Director

Enclosure

cc: Office of the Field Solicitor, Tulsa

DJW/byk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MIAMI TRIBE OF OKLAHOMA,

Plaintiff,

Civil Action

v.

Case No. 03-2220-DJW

UNITED STATES OF AMERICA;
GAIL A NORTON, SECRETARY,
UNITED STATES DEPARTMENT OF
THE INTERIOR; and AURENE MARTIN,
ASSISTANT SECRETARY OF INTERIOR
BUREAU OF INDIAN AFFAIRS,

Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court on Defendants' Motion for Reconsideration (doc. 30). Defendants request that the Court reconsider its Memorandum and Order dated June 22, 2005 (doc. 29) in which it reversed the Bureau of Indian Affairs' denial of James Smith's application to convey one-third of his 3/38 interest in the Maria Christiana Reserve No. 35 to the Miami Tribe of Oklahoma. For the reasons set forth below, Defendants' Motion for Reconsideration is granted in part and denied in part.

I. Background

James E. Smith ("Smith"), a member of the Miami Tribe of Oklahoma ("Miami Tribe"), holds a 3/38 restricted undivided interest in the Maria Christiana allotment, Miami No. 35 ("Miami Reserve"), located in Miami County, Kansas. In 2001, Smith submitted his application to the Bureau of Indian Affairs

("BIA") for approval to gift transfer one-third of his 3/38 undivided interest to Miami Tribe. The BIA denied Smith's application for gift conveyance.

Miami Tribe commenced the present action in this Court. Miami Tribe's Complaint asserts three Counts: Count I of the Complaint seeks judicial review of the BIA's decision under the Administrative Procedures Act ("APA").[1] Count II alleges that Defendants breached their fiduciary and trust duties to Miami Tribe. Count III alleges that Defendants have violated substantive and procedural due process and property rights of Miami Tribe. Early in the case, the parties agreed to bifurcate Count I (APA, Injunctive Relief, and Violation of 25 U.S.C. § 2216) of Plaintiff's Complaint from Counts II (Breaches of Trust) and III (Constitutional Violations) and to proceed first with Count I.[2]

On June 22, 2005, the Court issued its Memorandum and Order reversing the BIA's January 11, 2002 decision that denied Smith's application for approval to gift convey one-third of his interest in Miami Reserve to Miami Tribe and instructed the BIA to forthwith approve Smith's application. The Court's ruling recognized that Count II and III of Miami Tribe's Complaint remain pending.

On July 7, 2005, Defendants filed their Motion for Reconsideration of the Court's June 22, 2005 Memorandum and Order, requesting that the Court affirm the BIA's denial. Defendants alternatively argue that the Court should remand the matter to the BIA rather than reversing the BIA's decision with directions to approve Smith's application.

II. Applicable Standards

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[1] 5 U.S.C. § 702.

[2] *See* Scheduling Order (doc. 6).

As the Court's June 22, 2005 Memorandum and Order did not adjudicate all the claims in the case, Defendants filed their Motion for Reconsideration pursuant to Fed. R. Civ. P. 54(b). Under Rule 54(b), a court may reconsider any order not certified for appeal when the order in question did not resolve all the claims of all the parties in the action.[3] Rule 54(b) provides that "any order or other form of decision, however designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties."[4]

Although the standard applicable to ruling on a motion to reconsider an interlocutory, dispositive order under Rule 54(b) is not clear, courts in this district use the standards set forth for ruling on a Rule 59(e) motion for reconsideration for guidance.[5]

Using the Rule 59(e) standards, the grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.[6] Thus, a motion for reconsideration is appropriate where

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[3]Fed. R. Civ. P. 54(b).

[4]*Id.*

[5]*See Sump v. Fingerhut, Inc.*, 208 F.R.D. 324, 327 (D. Kan. 2002) ("courts routinely turn to the standards established under Rule 59(e) for instruction in constructing a review standard when considering a possible revision of an interlocutory order"); *Franco v. Unified Sch. Dist. No. 437,* No. 99-4167-DES, 2002 WL 1162488, at *3 (D. Kan. May 17, 2002) (same); *Demster v. City of Lenexa, Kan.*, 359 F. Supp. 2d 1182, 1184 (D. Kan. 2005) (the grounds justifying an alteration or amendment under Rule 59(e) or reconsideration of an interlocutory order are essentially the same); *Nelson v. Kansas*, No. 99-4184-DES, 2001 WL 1597959, at *4 (D. Kan. Nov. 28, 2001) (same).

[6]*Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp.*
(continued...)

the court has misapprehended the facts, a party's position, or the controlling law.[7] A motion to reconsider is not appropriate as a second chance for the losing party to ask the court to revisit issues already addressed or to consider new arguments and supporting facts that could have been presented originally.[8] Nor is a motion to reconsider to be used as "a second chance when a party has failed to present it strongest case in the first instance."[9] A losing party should not use a motion for reconsideration as a vehicle to rehash arguments previously considered and rejected.[10] The party seeking reconsideration bears the burden to demonstrate a change in the law, the availability of new evidence, or that reconsideration is necessary to prevent manifest injustice.[11] The decision whether to grant a motion to reconsider is committed to the court's sound discretion.[12]

II. Discussion

Defendants request that the Court reconsider and vacate its June 22, 2005 Memorandum and Order and replace it with an order that sustains the decision of the agency. Defendants request that in the event that the Court determines that the agency failed to consider necessary factors in its decision, the

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[6](...continued)
v. Samson Res. Corp., 57 F.3d 941, 948 (10th Cir. 1995)).

[7]*Id.*

[8]*Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991).

[9]*Steinert v. Winn Group, Inc.*, No. 98-2564-CM, 2003 WL 23484638, at *2 (D. Kan. Sept. 24, 2003) (quoting *Prairie Band Potawatomi Nation v. Richards,* No. 99-4071-JAR, 2003 WL 21536881, at *1 (D. Kan. July 2, 2003)).

[10]*Voelkel v. Gen. Motors Corp.*, 846 F. Supp. 1482, 1483 (D. Kan. 1994).

[11]*Sac & Fox Nation of Mo. v. LaFaver*, 993 F. Supp. 1374, 1376 (D. Kan. 1998).

[12]*Hancock v. City of Okla. City,* 857 F.2d 1394, 1395 (10th Cir. 1988).

Court should (1) vacate the Memorandum and Order to the extent that it concludes that the Tribe has jurisdiction over the Property for purposes of the Indian Land Consolidation Act, and (2) vacate its order that the BIA approve Smith's application to convey one-third of his interest in the Property to the Miami Tribe. Defendants request that the Court remand this matter to the agency for reconsideration its decision in light of factors that the Court concludes should have been considered.

Defendants assert three arguments in support of their motion. First, they contend that the Court erred by finding that the tribe has jurisdiction for purposes of the Indian Land Consolidation Act through unilateral actions. Second, they claim that the Court's ruling mistakenly reads 25 C.F.R. §§ 152.23 and 152.25(d) as requiring the BIA to approve transfers if one of the listed grounds are found. Finally, Defendants argues that if the Court concludes that its ruling was otherwise correct, the appropriate action is to remand the matter to the BIA for further consideration rather than directing that the agency approve Smith's application.

A. Miami Tribe's Jurisdiction over Miami Reserve

Defendants first submit that the Court's Memorandum and Order is based upon a manifest error of law when the Court concluded that Miami Tribe's unilateral actions have created jurisdiction over the property for purposes of 25 U.S.C. § 2216(a) of the Indian Land Consolidation Act ("ILCA"). They argue that the Tenth Circuit has unequivocally found that it is res judicata that Miami Tribe lacks jurisdiction over Miami Reserve and rejected the proposition that Miami Tribe's subsequent actions could restore jurisdiction.

Prior to the Court's June 22, 2005 Memorandum and Order, the Court requested additional briefing on several issues previously not discussed by the parties, including the issue of whether Smith's

application should be governed by 25 U.S.C. § 2216(b)(1).[13] In Defendants' First Supplemental Brief,[14] they argued that 25 U.S.C. § 2216(b)(1) of the ILCA was not applicable to Smith's application because Miami Tribe did not exercise jurisdiction over any portion of Miami Reserve. Defendants raise this same argument in their Motion for Reconsideration. The Court considered these arguments in its original ruling and concluded that the Tenth Circuit's holding that Miami Tribe's did not "exercise governmental power" over Miami Reserve under the Indian Gaming Regulation Act did not preclude Miami Tribe from qualifying as a "tribal government that exercises jurisdiction over the land" under the ILCA. The Court's limited holding for purposes of applying the land consolidation policies contained in 25 U.S.C. § 2216(a) held that Miami Tribe's actions were sufficient to establish that Miami Tribe exercises jurisdiction over Miami Reserve. The pertinent portion of the Court's Memorandum and Order states:

> While the Court agrees that the Tenth Circuit has settled the issue of whether Miami Tribe exercises jurisdiction over Miami Reserve under the Indian Gaming Regulatory Act, the Court is not convinced that the Tenth Circuit's decision answers the question whether Miami Tribe would qualify as a "tribal government that exercises jurisdiction over the land" under the ILCA. The Court does not interpret 25 U.S.C. § 2216(a)'s use of the phrase "tribal government that exercises jurisdiction over the land" to require an actual Congressional grant of jurisdiction over Miami Reserve to Miami Tribe. Miami Tribe's undisputed, claimed current actions and activities with regard to Miami Reserve reflect those of a tribe that exercises jurisdiction over Miami Reserve. It patrols and protects the lands, takes care of any burning needed, passes laws governing use of the lands, leases the lands, issues permits for individuals to use the lands, and uses the land for religious ceremonies. These actions are sufficient to establish that Miami Tribe exercises jurisdiction over Miami Reserve for purposes of applying the land consolidation policies contained in 25 U.S.C. § 2216(a).[15]

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[13]*See* doc. 23.

[14]*See* doc. 27.

[15]Doc. 29.

The Court determines that Defendants have not met their burden of demonstrating any of the grounds that would warrant reconsideration of the Court's June 22, 2005 Memorandum and Order. Defendants arguments merely rehash in greater detail the same arguments previously considered and rejected by the Court.[16] As such, the Court declines to reconsider this issue.

B. 25 C.F.R. §§ 152.23 and 152.25(d)

Defendants next argue that the Court's ruling mistakenly reads 25 C.F.R. §§ 152.23 and 152.25(d) as if they state that the Department of the Interior "shall" approve a transfer if there is a special relationship between Smith and the Miami Tribe. Defendants argue that the Court's decision effectively removes the agency's discretion and requires transfer if the agency finds a special relationship exists between the would-be donor and the would-be transferee tribe.

The pertinent portion of the Court's June 22, 2005 Memorandum and Order is set forth below:

> In this case, the BIA expressly found that a special relationship exists between grantor Smith and grantee Miami Tribe as Smith is a member of Miami Tribe. Notwithstanding this determination, the BIA required Smith to show "special circumstances" justifying the gift transfer. The regulation, however, uses the disjunctive "or." Thus, under the plain language of the regulation, Smith need only meet one of the three listed conditions. The BIA found that a special relationship exists between Smith and Miami Tribe. That finding, by itself, is sufficient under 25 C.F.R. § 152.25(d) to allow Smith to give his interest to Miami Tribe.[17]

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[16]*See Resolution Trust Corp. v. Greif*, 906 F. Supp. 1446, 1456-57 (D. Kan. 1995) (noting a motion to reconsider is not a mechanism to raise arguments or present evidence that should have been raised in the first instance, or to rehash arguments previously considered and rejected by the court).

[17]Doc. 29.

Contrary to Defendants' claim, the Court's Memorandum and Order does not state that the agency is required to approve a request if one of the three listed conditions in 25 C.F.R. § 152.25(d)[18] is met. Instead, the Court held that the BIA's finding that a "special relationship" exists between Smith and Miami Tribe was sufficient by itself under 25 C.F.R. § 152.25(d) for the agency to *allow* Smith to give his interest to Miami Tribe. The Court found the BIA's determination that Smith must show "special circumstances" *and* a "special relationship between the grantor and grantee" under 25 C.F.R. § 152.25(d) was not supported by the regulation's usage of the disjunctive "or."

Defendants' request for reconsideration on this issue is therefore denied.

C. Defendants' Alternative Request for Remand

Defendants alternatively request that if the Court concludes that its Memorandum and Order was otherwise correct, that the Court should remand the case to the agency for further review. They contend that before the Court grants the extraordinary remedy of remanding with an instruction to grant the approval of Smith's transfer, the Court should be sure that the agency has actually considered all applicable factors preliminary to an acquisition in trust and complied with all applicable procedures, including those governing acquisitions as outlined in 25 C.F.R. Part 151. Otherwise, in its attempt to correct certain perceived

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[18]25 C.F.R. § 152.25(d) addresses conveyances of trust or restricted land for less than the appraised fair market value or no consideration. It provides:

> 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 the owner's spouse, brother, sister, 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.

failures, the Court itself would inadvertently be mandating that the agency act without having been permitted to consider all potentially applicable factors and without having been given the opportunity to comply with any procedures that may be applicable.

Plaintiff argues that Defendants' request for "remand for further review" is pointless. Under the circumstances and findings in the record, further review is unwarranted because there is no reasonable or justifiable basis for not approving the gift transfer.

This Court has statutory authority to reverse a wrongful determination and compel agency action wrongfully withheld under the Administrative Procedures Act ("APA"). 5 U.S.C. § 706 provides, in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law.[19]

Notwithstanding the APA's express grant of authority for a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed,"[20] the Supreme Court has set forth the general principle that a reviewing court should remand a case to an agency for decision of a matter that statutes place

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[19] 5 U.S.C. § 706.

[20] *Id.*

primarily in agency hands.[21] Thus, if the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.[22]

The Tenth Circuit has likewise held that if an agency decides the case on a ground believed by an appellate court to be wrong, the case has to be remanded to the agency.[23] A remand rather than court consideration of the merits of appellant's case is the general procedure absent special circumstances or questions of law which are determinative of the appellant's claims.[24]

While in most cases where a litigant successfully challenges an agency's action the appropriate remedy is to remand the proceeding for agency action not inconsistent with the decision of the reviewing court, there are limitations to this rule.[25] When administrative misuse of procedure has delayed relief, courts have the equitable power to order relief tailored to the situation, not mere remand for agency use of its discretion.[26] The import of these cases is that when agency delays or violations of procedural requirements are so extreme that the court has no confidence in the agency's ability to decide the matter expeditiously

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[21] *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002).

[22] *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

[23] *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004).

[24] *Wilder v. Prokop*, 846 F.2d 613, 621 (10th Cir. 1988) (citing *Shubinsky v. United States*, 488 F.2d 1003, 1007 (Ct. Cl. 1973)).

[25] *Greene v. Babbitt*, 943 F. Supp. 1278, 1287 (W.D. Wash. 1996).

[26] *Benten v. Kessler*, 799 F. Supp. 281, 291 (E.D.N.Y. 1992) (citing *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)).

and fairly, it is not obligated to remand.[27] Rather than subjecting the party challenging the agency action to further abuse, it may put an end to the matter by using its equitable powers to fashion an appropriate remedy.[28]

In its June 22, 2005 Memorandum and Order, the Court found that the BIA's first articulated justification, that Indian landowners receive at least fair market value for their property interest unless special circumstances warrant otherwise, is inconsistent with 25 C.F.R. § 152.25(d), as well as 25 U.S.C. 2216(b). The Court further found that the BIA's second articulated reason, reduction of further fractionation of Miami Reserve, failed to consider the proposed transfer's long-range impact on further fractionation of Miami Reserve. Because the BIA's first reason for its decision was not in accordance with the law and its second reason failed to consider an important aspect of a factor which it relied in making its decision, the Court held that the BIA's decision denying Smith's application to convey a portion of his undivided interest in Miami Reserve was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

As pointed out by Defendants, the Court found that the BIA's second articulated reason for its decision failed to consider the long-term impact of further fractionation upon Miami Reserve. Remanding the case would permit the BIA to consider this aspect of further fractionation. Although the Court has concerns whether the BIA can fairly consider and decide Smith's application in light of the parties' past litigation history, the Court determines that these concerns are not sufficient to order that the BIA approve Smith's application to transfer his interest in Miami Reserve to Miami Tribe. The Court will therefore grant

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[27] *Greene*, 943 F. Supp. at 1288.

[28] *Id.*

Defendants' Motion for Reconsideration as to the portion of the Court's Memorandum and Order that directs the BIA to forthwith approve Smith's application to transfer one-third of his 3/38 interest in Miami Reserve to Miami Tribe.

Based upon Supreme Court precedent that a reviewing court should remand a case to an agency for a matter that statutes place primarily in agency hands, the Court determines that this case should be remanded back to the BIA for further proceedings consistent with the Court's June 22, 2005 Memorandum and Order.

IT IS THEREFORE ORDERED THAT Defendants' Motion for Reconsideration (doc. 30) is granted in part and denied in part. Upon reconsideration, the Court reverses the BIA's January 11, 2002 decision denying Smith's application for approval to gift convey one-third of his interest in Miami Reserve to Miami Tribe but remands the case back to the agency for further proceedings consistent with the Court's June 22, 2005 Memorandum and Order.

IT IS SO ORDERED.

Dated at Kansas City, Kansas on this 23rd day of November, 2005.

s/ David J. Waxse
David J. Waxse
United States Magistrate Judge

cc: All counsel

tions is six years from the date the claim accrued. SmartStop maintains that its contract claim is timely because, based on "AT & T's repeated retroactive adjustments to its statements," SmartStop "could not reasonably discover AT & T's breach for several years after the call." AT & T contends that any cause of action for breach of contract accrued on the date SmartStop received quarterly statements from AT & T. I find that there are material facts in dispute as to when SmartStop's claim for breach of contract accrued that preclude entry of summary judgment in SmartStop's favor. Accordingly, SmartStop's Motion for Partial Summary Judgment Regarding Statute of Limitations as to its Fifth Claim for Relief for Breach of Contract is **DENIED.**

IV. *CONCLUSION*

In conclusion, for the reasons stated above, it is

ORDERED that Defendant's Motion to Dismiss pursuant to FED. R. CIV. P 12(b)(1) Plaintiff's Second, Third and Fourth Claims for Relief under 47 U.S.C. §§ 276, 201, and 416(c) for lack of subject matter jurisdiction is **GRANTED.** Defendant's Motion to Dismiss pursuant to FED. R. CIV. P 12(b)(6) Plaintiff's Second, Third and Fourth Claims for Relief under 47 U.S.C. §§ 276, 201, and 416(c) based on statute of limitations is **DENIED AS MOOT,** it is

FURTHER ORDERED that Defendant's Motion to Dismiss pursuant to FED. R. CIV. P 12(b)(6) Plaintiff's First Claim for Relief for Breach of Contract based on statute of limitations is **DENIED,** it is

FURTHER ORDERED that Defendant's Motion to Dismiss pursuant to FED. R. CIV. P 12(b)(6) Plaintiff's Fifth Claim for Relief for Unjust Enrichment is **DENIED,** it is

FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment Regarding Statute of Limitations as to its Second, Third and Fourth Claims for Relief under 47 U.S.C. §§ 276, 201, and 416(c) is **DENIED AS MOOT,** it is

FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment Regarding Statute of Limitations as to its First Claim for Relief for Breach of Contract is **DENIED.**

MIAMI TRIBE OF OKLAHOMA, Plaintiff,

v.

UNITED STATES of America, et al., Defendants.

No. CIV.A.03–2220–DJW.

United States District Court, D. Kansas.

June 22, 2005.

Background: Indian tribe brought action under Administrative Procedures Act seeking judicial review of Department of Interior's Bureau of Indian Affairs' (BIA) decision denying tribe member's application to gift portion of his interest in restricted land to tribe.

Holdings: The District Court, Waxse, United States Magistrate Judge, held that:

(1) BIA's holding that there were no "special circumstances" warranting approval of transfer was arbitrary, and

(2) denial of approval on ground that transfer would increase further fractionation of individually-owned Indian lands was arbitrary.

Reversed.

1. Administrative Law and Procedure ⇐753

Under review under Administrative Procedure Act (APA), agency's action must be upheld, if at all, on basis articulated by agency itself. 5 U.S.C.A. § 706.

2. Administrative Law and Procedure ⇐763, 785

In order to determine whether agency acted arbitrarily, capriciously, abused its discretion, or acted not in accordance with law, reviewing court must determine whether agency's explanation for its decision is based on consideration of relevant facts and whether clear error of judgment occurred. 5 U.S.C.A. § 706.

3. Administrative Law and Procedure ⇐760, 763

Judicial inquiry into agency's decision should be substantial inquiry that is searching and careful; however, reviewing court has no power to substitute its own judgment for that of administrative agency. 5 U.S.C.A. § 706.

4. Administrative Law and Procedure ⇐763

Agency decision should be set aside if court finds that: agency relied on factors that Congress has not intended for it to consider, entirely failed to consider important aspect of problem, offered explanation for its decision that runs counter to evidence before agency, or is so implausible that it could not be ascribed to difference in view or product of agency expertise. 5 U.S.C.A. § 706.

5. Indians ⇐15(2)

Bureau of Indian Affairs' (BIA) stated policy that Indian landowners had to receive at least fair market value for allotted land purchases unless "special circumstances" warranted otherwise was not in accordance with regulation permitting Indian owners to convey trust or restricted land for less than appraised fair market value or for no consideration when there was "special relationship" between grantor and grantee, and thus invocation of policy to preclude tribe member from giving portion of his interest in property to tribe was arbitrary and capricious. Indian Land Consolidation Act, § 217(b), as amended, 25 U.S.C.A. § 2216(b); 25 C.F.R. § 152.25(d).

6. Indians ⇐15(2)

Bureau of Indian Affairs' (BIA) denial of tribe member's application to gift portion of his interest in restricted land to tribe on ground that transfer would increase further fractionation of individually-owned Indian lands was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law, where property was part of tribe's former reservation lands, tribe had indicated its intention to consolidate land interests in reserve in its land consolidation plan filed with and approved by BIA, and tribe had no incentive or plan to ever transfer any interest it might obtain in reserve. 25 C.F.R. § 152.23.

7. Indians ⇐15(2)

Miami Tribe qualified as "tribal government that exercises jurisdiction over the land," and thus Indian land consolidation policies codified in Indian Land Consolidation Act Amendments of 2000 applied to tribe member's application to transfer one-third of his undivided interest in Miami Reserve to Miami Tribe, even though Miami Tribe did not exercise jurisdiction over Miami Reserve for purposes of Indian Gaming Regulatory Act, where Miami Tribe's Indian Land Consolidation Plan, approved by Bureau of Indian Affairs (BIA), expressly identified Miami Reserve as land that Miami Tribe intended to consolidate, and Miami Tribe patrolled and protected lands, took care of any burning needed, passed laws governing use of lands, leased lands, issued permits for individuals to use lands, and used land for religious ceremonies. Indian Land Con-

solidation Act, § 217(a), as amended, 25 U.S.C.A. § 2216(a).

See publication Words and Phrases for other judicial constructions and definitions.

Kip A. Kubin, Bottaro, Morefield & Kubin, LC, Kansas City, MO, Christopher J. Reedy, Colantuono & Associates LLC, Leawood, KS, for Plaintiff.

David D. Zimmerman, Melanie D. Caro, Office of United States Attorney, Kansas City, KS, for Defendants.

MEMORANDUM AND ORDER

WAXSE, United States Magistrate Judge.

Plaintiff Miami Tribe of Oklahoma ("Miami Tribe") has filed this action pursuant to the Administrative Procedures Act,[1] seeking judicial review of the Department of the Interior's Bureau of Indian Affairs' ("BIA") decision denying James E. Smith's application to gift a portion of his interest in restricted land. Smith seeks to convey one-third of his 3/38 undivided interest in a thirty-five acre allotment known as the Maria Christiana Miami Reserve No. 35 to Miami Tribe. The parties have consented to the exercise of jurisdiction by the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). For the reasons set forth below, the Court reverses the BIA's denial of Smith's request to transfer a portion of his interest to Miami Tribe.

I. Facts

James E. Smith ("Smith"), a member of the Miami Tribe, holds a 3/38 restricted undivided interest in the Maria Christiana allotment, Miami No. 35 ("Miami Reserve"), located in Miami County, Kansas. He desires to gift transfer one-third of his 3/38 undivided interest to Miami Tribe. Smith inherited his 3/38 undivided interest in the Miami Reserve through his tribal ancestor Maria Christiana DeRome, who was originally granted a restricted fee patent for restricted allotment of 200 acres dated December 15, 1859.[2] The 1859 Miami Reserve land patent issued to the infant Maria Christiana DeRome provided that the lands "shall never be sold or conveyed without the consent of the Secretary of the Interior, for the time being."

Over time, the original 200–acre allotment has been reduced to its present size of approximately 35 acres. After Maria Christiana DeRome died in 1860, her parents sold 120 of the original 200 acres with the approval of the Secretary of the Interior. In 1986, Midwest Investment Properties, Inc. filed a partition action on a claim of adverse possession to ownership of the unrestricted interest in the remaining 80 acres of the allotment. The Court ordered the partitioning of the 80 acres into two tracts consisting of 45 acres to Midwest Investment Properties, Inc. and 35 acres to the Indian owners in restricted fee title.[3]

In 1995, the BIA denied a request by Earlene Smith Downs, one of Smith's relatives and owner of an interest in the Miami Reserve property, to convey by gift one percent of her undivided interest to Miami Tribe.[4] In denying her request, the BIA

1. 5 U.S.C. §§ 702–706.

2. The Maria Christiana Miami Reserve No. 35 has a long and intricate litigation history. *See Miami Tribe of Okla. v. United States*, 927 F.Supp. 1419 (D.Kan.1996); *Miami Tribe of Okla. v. United States*, 5 F.Supp.2d 1213 (D.Kan.1998); *State ex rel Graves v. United States*, 86 F.Supp.2d 1094 (D.Kan.2000), *Kansas v. United States*, 249 F.3d 1213 (10th Cir.2001); and *Miami Tribe of Okla. v. United States*, 316 F.Supp.2d 1035 (D.Kan.2004).

3. *Midwest Inv. Properties, Inc. v. DeRome*, No. 86–2497–O (D.Kan.1986).

4. *Downs v. Acting Muskogee Area Dir.*, 29 IBIA 94, 1996 WL 164987 (1996).

noted that Ms. Downs was not a member of Miami Tribe and she did not have a special relationship or circumstance with Miami Tribe warranting the gift conveyance.

In 2001, Smith similarly sought authorization from the Secretary of the Interior to convey by gift one-third of his interest in Miami Reserve to Miami Tribe. He completed an Application for Gift Deed of Indian Land dated August 17, 2001 to obtain the necessary approval from the Secretary of the Interior for the gift conveyance.[5] His stated reason for the proposed conveyance was that he wished to do something for the benefit of Miami Tribe and its members.

On January 10, 2002, the BIA, through Acting Director Dan Deerinwater, denied Smith's application for gift conveyance. In declining to approve the transfer, the BIA accepted that a special relationship exists between Smith, as a member of Miami Tribe, and Miami Tribe. Notwithstanding its recognition of the existence of a special relationship between Smith and Miami Tribe, the BIA found that no special circumstances justified a gift of Smith's interest to Miami Tribe. The BIA determined that Smith's conveyance of a portion of his interest would add to, rather than eliminate, the further fractionation of individually-owned Indian lands and would not serve to consolidate fractional interests and ownership into usable parcels. It further found that the proposed conveyance would not enhance tribal sovereignty or promote tribal self-sufficiency and self-determination any better than what could be accomplished through Miami Tribe's approved business development lease of Miami Reserve. The BIA concluded that the proposed conveyance would not be in the best long-term interest of Smith or the other allotment owners and that the conveyance would conflict with the Federal government's policy on fractionated interests as set out by the Indian Land Consolidation Act Amendments of 2000.[6]

In February 2002, Smith appealed the BIA's initial decision to the Interior Board of Indian Appeals ("Appeals Board"). The Appeals Board subsequently granted Miami Tribe's motion to intervene. Following the submission and consideration of briefs on the matter, the Appeals Board affirmed the BIA's decision in *Smith v. Acting Eastern Oklahoma Regional Director*.[7]

On May 5, 2002, Miami Tribe filed its Complaint in which it asserted three Counts. Count I of the Complaint seeks judicial review of the BIA's decision under the Administrative Procedures Act ("APA").[8] Count II alleges that Defendants breached their fiduciary and trust duties to Miami Tribe. Count III alleges that Defendants have violated substantive and procedural due process and property rights of Miami Tribe.

Early in this case, the parties agreed to bifurcate Count I (APA, Injunctive Relief, and Violation of 25 U.S.C. § 2216) of Plaintiff's Complaint from Counts II (Breaches of Trust) and III (Constitutional Violations) and to proceed first with Count I.[9] The Court's Scheduling Order provides that the scheduling issues with regard to Counts II and III will be taken up after the Court rules on the parties' briefs regarding the review of the administrative agency decision.

5. Admin. R. (doc. 3) at 121.

6. Pub.L. No. 106–462, 114 Stat.1991 (codified as amended at 25 U.S.C. §§ 2201–2219) (2000).

7. 38 IBIA 182, 2002 WL 32345894 (Oct. 31, 2002).

8. 5 U.S.C. § 702.

9. *See* Scheduling Order (doc. 6).

The parties' original APA briefing submitted to the Court focused primarily on whether the BIA correctly applied 25 C.F.R. §§ 152.23 and 152.25(d). Neither party focused on whether the 2000 amendments to the Indian Land Consolidation Act ("ILCA"), particularly 25 U.S.C. § 2216(b), applied to Smith's application for approval to transfer a percentage of his interest in Miami Reserve to Miami Tribe. The Court thereafter requested additional briefing from the parties to address this issue. The parties submitted the requested briefing and the Court is now ready to rule.

II. Standard of Review

Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." [10] But the "ultimate standard of review is a narrow one." [11]

[1] The APA authorizes the reviewing court to "compel agency action unlawfully withheld" and to "hold unlawful and set aside agency actions, findings, and conclusions" that the court finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [12] Under an APA review, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." [13] The Tenth Circuit has identified the "essential function of agency review as an analysis of"(1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." [14]

[2, 3] In order to determine whether the agency acted arbitrarily, capriciously, abused its discretion, or acted not in accordance with the law, the reviewing court must determine whether the agency's explanation for its decision is based on a consideration of the relevant facts and whether a clear error of judgment occurred.[15] The inquiry into the agency's decision should be a substantial inquiry that is searching and careful; however, the reviewing court has no power to substitute its own judgment for that of the administrative agency.[16]

[4] An agency decision should be set aside if the court finds that:

> the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[17]

10. 5 U.S.C. § 702; *see Catron County Bd. of Comm'rs v. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir.1996).

11. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

12. 5 U.S.C. §§ 706(1)-(2)(A); *Citizens*, 401 U.S. at 415–16, 91 S.Ct. 814; *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573–75 (10th Cir.1994).

13. *Olenhouse*, 42 F.3d at 1575 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

14. *Olenhouse*, 42 F.3d at 1574.

15. *Citizens*, 401 U.S. at 416, 91 S.Ct. 814.

16. *Id.*

17. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856.

III. The BIA's Decision

In making its decision, the BIA applied the following two regulations dealing with the sale, exchange, or conveyance of Indian trust or restricted lands: 25 C.F.R. §§ 152.23 and 152.25(d). The regulation setting forth the procedure for applications for a sale, exchange, or gift of restricted Indian land interests is contained in 25 C.F.R. § 152.23, which provides:

> 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 or as under conditions set out in § 152.25(d).[18]

25 C.F.R. § 152.25(d) addresses conveyances of trust or restricted land for less than the appraised fair market value or no consideration. It provides:

> 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 the owner's spouse, brother, sister, 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.[19]

In applying these regulations, the BIA provided two primary reasons for denying Smith's application to transfer one-third of his interest in Miami Reserve to Miami Tribe. The first reason articulated by the BIA was that Smith's proposed gift conveyance was contrary to its position that Indian owners receive at least fair market value when disposing of their property.[20] The BIA's second stated reason for denying the application was based upon the BIA's finding that conveying only one-third of Smith's interest would add to further fractionation of individually-owned Indian lands.[21] The Court will discuss in turn each reason articulated by the BIA.

A. Gift Nature of Smith's Proposed Conveyance

The first policy consideration articulated by the BIA in support of its decision to deny Smith's application concerned the fact that Smith seeks to give, rather than sell, a portion of his interest to Miami Tribe. In its determination letter, the BIA states its general position regarding proposed land transfers for less than fair market value: "[T]he Bureau's position remains unchanged that Indian landowners receive at least fair market value for allotted land purchases unless special circumstances warrant otherwise." [22] Although the BIA's decision recognized that a "special relationship" exists between Smith and Miami Tribe because Smith is a member of Miami Tribe, the BIA ultimately concluded that neither Smith nor Miami Tribe presented any "special circumstances that would justify a gift of a portion of [Smith's] undivided interest to the Tribe." [23]

[5] Miami Tribe argues that the BIA's uncompromising position on gift conveyances violates the language of its own regulation, which expressly authorizes no-consideration transfers when a "special

18. 25 C.F.R. § 152.23.

19. 25 C.F.R. § 152.25(d).

20. Admin. R. at 179.

21. Admin. R. at 179–180.

22. Admin. R. at 179.

23. Admin. R. at 179.

relationship" exists between the grantor and grantee. The Court agrees with Miami Tribe that the BIA's stated policy that Indian landowners receive at least fair market value for allotted land purchases unless "special circumstances" warrant otherwise is not in accordance with 25 C.F.R. § 152.25(d). The regulation states that 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 the owner's spouse, brother, sister, 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." [24]

In this case, the BIA expressly found that a special relationship exists between grantor Smith and grantee Miami Tribe as Smith is a member of Miami Tribe. Notwithstanding this determination, the BIA required Smith to show "special circumstances" justifying the gift transfer. The regulation, however, uses the disjunctive "or." Thus, under the plain language of the regulation, Smith need only meet one of the three listed conditions. The BIA found that a special relationship exists between Smith and Miami Tribe. That finding, by itself, is sufficient under 25 C.F.R. § 152.25(d) to allow Smith to give his interest to Miami Tribe.

Even more compelling to the Court is the apparent inconsistency between the BIA's stated policy regarding transfers for less than fair market value and the language within 25 U.S.C. § 2216(b), added by the 2000 amendments to the Indian Land Consolidation Act.[25] Section 2216(b) specifically addresses sales, exchanges and gift deeds (1) between Indians, and (2) *between Indians and Indian tribes.* It provides:

> Notwithstanding any other provision of law and only after the Indian selling, exchanging, or conveying by gift deed *for no or nominal consideration* an interest in land, has been provided with an estimate of the value of the interest of the Indian pursuant to this section—
>
> (i) the 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; and
>
> (ii) the approval of a transaction that is in compliance with this section shall not constitute a breach of trust by the Secretary.[26]

In its decision, the BIA states that its "position remains unchanged that Indian landowners receive at least fair market value when disposing of their property, and that Indian tribes should pay fair market value for allotted land purchases unless special circumstances warrant otherwise." [27] A close reading of 25 U.S.C. § 2216(b) does not support this presump-

24. 25 C.F.R. § 152.25(d) (emphasis added).

25. In their supplemental briefing, Defendants argue that the Court may not properly consider 25 U.S.C. § 2216(b)(1) because an analysis of this subsection of the statute is not found in the administrative record and it was not raised as an issue by the parties in the initial briefs filed with the Court. While the parties did not specifically cite 25 U.S.C. § 2216(b)(1) in their initial briefs, Miami Tribe generally referenced 25 U.S.C. §§ 2201 and 2216, along with several references to the Indian Land Consolidation Act, codified at 25 U.S.C. §§ 2201–2219, in its Complaint (doc. 1) and its Brief (doc. 8). The Court therefore finds that Miami Tribe's references are sufficient so that the Court may consider 25 U.S.C. § 2216(b)(1) in its review of the BIA's decision.

26. 25 U.S.C. § 2216(b)(1) (emphasis added).

27. Admin. R. at 179.

tion when the transaction is between Indians or between Indians and Indian tribes. In seemingly direct contrast, the statute allows the sale, exchange, or conveyance of an interest for less than fair market value, as long as (1) the sale, exchange or conveyance is between Indians or is between Indians and Indian tribes, and (2) the owner has been provided with, or waives, an estimate of the value of the interest sought to be conveyed. The Court therefore finds that the BIA's first articulated reason for denying the transfer, i.e., that it is a gift conveyance, is not in accordance with 25 U.S.C. § 2216(b).

B. Impact on Fractionation

The second reason stated by the BIA in its January 11, 2002 decision was that Smith's proposed transfer would add to further fractionation of individually-owned Indian lands. The BIA noted that Miami Tribe does not already hold any interest in the property other than a business development lease approved in 1999.[28] The BIA found that the proposed conveyance of only one-third of Smith's undivided interest in the property would "add to, rather than eliminate, the further fractionation of individually-owned Indian lands," and would not serve to consolidate the fractional interests and the ownership of those interests into usable parcels.[29] It further found that the proposed conveyance to Miami Tribe would not enhance tribal sovereignty or promote tribal self-sufficiency and self-determination over what could be accomplished through the business development lease with Miami Tribe.[30] The BIA also found that the proposed transfer would not reverse the effects of the allotment policy on Miami Tribe due to the off-reservation, out-of-state location of the tract.[31] The BIA further expressed concerns regarding "tract management, competing interests between [Miami] Tribe and the individual land owners, and the potential for land use conflicts." [32] The BIA reasoned that "highly fractionated ownership interests greatly complicate the Bureau's land management efforts and the successful discharge of the Federal government's trust responsibilities." [33]

Miami Tribe contends that the BIA's erroneous finding that the proposed transfer would cause further fractionation is based on a short-sighted view of the transfer and that the BIA erroneously failed to consider the long-range impact on further fractionation. Miami Tribe argues that, in the long term, conveyance of a portion of Smith's interest in the land to the Tribe would reduce further fractionation of Miami Reserve rather than increase it because Miami Tribe will likely exist into perpetuity and, because the Tribe has no descendants or heirs, further fractionation would be eliminated.

The applicable regulation governing exchanges of tribal land, 25 C.F.R. § 152.23, indicates that the BIA's examination should be based on whether the transaction appears to be clearly justified "in the light of the long-range best interest of the owner or owners." The BIA found that the conveyance of only one-third of Smith's interest would increase the fractionation of individually-owned Indian lands because Smith's already fractionated interest would be further fractionated between Smith and Miami Tribe. The BIA's finding, however, is based upon the immediate, short-term effect of the proposed transfer. Conspicu-

28. Admin. R. at 179.

29. Admin. R. at 179–180.

30. Admin. R. at 180.

31. Admin. R. at 180.

32. Admin. R. at 179.

33. Admin. R. at 179.

ously absent from the BIA's decision is any discussion of whether it considered the longer-range impact on further fractionation by Smith's proposed transfer. Miami Tribe has clearly indicated its intention to consolidate the land interests in Miami Reserve in its Land Consolidation Plan filed with and approved by the BIA. In its brief, Miami Tribe continues to state its intent to consolidate ownership interests in Miami Reserve.

Perhaps the BIA's reliance upon the short-term impact on further fractionation of individually-owned Indian lands would pass muster if Smith's application sought to transfer a portion of his interest to an unrelated Indian tribe with no connection or ties to the property. That is not the case, however, as Smith seeks to give a portion of his interest in Miami Reserve to the tribe of which he is a member. Moreover, Miami Reserve is part of the former reservation lands of Miami Tribe. At least one other Miami Reserve landowner has attempted to transfer a portion of her interest in Miami Reserve to Miami Tribe. Miami Tribe has provided the BIA with notice of its intent to include Miami Reserve in its land consolidation plan. As noted by the Tenth Circuit in 2001, Miami Tribe has adopted Miami Reserve's twenty-plus owners into its tribe, those owners have consented to tribal jurisdiction pursuant to a lease with the Tribe, and the Tribe has developed the tract.[34] Miami Tribe claims that it regularly patrols Miami Reserve, takes care of any burning needed, passes laws governing the use of the lands, leases the lands, issues permits for individuals to use the lands, and holds religious ceremonies. Miami Tribe has indicated that it has no incentive or plan to ever transfer any interest it may obtain in Miami Reserve.

