



INTERIOR BOARD OF INDIAN APPEALS

James E. Smith and Miami Tribe of Oklahoma v. Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

47 IBIA 259 (10/10/2008)

Judicial review of this case:

Affirmed, *Miami Tribe of Oklahoma v. U.S. Department of the Interior*,
679 F. Supp. 2d 1269 (D. Kan. 2010)

Related Board case:

38 IBIA 182

Judicial review, Remand to BIA, *Miami Tribe of Oklahoma v. United States*,
374 F. Supp. 2d 934 (D. Kan. 2005), as amended by 2005 U.S. Dist.
LEXIS 29468 (D. Kan. Nov. 23, 2005), vacated and remanded,
656 F.3d 1129 (10th Cir. 2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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JAMES E. SMITH and MIAMI TRIBE)	Order Affirming Decision in Part and
OF OKLAHOMA,)	Vacating in Part
Appellants,)	
)	
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

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

I. 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 land⁷ 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.

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

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 Tribe¹¹ 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

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

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

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.

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:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge