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)

REPLY BRIEF OF APPELLANT

BARRY R. GRISSOM
United States Attorney

DAVID D. ZIMMERMAN
Assistant United States Attorney
District of Kansas
Kansas City, Kansas, 66101
(913) 551-6730
david.zimmerman@usdoj.gov

IGNACIA S. MORENO
Assistant Attorney General

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

* Public officials currently holding office have been substituted for the original parties pursuant to Fed. R. App. P. 43(c)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATIONS:

RULES:

MISCELLANEOUS:

INTRODUCTION AND SUMMARY

The government's opening brief demonstrated that the district court erred in its June 22, 2005, order reversing the BIA's decision to disapprove a gift conveyance of a fractional interest in the Maria Christiana Reserve No. 35 from James Smith to the Miami Tribe. With little analysis, and in the face of a contrary decision of this Court, the district court erroneously held that the Tribe "exercised jurisdiction" over the Reserve because the Tribe took certain actions as if it had jurisdiction. As this Court has held, a Tribe cannot assume jurisdiction by unilateral Tribal actions. Moreover, it is *res judicata* that the Tribe's jurisdiction over this tract of land was terminated by Congress no later than the 1920s. Consequently, under the Indian Land Consolidation Act Amendments of 2000, 25 U.S.C.A. 2201 note & 2216 ("ILCA"), the Bureau of Indian Affairs ("BIA") of the Department of the Interior properly considered factors protective of tribal and individual Indian interests and determined whether the proposed gift furthers ILCA's purposes and served the long-term best interests of the parties. The agency's decision had a rational basis, and was supported by evidence and substantial agency expertise in this area. The district court improperly substituted its judgment for that of the agency. Accordingly, the district court's June 22, 2005 decision should be reversed and the agency's initial decision reinstated.

In response, the Tribe cursorily asserts that this Court lacks jurisdiction because the BIA is purportedly seeking review of its own decision and therefore no case or controversy exists. To the contrary, BIA now appeals the district court's final judgment, which subsumes all prior orders, including the court's 2005 order resolving one of the three claims alleged in the Tribe's complaint. The 2005 order vacated the agency's initial denial of the gift transfer and remanded the matter to the agency for a new decision in accordance with the court's erroneous order. The agency sought to appeal earlier but the district court declined to issue a Rule 54(b) order. This is thus the agency's first opportunity to appeal and it has done so properly.

As to the merits, the Tribe presents various complaints about historical actions by the Interior Department which are largely beside the point. Contrary to the Tribe's assertion, jurisdiction is a dispositive statutory factor going to the BIA's authority to approve or deny the gift transfer. In the absence of tribal jurisdiction, the agency acted well within its authority to disapprove the gift transfer after considering and discussing numerous pertinent factors. The BIA's disapproval of the gift in this instance does not represent a pernicious restraint on a Native American's ability to dispose of property interests, as the Tribe suggests, but rather a reasoned and well-founded decision entitled to deference.

Finally, the Tribe's assertions that it has jurisdiction notwithstanding this Court's decision in *State of Kansas v. United States ("Miami IV"),* 249 F. 3d 1213 (10th Cir. 2001), are to no avail. Both this Court and the district court in *Miami Tribe of Oklahoma v. United States* ("*Miami I*"), 927 F. Supp. 1419 (D. Kan. 1996), have found that the Tribe relinquished its jurisdiction long ago, that an "Indian tribe's jurisdiction derives from the will of Congress," and that the very same analysis as the district court erroneously employed here to find tribal jurisdiction from a Tribe's unilateral actions is inadequate to establish jurisdiction. Although the government had supported the Tribe's assertion of jurisdiction prior to *Miami IV*, the government has reasonably conformed its position to accord with this Court's decision in that case.

I

THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S 2005 ORDER

The Tribe is incorrect (Br.12-13)[1/] that this Court lacks jurisdiction to hear the BIA's current appeal. The government is appealing from the first and only

---

[1/] This brief will refer to the Miami Tribe's answering brief as "Br." and to the government's opening brief as "G.Br." This brief will also adopt the Tribe's convention of using "G.App.xx" and "T.App.xx" to refer to the federal and tribal appendices, respectively.

final judgment in the district court proceeding. The 2005 remand order on count one was adverse to the BIA. Although the district court upheld the BIA's decision on remand, in making its decision on remand, BIA was obliged to act in conformity with the court's adverse rulings in the 2005 order. As noted in the government's opening brief (G.Br. 25, 26-27, 28), the government consistently made clear throughout the remand and subsequent district court proceedings that it disagreed with the June 22, 2005, remand order and intended to appeal that order, including listing the June 2005 in its notice of appeal. Notice of Appeal, CR 150, G.App. 212. Thus, the final judgment is adverse to the United States because it is the direct consequence of the district court's erroneous 2005 order.

In addition, the 2005 order was a non-final order that the government need not, and for jurisdictional reasons probably could not, have immediately appealed. First, there were pending, unresolved claims. An order that does not decide all claims is not a final order unless the district court enters a Rule 54(b) judgment. *Sear, Roebuck & Co., v. Mackey*, 351 U.S. 427 (1956). In an effort to promote judicial economy (T.App. 9), the government did request that the district court permit review at the time under Rule 54(b), but to no avail. CR 80; App. 73.[2/]

[2/] The Tribe misconstrues (Br. 12-13) the government's earlier expression of concern about the possibility of being foreclosed review as tantamount to an

Thus, the order of January 4, 2010, is the first final order from which the government can appeal.

Second, this Court follows the prevailing view that "remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is not a final decision." *Trout Unlimited v. U.S. Dep't of Agric.*, 441 F.3d 1214, 1218 (10th Cir. 2006). See also, *Baca-Prieto v. Al Guigni*, 95 F.3d 1006, 1008 (10th Cir. 1996); *Rekstad v. First Bank System, Inc.*, 238 F.3d 1259, 1262 (10th Cir. 2001); *Bender v. Clark*, 744 F.2d 1424, 1426-1427 (10th Cir. 1984).[3/] This Court does recognize appellate jurisdiction to review remand orders in certain circumstances, most commonly where the federal government agency is the defendant and seeks to appeal because it would otherwise be barred from seeking further review of the district court order. *E.g.*, *Rekstad*, 238 F.3d at 1262; *Baca-Prieto*, 95 F.3d at 1099; *Bender*, 744 F.2d at 1428. "The critical inquiry is

---

admission that review *is* now foreclosed. This argument mistakenly assumes its own conclusion. Nor is the agency "attempting to appeal its own determination." Br. 13. The Tribe challenged in district court the agency's second determination to permit the land to be transferred in restricted fee status but not in trust and the district court resolved the pending claims. The agency is properly appealing from the district court's final order and judgment.

[3/] See also *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004); *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990); *Save Domestic Oil, Inc. v. United States*, 122 F. Supp. 2d 1375, 1377 (C.I.T. 2000) (citing cases from every circuit for this proposition).

whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." *Bender*, 744 F.2d at 1427; accord *State of Utah v. Kennecott Corp.,* 14 F.3d 1489, 1495-96 (10th Cir. 1994) ("practical construction of [28 U.S.C.] §1291 may generate jurisdiction through a subjective and ad hoc balancing of the interests of the parties against the policies of an unambiguous finality rule").[4/] The government is permitted to review a remand order on the rationale that not permitting review would effectively bar the government from ever obtaining review of the remand order.[5/]

This is not such a case. The June 22, 2005, order remanded only one count of the Tribe's complaint to the agency. It did not dispose of two others counts. These counts remained pending before the district court. May 22, 2006 Memorandum and Order, CR 73, G.App.71. Thus, even as one count was

---

[4/] In *Cotton Petroleum Corp. v. United States Department of the Interior*, 870 F.2d 1515, 1522 (10th Cir. 1989), this Court even held that it had jurisdiction over an appeal from a remand order brought by a private party (an oil and gas lessee with wells on restricted Indian allotment land), explaining that the issues presented were of such importance that any delay in review by this Court would likely result in further disputes and litigation, confusion and danger of injustice.

[5/] Additionally, this Court has recognized the right to appeal when a district order requiring additional agency action contained "all requisite components of a final order: it resolved all issues and granted the plaintiffs relief, enjoying issuance [of a BLM lease] until such analysis is complete." *State of New Mexico v. BLM*, 565 F.3d 683, 697 (10th Cir. 2009). In *New Mexico*, this Court assessed the finality of a remand order on a case-by-case analysis. *Id*. at 698-699.

remanded, the district court retained jurisdiction over, and would ultimately rule on, the other surviving counts[6/] in its final decision of January 4, 2010. An appeal of a final judgment draws in question all prior non-final orders and rulings which produced the judgment. *Montgomery v. City of Ardmore*, 365 F.3d 926, 934 (10th Cir. 2004); *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002).

Because the district court's June 2005 order was only as to one count, and two counts remained under consideration before the court, the government's ability to seek further review of the order of remand would not necessarily be foreclosed, and the government did not have a basis for appealing from the remand order. Indeed, the district court denied interlocutory certification under Rule 54(b). Accordingly, this Court has jurisdiction to review the government's appeal of the remand order.

6/ When the Tribe amended its complaint, on October 1, 2008, it dropped a count. CR 121.

II
ILCA DOES NOT COMPEL AUTOMATIC APPROVAL OF THIS GIFT TRANSFER

At Br. 13-30, the Tribe argues that ILCA compels the BIA's approval of the gift transfer from Smith to the Tribe and reviews several factors that, the Tribe contends, show that the elements for allowing the gift transfer have been satisfied.

As an initial matter, the Tribe reads the jurisdictional requirement right out of ILCA, citing as factors only that (1) Smith is an Indian (Br. 16); (2) the Tribe is an Indian Tribe (Br. 16-17); (3) the Reserve is an Indian allotment (Br. 15) ; and (4) that Smith wants to gift his land to the Tribe (Br. 15-16).

A. ILCA Requires a Finding of Tribal Jurisdiction. -- The Tribe contends that "[j]urisdiction is not a dispositive element in this case." Br. 11. This bald statement ignores controlling statutory language. First, as detailed in the government's opening brief (G.Br. 7), ILCA was enacted to consolidate tribal ownership of lands already within a tribe's reservation or jurisdiction. The statute's intent is to encourage land consolidation by transfers 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 that interest to an Indian or the tribal government *that exercises jurisdiction over the parcel of land* involved." 25 U.S.C. 2216(a) (emphasis

added). Moreover, 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).

In light of this statutory language, it is remarkable that the Tribe argues that jurisdiction has no relevance to approval of Indian land transfers. Br. 30. The Tribe offers no explanation for this statement and, indeed, it is at odds with the Tribe's district court pleadings making jurisdiction a central element of its arguments[7/] and statements in their own appellate brief (see, *e.g.*, Br. 25: policy statements in 25 U.S.C. 2216(a) "certainly apply to 25 U.S.C. § 2216(b)"). This position also conflicts with the district court's analysis. 374 F. Supp. 2d at 943-

---

7/ In district court, the Tribe argued:

> 25 U.S.C. 2216 (2001) reinforces the propriety of the transfer. Congress has expressly stated that it is the policy of the United States to encourage and assist the consolidation of Indian land ownership through transactions involving Indians and the tribal government *that exercises jurisdiction over the land*. As a member of the Miami Tribe, the *Miami Tribe has jurisdiction over Smith, a tribal member, and his land, the Miami Reserve.*

APA Brief by Miami Tribe, CR 8 at 8, emphasis added.

45. The district court found (*id*. at 945) that the Tribe had jurisdiction "for purposes of applying the land consolidation policies contained in 25 U.S.C. 2216(a)." The Tribe relied on these same policy provisions in insisting that ILCA's policies promote Tribal acquisition of Smith's partial interest. See, *e.g.*, Br. 16, 25-26. It is not true that the "Defendants did not even consider jurisdiction in their determinations." Br. 30. To the contrary, the Realty Office of the BIA, in reviewing Smith's application in 2002, noted that it need not address the additional issue of whether the Tribe exercises jurisdiction over the Reserve, both because its prior findings regarding the transfer militated already against a finding that the conveyance was appropriate, and because that issue had been specifically resolved by this Court in *Miami IV*. G.App.146. Accordingly, the Tribe may not sidestep the question of whether the Tribe has jurisdiction over the Reserve for purposes of this appeal.

B. The Tribe Lacks Jurisdiction Over the Reserve.-- The government's opening brief at 45-53 refutes the Tribe's claims (Br. 30-39) that the Tribe has jurisdiction over the Reserve and that no court decision indicates otherwise. In answer, the Tribe (1) asserts that the *Miami I* decision does not take into account the effect of the more recent adoption of the Reserve's owners as tribal members (Br. 34-37) and (2) dismisses the *Miami IV* decision as merely an interlocutory

decision in an appeal from a preliminary injunction (Br. 37). According to the Tribe (Br. 38), only *Miami II* has any precedential effect; *Miami II* was settled with a stipulation between the parties that the Tribe had jurisdiction over the Reserve for purposes of IGRA. G.Br. 16

When viewed in historic context, these cases provide the Tribe no basis for asserting current Tribal jurisdiction over the Reserve. First, *Miami I*, in an unchallenged decision that this Court deems *res judicata,* determined that the Tribe's jurisdiction was relinquished no later than 1924. 927 F.Supp. at 1426. Pointing to the Tribe's several court claims, over the course of a century, for reimbursement for prior reservation lands bought by Congress from the Tribe and allotted to, among others, Maria Christiana DeRome, the court found "no difficulty concluding from this series of events that plaintiff unmistakably relinquished its jurisdiction over Reserve No. 35." *Id*. The Tribe did not appeal *Miami I* when it had the opportunity[8/] and does not, and cannot, now contest this determination.

Miami II, on which the Tribe relies, has, by contrast, been essentially overruled and made unenforceable by subsequent decisions. The parties to *Miami*

[8/] See *Miami IV*, 249 F.3d at 1230.

II had settled the case by stipulating that the Tribe had jurisdiction for purposes of IGRA in order to "allow the Tribe to conduct gambling operations on the Reserve." *Miami Tribe v. United States*, 198 Fed.Appx. 686, 2006 WL 2392194, at *1 (10th Cir. 2006) ("*Miami V")*. This Court determined that the stipulation was unenforceable (*id*.). Moreover, in *Miami IV*, the Court held that the Tribe could not unilaterally create for itself sovereignty rights that did not otherwise exist. 249 F.3d at 1229. This Court declined to "entrench *Miami II*'s Joint Stipulation as the final resolution of the Tribe's claims to jurisdiction over the reserve." *Miami V*, 2006 WL 2392194, at *3. The Tribe places undue reliance upon the district court's decision in *Miami II* in light of the significant intervening and superseding determinations of this Court.

The Tribe also provides no analysis of *Miami IV*, merely dismissing it as an interlocutory appeal. Br. 10, 34-35, 37, 39. But even if *Miami IV* is not *res judicata*, *Miami IV*'s determination that the Tribe may not, by stipulation or other unilateral indicia of sovereignty, create jurisdiction, it is certainly still persuasive authority. See *Davis v. United States,* 343 F.3d 1282, 1291 (10th Cir. 2003). In *Miami IV*, this Court reinforced the *res judicata* conclusion in *Miami I* that "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. "Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing since to change the status of the tract." *Id.* at 1230-31. The Tribe's brief offers no rebuttal to the analysis presented in *Miami IV*, but simply seeks to avoid its implications altogether.[9/]

The Tribe notes (Br. 34-35) that *Miami I* was silent as to the impact of new members on tribal jurisdiction and reserved this issue in a footnote. *Miami I*, 927 F.Supp. at 1428, n.8. In fact, that footnote merely provides the opportunity to the Tribe to resubmit evidence of the current owners' consent to its management contract and a newly adopted tribal amendment, and notes "[o]f course, the court does not pass on whether or not a new submission will obtain approval." *Id*. In addition, the court also raises and declines to address the question of whether "a tribe's jurisdiction reaches its members' real property located outside the

---

[9/] The Tribe asserts, without citation, (Br. 38) that the government has indicated that "in 1873 Congress eliminated restrictions on Miami lands, including the restrictions on Miami Reserve." However, throughout this case, the government and parties have consistently assumed that restrictions on alienation exist and are the reason why regulatory approval for the proposed gift transfer is necessary. Indeed, in its own brief, the Tribe repeatedly emphasizes the restricted fee status of the property. Br. 11,13-14, 24-25, 29. As Congress intended in providing constraints on transfers of restricted fee lands, there is no fully unfettered "right to transfer property" (Br. 11) in the context of a case involving restricted fee Indian land.

reservation." But this Court, in *Miami IV*, expressly found that, as a legal matter, not "the Tribe's adoption of the tract's twenty-plus owners into the Tribe," nor these owners' consent to tribal jurisdiction pursuant to a lease with the Tribe, nor the Tribe's recent development of the Reserve alters the conclusion that "Congress abrogated the Tribe's jurisdiction over the tract long ago, and has done nothing to change the status of the tract." *Miami IV*, 249 F.3d 1230-31. "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." *Id*.