[6] As stated by the Supreme Court, one of the reasons for setting aside an agency decision is "if the court finds that the agency... entirely failed to consider an important aspect of the problem."[35] In this case, the Court, after much reflection, determines that the BIA's failure to consider Smith's application based upon the long-term impact on fractionation justifies setting aside the BIA's decision. It is clear to the Court that Miami Tribe has extensive connections and ties to Miami Reserve. The BIA's exclusive focus on the short-term impact of Smith's proposed transfer on the further fractionation of individually-owned Indian lands, in light of Miami Tribe's extensive connection and ties to Miami Reserve, convinces the Court that the BIA failed to consider an important aspect of a factor upon which it relied in making its decision. The Court therefore concludes that the BIA's second articulated reason for denying Smith's application, which is based upon the determination that it would increase further fractionation of individually-owned Indian lands in the short-term without considering the long-term impact, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

C. Indian Land Consolidation Act Amendments of 2000

The Court also finds that the BIA's decision as a whole is contrary to the stated

34. *Kansas v. United States*, 249 F.3d 1213, 1230 (10th Cir.2001). *See also State ex rel Graves*, 86 F.Supp.2d at 1096.

35. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

policies of Congress under the Indian Land Consolidation Act ("ILCA").[36] Specifically, the 2000 Amendments to the ILCA appear to encourage the type of transfer at issue in this case.

Congress enacted the ILCA[37] in 1983 and thereafter amended the ILCA in 1984[38] and in 2000.[39] The 2000 amendments modified several existing sections of the ILCA, added the declaration of policy, and added sections 214—220.[40] The Declaration of Policy added by Public Law 106–462[41] in November 2000 states:

> It is the policy of the United States—
>
> (1) to prevent the further fractionation of trust allotments made to Indians;
>
> (2) to consolidate fractional interests and ownership of those interests into usable parcels;
>
> (3) to consolidate fractional interests in a manner that enhances tribal sovereignty;
>
> (4) to promote tribal self-sufficiency and self-determination; and
>
> (5) to reverse the effects of the allotment policy on Indian tribes.

The 2000 amendments to the ILCA also added a statute specifically addressing trust and restricted land transactions. Subsection (a) of 25 U.S.C. § 2216 sets forth the federal government's policy on Indian land consolidation:

> It is the policy of the United States to encourage and assist the consolidation of land ownership through transactions—
>
> (1) involving individual Indians;
>
> (2) between Indians and the tribal government that exercises jurisdiction over the land; or
>
> (3) between individuals who own an interest in trust and restricted land who wish to convey that interest to an Indian or the tribal government that exercises jurisdiction over the parcel of land involved;
>
> in a manner consistent with the policy of maintaining the trust status of allotted lands. Nothing in this section shall be construed to apply to or to authorize the sale of trust or restricted lands to a person who is not an Indian.[42]

Defendants argue in their supplemental briefing that Smith's application to transfer one-third of his undivided interest in Miami Reserve is not governed by 25 U.S.C. § 2216(a), and that this statute should have no effect on the BIA's application of 25 C.F.R. §§ 152.23 and 152.25(d), because Miami Tribe does not qualify as "the tribal government that exercises jurisdiction over the land."[43]

1. Whether 25 U.S.C. § 2216 applies to Smith's application

The Indian Land Consolidation Act does not define "tribal government that exercises jurisdiction over the land," nor does it provide any guidance as to what Congress specifically intended by its reference to "tribal governments that exercise jurisdiction over the parcel of land involved," as used in 25 U.S.C. § 2216(a). Defendants contend that the Tenth Circuit has re-

36. Indian Land Consolidation Act of 1983, Pub.L. No. 97–459, §§ 201–211, 96 Stat. 2519 (1983).

37. *Id.*

38. Indian Land Consolidation Act Amendments of 1984, Pub.L. No. 98–608, 98 Stat. 3171 (1984) (amending 25 U.S.C. §§ 2203–2206, and adding § 2211).

39. Indian Land Consolidation Act Amendments of 2000, Pub.L. No. 106–462, 114 Stat. 1991 (2000).

40. Codified at 25 U.S.C. §§ 2213–2219.

41. See notes following 25 U.S.C. § 2201.

42. 25 U.S.C. § 2216(a) (emphasis added).

43. 25 U.S.C. § 2216(a)(2).

solved the general issue of whether Miami Tribe has jurisdiction over Miami Reserve under the Indian Gaming Regulatory Act in *Kansas v. United States.*[44] Defendants urge the Court to apply the same jurisdictional analysis by analogy to Miami Tribe's jurisdiction under the ILCA.

Miami Reserve has been the subject of extensive litigation before this Court and the Tenth Circuit Court of Appeals.[45] In *Miami Tribe I* through *Miami Tribe IV,* the courts analyzed Miami Tribe's jurisdiction over Miami Reserve in the context of the Indian Gaming Regulatory Act ("IGRA"). In *Miami Tribe IV,*[46] the Tenth Circuit summarized *Miami Tribe I* Court's findings and conclusions in regard to Miami Tribe's claim of jurisdiction over the Miami Reserve as follows:

> In 1873, the Tribe agreed to sell its unallotted lands in Kansas; Congress legislated the purchases of the lands in 1882. In 1884, the Tribe sought reimbursement for the land allotted to, among others, Maria Christiana DeRome. In essence, the Tribe claimed that the Maria Christiana allotment should be treated as unallotted land and sold to the United States. The Court of Claims agreed and compensated the Tribe for the land in 1891. In 1960, the Tribe sought interest on the payments made in 1891. The Court of Claims concluded that ... 1858 legislation had unlawfully taken funds and land designated for the Tribe [including Reserve No. 35], and awarded interest on the 1891 payments. The court in [Miami Tribe I] concluded from this series of events that the Tribe has unmistakably relinquished its jurisdiction over the Reserve. Moreover, in 1873, Congress expressly abrogated the Tribe's jurisdiction [over its former lands in Kansas], which was effective no later than 1924 when any members of the Tribe remaining in Kansas-and their heirs—became naturalized citizens.[47]

The *Miami Tribe IV* Court held that Miami Tribe's activities to claim tribal jurisdiction over the tract, namely (1) the Tribe's adoption of the tract's twenty-plus owners into the Tribe, (2) those owners' consent to tribal jurisdiction pursuant to a lease with the Tribe, and (3) the Tribe's recent development of the tract, did not alter the Court's conclusion that Congress abrogated Miami Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the tract.[48] The court restated the proposition of law that "an Indian tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts." [49]

Defendants argue that the Court's jurisdictional analysis in *Miami Tribe IV* can be extended to this case. They assert that the judicial determination that Congress abrogated the Miami Tribe's jurisdiction over Miami Reserve is a crucial factor in determining whether 25 U.S.C. § 2216 applies to Smith's transaction because an Indian tribe's jurisdiction is derived from the will of Congress, not by the acts of the

44. 249 F.3d 1213 (10th Cir.2001).

45. *See Miami Tribe of Okla. v. United States,* 927 F.Supp. 1419 (D.Kan.1996) ("*Miami Tribe I*"); *Miami Tribe of Okla. v. United States,* 5 F.Supp.2d 1213 (D.Kan.1998) ("*Miami Tribe II*"); *State ex rel. Graves v. United States,* 86 F.Supp.2d 1094 (D.Kan.2000) ("*Miami Tribe III*"); *Kansas v. United States,* 249 F.3d 1213 (10th Cir.2001) ("*Miami Tribe IV*").

46. 249 F.3d 1213 (10th Cir.2001).

47. *Id,* at at 1230. *See also Miami Tribe III,* 86 F.Supp.2d at 1095.

48. *Miami Tribe IV,* 249 F.3d at 1230–31.

49. *Id.* at 1231.

tribe. Defendants argue that because Congress abrogated the Miami Tribe's jurisdiction over Miami Reserve and has done nothing since to restore jurisdiction to the Tribe, Miami Tribe does not presently exercise jurisdiction over any portion of Miami Reserve.

While the Court agrees that the Tenth Circuit has settled the issue of whether Miami Tribe exercises jurisdiction over Miami Reserve under the Indian Gaming Regulatory Act, the Court is not convinced that the Tenth Circuit's decision answers the question whether Miami Tribe would qualify as a "tribal government that exercises jurisdiction over the land" under the ILCA. The Court does not interpret 25 U.S.C. § 2216(a)'s use of the phrase "tribal government that exercises jurisdiction over the land" to require an actual Congressional grant of jurisdiction over Miami Reserve to Miami Tribe. Miami Tribe's undisputed, claimed current actions and activities with regard to Miami Reserve reflect those of a tribe that exercises jurisdiction over Miami Reserve. It patrols and protects the lands, takes care of any burning needed, passes laws governing use of the lands, leases the lands, issues permits for individuals to use the lands, and uses the land for religious ceremonies. These actions are sufficient to establish that Miami Tribe exercises jurisdiction over Miami Reserve for purposes of applying the land consolidation policies contained in 25 U.S.C. § 2216(a).

Moreover, Miami Tribe's Indian Land Consolidation Plan, approved by the BIA, expressly identifies Miami Reserve as land that the Miami Tribe intends to consolidate under the ILCA.[50] By its approval of Miami Tribe's Indian Land Consolidation Plan, the BIA has implicitly recognized Miami Tribe as exercising jurisdiction over Miami Reserve. In light of the BIA's implicit recognition of Miami Tribe as a tribal government exercising jurisdiction over Miami Reserve under the ILCA, it is inconsistent for Defendants to now claim that Miami Tribe does not qualify as a tribal government exercising jurisdiction over Miami Tribe under 25 U.S.C. § 2216(a).

The Court also finds it inconsistent for Defendants to argue that the Court should not apply the federal government's land consolidation policy contained in 25 U.S.C. § 2216(a). The BIA's decision expressly cited the "Federal government's policy on fractionated interest as set out by the Indian Land Consolidation Act Amendments of 2000" [51] in support of its decision denying Smith's application. Now the BIA argues that the federal government's land consolidation policy, also contained in the ILCA Amendments of 2000, should not apply to Smith's application. These seemingly contradictory positions give the impression that the BIA uses ILCA policies when they support its action but declines to give ILCA policies the same weight when the policies appear contrary to its decision.

[7] The Court holds that for purposes of the policy sections set forth in the ILCA, Miami Tribe qualifies as a "tribal government that exercises jurisdiction over the land." As such, the Indian land consolidation policies codified in 25 U.S.C. § 2216(a) should apply to Smith's application to transfer one-third of his undivided interest in Miami Reserve to Miami Tribe.

IV. Conclusion

The BIA articulated two policy reasons in support of its decision to deny Smith's application to transfer one-third of his undivided interest in Miami Reserve to Miami Tribe. The BIA's first articulated jus-

50. Admin. R. at 51.

51. Admin. R. at 179.

tification, that Indian landowners receive at least fair market value for their interest unless special circumstances warrant otherwise, is inconsistent with 25 C.F.R. § 152.25(d), as well as 25 U.S.C. 2216(b). The BIA's second reason, reduction of further fractionation of Miami Reserve, failed to consider the proposed transfer's long-range impact on further fractionation of Miami Reserve. Because the BIA's first reason for its decision was not in accordance with the law and its second reason was based upon its failing to consider an important aspect of a factor upon which it relied in making its decision, the BIA's decision denying Smith's application to convey a portion of his undivided interest in Miami Reserve is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court therefore reverses the BIA's January 11, 2002 decision and directs the BIA to approve Smith's application to convey one-third of his interest in Miami Reserve to Miami Tribe.

IT IS THEREFORE ORDERED that the January 11, 2002 decision of the BIA denying Smith's application for approval to gift convey one-third of his interest in Miami Reserve to Miami Tribe is hereby reversed and the BIA is instructed to forthwith approve Smith's application.

IT IS FURTHER ORDERED that a telephone Status Conference is scheduled *July 19, 2005 at 10:00 a.m.* to discuss scheduling issues with regard to Counts II and III of Plaintiff's Complaint.

IT IS SO ORDERED.

UNITED STATES of America, Plaintiff,

v.

Refugio CASTANEDA–MARQUEZ, Defendant.

No. CR 04–593 JB.

United States District Court, D. New Mexico.

Dec. 3, 2004.

Background: Defendant was convicted pursuant to his plea of guilty of illegal reentry by deported alien previously convicted of aggravated felony. United States objected to base offense level computation in presentence report.

Holding: The District Court, Browning, J., held that conviction of simple possession of marijuana, for which defendant received ten years' probation after sentence of 10 years' imprisonment was suspended, warranted base-level increase of eight rather than 12.

Ordered accordingly.

Sentencing and Punishment ⇐793

Texas conviction of simple possession of marijuana, for which defendant received ten years' probation after sentence of ten years' imprisonment was suspended, warranted base-level increase of eight as aggravated felony under Sentencing Guidelines upon conviction of illegal reentry of deported alien previously convicted of aggravated felony; simple possession did not qualify as "drug trafficking offense" under separate subsection of Sentencing Guideline providing for 12-level increase. U.S.S.G. §§ 2L1.2(b)(1)(B, C), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

JAMES E. SMITH, Appellant	:	Order Affirming Decision
v.	:	
	:	Docket No. IBIA 02-63-A
ACTING EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	October 31, 2002

This is an appeal from a January 11, 2002, decision of the Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), which denied the application of Appellant James E. Smith to gift convey an interest in the Maria Christiana allotment, Miami No. 35, Miami County, Kansas (the allotment), to the Miami Tribe of Oklahoma (Tribe). For the reasons discussed below, the Board affirms the Regional Director's decision.