The Tribe complains (Br.10, 35 and 39) that "there has been no factual consideration on the record of the merits of the Miami Tribe's jurisdiction over the Miami Reserve since the investigations in *Miami II* confirmed the presence of current jurisdiction." However, this Court has addressed the jurisdictional question with clarity. This Court concluded that the Tribe had lost jurisdiction and could not unilaterally restore its own jurisdiction by adopting tribal members or using and patrolling the Reserve. It is a matter of law whether Congress has taken action to restore the jurisdiction that was terminated almost a century ago. *Miami IV*, 249 F.3d at 1229. This Court's legal finding in *Miami IV*, rejecting the ability of a Tribe to establish jurisdiction by unilateral tribal actions, does not require

development of a factual record and is controlling legal analysis here, even if not *res judicata.*[10/]

Furthermore, the Interior Solicitor's subsequent, October 31, 2002, opinion expressly analyzed the significance of the adoption and concluded that tribal jurisdiction could not be inferred from the Tribal adoption. Letter, Solicitor William G. Meyers III, to Acting General Counsel Penny J. Coleman, dated 10/31/02, at 15 (G.Br. Addendum). The Tribe does not even mention this legal opinion, much less refute it. The Solicitor's opinion is persuasive and entitled to deference as such.

C. That the Reserve is Allotted Lands Held in Restricted Fee Does Not Confer Jurisdiction. -- *Miami I* explicitly rejected the claim (Br. 38-39) that the Tribe has jurisdiction over the Reserve based on its status as restricted allotment land.

> Plaintiff points to the continued restricted status of Reserve No. 35 as proof of its jurisdiction. Reserve No. 35's restricted status, however, does not arise from any lingering traces of plaintiff's sovereignty but rather from the terms of the United States's conveyance of the

---

[10/] Moreover, the Tribe had no lack of opportunity to brief this issue and provide factual material. The Administrative Record before the district court here was supplemented many times by the Tribe as well as the government; the Tribe had every opportunity to provide more information about jurisdiction had it so chosen. See, *e.g.*, CR 56; 93; 99; 127; 129; 136; 139; 140; 141; 145; 146; 147.

> property to Maria Christiana DeRome. As both the tribe and the government have acknowledged, the patent issued covering the allotment contained a clause stating that the land could not be conveyed or sold without consent of the Secretary of the Interior.

927 F.Supp. at 1426, n.5. Following *Miami I*, claims of tribal jurisdiction over the land based on the restricted status of the Reserve are without foundation.[11/]

The Tribe misconstrues *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975), to claim that the Tribe necessarily has jurisdiction over territory owned or possessed by tribal members. Br. 26, 33. The quoted sentence -- "it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." -- does not support the Tribe's more sweeping claim that any land owned by a tribal member is within tribal jurisdiction.[12/] Furthermore, *Mazurie* did not involve member-owned land located far from the tribe's reservation. Rather, in *Mazurie*, the lands

---

[11/] *Mustang Production Co. v. Harrison,* 94 F.3d 1382 (10th Cir. 1996), is distinguishable. In *Mustang*, no question was raised whether the Indian allotments at issue were owned by individuals who had always been tribal members. In addition, Congress had acted only to terminate the Tribe's reservation, but not the Tribe's jurisdiction. *Id*. at 1385. This Court consequently had a basis on which it could conclude that the Cheyenne-Arapaho Tribes retained their inherent sovereignty over the land and the people.

[12/] Given the parallelism in the sentence structure, "their" evidently refers to the *tribe's* members and the *tribe's* territory.

at issue were undisputedly "within the reservation's boundaries." 419 U.S. at 546.

The Tribe further confuses the issue (Br. 33-34, 38) by citing 18 U.S.C. 1151 to claim that, as a restricted allotment held by Indians, the Reserve is "Indian country," over which the Miami Tribe (or any tribe) necessarily has jurisdiction. But Congress had already terminated the Tribe's jurisdiction over the Maria Christiana Allotment when Section 1151 was enacted in 1948. Not only had Congress abrogated the Tribe's jurisdiction over the Reserve in 1924, but Maria Christiana De Rome was among those who had been stricken from the list of Miami Tribe members and severed their ties with the Tribe in 1867.[13/] In addition, the Tribe had already repeatedly argued in court that the Maria Christian Allotment was improperly allotted to persons who were *not* tribal members and has repeatedly won damages based on this argument. *Miami IV*, 249 F.3d at 1230. Thus, when Section 1511 was passed, there was no existing nexus between the

---

[13/] The Tribe now implies that there was error in the conclusion that Maria Christiana was not a tribal member. Br. 6. However, the Tribe embraced and relied upon the fact that Maria Christiana was not a tribal member when it successfully sued for reparations for the allocation of Miami Tribe lands to non-tribal individuals including Maria Christiana. See G.Br. 12-13.

Reserve lands and the Tribe.[14/] The Tribe had not retained any inherent sovereignty.

The Tribe aptly quotes (Br. 34) *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000), to emphasize the critical importance of jurisdictional status of Indian lands. Jurisdiction implicates not only ownership, but also core sovereignty interests of the exercise of civil and criminal authority. *Id*. For this reason, the district court's unsupported conclusion that the Tribe "exercises jurisdiction" under ILCA should be reversed. Far from "ignoring the Miami Tribe's jurisdiction," the government is complying with prior determinations that the Tribe has relinquished its jurisdiction over the Reserve and cannot regain it by unilateral actions.

C. The BIA Considered and Balanced the Correct Factors and Reached a Reasoned and Well-Founded Conclusion. -- The Tribe mistakenly asserts that the Secretary is required to approve the gift conveyance because of the

---

[14/] The document found at T.App. 45-52, and referenced at Br. 33 in support of the Tribe's claim that Section 1151 "grants jurisdiction to tribes" is inapposite. In that instance, a *Congressional* action (the Seneca Nation Settlement Act of 19990, 25 U.S.C. 1774) specifically permitted the Seneca Nation to acquire off-reservation lands for gaming purposes. T.App.46-47. The Secretary of the Interior expressly cautioned that the fact of Congressional authorization made that instance distinct from cases, such as here, "when a tribe is seeking a discretionary off-reservation trust acquisition." *Id*.

existence of a special relationship between Smith and the Tribe. Br. 19.[15/] For reasons fully explained in our opening brief at 38-42, the Tribe is incorrect. At bottom, the Tribe relies upon one of the statutory provisions that makes manifest the fact that the BIA retains discretion over an application for a gift transfer: 25 U.S.C. 2216(b) *permits* but does not *require* federal approval of a gift conveyance. ILCA's requirement for Secretarial approval, and the language in 25 U.S.C. 483 authorizing the Secretary to approve conveyances "in his discretion," further evidence the Secretary's discretionary authority. Thus, although true that Smith is a tribal member,[16/] that the Tribe is an Indian tribe, and that there is a special relationship between the two, by statute and regulation (25 U.S.C. 483; 25 C.F.R. 152.25(d); 25 C.F.R. 152.23) BIA *must* review the proposed transfer to determine if it is in the long range best interests of the Tribe and the owners of the Reserve, which is what the BIA did here.