Appellant holds a 3/38 restricted interest in the allotment. In July 2001, he wrote to BIA, stating that he wished to give 1/3 of his interest to the Tribe. In November 2001, he completed an application for gift deed. He advised BIA staff by telephone that his reason for wanting to make the gift was that he wished to do something for the Tribe and its members.

The Regional Director denied Appellant's application on January 11, 2002. In most respects, his decision tracks the January 5, 1995, decision in which he denied a similar request made by Earline Smith Downs. 1/ See Downs v. Acting Muskogee Area Director, 29 IBIA 94 (1996). However, unlike Downs at the time of the 1995 decision, Appellant is a member of the Tribe. 2/ Therefore, whereas the Regional Director had found that Downs did not have a

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1/ Downs sought to gift convey a one percent interest in the same allotment to the Tribe, while retaining a 15.4592 percent interest in herself.

2/ On Dec. 4, 1995, the Tribe revised its Constitution, making the heirs to the allotment eligible for membership. The revised Constitution was approved by the Acting Deputy Commissioner of Indian Affairs on Feb. 22, 1996.

special relationship with the Tribe within the meaning of 25 C.F.R. § 152.25(d), 3/ he found that Appellant does have a special relationship with the Tribe. Even so, he denied Appellant's application, explaining:

> As set out in my earlier analysis of a similar conveyance request by [Downs], highly fractionated ownership interests greatly complicate [BIA's] land management efforts and the successful discharge of the Federal government's trust responsibility. 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, [BIA's] position remains unchanged that Indian landowners receive at least fair market value when disposing of their 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 for 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 such a 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.

Regional Director's Jan. 11, 2002, Decision at 2.

3/ 25 C.F.R. § 152.25(d) provides:

"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 the owner's spouse, brother, sister, 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."

The Regional Director also found that the conveyance of only 1/3 of Appellant's interest to the Tribe would conflict with the policy of the Indian Land Consolidation Act (ILCA) Amendments of 2000 (Act of Nov. 7, 2000, Pub. L. No. 106-462, 114 Stat. 1991) because it would increase the fractionation of the allotment.

Appellant appealed the Regional Director's decision to the Board. The Tribe sought and was granted permission to intervene.

As noted above, the situation here is similar to that in Downs. In Downs, the Board stated that, in considering an application for gift conveyance, BIA was required to make a careful examination of the circumstances surrounding the application. The Board then stated:

> While a careful pre-approval examination is required, however, the determination of whether or not to approve a proposed gift conveyance is a matter within the discretion of BIA. Thus, as in the case of other BIA discretionary decisions, the Board's role here is to determine whether BIA has given proper consideration to all legal prerequisites to the exercise of discretion. If it has, and if there is support for its decision in the record, the Board will not substitute its judgment for BIA's.

29 IBIA at 97. The Board found in Downs that the Regional Director had made the necessary careful examination and that his decision was supported by the record. The Board therefore affirmed the Regional Director's denial of Downs' gift deed application.

For the most part, Appellant and the Tribe make no attempt to distinguish the situation here from the situation in Downs. Rather, they simply repeat the arguments made and rejected in the earlier case. It appears possible, however, that they intended to argue that this case may be distinguished from Downs with respect to ILCA considerations.

In Downs, the Board affirmed the Regional Director's conclusion that the proposed conveyance was in conflict with the policy of ILCA because it would increase fractionation. As indicated above, the Regional Director reached a similar conclusion in his decision in this case. In their briefs before the Board, Appellant and the Tribe suggest that there is now a plan to consolidate the fractional interests of some of the heirs to the allotment through conveyances to the Tribe. They do not contend that the Tribe presently owns an interest in the allotment. However, they state that heirs representing 25.8% of the interests in the allotment have signed agreements to transfer their interests to the Tribe. Appellant's Brief at 7, par. 29; Tribe's Brief at 7, par. 29. Neither Appellant nor the Tribe contends that this information was made available to the Regional Director, and the record does not show that it was. Clearly, the Regional Director cannot be faulted for not considering information that was not provided to him.

The Board has a well-established practice of declining to consider information presented for the first time on appeal, e.g., Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 114-15 (2000), and so declines to consider the statements made by Appellant and the Tribe concerning the intentions of other heirs. 4/ The Board finds that Appellant and the Tribe have failed to distinguish this case from Downs with respect to ILCA considerations.

Appellant and the Tribe make two arguments that were not made in Downs: (1) BIA has a non-discretionary duty to approve the transfer under 25 U.S.C. § 2216(c) and (2) BIA's denial of Appellant's request is an unconstitutional taking of property and a violation of due process under the Fifth Amendment to the United States Constitution.

25 C.F.R. § 2216(c) provides:

> **Acquisition of interest by Secretary**
>
> An Indian, or the recognized tribal government of a reservation, in possession of an interest in trust or restricted lands, at least a portion of which is in trust or restricted status on November 7, 2000 and located within a reservation, may request that the interest be taken into trust by the Secretary. Upon such a request, the Secretary shall forthwith take such interest into trust.

Appellant and the Tribe argue that this provision is applicable here because Appellant is an Indian and the allotment in which he holds an interest is within a reservation. Neither Appellant nor the Tribe provides any support for their contention that the allotment is within a reservation. Indeed, the materials they submit indicate that it is not within a reservation. Further, even if the allotment were within a reservation, Appellant's interest does not appear to be one covered by the provision because it is in restricted status. 5/

4/ Even if the Board were to consider this new information, the bare statements made by Appellant and the Tribe would have little weight given the lack of any supporting evidence.

Oddly, although Appellant states that he, like other heirs, has executed an agreement to convey his interest to the Tribe, he fails to furnish a copy of his agreement to the Board. He also fails to explain why, if he intends to convey his interest to the Tribe, his present gift deed application covers only 1/3 of his interest.

5/ The legislative history of 25 U.S.C. § 2216(c) indicates that it applies only to interests which have lost their trust or restricted status. See S. Rep. No. 106-361 at 22 (2000):

"Subsection [2216(c)] addresses situations where some or most of a parcel is held in trust, but some undivided interests in the same parcel have passed out of trust. In these situations, when the land is located within a reservation, the Secretary is to take these lands [sic] into

The Board need not reach these issues, however. 25 U.S.C. § 2216(c) is not relevant here because it addresses acquisitions, rather than dispositions of trust/restricted property. As the Regional Director made clear, his decision concerned only Appellant's request to dispose of restricted property. While recognizing that the entire transaction, had it proceeded, would have included both a disposition by Appellant and an acquisition by the Tribe, the Regional Director specifically stated that he would not consider the acquisition aspect of the proposed transaction in light of his decision concerning the disposal aspect.

To the extent Appellant and the Tribe may have intended to argue that the Regional Director erred in considering only the disposal aspect of the proposed transaction, the Board rejects that argument. Once the Regional Director determined not to approve the disposal aspect, it would have been a useless exercise to consider the acquisition aspect. He did not err in ending his inquiry upon determining not to approve the disposal.

Appellant and the Tribe contend that the Regional Director's decision is unconstitutional because it is an abrogation of the right to pass property. In support of their contention, they cite Hodel v. Irving, 481 U.S. 704 (1987), in which the Supreme Court held that the original escheat provision of ILCA effected an unconstitutional taking of property.

Although they frame their argument as a constitutional challenge to the Regional Director's decision, it is apparent that they are actually challenging the constitutionality of 25 C.F.R. § 152.25(d), as well as the several Federal statutes which make conveyances of trust and restricted land subject to approval by the Secretary of the Interior. To the extent that there is an abrogation of the right to pass property here, that abrogation was effected by Federal statute, not by the Regional Director.

The Board has no authority to declare a Federal statute or regulation unconstitutional. E.g., Kansas v. Acting Southern Plains Regional Director, 36 IBIA 152, 154 (2001), and cases cited therein. Therefore, the Board lacks jurisdiction to address this argument.

As was the case in Downs, the Regional Director made a careful examination of the circumstances surrounding Appellant's gift deed application. The Board finds that the record provides support for the Regional Director's decision.

Appellant bore the burden of proving that the Regional Director did not properly exercise his discretion. E.g., Yerington Paiute Tribe v. Acting Western Regional Director,

---

fn. 5 (continued)
trust forthwith. These provisions will facilitate greater consolidation and assist in the administration of interests in trust or restricted lands."

36 IBIA 261, 264 (2001); Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 39 (1999). Neither Appellant nor the Tribe has made such a showing here.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's January 11, 2002, decision is affirmed. 6/

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

6/ Arguments made by Appellant or the Tribe but not discussed in this decision have been considered and rejected.

All pending motions are denied.

James E. Smith v. Acting Eastern Oklahoma
Regional Director
Docket No. IBIA 02-63-A
Order Affirming Decision
Issued October 31, 2002
38 IBIA 182

Distribution:

James E. Smith
31130 S. General Kearny Rd.
143
Temecula, CA 92591-2041
BY CERTIFIED MAIL

Kenneth Bellmard, Esq.
Miami Tribe of Oklahoma
P.O. Box 1326
Miami, OK 74355-1326

Regional Director
Eastern Oklahoma Regional Office
Bureau of Indian Affairs
101 North 5th Street
Muskogee, OK 74401

Field Solicitor
U.S. Department of the Interior
7906 East 33rd Street
Suite 100
Tulsa, OK 74145

IBIA 02-63-A Ord Affg Dec. 10-31-02

SENDER:
- ☐ Complete items 1 and/or 2 for additional services.
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- ☐ Print your name and address on the reverse of this form so that we can return this card to you.
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- ☐ Write *"Return Receipt Requested"* on the mailpiece below the article number.
- ☐ The Return Receipt will show to whom the article was delivered and the date delivered.

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1. ☐ Addressee's Address
2. ☐ Restricted Delivery

3. Article Addressed to: James E. Smith

4a. Article Number 7000 1940 0006 9197 5032

4b. Service Type
☐ Registered ☐ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

5. Received By: *(Print Name)*

6. Signature *(Addressee or Agent)*

8. Addressee's Address *(Only if requested and fee is paid)*

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0011

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Eastern Oklahoma Regional Office
101 N. 5th Street
Muskogee, OK 74401-6206

IN REPLY REFER TO:

Real Estate Services

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

JAN 11 2002

Mr. James Smith
31130 S. General Kearny Rd. #143
Temecula, California 92591-2041

Dear Mr. Smith:

This is my decision on your application for a gift conveyance of 1/3 of your undivided interest in the restricted allotment of Maria Christiana, No. 35. For the reasons discussed below, I am denying your request.

Your application dated August 17, 2001, requests the conveyance of 1/3 of your undivided interest in the 35.0 acre tract known as the allotment of Maria Christiana, Miami No. 35, described as the East 35 acres of the E½ SW¼ Section 13, Township 19 South, Range 24 East, 6th P.M., Miami County, Kansas, together with a 66-foot easement over and across the North 66 feet of the West 45 acres of the E½ SW¼ Section 13, Township 19 South, Range 24 East, for the sole purpose of ingress and egress. The allotment is held in restricted status through a restricted fee patent dated December 15, 1859. According to the records of the Bureau of Indian Affairs' (Bureau) Miami Field Office, you own a undivided 11340/143640 restricted interest, or 7.89 percent, in the tract. It is your wish to transfer an undivided 1/3 of your interest to the Miami Tribe of Oklahoma as a gift for no consideration. This would amount to 3780/143640, or 2.63 percent. The reason you have given for the proposed gift is your desire to do something for the benefit of the Miami Tribe and its members.

Gift conveyances between Indians are a two-part transaction consisting of a disposal by the grantor and an acquisition by the grantee. The disposal portion is considered under the regulations of 25 CFR 152. The acquisition portion of the transaction is governed by 25 CFR 151 - Land Acquisitions. The conveyance of restricted land by gift is authorized by 25 CFR 152.23 - Applications for sale, exchange or gift, and §152.25(d) - Gifts and conveyances for less than the appraised fair market value, which provides for gift conveyances when the prospective grantee is the Indian owner's spouse, brother, sister, lineal ancestor 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.

0178

In considering applications for disposals, the Bureau is charged with the responsibility to assure that the rights of the individual landowners are protected and that it is in their long-range best interest to dispose of their land or interests in the land. Although my review of your application reveals that the proposed conveyance is not to authorized family members, I can accept that a special relationship exists between you, as a member of the Miami Tribe of Oklahoma, and the Tribe. I have also determined not to consider the acquisition portion of this transaction since the transaction will not proceed to that point.

As set out in my earlier analysis of a similar conveyance request by Ms. Earline 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. 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 landowners receive at least fair market value when disposing of their 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 for 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 such a 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.

Additionally, the Federal government's policy on fractionated interests as set out by the Indian Land Consolidation Act Amendments of 2000, P.L. 106-462, 114 Stat. 1992, is (1) to prevent the further fractionation of trust allotments made to Indians; (2) to consolidate fractional interests and ownership of those interests into usable parcels; (3) to consolidate fractional interests in a manner that enhances tribal sovereignty; (4) to promote tribal self-sufficiency and self-determination; and (5) to reverse the effects of the allotment policy on Indian tribes. Conveying only 1/3 of your undivided interest in the allotment would add to, rather than eliminate, the further fractionation of individually-owned Indian

lands. It would not serve to consolidate fractional interests and the ownership of those interest 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 your undivided interest to the Miami Tribe conflicts with stated U.S. policy.

Based on my review of your application, I do not find that your proposed gift conveyance to the Miami Tribe would be in your, or the other landowners', long-range best interest. I have also determined that it conflicts with Federal policy dealing with fractionated interests.

By copy of this letter, the Miami Tribe of Oklahoma is also advised of this decision.

This decision may be appealed to the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340 (copy enclosed). Your notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to this office. The notice of appeal should clearly identify the decision being appealed. If possible, attach a copy of the decision. Copies of the notice of appeal must be sent to (1) the Assistant Secretary - Indian Affairs, 4140 MIB, U. S. Department of the Interior, 18th and C Streets, N. W., Washington, D. C. 20240, (2) each interested party known to you, and (3) this office. The notice of appeal sent to the Board of Indian Appeals must certify that copies have been sent to these parties. If you are not represented by an attorney, you may request assistance from this office in the preparation of your appeal. If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Sincerely,

Acting Director

Enclosure

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

OCT 31 2002

Penny J. Coleman, Esq.
Acting General Counsel
National Indian Gaming Commission
1441 L Street, NW (Suite 9100)
Washington, DC 20005

Re: Whether the Maria Christiana Reserve No. 35 is "Indian lands" for Purposes of Gaming under the Indian Gaming Regulatory Act?

Dear Ms. Coleman:

I am writing to you regarding whether the Maria Christiana Reserve No. 35 (Reserve), a restricted Indian allotment located in the State of Kansas (State), constitutes "Indian lands" under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. As you know, this issue has been litigated several times with three district court decisions and a court of appeals decision.

In the last round of litigation over our opinion issued on November 10, 1998, (1998 Opinion) to the National Indian Gaming Commission (NIGC), the Department of Interior (DOI) acknowledged that it did not completely address whether the jurisdiction of the Miami Tribe of Oklahoma (Tribe) existed, thereby enabling the Tribe to exercise governmental authority over the Reserve. The 1998 Opinion set forth in part our analysis of whether the Reserve constituted "Indian lands" as defined by the IGRA as "any lands title to which is . . . held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4).

While the DOI agreed to address this issue in its briefings before the courts, given the strong language in the opinion of the Court of Appeals for the Tenth Circuit that Congress abrogated the Tribe's jurisdiction long ago, we believe this remaining issue has been decided. We nevertheless issue this opinion to assist in the NIGC's review of the management contract submitted for re-approval by the Tribe and the Butler National Service Corporation (Butler) and to ensure a complete record of this decision. Thus, for the following reasons, we find that the Tribe does not possess jurisdiction over the Reserve and, therefore, the Reserve is not "Indian lands" for purposes of gaming under the IGRA.

I. PROCEDURAL BACKGROUND

In Miami Tribe of Oklahoma v. United States, 927 F. Supp 1419 (D. Kan. 1996) (**Miami I**), the Tribe sought judicial review of the NIGC's disapproval of a

management contract between the Tribe and Butler. The Tribe appealed the initial disapproval of the contract and the NIGC affirmed the disapproval on April 4, 1995. On June 9, 1995, the NIGC supplemented its decision with the May 23, 1995, opinion of the Associate Solicitor, Division of Indian Affairs (1995 Opinion).

In his 1995 opinion, the Associate Solicitor concluded that the Tribe did not exercise the requisite governmental powers over the Reserve; thus it was not "Indian lands" as defined by the IGRA. The **Miami I** court thoroughly reviewed the history of the Reserve and determined that Congress had expressly abrogated the Tribe's jurisdiction over the Reserve. Id. at 1426. The court further noted that, after the NIGC's decision in the case, the Tribe amended its constitution, enabling it to approve membership of the current Reserve owners. The court left the door open for the Tribe to resubmit its management contract to the NIGC with evidence of the constitutional amendment and the current owners' consent to Tribal jurisdiction.[1] The court did not opine, however, on whether the NIGC would approve the management contract with this new information. Id. at 1429 n.8.

The Tribe did not appeal this decision. Instead, the Tribe resubmitted the management contract and the NIGC again sought an opinion from our office. In a second opinion dated May 12, 1997, the Acting Solicitor found that the changes made by the Tribe did not provide enough evidence of tribal jurisdiction to bring the Reserve within the definition of "Indian lands" for the purposes of the IGRA. The NIGC adopted this opinion and disapproved the management contract. The Tribe again sought judicial review of the NIGC Chairman's disapproval, given the circumstances of the constitutional amendment and the new membership status of the owners of the Reserve.

In Miami Tribe of Oklahoma v. United States, 5 F. Supp. 2d 1213 (D. Kan. 1998) (**Miami II**), the Court was faced with the Tribe's "facially sound" contention that it had established jurisdiction by the actions it had taken. Id. at 1218. The court made clear the following:

> 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.

Id. The court reversed the Chairman's disapproval of the management contract and remanded the case to the NIGC to provide a better record, particularly with regard to factors that would illuminate the issue of whether or not the Tribe is "actually and concretely" exercising governmental power over the Reserve. Id. at 1219.

[1] In leasing the Reserve to the Tribe, the owners/new members specifically consented to Tribal jurisdiction.

As a result of this remand, the DOI conducted an inquiry into the issue of the Tribe's exercise of governmental power. The Associate Solicitor determined, as a matter of fact and law, that the Tribe's exercise of governmental power was enough to satisfy the requirement in 25 U.S.C. § 2703(4) and that the Reserve was "Indian lands" of the Tribe.

Consistent with the NIGC's policy in 1998,[2] the NIGC adopted the Associate Solicitor's opinion. Based upon this advice, the Tribe and NIGC settled **Miami II** with a "Stipulation and Agreement" filed on January 15, 1999, that the NIGC Chairman would treat the Reserve as "Indian lands" for the purpose of his review and approval or disapproval of the gaming management contract between the Tribe and Butler. In exchange, the Tribe agreed to dismissal with prejudice of its claim.

Pursuant to this stipulation, the Chairman of the NIGC began another review of the proposed management contract between the Tribe and Butler and the necessary background investigations were conducted. Based upon such review and investigation, the NIGC Chairman determined that the contract met the requirements for approval under 25 U.S.C. § 2711 and that the persons with a financial interest in, or management responsibility for, the contract were suitable. Treating the Reserve as "Indian lands" pursuant to the **Miami II** stipulation, the Chairman approved the management contract on January 7, 2000.

Meanwhile, the State filed suit under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701, et seq. against the United States, various agencies and officials challenging the 1998 Opinion that the Reserve constituted "Indian lands" and seeking a preliminary and permanent injunction against facilitating any gaming on the Reserve. Kansas v. United States, 86 F. Supp. 2d 1094 (D. Kan. 2000), aff'd 249 F.3d 1213 (10th Cir. 2001) (**Miami III**). The United States moved to dismiss the case and objected to the State's Motion for a Temporary Restraining Order (TRO). The **Miami III** district court concluded that the NIGC's "Indian land determination was undertaken in an arbitrary and frivolous manner," 86 F. Supp. 2d at 1099, and that the NIGC did not address the threshold issue of whether the Tribe had jurisdiction over the Reserve. Id. at 1098.

The district court denied the United States' Motion to Dismiss and granted the preliminary injunction[3] from which the United States sought interlocutory appeal to the Court of Appeals for the Tenth Circuit. The Court of Appeals for the Tenth Circuit subsequently characterized the NIGC's conduct in determining whether the Tribe

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[2] In February 2000, the NIGC and the DOI executed a Memorandum of Understanding (MOU) that provided for a collaborative process in the development of legal opinions relating to "Indian lands." The MOU alters the prior NIGC practice of requesting DOI to determine "Indian land" matters under the IGRA and deferring to such determinations.

[3] The State filed a Motion for TRO and withdrew it. The State later renewed its Motion for TRO. At the hearing on the TRO, the district court decided to treat the TRO as a request for a Preliminary Injunction.

exercises governmental power over the Reserve, without first determining the jurisdictional basis for that power, as putting "the cart before the horse." 249 F.3d at 1229.

The Court of Appeals for the Tenth Circuit discussed the actions undertaken by the Tribe to demonstrate the existence of jurisdiction and the exercise of governmental power over the Reserve.

> None of these recent events, however, alters the conclusion that Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the tract. An Indian tribe's jurisdiction derives from the will of Congress, not from the consent of the fee owners pursuant to a lease under which the lessee acts.

Id. at 1230-31. The Court of Appeals for the Tenth Circuit remanded for further proceedings consistent with its opinion.[4] The Federal Defendants moved the district court to vacate the NIGC's approval of the management contract and remand the matter to the agencies. On June 24, 2002, the district court remanded the matter for "further proceedings not inconsistent with the [district court's] opinion and Tenth Circuit's decision." 2002 U.S. Dist. LEXIS 12392. After evaluating this matter on remand, as more fully discussed herein, I find that the courts have decided this matter and left no room for a contrary conclusion.

II. FACTUAL BACKGROUND

A. Statutory History

Most of the history of the Reserve is reviewed in detail in **Miami I** and need not be repeated here in its entirety. For purposes of this analysis, the first key event was the Treaty of June 5, 1854, 10 Stat. 1093, which identified two groups of Miami Indians: the Western Miamis who had emigrated to Kansas[5] and those who remained in Indiana (Indiana Miamis). Article 2 of the 1854 Treaty implicitly reserved jurisdiction to the Tribe with respect to certain civil issues.

> When selections are so made, or attempted to be made, as to produce injury to, or controversies between, individuals, which cannot be settled by the parties, the matters of difficulty shall be investigated and decided

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[4] It should be noted that neither the district court nor the Court of Appeals for the Tenth Circuit addressed whether the State had standing to seek review of a gaming management contract, nor did the Courts discuss the basis for the NIGC to revisit the issue of the Reserve's status in the context of a management contract review, in light of the stipulation and agreement that was signed in the settlement of **Miami II**.

[5] As discussed infra, the present-day Miami Tribe of Oklahoma consists of Western Miamis who moved to Oklahoma under the terms of a subsequent treaty.

> on equitable terms, by the chiefs of the Tribe, subject to appeal to the agent, whose decision shall be final.

10 Stat. at 1094. Article 2 also provided that the lands not ceded to the United States were reserved for use by the Tribe and that members could make selections of two hundred acres each. The patents that would issue for these selected lands would be

> subject to such restrictions respecting leases and alienation as the President or Congress of the United States may impose; and the lands so patented shall not be liable to levy, sale, execution, or forfeiture: *Provided*, That the legislature of a State within which the ceded country may be hereafter embraced, may, with the assent of Congress, remove these restrictions.[6]

Under the 1854 Treaty, the Indiana Miamis were not to receive any compensation for lands in Kansas ceded by the Western Miamis, although payments required by the Treaty of November 28, 1840, 7 Stat. 582, would go to the Indiana Miamis who were identified on a list of 302 names. This list did not include the DeRome family; however, the 1854 Treaty allowed the Indiana Miamis to add to the list. The Senate ratified the 1854 Treaty on August 4, 1854, with an amendment which limited the annuity roll of the Indiana Miamis to only those individuals that were on the list of 302 names, "the increase of the families of the persons" on that list, and those persons "added to said list by the consent of the said Miami Indians of Indiana, obtained in council, according to the custom of the Miami tribe of Indians." 12 Op. Att'y Gen. 236, 242 (1867).

In the Act of June 12, 1858, 11 Stat. 329, Congress directed that 68 (later 73) names be added to the list of 302 names; members of the DeRome family, including Maria Christiana, were added at this time. The leaders of the Indiana Miamis opposed the inclusion of these individuals. See H.R. Rep. No. 3852, 51st Cong., 2d Sess. (1891); H.R. Exec. Doc. No. 23, 49th Cong., 1st Sess. at 14 (1886). The 1858 Act also directed the Secretary to pay these individuals annuities for past years and to allot to each of them 200 acres to be taken from lands within the remaining Miami reservation. The Act of March 3, 1859, 11 Stat. 430, authorized the Secretary to issue restricted patents for these lands pursuant to the 1854 Treaty. The land, known as the Reserve, allotted by restricted

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[6] On February 1, 1865, the Kansas Legislature enacted the following legislation: "[A]ll members of Indian tribes to whom lands have been granted by the United States, in this State, and who have received patents therefore, are hereby authorized to sell or convey the same by deed in fee simple, or to mortgage the same, with the like effect and under the same restrictions and limitations as are provided by law for conveyances in other cases. Kansas Laws 164-65 (1865). The Court of Appeals for the Tenth Circuit in **Miami III** noted that in a March 1, 1872, Kansas Joint Resolution, Kansas removed restrictions on the alienability of the Kansas Reserves (available through the Kansas State Historical Society, 6425 SW 6th Avenue, Topeka, KS 66615). **Miami III**, 249 F.3d at1230. By Act of January 23, 1873, 17 Stat. 417, Congress subsequently assented to the Kansas legislature's authorization of removal of restrictions against alienation on fee-patented land, "in all cases in which the title has legally passed to citizens of the United States other than Indians."

fee patent dated, December 15, 1859, to Maria Christiana DeRome was indisputably inside the Tribe's Kansas reservation.