The Tribe denigrates (Br. 19-20) the BIA's rationale as to why the gift transfer would not be in the long term interests of Smith, other lands owners, or the Tribe. However, the BIA expresses concern about Smith giving a gift

---

[15/] Indeed, the Tribe asserts (Br. 15-16) that the only factor to be analyzed by the agency is the intent of the grantor.

[16/] Smith is a tribal member because he was adopted by the Tribe in 1996, not because he is a 1/64 Miami Indian. G.App. 143.

conveyance in light of "recent history and gaming-related aspects of this tract * * *" (G.App.133), and notes that the proposed gift is "not in the long-range best interest of either you or the other Indian owners of the allotment." *Id.* The BIA found that the gift would cause increasing fractionation of the ownership of the tract, that highly fractionated ownership greatly complicates federal management of Indian lands, and can lead to competing and conflicting land use interests between the Tribe and individual Indian owners, and that Indian tribes should pay fair market value for allotted land purchases absent special circumstances. *Id*. In addition, the BIA noted that the lease to develop a gaming facility to improve revenue for the Tribe and the individual Indian landowners accomplished Smith's stated desire to benefit the Tribe. *Id.*

The Tribe insists (Br. 20) that the gift will benefit all owners by providing stability and advancing the Tribe's land consolidation plan, but the fact remains that the Tribe has long been interested in instituting gaming on the Reserve (see *Miami I*, *Miami IV*, etc.) and, indeed, concedes (Br. 21) that the business lease referenced in the BIA decision pertains to gaming. The Tribe's claims (Br.2) that "[n]othing in the proposed gift transaction relates to gaming" seems at odds with this history. The BIA's concern about the Smith's gift of a real estate interest given this history is not misplaced. If, as the Tribe claims (Br. 22), "[t]he Indian

land status could give the tract potential value long term and thus additional benefit to the owners," why would the Tribe not pay Smith fair compensation for that interest?

The BIA's concerns about tract management, competing interests and conflicts are well founded. The record does not support the claim (Br. 21) that "the most important interest to Smith and Smith's family members" is that the Reserve "remain" Indian land; there is also no record evidence that this "interest" is shared by other owners of the Reserve. At most, the record shows that, after the BIA issued its decision, the Tribe claimed that it had a plan to consolidate the fractional interests of some 25 percent of the heirs. G.App. 125. The record does not show a commitment to transfer interests by the other owners (or by Smith to transfer his retained interests), and, of course, it cannot show that the owners will remain in harmony about the use of the Reserve in the future. Accordingly, the BIA was more than reasonable in considering the "potential for land use conflicts." The BIA's decision incorporated by reference (see G.Br. 35) the additional analysis it gave in its prior decision in *Earline Smith Downs v. Acting Muskogee Area Director, BIA*, 29 I.B.I.A. 94, 1996 WL 164987 (I.B.I.A.) (1996): "where tribes own small interests in allotted lands, the tribes and the individual owners often have competing interests in the use of the land." *Id*. at *4-5. This

assessment is due deference because it is based on BIA's considerable experience in managing Indian lands. *Id.*

In addition, when the BIA was first considering the Smith gift transfer, the Tribe owned no other interest in the Reserve; it acquired the Downs interest through probate in 2006, after issuance of the district court decision (G.Br.20, n.11). Thus, the Smith gift was necessarily going to further divide ownership in the Reserve by adding the Miami Tribe as a new, fractional owner. This Court reviews the reasonableness of an agency's decisions based on the evidence before the agency at the time the decision was made. *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1217 (10th Cir. 1997).

There is also no evidence to support the Tribe's allegation (Br. 23) that the "only way to proactively protect the Indian nature of the Miami lands [sic] is to have Miami Tribe ownership of the * * * Reserve."[17/] The Tribe several times raises the case of *Midwest Investment Properties, Inc. v. Fred DeRome,* D. Kan.

[17/] Nor is there any record support for the statement (Br. 29) that the "Tribe has the resources to make productive and cultural uses of the" Reserve. The Tribe also references several federal documents which are irrelevant or predate *Miami IV* and the Solicitor's opinion, and must now be viewed in light of that decision. For example, at Br. 30, the Tribe relies on statements made by the government in a document issued in 1994, well before *Miami I* and *Miami IV* issued. Br. 30, citing T.App.71.

No. 86-2497-O (Br. 5, 23, 27), as a purported example of federal malfeasance, even though it has no real bearing on the question of jurisdiction or the propriety of this gift conveyance. Indeed, the Tribe's reference (Br. 23) to the "dramatic reduction in size of the restricted allotment from 80 to 35 acres" in *Midwest Investments* is a red herring. In 1982, Congress passed the Pub. L. No. 97-344 (Oct. 15, 1982), 96 Stat. 1645, which authorized actions to partition adversely possessed interests in the Maria Christiana Allotment, so that non-Indian interests in the allotment (which Congress recognized could be subject to adverse possession) would be separated from Indian interests (not subject to adverse possession).[18/] Pursuant to this enactment, Midwest Investment Properties, Inc., sued to partition the undivided interests of Indian and non-Indian owners of the 80-acre allotment. As a result of the decision partitioning the land, instead of owning 45 percent of 80 acres, the Indian owners (who were not members of the Tribe at that time) owned 100 percent of 35 acres that were clearly protected. None of the property interests of the Indian owners was adversely possessed; only the percentages of the non-Indian owners were taken. The district court's final