These individuals drew annuities at the designated places in Indiana from 1859 until 1867. The Appropriations Act of March 2, 1867, 14 Stat. 492, 502, 515, authorized appropriations for the Indiana Miamis "as may be, upon the opinion of the Attorney General, legally entitled to the same, under the provisions of the treaty with said Indians of June 5, 1854 and Senate amendments thereto, regardless of any subsequent legislation."

In 1867, the United States Attorney General issued an opinion stating that the names of the 73 individuals had been improperly added to the annuity roll, as the names had been added without the consent of the Indiana Miamis. 12 Op. Att'y Gen. 236 (1867); S. Misc. Doc. No. 131, 53rd Cong., 3d Sess. (1895). The Attorney General reasoned that the 1867 Appropriations Act directed him to disregard "subsequent legislation," that is, any legislation enacted after the 1854 Treaty and its Senate amendment dated August 4, 1854. This "subsequent legislation" included the Act of June 12, 1858, which added the DeRome family to its list of 302 names.

Thus, any future annuity roll would include, and subsequent annuities would be designated for, only those Indiana Miamis who were either on the list of 302 names, part of "the increase of the families of persons" on the list of 302 names, or added with the consent of the Indiana Miamis, notwithstanding the Act of June 12, 1858. As noted earlier, the Indiana Miamis had already objected to the inclusion of these individuals, so the DeRome family would no longer be included on the annuity rolls.

After these individuals were dropped from the annuity roll of the Indiana Miamis, Congress instructed the Secretary of the Interior to include these individuals on the rolls of the Miami Indians in Kansas if he found them entitled to be included. See Act of March 3, 1873, 17 Stat. 631. However, the Secretary of the Interior found that the 73 individuals were not eligible to be included on the roll of the Western Miamis because they remained in Indiana instead of emigrating. See H.R. Rep. No. 3852, 51st Cong., 2d Sess. (1891).[7]

The United States and the Miami Tribe entered the Treaty of February 23, 1867, 15 Stat. 513, in which the Miamis would move from Kansas to Oklahoma. Those Miamis who remained in Kansas could become United States citizens and surrender tribal membership after fulfilling certain conditions. Act of March 3, 1873, 17 Stat. 631.

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7 The Tribe disputes whether the DeRome family failed to emigrate from Indiana to Kansas. The Tribe has alleged that the DeRomes were in Kansas at the time of the allotment, but may have returned to Indiana, then returned again to Kansas. The Tribe has also alleged that the burial sites of Maria Christiana's brothers and sisters are located in the vicinity of the Reserve, although the burial site of Maria Christiana DeRome is unknown.

The Western Miamis ceded their remaining land in Kansas and Congress directed the Secretary of the Interior to determine which individuals were entitled to share in the resulting funds, including "those persons of Miami blood or descent for whom provision was made by the third section of the act of [June 12, 1858], if in the opinion of the Secretary of the Interior the said Indians are entitled to be so included under treaty stipulations." 17 Stat. 631, 632.

By letter dated February 11, 1873, the Secretary of the Interior forwarded to Congress a report from the Superintendent of Indian Affairs that determined that none of the individuals who had received an allotment pursuant to the 1858 Act were entitled to share in the proceeds from the sale of the Tribe's land in Kansas. The Commissioner opined that these individuals had not been "recognized as Miamis, either by the tribe in Kansas or by those residing in Indiana, who . . . have never joined the tribe in Kansas, and until now have claimed no benefits from their annuities." See J.R. Exec. Doc. No. 199, 42nd Cong., 3d Sess. (1873). Maria Christiana DeRome had been included in this group and had received her allotment despite the lack of tribal membership in either group.

In 1882, the Attorney General opined that only those Miamis who moved to Kansas were entitled to receive allotments or proceeds from the sale of the allotments, 17 Op. Att'y Gen. 410, 412 (1882), and that the 1858 Act [adding the DeRome family to the list of persons receiving allotments] was "virtually repealed." Id. at 415. The Western Miamis petitioned Congress in 1884, asking that the Western Miamis be reimbursed for the money and lands taken from them and given to the 73 individuals on the 1858 list. H.R. Rep. No. 3852, 51st Cong., 2d Sess. at 2 (1891). Following referral from Congress, the Court of Claims concluded that the Western Miamis were entitled to recover the amount of money erroneously paid as back annuities for the 73 individuals, as well as the value of the land allotted to those individuals. See The Western Miami Indians v. United States, Ct. Cl. No. 1349, Jan. 9, 1891, in H.R. Misc. Doc. No. 83, 51st Cong., 2d Sess. (1891). In 1892, the United States compensated the Western Miami, 281 F.2d at 212 (citing 26 Stat. 1000), and provided additional compensation in 1960 when the Western Miami sought payment of interest on the compensation. Id.

B. Subsequent History

1. **Tribal actions**

More recently, the Tribe engaged in several activities intended to demonstrate that it uses its alleged jurisdiction to exert governmental powers over the Reserve. Tribal Resolution 93-12 (Jan. 5, 1993) expressly reaffirmed the Tribe's governmental jurisdiction over the Reserve. In Tribal Resolution 94-48 (August 3, 1994), the Tribe requested assistance from the Bureau of Indian Affairs (BIA) concerning the escheat to the Tribe of interests in the Reserve. Tribal Resolution 95-13 (December 6, 1994) enacted a code governing the descent and distribution of trust or restricted lands over which the Tribe has jurisdiction and specifically included the Reserve. Tribal Resolution 95-48 (May 9, 1995) set out the terms by which the Tribe purportedly agreed to accept a

one percent undivided interest in the Reserve from heir-owner Earline Smith Downs, although this transaction was never completed.

The Tribe has assumed the physical maintenance of the property and has taken steps to discourage trespass on the Reserve. Activities observed during a site visit in 1998 by DOI personnel included the operation of an "outreach center" in a mobile home building on the property and the presence of a construction trailer. The Tribe has issued a license to a Tribal member to operate a smoke shop on the Reserve. Water, telephone, and electricity services are available on the Reserve. Tribal Police regularly travel to Kansas to conduct surveillance of the Reserve.

Although neither Maria Christiana DeRome nor her heirs elected to move with the Tribe to Oklahoma, the Tribe proposed to amend its constitution in 1996 to authorize membership specifically for the heirs of Maria Christiana DeRome:

> (f) Any person of Miami Indian blood and/or blood descendent thereof, who relocated to Kansas, who has been issued restricted land patents to land within the Miami Reservation in Kansas territory as stipulated under the second Article of the treaty with the Miami, dated June 5th, 1854, and approved by the third section of an Act of Congress dated June 12th, 1858, or any persons listed in the La Cygne Journal, in 1871, whose names appear as an Indian headright, who makes application, may be admitted to membership in the Miami Tribe of Oklahoma.

The constitutional amendment was approved by Tribal election and submitted to DOI. The Secretary of the Interior approved the amended constitution on January 18, 1996. Numerous heirs of Maria Christiana DeRome were later granted tribal membership when the Tribe passed an ordinance approving their membership. In addition, the heirs specifically consented to tribal jurisdiction in leasing the Reserve to the Tribe.

2. **Bureau of Indian Affairs actions**

The BIA has issued letters regarding the status of the Reserve. In 1974, the BIA Acting Director, Office of Trust Responsibilities, notified the Anadarko Area Director by letter of his conclusion that the Reserve remained in restricted fee status and under the jurisdiction of the BIA. The Realty Specialist, BIA Miami Agency, informed the Tribal chief in a 1993 letter that the Reserve was held in restricted status, would be subject to the escheat provisions of the Indian Land Consolidation Act of 1983, and other tribes had not challenged the jurisdiction of the Tribe. In a 1994 letter, the Superintendent, BIA Miami Agency, noted that the Reserve was held in trust/restricted title by the United States. The BIA has also continued to administer probates of the Reserve. See Brief of Amici, Bureau of Indian Affairs, U.S. Department of Interior, filed in The Matter of Estate of James Dallas McHenry, Deceased Miami of Oklahoma, IP OK 274 P 93.

III. APPLICABLE LAW

A. The Indian Gaming Regulatory Act (IGRA)

In the IGRA, Congress designed a comprehensive statutory scheme for the conduct of gaming activities on Indian lands. Congressional findings indicate the following:

> [T]he establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702(3). On the basis of these findings and to fulfill several statutory responsibilities, Congress established the NIGC and gave it jurisdiction to regulate several aspects of Indian gaming. 25 U.S.C. § 2704(a). That authority includes the review of management contracts that are defined as "any contract ... between an Indian tribe and a contractor ... if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.

For tribes to conduct gaming under the IGRA, such gaming must be conducted on "Indian lands" over which the Tribe has jurisdiction, as defined by the IGRA. The IGRA defines "Indian lands" as follows:

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

25 U.S.C.A. § 2703(4).

B. Statutory Interpretation

1. **Deference to agency construction**

The legal analysis of the IGRA must occur within the framework of principles of statutory interpretation. An agency must give effect to the unambiguous intent of Congress, although it must take a different approach in circumstances where the statute is susceptible to more than one meaning. See Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843-45 (1984). Under such circumstances, the agency must utilize its specialized expertise and attempt to apply the statute in a rational manner.

2. **The Indian canon of interpretation**

If it is determined that the language of a statutory provision is ambiguous,[8] federal courts have an obligation to construe statutes enacted for the benefit of Indians "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 718 (10th Cir. 2000); NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1194-5 (10th Cir. 2002). Indeed, as the Court of Appeals for the District of Columbia has ruled, "if [an ambiguous law] can reasonably be construed as the Tribe would have it construed, it *must* be construed that way." Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (emphasis in original).

But the courts are not entirely in agreement as to the effect of this rule of construction on interpretations by a federal agency like the DOI or by the NIGC. Compare Ramah Chapter of the Navajo Nation v. Lujan, 112 F.3d 1455 (10th Cir. 1997) (canon of construction of liberal interpretation trumps agency interpretations) with Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (deference due expert agencies makes application of canons of construction inappropriate). Very limited authority exists in the legislative history of the IGRA for applying this canon of construction. See 134 Cong. Rec. H8153 (daily ed. Sept. 26, 1988) (Rep. Udall, IGRA's primary House sponsor, calling on courts to apply "the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.")

IV. METHOD OF ANALYSIS

This discussion will focus solely on the question of the Tribe's jurisdiction over the Reserve. The Court of Appeals for the Tenth Circuit instructed that the inquiry focus on the intent and purpose of Congress concerning the present-day status of the Reserve. In examining this question, the DOI had the benefit of reviewing the pleadings and opinions in the litigation over this Reserve and each of the parties had ample opportunity to develop and refine its legal and factual positions. Thus, the DOI was able to review information or submissions from the United States Department of Justice, the State of Kansas, and the Tribe. The DOI also reviewed expert reports and other documents and materials recently submitted by the State of Kansas and attorneys for the Tribe.

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[8] Provisions of the IGRA have been found ambiguous by the Court of Appeals for the Tenth Circuit in this case. Kansas v. United States, 249 F.3d 1213, 1228 (10th Cir. 2001) (noting that the "IGRA sheds little light on the question of whether under the [circumstances of the case] the tract constitutes "Indian lands"), and in Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10th Cir. 2001) (noting that the IGRA does not define the term, "reservation;" therefore, Chevron deference would apply to any Commission construction of that term).

V. LEGAL ANALYSIS

Analysis of the "Indian lands" definition is not necessary if the Tribe does not possess the requisite jurisdiction over the Reserve. "Tribal jurisdiction" is a threshold requirement to the exercise of governmental power. See, e.g., Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 701-703 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994), superseded by statute as stated in Narragansett Indian Tribe v. National Indian Gaming Comm'n, 158 F.3d 1335 (D.C. Cir. 1998); **Miami II**, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998); (A tribe must have jurisdiction in order to be able to exercise governmental power); **Miami I**, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.) This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to lands over which a tribe has jurisdiction. 25 U.S.C. §§ 2703(7)(D); 2710(a)(1), (a)(2), (b)(1), (b)(4)(A), & (d)(1)(A)(i); and 2713(d); see also Narragansett Indian Tribe, 19 F.3d at 701-703.

A. The principle of res judicata requires a finding of no Tribal jurisdiction over the Reserve.

A review of the opinions in this matter demonstrates that the courts have left no room for a finding that the Tribe possesses jurisdiction over the Reserve. The Court of Appeals for the Tenth Circuit affirmed the **Miami I** district court's opinion that the Tribe did not have the requisite jurisdiction:

> The difficulty with the Government's position is that the district court in Miami Tribe I thoroughly analyzed the question of the Tribe's jurisdiction over the tract based upon the United States' treatment of the tract. The court concluded that no lawful basis existed to suggest the Tribe presently had jurisdiction over the tract. Miami Tribe I, 927 F. Supp. at 1424-27 . . . Rather, Congress years ago "unambiguously intended to abrogate the Tribe's authority of its lands in Kansas and move the Tribe to new lands in Oklahoma."

249 F.3d at 1230-31. In addition, the Court of Appeals for the Tenth Circuit included a summary of the findings and conclusions of the **Miami I** district court opinion:

> The Reserve is located inside the original boundaries of the Tribe's reservation in Kansas. In 1873, the Tribe agreed to sell its unallotted lands in Kansas; Congress legislated the purchases of the lands in 1882. In 1884, the Tribe sought reimbursement for the land allotted to, among others, Maria Christiana DeRome. In essence, the Tribe claimed that the Maria Christiana allotment should be treated as unallotted land and sold to the United States. The Court of Claims agreed and compensated the Tribe for the land in 1891. The Court of Claims concluded that . . . 1858 legislation had unlawfully taken funds and land designated for the Tribe

> [including Reserve No. 35], and awarded interest on the 1891 payments. The court in [Miami Tribe I] concluded from this series of events that the Tribe has unmistakably relinquished its jurisdiction over the Reserve. Moreover, in 1873, Congress expressly abrogated the Tribe's jurisdiction [over its former lands in Kansas], which was effective no later than 1924 when any members of the Tribe remaining in Kansas – and their heirs – became naturalized citizens.