---

[18/] The purpose of a partition action is to take undivided interests in a whole parcel of property and divide the property, resulting in individual ownership of smaller parcels that correlate to the formerly undivided interests in the whole. *Black's Law Dictionary*, 1119-20 (6th ed. 1990)

order of May 3, 1989, confirmed that the partitioned lands would be held for the Indian owners in restricted fee title, as mandated in Pub. L. No. 97-344. *Midwest Investment Properties, Inc. v. Fred DeRome,* D. Kan. No. 86-2497-0, Order Confirming Report of Commissioners in Partition; Administrative Record, CR 128, pp. 923, 924.[19/]

There is thus no legal basis for the Tribe's claim (Br. 5, 23, 24) that the federal government failed in its fiduciary duties in *Midwest Investment*. Contrary to the Tribe's assertions (Br. 5, 27), the government did not represent Smith or his family, the Tribe or any tribal member in *Midwest Investment*; the United States appeared as a named party because Pub. L. No. 97-344 specifically provided that the United States must be a party if a private owner brought a partition action. Indeed, the district court specifically noted that "[n]o defendants, except the United States and Earline Downs, have answered. Each and every other defendant has failed to file an answer or other responsive pleading, and the Court finds each of said defendants in default." *Midwest Investment Properties, Inc., v. Fred DeRome*, D. Kan. No. 86-2497-0, Journal Entry, CR 128, p. 939 (Addendum).

[19/] For the Court's convenience, pertinent district court orders from the *Midwest Investment* proceedings are attached in an Addendum to this brief. They are also available on PACER at the locations cited.

Regardless of these issues, the *Midwest Investment* outcome simply does not affect issues being reviewed in this case and has no bearing on whether the Tribe has jurisdiction over the Reserve or whether the BIA's consideration and action on Smith's proposed gift conveyance properly implemented ILCA.

The Tribe faults the government (Br. 34, 28) for not adhering to the "*Blackfeet* canon" or Indian canon of construction to construe ILCA and its implementing regulations in favor of the Tribe. In this instance, since the Tribe, Smith, and all other owners of the Reserve are Indians, the BIA's construction of ILCA and its regulations to protect the interests of Smith and other Reserve owners comports with these canons and protects Indian interests, even if the results are not what the Tribe would prefer.[20/] In addition, by distinguishing requirements for gifts of land from to a tribe by a tribal member from sales of such land, Congress clearly expressed its concern that a gift conveyance be more carefully reviewed and approved than a sale. The Tribe's analogy to a sale of land (Br. 29) fails precisely because, in the absence of payment of fair market value, Congress wanted to ensure that individual Indian's interests were protected. See, *e.g.*, 25 U.S.C. 2216(b) (requiring that the Indian donor be provided with an

---

[20/] Mr. Smith has not expressly participated in this appeal except to the extent that he may be presumed to be represented by the Tribe.

estimate of the value of the land). Nothing in ILCA or its regulations supports the Tribe's claim (Br. 29) that "[a]gency scrutiny of a transfer from a member to his tribe should be minimal." Nor does the Tribe demonstrate in any way how approval of this fractionated gift would "reverse the effects of the allotment policy on Indian tribes." Br. 29. There is simply no support for the argument (Br. 29-30) that transferring interests to the Tribe would keep restricted Indian lands in the possession and ownership of Indians; the existing restriction on alienation already preserves the Indian land status. The Tribe has not shown how its ownership of an increasingly fractionated interest will benefit Smith or any other owners of the Reserve, and the BIA reasonably concluded that it would not be in their long-term best interests.

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.

Respectfully submitted,

BARRY R. GRISSOM
United States Attorney

DAVID D. ZIMMERMAN
Assistant United States Attorney
District of Kansas
Kansas City, Kansas, 66101
(913) 551-6730
david.zimmerman@usdoj.gov

IGNACIA S. MORENO
Assistant Attorney General

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

September 17, 2020
90-2-4-11002

CERTIFICATE OF COMPLIANCE

Please complete one of the sections:

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,228 words.

Complete one of the following:

X I relied on my word processor to obtain the count and it is: Word Perfect X3.

I counted five characters per word, counting all characters including citations and numerals.

Section 2. Line count

My brief was prepared in a monospaced typeface and contains _____ lines of text.

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

/s/
M. Alice Thurston

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate ECF system and that all participants in this case, listed below, were served through that system:

Christopher J. Reedy
19920 W. 161st St.,
Olathe, KS 66062

Kip A. Kubin
Bottaro, Morefield & Kubin
1001 E. 101st Terrace
Kansas City, MO 64131

I further certify that:

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

(b) the digital submissions have been scanned for viruses with the most recent version of a Computer Associates eTrust InoculateIT, version 6.0.96, continuously updated and, according to the program, are free of viruses.

/s/

M. Alice Thurston
Attorney, Appellate Section
Environment & Natural Resources Division
Department of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026
(202) 514-2772
alice.thurston@usdoj.gov

ADDENDUM

Midwest Investment Properties, Inc. v. Fred DeRome, D. Kan. No. 86-2497-0, Order Confirming Report of Commissioners in Partition, May 3, 1989 (CR 128, pp. 922-230;

Midwest Investment Properties, Inc., v. Fred DeRome, D. Kan. No. 86-2497-0, Journal Entry, September 22, 1988 (CR 128, pp. 935-944).

FILED

MAY 0 3 1989

RALPH L. DeLOACH, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MIDWEST INVESTMENT PROPERTIES, INC.,
Plaintiff,

vs. No. 86-2497-0

FRED DeROME, et al,
Defendants.

ORDER CONFIRMING REPORT OF COMMISSIONERS IN PARTITION

Now, on this 3rd day of May, 1989, the above captioned matter comes on for hearing on the motion of plaintiff to confirm the Report of the Commissioners dated March 31, 1989, duly returned and filed herein with the Clerk of the United States District Court. The Court finds that reasonable notice has been given to all parties affected by the report pursuant to K.S.A. 60-1003(3) and that no exceptions to the report have been filed. Plaintiff appears by Lynn E. Martin, its attorney. The defendant, United States of America appears through counsel, Janice Miller Karlin, Assistant United States Attorney for the District of Kansas; and John A. Wilson appears as guardian ad litem and military attorney.

WHEREUPON, the Report of Commissioners is submitted to the Court and the Court, after examining said report and being fully advised in the premises and no exceptions thereto having been filed or made to said commissioners' report, finds that the actions and proceedings of said

118

commissioners are regular and in strict compliance with the law and the order of this Court; that the partition of siad real estate by the Commissioners is fair, just and reasonable and should be approved and confirmed as provided by law.

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 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.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the Commissioners, Marvin B. Clark, Gary Hosack and E. L. (Jack) Lindsey, should each be paid the sum of $100.00 as and for Commissioner's fee and that John A. Wilson should be paid the sum of $150.00 for his services as Guardian ad Litem and Attorney for Defendants in the Military Service with said fees to be paid by plaintiff herein.

EARL E. O'CONNOR, Chief Judge
U. S. District Court

APPROVED BY:

LYNN E. MARTIN, No. 06723
117 South Pearl - P. O. Box "E"
Paola, Kansas 66071
(913) 294-3400
Attorney for Plaintiff

BENJAMIN L. BURGESS, JR.
United States Attorney

JANICE MILLER KARLIN, No. 10740
Assistant United States Attorney
812 N. 7th Street, Room 412
Kansas City, Kansas 66101
(913) 236-3730

JOHN A. WILSON
641 Main Street
Osawatomie, Kansas 66064
Guardian ad Litem and Attorney for
Defendants in the Military Service

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MIDWEST INVESTMENT PROPERTIES, INC.,

Plaintiff,

vs. No. 86-2497-O

FRED DeROME, et al.,

Defendants.

FILED
SEP 22 1988
RALPH L. DeLOACH, Clerk
By Deputy

JOURNAL ENTRY

Now on this 22nd day of September, 1988 comes on for hearing plaintiff's motion for summary judgment. The court, being advised in the premises, finds as follows:

1. After examining the proofs of publication, the returns of service by the United States Marshal and the acknowledgments in the file, the court finds, generally, that plaintiff has made reasonable efforts to serve each named defendant to this action, as follows:

a) Service on the following named defendants, Fred DeRome, Hazel Taber, also known as Hazel Tabor, Della Webb, Leona McHenry, George DeRome, Lillian Faye (Smith) Paris, and Lulu Regensberger, was attempted by plaintiff by hiring Crown Investigators to serve summons thereon, but when said defendants could not be found, they and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown successors and assigns of such

///

defendants as are or were partners or in partnership; and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disability, were served with summons by publication.

b) Personal service of summons was had on Frederick DeRome King, Charles DeRome King, Connie King Dryden, also known as Connie King Drigden, by the U.S. Marshal.

c) Service on the following defendants, Wynona Brown Hull, Victoria L.D. King Melanson, Sherry Wikle GoForth, John Foster and Judy June Webb Robinson, was attempted by the U.S. Marshal. When said defendants could not be found, they and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown successors and assigns of such defendants as are or were partners or in partnership and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disability were regularly served with summons by publication.

d) Service on the following named defendants, Theodore (Cap) Hamilton, Minnie Shives, Harry McGuire, Nettie Brindley, Alice Goos, Arthur McGuire, Bertha Maby, Bessie Lilletha Jones, E.C. Deel, Jess Taber, Albert J.

Regensburger, George S. Banagis, and Steven Joe Morton was attempted by plaintiff by hiring Kenneth Niesz to serve summons thereon. When said defendants could not be found, they and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown successors and assigns of such defendants as are or were partners or in partnership and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disability were served with summons by publication.

e) Service on Harold E. Smith was attempted by plaintiff by mailing to Harold E. Smith, c/o Earline Smith Downs, 1200 South Pine, Newton, Kansas 67114; that said letter was never returned to plaintiff and that thereafter plaintiff requested service of the Sheriff of Harvey County and return was made by said Sheriff that Harold E. Smith was deceased. That Harold E. Smith, the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown successors and assigns of such defendants as are or were partners or in partnership and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disa-

bility was served with summons by publication.

f) The defendants, Eugene Nalley, Richard Arthur DeRome, Irene DeRome Steffan, Mary DeRome Shumway, Wendy Foster, Pauline McHenry Sines, Ruby McHenry Hindman, Mable Brown Rutkey, Wayne DeRome, Inez DeRome Mowery, Evelyn DeRome Fast, Muriel Northrop DeRome, Dallas McHenry, Ada Mae McHenry Coss, Kenneth McHenry, Jack A. Webb, Tracie R. Webb and Allen Webb have been served personally by mail.

g) WHEREUPON, the Court finds that John A. Wilson, heretofore appointed as attorney for such of the defendants served by publication as may be in the military service of the United States as defined by the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, and John A. Wilson, heretofore appointed as guardian ad litem for any defendants served by publication who may be minors or in any way under legal disability, has heretofore filed a written general denial on behalf of said defendants as required by law.

The Court finds it has jurisdiction over each of the named defendants. All proofs of publication service are expressly approved and confirmed.

2. This Court has jurisdiction of this matter pursuant to P.L. 97-344, 96 Stat. 1645, as amended by P.L. 97-428, 96 Stat. 2268.

3. No defendant, except the United States and Earline Downs, have answered. Each and every other defendant has failed to file an answer or other responsive pleading, and the Court finds each of said defendants in default.

4. Plaintiff's Motion for Summary Judgment has been on file for more than twenty (20) days, and only the United States has filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. As to the only other defendant who has entered an appearance, Earline Smith Downs, the Court finds she is deemed to admit the material facts set forth in plaintiff's memorandum pursuant to D. Kan. Rule 206(c) for failure to respond.