249 F.3d at 1230-31, citing Kansas v. U.S., 86 F. Supp. at 1095-96.

The Court of Appeals for the Tenth Circuit affirmed these conclusions and went on further to hold:

> Because the Tribe did not appeal Miami Tribe I, the district court's findings and conclusions regarding the status of the tract, including its construction of the relevant legislation and treaties, are now res judicata and we need not revisit them here. . . . Notably, none of the Defendants have ever challenged Miami Tribe I's findings and conclusions regarding the status of the tract. Rather, they rely solely on the Tribe's activities subsequent to Miami Tribe I to claim tribal jurisdiction over the tract – namely (1) the Tribe's adoption of the tract's twenty-plus owners into the Tribe, (2) those owners' consent to tribal jurisdiction pursuant to a lease with the Tribe, and (3) the Tribe's recent development of the tract. None of these recent events, however, alters the conclusion that Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the tract. An Indian tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts. We conclude that the State of Kansas has a substantial likelihood of success on the merits of this cause.

249 F.3d at 1230-31.

The Court of Appeals for the Tenth Circuit affirmed the preliminary injunction issued by the district court and remanded the matter for further proceedings. This decision was not appealed.

In this circuit, the doctrines of res judicata and collateral estoppel bar litigation on issues that could have been, but were not raised previously in state court litigation. Reed v. McKune, 298 F.3d 946 (10th Cir., 2002). In this case, the Court of Appeals for the Tenth Circuit looked to Kansas law and observed that an issue is res judicata when there is "concurrence" of four conditions: (1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made. Id. at 950 (citations omitted). The Court of Appeals for the Tenth Circuit found all of these conditions to be present in the instant case.

The doctrine of collateral estoppel prevents a second litigation of the same issues between the same parties or those in privity with the parties. Under Kansas law, the conditions require the following: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment; (2) the parties must be the same or in privity; (3) the issue litigated must have been determined and necessary to support the judgment. Id. (citation omitted). These conditions also appear to be present in this matter.

The related doctrine of the "law of the case" also has applicability here. This doctrine provides that where the judgment from which relief is sought was the subject of appellate review, the lower court is bound, under the law of the case, by the court of appeals' prior ruling and may not deviate from the appellate decision. Corex Corp. v. United States, 638 F.2d 119, 122 (9th Cir. 1981) ("When a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court."), citing Firth v. United States, 554 F.2d 990, 993 (9th Cir. 1977).

The Corex court of appeals reversed a trial court's grant of a new trial under Rule 60(b) of the Federal Rules of Civil Procedure based upon the ground that new evidence had been discovered. However, since the "new" evidence concerned events that had occurred after the end of the trial, the Corex court held that it was not new evidence for the purposes of Rule 60(b). The Court of Appeals for the Federal Circuit noted that courts uniformly adhere to this view. Halas v. Quigg, 914 F.2d 270 (Fed. Cir. 1990).

Although the district court in this case is free to consider "intervening circumstances" not previously known to the court and can reopen to modify the judgment, it may do so only in a manner that is consistent with the original ruling or that does not change the opinion in any material respect. See nn. 22-23 Wright, Miller & Kane, Federal Practice and Procedure § 2873. In its decision to remand, the district court instructed that further proceedings were not to be inconsistent with its previous opinions or those of the Court of Appeals for the Tenth Circuit. A DOI opinion concluding that the Tribe possesses jurisdiction over the Reserve would contradict the opinion of the Court of Appeals for the Tenth Circuit in **Miami III**. By suggesting that the district court should reverse its previous finding of no jurisdiction, such an opinion would require the district court to change in a very material aspect the decision of the Court of Appeals for the Tenth Circuit. The district court does not have this authority, much less the DOI. See Corex, 638 F.2d 119; Firth, 554 F.2d 990.

The situation in Firth is closely analogous to the one which was before the district court. In that personal injury case, the district court on remand applied the mandate of the court of appeals as to certain facts at issue, even though it disagreed with the court of appeals. The defendant-government appealed, contending that the district court improperly construed the mandate. The court of appeals disagreed:

> Our prior decision and mandate in this case, whether correct or in error, was based on a thorough review of all of the evidence and consideration

> of the same arguments pressed here, and we concluded that the evidence did not support a finding of contributory negligence. Contrary to the government's assertion, this court had before it and considered on the first appeal all of the evidence on the issue of contributory negligence, and the resulting mandate did not leave the matter open for reappraisal or clarification by the district court. Thus, the lower court correctly refused to reevaluate the issue on remand.

554 F.2d at 994. The same is true here: the Court of Appeals for the Tenth Circuit had before it all of the available evidence considered by the district court supporting the Tribe's claim to jurisdiction over the Reserve and issued a ruling on those facts in a manner that was not open to revision, much less reversal. Were the district court to reverse itself and disagree with the ruling of the Court of Appeals for the Tenth Circuit, it may not reevaluate the issue on remand.[9]

B. Recent Tribal membership cannot overcome Congress' abrogation of Tribal jurisdiction over the Reserve.

The courts in **Miami I** and **Miami II** did not address the question of whether Tribal jurisdiction over the Reserve might arise from the actions taken by the Tribe to extend membership to the present-day owners of the Reserve. The **Miami I** court left the door open for the Tribe to resubmit its management contract to the NIGC with evidence of the constitutional amendment and the current owners' consent to Tribal jurisdiction. In his 1997 Opinion, the Acting Solicitor found that these events did not provide enough evidence of tribal jurisdiction to bring the Reserve within the definition of "Indian lands" for the purposes of the IGRA. The **Miami II** court found "facially sound" the Tribe's contention that the subsequent actions established jurisdiction and required the federal agencies to provide a better record on the jurisdiction issue.

1. The Tribe can determine its own membership.

An attribute of the sovereignty of an Indian tribe is its right to determine its own membership. Montana v. U.S., 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (Indian tribe has "complete authority to determine tribal membership except in specific instances."); Martinez v. Southern Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957) ("a tribe has complete authority to determine all questions of its own membership"); Smith v. Babbitt, 100 F.3d 556 (8th Cir. 1996), cert. denied sub nom., Feezor v. Babbitt, 522 U.S. 807 (1997) (Tribes' retained sovereignty includes authority to determine tribal membership). Further, tribal membership is a bilateral political

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[9] The Acting Solicitor, in the 1997 Opinion, observed the following: "The Miami Tribe of Oklahoma did not exercise governmental powers over the land in 1995 and, in our opinion, the admission of the owners of the land into the Tribe is alone not sufficient evidence of tribal authority to bring the land within the definition of "Indian lands" under IGRA." 1997 Opinion at 2.

relationship, Masayesva v. Zah, 792 F. Supp. 1178, 1181 (D. Ariz. 1992), and a tribe exercises retained sovereignty over Indians who consent to be tribal members. Duro v. Reina, 495 U.S. 676 (1990).

As we noted in Section II.B.1 of this Opinion, the Tribe amended its Constitution in 1996 to authorize membership specifically for the heirs of Maria Christiana DeRome. That amendment was approved by Tribal election and by the Secretary of the Interior on January 18, 1996.[10] The heirs of Maria Christiana DeRome, after becoming tribal members, specifically consented to tribal jurisdiction in their lease with the Tribe for the Reserve dated September 30, 1998:

> "The undersigned Indians being members of the Miami Tribe of Oklahoma consent to the Jurisdiction and governing powers of the Miami Tribe of Oklahoma over all real property held in Indian Country by the undersigned Indians including undersigned Indians' interests in Maria Christiana Miami Reserve No. 35."

Thus, the Tribe exercised its inherent power to determine its own membership when it extended tribal membership to the Reserve owners; the Reserve owners specifically submitted to Tribal jurisdiction in the lease agreement. However, tribal jurisdiction cannot extend to the Reserve, but only to Tribal owners/members of the Reserve, because Congress abrogated Tribal jurisdiction over the Reserve. The Tribe asserts that it has jurisdiction over Indian Country which includes restricted Indian allotments. Because the Reserve owners are now members and this Reserve is a restricted Indian allotment, the Tribe believes it now has jurisdiction. This argument does appear "facially sound" as the **Miami II** court noted. But we cannot infer solely on the basis of the restricted status of a parcel that jurisdiction necessarily inures particularly in light of a Congressional abrogation.[11] The Tribe cannot by its unilateral actions override the intent of Congress as expressed in numerous Acts.

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[10] Pursuant to the Oklahoma Indian Welfare Act (OIWA) of 1936, 25 U.S.C. §§ 501-510, the Tribe adopted its Constitution and By-laws that were ratified by the Secretary of the Interior on January 6, 1938. The Constitution enabled the Tribal governing body to enact measures necessary to exercise jurisdiction over territory and members. In the OIWA, Congress intended to reestablish the Oklahoma tribes and provide for the establishment of tribal governments.

[11] The Court in Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), upon which the Tribes relies for its conclusion, noted that Congress had not divested the Cheyenne-Arapaho Tribe of jurisdiction over the tribal member trust allotment. Thus, Mustang Production is distinguishable and does not support the Tribe's conclusion.

2. Congress exercised its plenary power over Indian matters when it abrogated Tribal jurisdiction over the Reserve and has taken no subsequent action to reinstate that jurisdiction.

The Supreme Court has held that Congress may impose limits on tribal sovereignty. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896). However, such limits cannot be imposed unless Congress makes its intent to limit sovereignty clear. See, e.g., Fletcher v. United States, 116 F.3d 1315, 1327 (10th Cir. 1997). In this case, through treaties, statutes and compensation paid to the Western Miamis for annuities paid and the value of lands allotted to Maria Christiana DeRome, Congress clearly abrogated the Tribe's jurisdiction over the Reserve.

The **Miami I** court also concluded that:

> even if Maria Christiana DeRome was a member of the tribe by fiat of Congress, that membership (as well as the membership of her heirs) ended in 1867. Any jurisdiction stemming from Maria Christiana DeRome's abbreviated membership ended in either 1884, when it was unmistakably relinquished or in 1924, when Congress' abrogation became indisputably effective.

927 F. Supp. at 1427.

As we have noted previously, the Court of Appeals for the Tenth Circuit concluded that the history points to the unmistakable conclusion that the Tribe's jurisdiction has been abrogated. But what is most problematic for the Tribe is that the Court of Appeals for the Tenth Circuit emphatically stated that Congress has done nothing subsequently to reinstate the Tribe's jurisdiction over the Reserve. The Tribe has not provided any relevant arguments to counter the prior abrogation.

The Tribe has alleged that Pub.L. 97-344, 96 Stat. 1645 (Oct. 15, 1982), as amended by Pub.L. 97-428, 96 Stat. 2268 (Jan. 8, 1983), would support restoration of the Tribe's jurisdiction. This legislation was enacted to partition the Reserve because the tangled restricted and non-restricted fractional interests in the Reserve made it unmarketable and the Secretary could only partition "trust", not restricted, lands. See S.R. 97-107, 97th Cong., 1st Sess. 4-5 (1981). The relevant section of Pub.L. 97-344 provides:

> [A]ny owner of an interest in the following lands ... (3) the east half, southwest quarter, section 13, township 19 south, range 24 east, sixth principal meridian, Kansas, containing 80 acres and known as the Maria Christiana Miami Allotment, lands derived from a patent under Act of March 3, 1859 (11 Stat. 430) may commence an action in the United States District Court for Kansas to partition the same in kind or for the sale of such land in accordance with the laws of the State of Kansas .... For the purposes of such action, the Indian owners shall be regarded as vested with an unrestricted fee simple title to their interests in the

> land and the United States shall be a necessary party to the proceedings. Any conveyance ordered by the court in such proceedings will be made in unrestricted fee simple to non-Indian grantees and in a restricted fee to Indian grantees.

96 Stat. 1645.

This legislation does not address the Miami Tribe's authority over the Reserve or subject the partitioning or distribution actions to the Miami tribal courts. The legislation does not repeal the prior 1873 Act, or any prior Act, even though it references the statute under which Maria Christiana DeRome received her allotment. We find that in enacting this special legislation Congress did not restore the Tribe's jurisdiction. And this legislation was enacted eight years prior to the holding of the Court of Appeals for the Tenth Circuit that Congress had "done nothing" to reverse its abrogation of tribal jurisdiction.

As discussed above, the **Miami I** district court and the Court of Appeals for the Tenth Circuit concluded that Congress specifically abrogated the Tribe's jurisdiction over the Reserve. Having so acted, Congress would have to take a subsequent action to reinstate Tribal jurisdiction. The Tribe cannot, through its unilateral actions, override congressional intent and disturb that which Congress has made clear.

VI. CONCLUSION

The Court of Appeals for the Tenth Circuit in **Miami III** affirmed the **Miami I** district court's opinion that Congress abrogated the Tribe's jurisdiction over the Reserve and noted that Congress has not acted since **Miami I** to overturn that decision. I conclude that the Reserve does not constitute "Indian lands" within the jurisdiction of the Tribe for purposes of the IGRA.

Sincerely,

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