5. The United States has now consented to this Journal Entry and the findings of fact and orders.

6. The Court makes the following further findings of fact:

a) Midwest Investment Properties, Inc. and its predecessor, Harold Mooney, Sr. have, for more than 15 years, been in open, exclusive and continuous possession of the East Half of the Southwest Quarter of Section 13, Township 19 South, Range 24 East, Miami County, Kansas. During said time, plaintiff and its predecessor, Harold Mooney, Sr., knew that the claim to their ownership was adverse to others. Harold Mooney, Jr. had exclusive and continuous possession from the date of death of Harold Mooney, Sr. on July 31, 1975, until it was deeded to Midwest Investment Properties, Inc. in December, 1975.

b) Harold Mooney, Sr. farmed the property in question for more than 10 years prior to the deed of the property to Midwest Investment Properties, Inc. in December, 1975. Harold Mooney, Sr. retained Lynn E. Martin in 1972 to take whatever action was necessary to perfect his title to said property.

c) Midwest Investment Properties, Inc. farmed and controlled the property from and after December, 1975, and paid real estate taxes to Miami County for the years of 1977, 1978, 1979, 1980, 1981 and 1982.

d) This land was patented to Maria Christiana, Miami Indian pursuant to the Act of March 3, 1859, 11 Stat. 430, which patent contained a restriction against alienation held by the Secretary of the Interior.

e) That on or about fifteen (15) years prior to the filing of plaintiff's petition, the restricted ownership belonging to Indian heirs was 45.52083333% of the real estate covered by this lawsuit. The nonrestricted ownership now belonging to plaintiff by way of adverse possession, fifteen years prior to the filing of this petition, was 54.47916667%.

f) The 97th Congress passed a law to provide for the partitioning in kind or the sale of certain restricted Indian land in the State of Kansas which includes the land which is the subject in question, such partition to be in accordance with the laws of the State of Kansas.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Court's findings are made the order of this Court and are hereby adopted.

IT IS FURTHER ORDERED as follows:

1. Midwest Investment Properties, Inc., plaintiff herein, has acquired by adverse possession over the fifteen years prior to the filing of this action, a 54.47916667% interest in the following described real estate situated in Miami County, Kansas, to-wit:

> East Half of the Southwest Quarter of Section 13, Township 19 South, Range 24 East, Miami County, Kansas,

pursuant to Kan. Stat. Ann. § 60-503.

2. The remaining 45.52083333% interest in said real estate is owned by Indian heirs by restricted fee, in proportions determined by the Bureau of Indian Affairs.

3. This Court orders this land to be partitioned in kind into two contiguous parcels, with Midwest Investment Properties, Inc. to be vested with an unrestricted fee simple title to its parcel and the Indian owners to be vested with restricted fee title, to their parcel, in percentages determined by the Bureau of Indian Affairs.

4. Commissioners should be appointed to make partition as provided by law, and the Court hereby finds that Gary Hosack, Marvin B. Clark and E.L. (Jack) Lindsey should be appointed as commissioners in partition to make partition and division of said real estate as hereinafter provided.

IT IS FURTHER ORDERED that Gary Hosack, Marvin B. Clark and E.L. (Jack) Lindsey, be and they are hereby appointed to partition the real estate into two contiguous parcels among the parties, plaintiff to receive a 54.47916667% share and the Indian owners to receive a 45.52083333% aggregate share. If such partition into two contiguous parcels cannot be made without manifest injury or is for any reason impractical, however, the commissioners shall appraise the value of the property, and report their conclusions to the Court; that each person with any ownership in said real estate shall have the right to elect to take said real estate for the appraised value thereof, and as determined by said commissioners; that in the event no elections are filed, or in the event two or more elections are filed in opposition to each other, then and in such event said above real estate shall be sold at public auction by the U.S. Marshal for Kansas, in the manner provided by law, and subject to the approval of the Court. Monies resulting from a sale in lieu of partition shall be distributed as follows: Plaintiff's 54.47916667% of the net sale proceeds to the Clerk of the District Court of Miami County, Kansas, for distribution and administration in accordance with the laws of Kansas and 45.52083333% of the net sale proceeds to the Bureau of Indian Affairs to be distributed and administered through trust accounts to the Indian heirs. In the event of sale, there shall be no redemption rights whether sold as a result of election or by public auction by the U.S. Marshal for Kansas.

IT IS FURTHER ORDERED BY THE COURT that said commissioners in partition shall take an oath as provided by law, and file the same with the Clerk of this Court upon entering upon their duties herein.

IT IS FURTHER ORDERED BY THE COURT that if said property can be partitioned in kind, then the costs of this action, including survey costs, if any, and commissioners' fees which may accrue in this action will be paid by plaintiff.

IT IS FURTHER ORDERED BY THE COURT that if partition cannot be made in kind, as described above, then the property shall be sold as provided for herein and the proceeds of said sale shall be paid as follows:

First: To the payment of court costs and commissioners' fees which may accrue in this action;

Second: Balance to be paid out as follows: Plaintiff's 54.47916667% share to the Clerk of the District Court of Miami County, Kansas, for distribution and administration in accordance with the laws of Kansas; and the Indian heirs' 45.52083333% share to the Bureau of Indian Affairs to be distributed and administered through trust accounts for the benefit of the Indian heirs.

EARL E. O'CONNOR, Chief Judge
U.S. District Court

APPROVED BY:

LYNN E. MARTIN, #06723
117 South Pearl
P.O. Box E
Paola, KS 66071
Attorney for Plaintiff

BENJAMIN L. BURGESS, JR.
United States Attorney

Janice Miller Karlin

JANICE MILLER KARLIN
Assistant United States Attorney
812 N. 7th Street, Room 412
Kansas City, KS 66101
913-236-3730
Ks. S.Ct. #10740

John A. Wilson

JOHN A. WILSON
641 Main Street
Osawatomie, KS 66064
Guardian Ad Litem and Attorney for
Defendants in the Military Service